IN THE SUPREME COURT OF MISSOURI

CURT PETERS and CHERIE PETERS,	)	
	)	
Appellants,	)	
	)	
vs.	)	Appeal No.: SC94442
	)	
PATRICK TERRIO,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY
STATE OF MISSOURI

THE HONORABLE JON A. CUNNINGHAM, PRESIDING
CIRCUIT JUDGE, DIVISION FIVE

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Respondent Patrick Terrio provides a separate Statement of Facts to set forth facts material to the questions of law presented by this appeal.

A. Introduction

Plaintiff Curt Peters brought this personal injury action against Defendant Wady Industries, Inc. ("Wady Industries") and Defendant Patrick Terrio ("Terrio") for injuries he suffered at a construction site while working for Tramar Construction, Inc. ("Tramar"). (LF9) Cheri Peters also brought a loss of consortium claim based on Curt Peters' injuries. (LF17-18) Plaintiffs alleged that Terrio had a duty to exercise reasonable care for the safety of others in his capacity as project manager. (LF69) In response, Terrio denied Plaintiffs' claim of negligence and moved to dismiss Plaintiffs' action for lack of subject matter jurisdiction, invoking the Workers' Compensation Statute. (LF7, 69-70) Plaintiffs then sought and received leave to file their First Amended Petition. (LF5, 9, 70)

B. Plaintiffs allege Peters was injured while transporting dowel baskets for Tramar.

In their First Amended Petition, Plaintiffs allege that Terrio acted as a project manager for Tramar and was working within the course and scope of his employment at all times relevant to their causes of action. (LF10, ¶7) Wady Industries manufactured and shipped dowel baskets to Tramar for use in its concrete construction work. (LF10, ¶9) Wady Industries shipped the baskets to Tramar by stacking one basket on top of the other, without warning, bracing, or other precautionary measures. (LF10, ¶10) Tramar

then kept the baskets in this same manner until needed for construction, at which time they would transport the baskets to the required construction site, still stacked in the same manner. (*Id.*)

Plaintiffs further allege Terrio received warnings from Tramar employees concerned that transporting the baskets in this manner posed a safety hazard. (LF10, ¶11) On September 24, 2008, Terrio ordered that baskets be sent to one of Tramar's job sites. (LF10, ¶12) During the transportation, a row of the dowel baskets fell from the flatbed and onto Peters, injuring him. (LF10, ¶13)

C. Plaintiffs allege Terrio failed to change Tramar's method of transport despite warning by other employees.

In their First Amended Petition, Plaintiffs brought claims against Wady Industries for product liability and failure to warn, under theories of both negligence and strict liability. (LF11-16) Plaintiffs further brought a claim against Terrio for negligence, alleging he had a "duty to exercise reasonable care for the safety of others including the plaintiff at all relevant times." (LF16, ¶40) Plaintiffs claim Terrio breached his duty to Peters in the following ways:

a. Defendant allowed the baskets to be transported on a flatbed truck while stacked at a level that exceeded a safe height;

b. Defendant failed to insure that the baskets were properly braced or secured for transportation and unloading;

c. Defendant failed to provide sufficient help; and

d. Defendant failed to provide adequately trained help; and

e. Defendant failed to provide a proper area for the unloading of the baskets; and;

f. Defendant failed to heed the warnings of employees about the stacked baskets;

g. Defendant allowed the unsafe course to become standard operating procedure;

h. Defendant ordered and directed plaintiff Curt Peters to load, stack, transport, and unload the baskets in the aforementioned unsafe manner;

i. Defendant ordered and directed plaintiff Curt Peters to load, transport, and unload the baskets in the aforementioned manner in violation of OSHA Regulations including 29 CFR 1926.250 (a)(1).

(LF16-17, ¶41)

D. Terrio moved to dismiss Plaintiffs' claims against him based on the trial court's lack of subject matter jurisdiction because Plaintiffs' action falls within the scope of the Workers' Compensation Statute.

Because the allegations in the First Amended Petition still fell within the scope of the Workers' Compensation Statute, Terrio filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and asserted an affirmative defense invoking the Workers' Compensation Statute. (LF24, ¶8, LF26)

Terrio argued that Plaintiffs' action rested exclusively on Terrio's actions in carrying out Tramar's duty to provide a safe workplace. (LF34-38) Terrio further argued

that Plaintiffs failed to allege Terrio created a hazardous condition or directed Peters to engage in a dangerous activity so as to create a personal duty to protect Peters from harm. (*Id.*) In response, Plaintiffs argued that Terrio was personally and actively involved in the creation of the danger that led to Peters' injury and, therefore, not entitled to immunity under the Workers' Compensation Statute. (LF40) Plaintiffs argued that Terrio's disregard of prior warnings constituted an affirmatively negligent act. (*Id.*)

Ultimately, the trial court agreed with Terrio and dismissed Plaintiffs' action against Terrio, holding that Plaintiffs failed to allege a breach of duty independent from Tramar's non-delegable duty to provide a safe workplace. (LF69-73) To allow this appeal to go forward, Plaintiffs voluntarily dismissed their action against Wady Industries (LF74), and had the trial court enter final judgment based on the Court order dismissing Plaintiffs' action against Terrio. (SLF1, SSLF1)

On appeal, the Eastern District affirmed the trial court's dismissal in a 2-1 decision, finding that "one cannot escape the fact that each allegation of Terrio's negligence is perfectly inseparable from Tramar's non-delegable duty to provide a safe workplace." (App. A5-A6) The Honorable Glenn A. Norton filed a dissenting opinion arguing that the Western District's recent decision in *Leeper v. Asmus*, 440 S.W.3d 478 (Mo. App. W.D. 2014) *reh'g and/or transfer denied* (June 24, 2014), *transfer denied* (Sept. 30, 2014), should be applied, and that its application established an independent duty of care owed by Terrio under the facts stated in Plaintiffs' First Amended Petition. (Appellant's App. A14) Judge Norton certified that the majority decision was contrary to

Leeper and transferred the case to this Court under Missouri Supreme Court Rule 83.03. (Appellant's App. A10)

POINT RELIED ON

I. The trial court did not err in dismissing Plaintiffs' co-employee negligence claim because Plaintiffs' claim does not allege that Terrio independently and negligently made an otherwise safe workplace unsafe, but rather alleges only that Terrio failed to correct the unsafe method used by Tramar to transport dowel baskets; therefore Plaintiffs' allegations fall squarely within Tramar's non-delegable duty to provide a safe workplace.

Leeper v. Asmus, 440 S.W.3d 478 (Mo. App. W.D. 2014) *reh'g and/or transfer denied* (June 24, 2014), *transfer denied* (Sept. 30, 2014)

Hansen v. Ritter, 375 S.W.3d 201 (Mo. App. W.D. 2012)

Burns v. Smith, 214 S.W.3d 335 (Mo. banc 2007)

Gunnett v. Girardier Bldg. & Realty Co., 70 S.W.3d 632 (Mo. App. E.D. 2002)

ARGUMENT

I. The trial court did not err in dismissing Plaintiffs' co-employee negligence claim because Plaintiffs' claim does not allege that Terrio independently and negligently made an otherwise safe workplace unsafe, but rather alleges only that Terrio failed to correct the unsafe method used by Tramar to transport dowel baskets; therefore Plaintiffs' allegations fall squarely within Tramar's non-delegable duty to provide a safe workplace.

A. Introduction

A co-employee's personal duty to fellow employees does not include a legal obligation to perform the employer's non-delegable duty to provide a safe workplace. *Hansen v. Ritter*, 375 S.W.3d 201, 217 (Mo. App. W.D. 2012). In order for an injured worker to sue a co-employee, the co-employee must have been personally negligent outside the scope of the employer's responsibility to provide a safe workplace. *Burns v. Smith*, 214 S.W.3d 335, 337 (Mo. banc 2007). While the test for determining when a personal duty exists has evolved, Missouri courts have been unwavering that a co-employee's duty is separate and apart from the employer's non-delegable duty to provide a safe workplace.

As first clearly stated in *Kelso v. W.A. Ross Constr. Co.*, nearly eighty years ago, co-employees do not owe fellow employees the legal duty to perform the employer's non-delegable duties. 85 S.W.2d 527, 534 (Mo. 1935). Since then, no Missouri case has ever imposed liability on a co-employee for negligent performance of an employer's non-delegable duties. *Hansen*, 375 S.W.3d at 208. The Western District's decision in *Leeper*

v. Asmus does nothing to change this analysis. 440 S.W.3d 478. Indeed, *Leeper* specifically affirmed: "it must *first* be determined whether a workplace injury is attributable to a breach of the employer's nondelegable duties. If yes, then a co-employee's negligent act or omission *will not support* a personal duty of care in negligence as a matter of law, regardless [of how] the act or omission [is] characterized." *Id*. at 494 (emphasis added).

Here, Plaintiffs allege that Terrio was negligent because he failed to address the concerns raised by other employees that the manner in which Tramar transported the dowel baskets was unsafe before ordering Peters to transport the baskets on the day of the accident. The duties alleged by Plaintiffs fall squarely within Tramar's non-delegable duties, including the duties to provide a safe workplace, safe equipment, and a safe instrumentality and manner of work. Simply put, it was Tramar's duty, and not Terrio's, to correct the allegedly unsafe manner in which the dowel baskets were transported. Accordingly, the trial court properly dismissed Plaintiffs' claims against Terrio.

B. Standard of Review

Dismissal for lack of subject matter jurisdiction is appropriate "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction." MO. R. CIV. P. 55.27 (g)(3); *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. banc 2002). "[W]here … the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*." *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003).

This Court is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it; the trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground. *Id.*; *Carman v. Wieland*, 406 S.W.3d 70, 73 (Mo. App. E.D. 2013).

C. The threshold requirement to maintain an action against a co-employee is the existence of a duty independent of the employer's non-delegable duties.

The substitution of the Workers' Compensation Law for traditional tort remedies reflects an historical compromise recognizing the benefits of providing a means to effectively resolve claims for workers' injuries without resorting to the unpredictability of litigation. *See Gunnett v. Girardier Bldg. & Realty Co.*, 70 S.W.3d 632 (Mo. App. E.D. 2002). An employee who sustains an injury through an accident arising out of and in the course of employment is provided certain compensation without having to prove fault on the employer's part and without being subject to common-law defenses. *Id.* at 636.

In exchange for definite compensation for all work-connected injuries, employees forgo their rights to sue their employers for negligence and to obtain the common-law measure of damages in cases where fault could be shown. *Id.; Quinn v. Clayton Const. Co., Inc.*, 111 S.W.3d 428, 432 (Mo. App. E.D. 2003). The extension of Workers' Compensation Law immunity to co-employees reflects a concern for those instances in which a co-employee's alleged negligence may require indemnification by the employer,

effectively eliminating the component of the compromise that protects the employer. *See State ex. rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo. App. E.D. 1982).

Because an employer may delegate its duty to provide a safe workplace to its employees, courts have extended the employer's statutory immunity from suit to employees of the exempt employer, "albeit in a more limited fashion." *Burns*, 214 S.W.3d at 337 (*quoting State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 621-22 (Mo. banc 2002)). Risks that are attendant to performing the employer's work as directed are thus necessarily subsumed within the employer's non-delegable duties, and cannot support an independent personal duty owed by a co-employee. *Leeper*, 440 S.W.3d at 485. Suits against employees personally for breach of the duty to maintain a safe workplace are preempted by the Workers' Compensation Statute. *Taylor*, 73 S.W.3d at 621-22.

i. A negligence claim requires a duty on the part of the defendant to protect the plaintiff from injury.

When a plaintiff brings a common-law negligence action against a co-employee, the plaintiff must establish the same elements applicable to any negligence action: 1) that a duty existed on the part of the defendant to protect the plaintiff from injury; 2) that the defendant failed to perform the duty; and 3) that the defendant's failure proximately caused the plaintiff's injury. *Hansen*, 375 S.W.3d at 218. As in other common-law actions, the threshold matter is the existence of a duty owed by the co-employee. *Id.* "Duty is unique among the elements of negligence because the existence of duty is a question of law to be decided by the court." *Miles ex rel. Miles v. Rich*, 347 S.W.3d 477, 483 (Mo. App. E.D. 2011) (internal quotations omitted). As an issue of law, duty is not

established by a party's testimony or the testimony of a retained expert; rather, it is determined by the Court based on circumstances of the case and the relationship of the parties. *See Burns v. Black & Veatch Architects*, 854 S.W.2d 450, 452-53 (Mo. App. W.D. 1993) (Duty is a matter of law that cannot be established by expert opinion).

ii. The law imposes certain non-delegable duties onto an employer regarding the safety of its employees.

It is well settled that the law imposes upon an employer non-delegable duties regarding the safety of its employees. These include the following five specific duties related to employee safety: (1) to provide a safe workplace; (2) to provide safe equipment in the workplace; (3) to warn employees about the existence of dangers which the employees could not reasonably be expected to be aware; (4) to provide a sufficient number of competent fellow employees; and (5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety. *Leeper*, 440 S.W.3d at 484 (*citing* W. Prosser, LAW OF TORTS, section 80, p. 526 (4th ed. 1971)); *Hansen*, 375 S.W.3d at 208-09.

Under common law, a servant who performed the master's non-delegable duties was treated as the functional equivalent of the master. *Hansen*, 375 S.W.3d at 209. If the servant "negligently performed, the principal is liable for all injuries that may naturally flow therefrom, and he must answer in damages to the injured servant the same as if he had committed the act in person." *Id*. (*quoting Edge v. Sw. Mo. Elec. Ry. Co.*, 104 S.W. 90, 97 (1907)). Accordingly, a co-employee cannot be held personally liable for his negligence in carrying out an employer's non-delegable duties, including the duty of the

employer to provide a safe workplace. *Gunnett*, 70 S.W.3d at 639. Stated differently, a co-employee owes no personal duty to co-workers to perform non-delegable duties, such as providing a safe workplace, because those duties necessarily derive from the master-servant relationship. *Hansen*, 375 S.W.3d at 214.

"The duty of the master to exercise ordinary care to furnish his servant a reasonably safe place in which to work is one of the duties owing by the master to his servant, *which cannot be delegated* to a fellow servant so as to relieve the master from liability for the negligent performance by such servant of an act constituting part of such duty of the master. *Bender v. Kroger Grocery & Baking Co.*, 276 S.W. 405, 406 (1925) (emphasis added). "Providing a safe place to work is just one of the non-delegable duties an employer owes its employees—a duty which the employer may not escape by delegating the task to someone else." *Gunnett*, 70 S.W.3d at 638.

No Missouri case has ever imposed liability on a co-employee for negligent performance of an employer's non-delegable duties. *Hansen*, 375 S.W.3d at 208. "Thus, when an employee fails to perform the employer's non-delegable duty, the failure is that of the employer, not the employee." *Gunnett*, 70 S.W.3d at 638. "Since the failure is that of the employer, and since recovery under workers' compensation law is the employee's exclusive remedy vis-a-vis his employer, a co-employee performing a non-delegable duty of the employer is entitled to the benefit of the employer's immunity from common-law negligence suits under workers' compensation law." *Id*.

iii. The nature of the duty determines whether a co-employee may be held liable in a civil action, or if the sole remedy lies under the Workers' Compensation Statute.

If an injured employee can only show the existence and breach of an employer's non-delegable duty, the injured employee's only remedy lies under the Workers' Compensation Statute. *Taylor*, 73 S.W.3d at 621 ("The Workers' Compensation Law provides the exclusive remedy against employers for injuries covered by its provisions."). In such cases, a civil suit against a fellow co-employee is not permitted because "[p]rohibition lies to prevent circuit courts from exercising jurisdiction over actions where workers' compensation provides the exclusive remedy; subject matter jurisdiction over such matters properly lies in the Labor and Industrial Relations Commission." *Id.* Accordingly, a petition that only alleges a breach of a non-delegable duty of the employer must be dismissed for lack of jurisdiction in the civil courts.

To avoid having a claim fall under the exclusive jurisdiction of the Commission, the injured worker must demonstrate circumstances showing a personal duty of care owed by the defendant to the injured worker, separate and apart from the employer's non-delegable duties, and that breach of this personal duty proximately caused the worker's injuries. *Quinn v. Clayton Const. Co., Inc.*, 111 S.W.3d 428, 432 (Mo. App. E.D. 2003). "Whether or not a personal duty exists is a matter of law and is necessarily dependent on the particular facts and circumstances of each case." *Arnwine v. Trebel*, 195 S.W.3d 467, 477 (Mo. App. W.D. 2006) (*quoting Risher v. Golden*, 182 S.W.3d 583, 587 (Mo. App. E.D. 2005)). To charge actionable negligence in a civil suit against a co-employee,

something "extra" is required beyond a breach of the employer's duty of general supervision and safety. *Badami,* 630 S.W.2d at179-80. The question of what is sufficient to meet this standard "has not proven susceptible of reliable definition, and Missouri courts have essentially applied the rule on a case by case basis with close reference to the facts in each individual case." *Taylor*, 73 S.W.3d at 622.

Regardless of what is required to allege a co-employee's personal duty to an injured employee, the initial determination must always be whether the injury was caused by a breach of the employer's non-delegable duties. *Leeper*, 440 S.W.3d at 485. "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." *Hansen*, 375 S.W.3d at 217.

D. *Leeper* does not change the threshold requirement of an independent, personal duty.

In *Hansen v. Ritter*, the Western District confirmed that a "co-employee's duties owed to fellow employees do not include the duty to perform the employer's non-delegable duties, as those duties necessarily derive from, and not independent of, the master-servant relationship." 375 S.W.3d at 214. The *Hansen* court held that even under the 2005 amendment to the Workers' Compensation Act requiring strict construction, plaintiffs must allege "something more" than a breach of an employer's non-delegable duties. *Id.* In *Carman v. Weiland*, the Eastern District agreed with the Western District's analysis, continuing to hold that a plaintiff must demonstrate circumstances showing a

personal duty by the defendant separate and apart from the employer's non-delegable duties. 406 S.W.3d at 77-78. The Eastern District further concluded that, because the "something more" requirement existed in common law even before the Act's passage, a plaintiff must satisfy the test, notwithstanding the 2005 amendments. *Id.* at 77; *see also Amesquita v. Gilster-Mary Lee Corp.*, 408 S.W.3d 293, 304 (Mo. App. E.D. 2013).

In its recent decision in *Leeper v. Asmus*, the Western District rejected the refined "something more" test laid out in *Hansen*, *Carman*, *Amesquita*, and other cases, holding the test does not align with the common law of co-employee liability. 440 S.W.3d at 480. However, the court did not waver from application of the threshold requirement that a plaintiff plead a duty independent of the employer's non-delegable duties to maintain an action against a co-employee. *Id.* at 484. The court found that "it must first be determined whether a workplace injury is attributable to a breach of the employer's nondelegable duties. If yes, then a co-employee's negligent act or omission will not support a personal duty of care in negligence as a matter of law, regardless whether the act or omission can be characterized as 'something more' If no, then a co-employee's negligent act or omission may support an actionable duty of care in negligence, regardless whether the act or omission can be characterized as 'something more.'" *Id*. at 494. Accordingly, *Leeper's* rejection of the revised "something more" test does nothing to change the initial analysis of whether the injury is attributable to a breach of a non-delegable duty.

Indeed, *Leeper* confirms that if a workplace injury is "attributable in any manner" to the employer's non-delegable duties, then the co-employee "can owe no duty of care in

negligence, and the co-employee's negligence is chargeable to the employer." *Id*. at 496 fn.16. "If, after considering all relevant facts and circumstances, an employee's workplace injury can be attributed to the employer's breach of a nondelegable duty, then a negligent co-employee owes no duty in negligence to the injured employee as a matter of law." *Id*. at 488. As the majority opinion in this case correctly notes, *Leeper* advises that "if the employer is 'on the hook' at all, then the employee is off." (Appellant's App. A6 n.6)

Under the facts of the case in *Leeper*, the court first held that the plaintiff had met the threshold requirement by making allegations against the co-employee that went beyond the employer's non-delegable duties. 440 S.W.3d at 489. Specifically, that the co-employee, in failing to perform his job as instructed, rendered an otherwise safe workplace unsafe. *Id.* at 496. Only after reaching this first conclusion did the *Leeper* court go on to address the second part of the analysis: the standard to be used when determining whether plaintiff had sufficiently alleged personal affirmative duties on the part of the co-employee. *Id*. at 489. In other words, the plaintiff in *Leeper* made allegations beyond the failure to provide a safe workplace, and alleged personal affirmative duties on the part of the co-employees. Had the *Leeper* court initially found that the plaintiff had instead only alleged the existence of an unsafe workplace, the analysis of whether the "something more" test is an appropriate gauge of determining a co-employee's personal duty would not have been necessary.

E. Plaintiffs' allegations fall squarely within Tramar's non-delegable duties and, therefore, fail to meet the threshold requirement to maintain an action against Terrio.

i. Plaintiffs merely allege an unsafe workplace, which cannot support co-employee liability.

In contrast to the plaintiff in *Leeper*, Plaintiffs here fail to allege that Terrio rendered an otherwise safe workplace unsafe through his alleged negligence. To the contrary, Plaintiffs make clear the Tramar workplace was inherently unsafe. Plaintiffs allege Tramar received dowel baskets from Wady Industries already stacked in a dangerous manner. (L.F.10 ¶ 10) The baskets were kept stacked in the same manner while stored at Tramar's facility. (*Id*.) When Tramar transported the baskets to job sites, they simply kept them stacked in the same manner as they were received and stored. (*Id*.; L.F.16 ¶ 41a) Plaintiffs allege that in spite of the danger, this was the method of storage and transport of dowel baskets used by Tramar as a matter of course. (L.F.17 ¶ 41g) Plaintiffs further allege that Tramar employees were aware of the danger. (L.F.17 ¶ 41f)

As the trial court found, and the appellate court agreed, all of these allegations implicate Tramar's non-delegable duties, and do not create an affirmative personal duty independent of the employer's duty to provide a safe workplace. Indeed, the allegations expressly allege that the "unsafe course" in which the baskets were routinely handled was "standard operating procedure" at Tramar. (L.F.17 ¶ 41g).

In *Hansen*, the Western District affirmed the dismissal of the plaintiff's petition, finding that it failed to assert a personal duty owed by a co-employee existing

independent of the employer's non-delegable duties. 375 S.W.3d at 217. The plaintiff alleged only that the co-employee defendants were negligent in failing to detect, correct, and prevent work practices that rendered the workplace unsafe, and in failing to warn employees of the danger. *Id*. at 204.

The court concluded that the alleged duties were "part and parcel of the Employer's non-delegable duty to provide a safe workplace" because the duties ascribed to the co-employees were either specifically delegated to them by the employer or merely a part of "going to work." *Id*. at 219. The allegations of duty in the present case mirror the allegations in *Hansen*. Here, Plaintiffs merely allege that Terrio failed to provide a safe workplace, failed to take steps to render the unsafe workplace safe, and directed Peters to perform his job in the usual manner in an unsafe workplace. These actions or omissions only implicate duties belonging exclusively to the employer, Tramar.

Judge Norton's dissent agrees that Plaintiffs do not "specifically" allege an independent duty, "or that Terrio's actions solely rendered an otherwise safe workplace unsafe." (Appellant's App. A15) This finding alone should have been sufficient to affirm the trial court's dismissal of Plaintiffs' petition. Nevertheless, Judge Norton found that under the petition's "broadest intendment" the allegation that Terrio ordered and directed the baskets stacked in an unsafe manner knowing they were unsafe was sufficient to find an independent duty. (*Id.*) The majority correctly points out that while the standard of review requires that the petition be given its broadest intendment, "it does not invite us to infer *additional* facts." (Appellant's App. A6) (emphasis in original).

ii. Plaintiffs have not alleged that Terrio independently and negligently made an otherwise safe workplace unsafe.

Plaintiffs argue that Terrio personally created the dangerous condition because he retained control over how the dowel baskets were stacked, had been warned that the manner in which they were stacked was dangerous, and directed Peters into this place of danger. However, a negligent act cannot arise from a mere failure to correct an unsafe condition; it must be separate and apart from the employer's non-delegable duty to provide a safe workplace. *State ex rel. Ford Motor Co. v. Nixon*, 219 S.W.3d 846, 850 (Mo. App. W.D. 2007) (*citing Burns*, 214 S.W.3d at 338); *see also Johnson v. American Car & Foundry Co.*, 259 S.W. 442 (Mo. 1924) (employer liable to injured worker where the employer failed to correct the foreman's negligent method of doing the work and the foreman's 'habit' caused a safe place of work to be unsafe).

While Plaintiffs allege that Terrio directed Peters to handle the unsafe dowel baskets, Plaintiffs do not allege that this directive was outside the scope of Peters' usual job routine or in any way unusual. Missouri courts have consistently held that providing supervisory direction to an employee is insufficient to establish a personal duty. *See e.g., Lyon v. McLaughlin*, 960 S.W.2d 522, 526 (Mo. App. W.D. 1998). Supervisory employees are only held liable to co-employees when the tasks they require are separate and apart from those tasks routinely required in the everyday operations of an employer's business. *Burns*, 214 S.W.3d at 320. Supervisory employees will not be held liable for instructing employees to perform an act that is within the normal course of

responsibilities for employees, even where the employee is subsequently injured in the performance of that task. *Id*.

The dangerous condition that Plaintiffs allege was the normal state of storing and transporting baskets at Tramar. It is Tramar's duty, not Terrio's to provide a safe working environment and method of transport. Tramar delegated its supervisory responsibility to Terrio such that he had the authority to change the method of transport. That he did not do so after other workers alerted him to a potential danger and before ordering the baskets to be transported on the day of Peters' accident does not transform Tramar's non-delegable duty into a personal duty owed by Terrio. *Burns*, 214 S.W.3d at 337 (When an employer delegates responsibility to provide a safe workplace to an employee, that employee is entitled to immunity under the Workers' Compensation Statute as an employer.); *Gunnett*, 70 S.W.3d at 638 (Employer may not escape non-delegable duties by assigning them to an employee.). Accordingly, Plaintiffs' allegations have only shown breach of the employer's non-delegable duty to provide a safe workplace, and cannot provide the basis for individual liability against a co-employee.

The cases offered by Plaintiffs do not suggest anything different. In *Marshal v. Kansas City*, a co-employee shook a hose to remove the kinks, which caused the plaintiff to trip. 296 S.W.2d 1, 2 (Mo. 1956). The Court determined that the hose itself was not defective, and that the injury was caused by the co-employee's negligent use of the hose. *Id*. Specifically, the Court found that "the place of work was not unsafe and the hazard was not brought about by the manner in which the work was being done." *Id*. This is completely distinguishable from this case where Plaintiffs are not only alleging that the

dowel baskets were themselves defective, but also that the storing and transporting of the baskets was generally done in an unsafe manner, rather than made unsafe as a result of an isolated instance of negligent use.

Similarly, in *Graczak v. City of St. Louis*, the plaintiff was injured when a co-employee hit his hand with a steam hammer. 202 S.W.2d 775, 776 (Mo. 1947). In *Graczak*, the plaintiff sued the employer and prevailed for a violation of the non-delegable duty to provide a safe workplace on the basis that the co-employee failed to give the customary warning signal before lowering the hammer. *Id*. On appeal, the court reversed, finding that the injury was attributable to the negligence of the co-employee, not the employer. *Id*. at 780. The court held "where an appliance is reasonably safe to operate … 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." *Id*. at 777.

Again, it is not clear how these facts are applicable to this case, as Plaintiff makes clear that the stacked dowel baskets were not "reasonably safe" until made unsafe by Terrio, but rather were inherently unsafe and remained so as part of the usual manner in which they were handled at Tramar. Indeed, *Graczak* distinguishes its facts from the facts of *Johnson v. American C. & F. Co.*, 259 S.W. at 444, where the employer was found liable for failing to correct the foreman's negligent method of using a steam hammer which caused injury to an employee. *Id*. at 779.

In *Sylcox v. National Lead Co.*, the plaintiff was injured after being thrown from a bus driven by a co-employee. 38 S.W.2d 497, 498-99 (Mo. App. 1931). Plaintiff sued

both the employer and the co-employee for negligence and the court found a submissible case against the co-employee. *Id*. at 501. *Sylcox* merely stands for the proposition that a common law right of action against a co-employee for "his own misfeasance" still exists after the enactment of the Workers' Compensation Act, a proposition not at issue here. *Id*. at 501-02.

Finally, in *McCarver v. St. Joseph Lead Co.*, the plaintiff was ordered by a supervisor to take down loose rock from a mine, and was subsequently killed when the roof of the mine collapsed. 268 S.W. 687, 688 (Mo. App. 1925). Before the promulgation of the Workers' Compensation Act, plaintiff sued both his employer and the supervisor for negligence. *Id*. The plaintiff argued that the supervisor gave the order without first properly inspecting the roof. *Id*. *McCarver*, like *Sylcox*, was decided during a time when Missouri determined co-employee liability on the basis of whether the co-employee's conduct constituted misfeasance (omission by an agent to perform a duty owed to a third party) and nonfeasance (omission by an agent to perform a duty owed to the principal). *See Hansen*, 375 S.W.3d at 211.

Eventually, this dichotomy was called into question as a "fictitious distinction, which can only result in confusion" because acts of omission or commission could fall into either category. *Lambert v. Jones*, 98 S.W.2d 752, 757 (Mo. 1936). This Court instead determined that the focus should be on whether the co-employee owed the injured plaintiff a duty of care. *Id*. "*Lambert* shifted emphasis to determining whether a legal duty exists independent of a master-servant relationship as a means of demarcating liability to injured third parties."' *Hansen*, 375 S.W.3d at 213. From thereon, the focus

was on "the breach of duty owed to the third party under the law, which makes him liable without regard to whether he is the servant or agent of another." *Ryan v. Standard Oil Co. of Indiana*, 144 S.W.2d 170, 173 (Mo. App. 1940). *McCarver* specifically held that the supervisor's duty "to exercise ordinary care in discovering the extent of the danger" derived from his position as "the alter ego" of the employer. 268 S.W. at 689. Accordingly, the finding in *McCarver* that the supervisor could be liable to a co-worker for "misfeasance" based on an "alter ego" relies on dated analysis and should not be applied to the facts of this case. *Id*. at 690.

iii. Focusing first on the employer's non-delegable duties is required by common law.

Plaintiffs argue that the Majority's application of *Leeper's* two-part test, which first requires a determination that a plaintiff's injury is not attributable to an unsafe workplace, will allow the non-delegable duties of the employer to swallow the common law application of co-employee liability. (Appellant's Brief, pg. 9) Plaintiffs misunderstand the controlling authority. Under common law, Missouri courts recognized a distinction between a generally unsafe workplace that causes an employee's injury versus a generally safe workplace that is made unsafe solely by the actions or omission of a fellow employee. Where the latter exists, the courts allow claims for co-employee liability to advance.

For example, in *Marshall v. Kansas City*, the Court reiterated that an "employer ... owes to its employees the non-delegable duty to furnish safe tools and appliances and a reasonably safe place to work and failing in these respects is subject to liability for injury

resulting to its employees." 296 S.W.2d 1, 3 (Mo. 1956). The Court distinguished between cases where injury results "from a hazardous condition and an unsafe place to work due to the method or manner in which the work is being done," from cases where "the place of work was not unsafe and the hazard was not brought about by the manner in which the work was being done" but instead by reason of the manner in which a co-employee handled an otherwise safe piece of equipment. *Id*. The Court concluded that the employee was injured by the independent negligent act of the fellow employee, "and not by reason of the breach of any non-delegable duty owed by the [employer]." *Id.* The Court thus permitted personal liability to attach to the negligent employee after first examining whether the employee had alleged a generally unsafe workplace or an independent act of negligence. *Id*.

The trial court and the majority opinion correctly apply this same analysis to find the opposite in this case. Plaintiffs have only pled that the dowel baskets at Tramar were regularly maintained and transported in an unsafe manner and Terrio did nothing to stop it. There allegations merely suggest "an unsafe place to work due to the method and manner in which the work is being done." *Marshall*, 296 S.W.2d at 3. Plaintiffs have not demonstrated Terrio was personally responsible for creating the dangerous condition in an otherwise safe workplace. Accordingly, Plaintiffs have not demonstrated that they have a cause of action at common law for negligence against Terrio.

CONCLUSION

Plaintiffs allege no actions by Terrio that suggest the existence of a duty independent from Tramar's duty to provide a safe workplace. Plaintiffs allege only a

failure to correct an already unsafe workplace, namely, that Terrio ignored warnings and continued to transport dowel baskets in the dangerous manner regularly used by Tramar. Because Plaintiffs have not met the threshold requirement of showing something other than a breach of the employer's non-delegable duty to provide a safe workplace, this Court need not reach the next step of determining what is required to show an independent, personal duty of a co-employee as a matter of law.

Respondent Patrick Terrio, therefore, respectfully requests the Court to affirm the trial court's judgment in his favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed through the Missouri Court of Appeals' electronic filing system on December 18, 2014, to be served on:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Respondent's Substitute Brief includes the information required by Rule 55.03.

2. The Respondent's Substitute Brief complies with the limitations contained in Rule 84.06;

3. The Respondent's Substitute Brief, excluding cover, certificate of service, certificate required by Rule 84.06(c), and signature block, contains 6,838 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Respondent's Substitute Brief was prepared; and

4. Respondent's Substitute Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

/s/ Teresa M. Young