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' REPLY BRIEF

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Argument

1. Introduction.

This case is about duty. Duty is about forseeability and forseeability at its core is about the defendant's knowledge of risk. See *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 155-56 (Mo.banc 2000). Here, Respondent's personal duty to Appellant arose when he was told that the Dowel baskets as stacked on the flatbed truck were at risk of falling which made Appellant's injuries from the falling baskets foreseeable. This knowledge coupled with Respondent's control over the manner in which the baskets were stacked [L.F. 11, ¶14], created a personal and independent duty on the part of Respondent to avoid exposing Appellant to this unnecessary danger. Instead, Respondent ordered Appellant into this known position of peril and he should be answerable for breaching this personal duty.

2. Co-employees are subject to suit under Missouri's common law for the breach of personal duties of care owed to each other.

Appellants submit that the common law here represents our society's common sense that a jobsite should not be a safe haven for employees to act negligently toward one another with impunity under the guise that all workplace injuries are necessarily part of the employer's non-delegable duty to provide a safe workplace. Rather, the duty of care owed by co-employees to each other is governed by what this Court has called "the most elemental principles of tort liability":

> "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 v. Duncan, 293 S.W.2d 944, 949 (Mo. 1956), citing 35 AM.JUR. Master and Servant §§ 526, 527 at 955-956 (1941).

Nevertheless, the common law also recognizes that the employer has certain non-delegable duties [to provide a safe workplace, safe equipment, warnings of hidden dangers, a sufficient number of competent fellow employees, and effective safety rules] the breach of which will not support a cause of action against a co-employee. However, it is manifest that those employer duties are NOT the exclusive duties that may arise and be breached at the jobsite but that co-employee personal duties may also co-exist.

The question becomes when is a duty personal to the co-employee and thus independent of the employer's duties? This Court has answered this question repeatedly. For example, in *Tauchert v. Boatmen's National Bank of St. Louis*, 849 S.W.2d 573, 574 (Mo.banc 1993), the Court held that a co-employee that creates a hazardous condition has breached his or her personal duty of care and is personally liable for injuries that result. *Id.* Moreover, this breach of the co-employee's personal duty is not "merely a breach of an employer's duty to provide a safe workplace." *Id.* It is separate and apart and independently actionable. Thus, a hazardous condition in the workplace that causes

injury may be the result of the breach of the employer's duty, but when the hazard is created by a co-employee, that co-employee is subject to personal liability.

In *Kelso v. W.A. Ross Const. Co.*, 85 S.W.2d 527, 536 (Mo. 1935), this Court held:

> "In other words, the rule that the master is bound to see that the environment in which a servant performs its duties is kept in a reasonably safe condition is not applicable where the environment becomes unsafe solely through the default of that servant himself, or his fellow employees."

3. Here, Respondent's personal conduct made Appellant's jobsite unsafe.

Since Respondent had control over the manner in which the baskets were stacked, Respondent's *personal* duty to Appellant was triggered when he learned that his method of stacking the baskets was dangerous and was exposing Appellant to foreseeable injuries.

Respondent's position as Appellant's supervisor with control over the manner in which the baskets were stacked is an important factor in the duty analysis here:

> "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."

Steinhauser v. Spraul, 21 S.W. 859, 860 (Mo. 1893).

Appellants submit based on the foregoing authorities that Respondent's duty arose based on his knowledge of the danger posed by stacking the baskets too high and his control over and ability to change the manner in which these baskets were stacked. Respondent breached this duty on September 24, 2008, when despite this knowledge he failed to exercise his control over the baskets to make them safe and instead ordered that they be stacked in said dangerous manner and directed Appellant to be exposed to this unnecessary danger.

Respondent's conduct in this regard satisfies this Court's test that a co-employee is subject to a negligence suit when he or she creates a hazardous condition that injures another employee. See, *Kelso*, 85 S.W.2d at 536 ("…where the environment becomes unsafe solely through the default of that servant himself, or his fellow employees."); *Tauchert*, 849 S.W.2d at 574.

4. Respondent's arguments.

First, Respondent argues that it had no duty with respect to the safety of how the baskets were to be stacked because he simply ordered the baskets to be stacked at the same height the supplier did. This argument ignores Appellant's pleading that Respondent had control over the manner of stacking the baskets. L.F. 11, ¶14. Moreover, the fact that the baskets arrived at Tramar stacked in a certain way may be relevant at trial, but it is not relevant to the question of Respondent's duty once the baskets were under his control, particularly when he was warned of the hazard and had the ability to fix it.

Respondent's second argument is essentially that he had no duty because it was the employer's responsibility to correct this danger. The defect in Respondent's argument is that he was the one that created the danger and, as shown by the authorities cited above, a co-employee may be liable for dangerous conditions he or she creates. It should be noted that these baskets that injured Appellant were not part of an on-going danger or defect on the jobsite. These were new baskets that were to be used on one occasion, September 24, 2008. They were transported from Tramar on that morning to be used to build a highway. That Respondent had previously ordered other baskets to be stacked dangerously does not make it solely Tramar's responsibility for correcting Respondent's conduct. These were individual and personal acts of negligence on the part of Respondent that created a hazardous condition on September 24, 2008, which led to Appellant's injuries. Respondent should be answerable for such negligence.

5. Conclusion.

Appellant's petition sufficiently alleges a cause of action against Respondent based on his breach of a personal duty independent of the employer's duties. The common law in Missouri supports Appellant's right to proceed.

Respondent knew his method of stacking the baskets posed a danger to Appellant and made Appellant's injuries foreseeable. Respondent had the ability to rectify the danger but chose not to. Instead, on September 24, 2008, he ordered the baskets to be stacked in the known dangerous manner and ordered Appellant into this position of peril which tragically resulted in the baskets falling onto Appellant and causing his catastrophic injuries.

Appellants respectfully request this Honorable Court reinstate their petition and allow them to litigate this action up to and including a jury trial.

Certificate of Compliance

I hereby certify pursuant to Rule 84.06(c) that this Reply brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 1,391 words, exclusive of the sections exempted by Rule 84.06(b).

/s/ James M. Dowd
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Certificate of Service

I hereby certify that Appellants' Reply Brief was filed on January 12, 2015, 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