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IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

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| RUSSELL EVANS, | ) | |
| | ) | |
| Plaintiff/Appellant, | ) | Appeal No. SD33209 |
| | ) | |
| v. | ) | |
| | ) | |
| MONTE BARRETT and RON WILSON, | ) | |
| | ) | |
| Defendants/Respondents. | ) | |

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APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

STATE OF MISSOURI

THE HONORABLE MICHAEL J. CORDONNIER

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# BRIEF OF RESPONDENT MONTE BARRETT

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## INTRODUCTION

This appeal arises from a lawsuit involving a workplace accident that occurred when, at the direction of their employer, Respondent Monte Barrett and Appellant Russell Evans were working together to move trusses at a construction site. Specifically, Barrett was operating a forklift while Appellant was assisting with stabilizing the trusses using a tag line when the forklift struck Appellant, causing his injuries.

The circuit court, after carefully reviewing the allegations of Appellant's petition, found that all of the allegations of negligence fell within the employer's non-delegable duties related to safety and, as such, Barrett could not be liable. (LF 483-84). The court found that those duties include (1) the duty to provide a safe workplace; (2) the duty to provide safe equipment in the workplace; (3) the duty to warn employees of the existence of dangers of which the employees could not reasonably be expected to be aware; (4) the duty to provide a sufficient number of competent fellow employees; and (5) the duty to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety. Because Appellant's claims against Barrett failed to allege any duty independent of the employer's non-delegable duty to maintain a safe workplace, the circuit court properly granted summary judgment.

Appellant claims that the Western District's decision in *Leeper v. Asmus* has greatly expanded co-employee liability for accidents occurring during the time period when his accident took place. 2014 WL 2190966 (Mo. App. W.D.,

May 27, 2014).[1] He claims the circuit court should have therefore allowed his claim against Barrett to withstand summary judgment. As set forth more fully below, it is questionable whether *Leeper* accurately reflects Missouri law. Rather, as discussed below, the Eastern District's decision in *Carman v. Wieland* more accurately states Missouri law on co-employee liability and, in any event, is more factually similar to the instant case. 406 S.W.3d 70, 76 (Mo. App. E.D. 2013). Nonetheless, *Leeper* is distinguishable. In *Leeper*, the plaintiff alleged that the defendant had failed to follow the instructions of his employer, had failed to perform a specific job duty, and that the hazard that led to his injury was not a normal danger of the job that he was performing. Appellant's petition makes no such claims here.

Rather, here, it is undisputed that Appellant and Barrett were following their employer's instructions in the manner in which they moved the trusses, which Appellant alleges led to his injuries. There is no claim that Barrett failed to follow his employer's instructions in operating the forklift or that the injury was not merely related to the manner in which Appellant and Barrett were directed to perform the work. Simply put, there was no allegation against Barrett that went beyond the non-delegable duties outlined above. Thus, summary judgment was properly granted.

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[1] *Leeper* is not yet final. An application for transfer to the Missouri Supreme Court is currently pending. (Case no. SC94308)



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## STATEMENT OF FACTS

On November 26, 2009, Wilco Contractors, Inc. ("Wilco") was constructing an apartment complex on South Scenic Street in Springfield, Missouri. (LF 280-81). As part of the construction project, a number of trusses needed to be lifted from the ground onto the building under construction. (LF 329). One of Wilco's employees, Respondent Monte Barrett, was using a forklift to move the trusses to the appropriate location at the construction site. (LF 281, 288, 318). Another of Wilco's employees, Appellant Russell Evans, was helping to move the trusses by operating a tag line, which is a rope that is connected to the trusses to help stabilize the load as the forklift carries them to their final destination. (LF 278, 280, 281, 288). Appellant was responsible for holding the rope and keeping the trusses in place. (LF 288). This task required that he walk out in front of the forklift and out to its side, applying tension to the rope when necessary. (LF 288-89, 290).

As the two men were working to move the trusses, the load shifted and pulled Appellant toward the forklift. (LF 289). The forklift then struck Appellant and ran over his foot. (LF 290-92). Appellant stated that he believed the load shifted when the forklift drove over a large rock. (LF 114-16, 289-90). He further stated that the forklift was moving slowly at the time, and that he had not previously experienced a load shift to that degree. (LF 116-17).

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Appellant sued Barrett,[2] alleging that Barrett was negligent:

a. In failing to keep a careful lookout for persons in the path of his forklift;

b. In driving too closely to other persons working on the job site;

c. In operating a vehicle he was not trained to operate; and

d. In allowing the forklift he was operating to come into contact with plaintiff's body. (LF 18).

Barrett moved for summary judgment, alleging that Appellant, as a co-employee, could not establish that Barrett owed him a personal duty of care. (LF 246-47). The circuit court agreed and sustained the motion, ruling that any duty to operate the forklift in a safe manner was owed to Appellant by his employer, Wilco, and that duty was non-delegable. (LF 471-72). The circuit court also ruled that Appellant had failed to allege any duty independent of his employer's non-delegable duty to maintain a safe working environment. (LF 472).

This appeal followed.

[2] Evans also sued Ron Wilson, the President of Wilco. (L.F. 19-20, 218). Evans did not appeal the circuit court's grant of summary judgment regarding Wilson.

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## POINT RELIED ON

**I. The circuit court correctly granted summary judgment in favor of Respondent Monte Barrett because Appellant failed to demonstrate that Barrett owed him an independent duty of care in that Appellant failed to prove that his injury resulted from an affirmative negligent act of Barrett that would serve to take Barrett's conduct outside of the scope of his employer's non-delegable duty to maintain a safe workplace. (Responding to Appellant's sole point on appeal).**

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## ARGUMENT

**I. The circuit court correctly granted summary judgment in favor of Respondent Monte Barrett because Appellant failed to demonstrate that Barrett owed him an independent duty of care in that Appellant failed to prove that his injury resulted from an affirmative negligent act of Barrett that would serve to take Barrett's conduct outside of the scope of his employer's non-delegable duty to maintain a safe workplace. (Responding to Appellant's sole point on appeal).**

### A. Standard of Review

This Court reviews the grant of summary judgment *de novo*. *ITT Commercial Fin. Corp v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993). A grant of summary judgment will be upheld if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp.,* 854 S.W.2d at 376. The dispute, however, must be "real, not merely argumentative, imaginary, or frivolous." *DeRousse v. State Farm Mut. Ins. Co.*, 298 S.W.3d 891, 894 (Mo. banc 2009).

The substantive law determines which facts are material. *Martin v. City of Washington*, 848 S.W.2d 487, 491 (Mo. banc 1993). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* A factual issue only exists "if evidentiary

issues are actually contested, are subject to conflicting interpretations, or if reasonable persons might differ as to their significance." *Id.* at 492. "A motion for summary judgment need no longer rest on unassailable proof, nor is it precluded by 'the slightest doubt resting on a scintilla of evidence.'" *Id.* Therefore, a party confronted by a properly supported summary judgment motion "must set forth specific facts showing that there is a genuine issue for trial." *Id.* Put definitively, "[m]ere doubt and speculation do not create a genuine issue of material fact." *Id.*

Finally, an appellate court must affirm a grant summary judgment if it is sustainable under any theory, even if "on an entirely different basis than that used by the trial court." *Lumbermens Mut. Cas. Co. v. Thornton*, 92 S.W.3d 259, 269 (Mo. App. W.D. 2002); *Peck v. Alliance General Ins. Co.*, 998 S.W.2d 71, 74 (Mo. App. E.D. 1999).

**B. Even if "something more" was not the correct test as urged by the Western District in *Leeper*, summary judgment was still proper because this case is distinguishable from *Leeper*. Here, there was no allegation that Barrett was failing to follow the employer's instruction at the time of the accident.**

Appellant essentially hinges his entire argument on appeal on this Court following the Western District's holding in *Leeper v. Asmus* rather than the Eastern District's approach to co-employee liability during the 2005 to 2012 time



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period set forth in *Amesquita v. Gilster–Mary Lee Corp.,* 408 S.W.3d 293, 303 (Mo. App. E.D. 2013) and *Carman v. Wieland*, 406 S.W.3d 70, 76 (Mo. App. E.D. 2013). As discussed below, the *Leeper* court erroneously assumed that the "something more" doctrine did not reflect the proper test for co-employee liability for workplace accidents occurring from 2005 to 2012. Rather, the Eastern District's decision in *Carman* is directly on point and this Court should rely on that case in affirming the circuit court's grant of summary judgment in this case. Nonetheless, this Court need not resolve the conflict between the Western District and Eastern District on this issue to decide this case.

Even assuming that this Court finds that *Leeper*'s analysis of co-employee liability is accurate, this Court should affirm the circuit court's judgment because this case is factually distinguishable from *Leeper*. Significantly, the plaintiff in *Leeper* specifically alleged that the defendant had failed to follow the instructions of his employer, had failed to perform a specific job duty required, and that the falling pipe was not a normal danger of the job that he was performing. The court expressly pointed to this allegation as a basis for its holding that the amended petition supported an independent duty owed to the co-employee plaintiff in that case. 2014 WL 2190966 at *17.

Here, Appellant made no such allegations. Unlike in *Leeper*, all of the facts alleged in Appellant's petition and all of the undisputed facts presented in the motion for summary judgment demonstrate that Barrett and Appellant were performing their work as directed by their employer and that a sudden shift of



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the trusses was a hazard that was brought about by the manner in which the work was being performed. Here, unlike in *Leeper*, that the load might shift was an inherent risk of the work being performed as directed by the employer. In fact, Appellant was specifically tasked with helping to prevent such a shift. Appellant has failed to prove, or even allege, that Barrett was not working in the manner instructed by his employee.

Additionally, unlike in *Leeper*, Appellant has failed to allege that a shift in the forklift's load was not a hazard brought about by the manner in which the work was being performed. Significant to the plaintiff's success in *Leeper* was that he alleged that the accident happened in a manner that was not a normal risk of the work being performed. *See Leeper*, at *17. As such, the Western District held that the allegations were sufficient to allege that "the employer performed all of its nondelegable duties such that a reasonably safe workplace, a safe instrumentality of work, and safe methods or work, became unsafe *solely through the fault of [the defendant]*." *Id.* (emphasis added). The allegations and facts presented here are not similarly sufficient. Instead, the facts demonstrate that the manner of the work being performed led to the risk of such an accident. The undisputed facts demonstrate: 1) that the trusses being lifted to the top of a building shifted as a normal part of the job being performed; 2) that Appellant was responsible for preventing such a shift; 3) that Appellant and Barrett were both performing their job duties in the manner instructed by their employer; and 4) that Appellant's injury was a result of a hazard brought about by the manner in



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which the work was being performed. Unlike in *Leeper*, Plaintiff here has not demonstrated that his injury resulted from anything other than his employer's duty to maintain a safe workplace, and Plaintiff cannot demonstrate that the workplace was made unsafe *solely* through the fault of Barrett.

This Court, in *Parr ex rel. Waid v. Breeden*, has demonstrated a willingness to distinguish cases from *Leeper* and to find that *Leeper* is not controlling. 2014 WL 3864710, (Mo. App. S.D., Aug. 6, 2014). In *Parr*, the family of a commercial vehicle driver who was killed while driving for his employer sued several of the driver's co-employees alleging that they negligently permitted the driver to go out on the road. While this Court cited *Leeper* in its analysis, it specifically stated that *Leeper* is not controlling, and then found that the alleged negligence of the co-employee in permitting the driver to go out on the road was part of the employer's non-delegable duties to ensure a safe workplace. *Id.* at *4-5. Moreover, this Court stated that the plaintiffs had failed to allege any affirmative act that was outside of the normal job duties of the co-employees. *Id.* at *5. More specifically, this Court stated that "[a]ssigning [the driver] this type of work was a normal job duty necessarily attendant to performing the employer's business as directed by the employer." While *Parr* was certified for transfer to the Supreme Court by the dissenting Judge, it nonetheless demonstrates that *Leeper* may be easily distinguished and should not be misapplied to greatly expand co-employee liability.



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Similarly, in the most recent Missouri appellate decision on co-employee liability, handed down the same date as this filing, *Peters v. Wady Industries*, the Eastern District held that resolution of the conflict created by *Leeper* may be unnecessary where the threshold issue of "whether the defendant employee's conduct was independent of his employer's non-delegable duties" is dispositive. (Mo. App. E.D. No. 100699, Sept. 9, 2014) (Slip op. p. 4). In *Peters*, the plaintiff was injured when a stack of dowel baskets fell on him as he was unloading them at a construction site. *Id.* at 1-2. He claimed that his co-employee negligently allowed the baskets to be transported on a flatbed truck stacked at a level that exceeded a safe height, that he failed to insure the boxes were properly braced for transporting, that he failed to provide sufficient and adequately trained help, that he failed to provide a proper area for unloading the baskets, and that he failed to heed the warnings of employees about the stacked boxes. *Id.* at 2. The Court reiterated the well-settled non-delegable duties of the employer relied on by the circuit court in this case, i.e., "(1) to provide a safe workplace; (2) to provide safe equipment in the workplace; (3) to warn employees about the existence of dangers of 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." *Id.* at 5. As in the instant case, the Court found that the allegations of negligence in the petition did not fall outside these non-delegable



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duties. The Court found that, at best, the petition asserted that the co-employee "knew of the danger and failed to protect him from it." *Id.*

Likewise, in this case, Appellant alleges simply that Barrett was negligent in operating the forklift—a task he was charged with by his employer—and that he was further not trained to operate the forklift, and ultimately allowed the forklift to come into contact with Appellant's body. (LF 18). Yet, this conduct does not extend in any way beyond the duty to maintain a safe workplace, to provide safe equipment, and to provide competent employees to operate that equipment—duties falling squarely within the non-delegable duties identified by *Peters*, *Hansen*, and the circuit court in this case.

*Peters,* like *Parr*, was transferred to the Missouri Supreme Court by a dissenting judge that found a conflict with *Leeper*. Nonetheless, both cases demonstrate that *Leeper* can be distinguished both factually and legally. Here, there was no conduct like in *Leeper* that was in contravention of how the employer instructed Appellant and Barrett to do the work that led to Appellant's injuries. Further, there was no allegation in the petition that went beyond well-settled non-delegable duties of the employer.

Ultimately, regardless of the test used, Appellant has not adequately alleged or proven that Barrett owed him an independent duty of care. All of the allegations in the petition and all of the undisputed facts demonstrate that Barrett was operating a forklift to complete a job as directed by his employer. Appellant's injury occurred while the two men were working as directed by their



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employer. Appellant was injured by a hazard that was created by the manner in which the work was being performed. Appellant has not alleged "something more" than conduct subsumed by his employer's non-delegable duty to provide a safe workplace. Nor has Appellant alleged any facts whatsoever that would otherwise demonstrate that Barrett owed him any kind of personal duty of care independent from his employer's non-delegable duties. Therefore, this Court should affirm the circuit court's grant of summary judgment in favor of Barrett and against Appellant.

### C. Summary judgment was proper because the claim against Barrett relates solely to the employer's non-delegable duty to maintain a safe workplace and the circuit court properly found that Appellant did not allege "something more" or any conduct that created a personal duty owed by Barrett to Appellant.

Missouri law has long recognized that one employee may hold a co-employee liable in certain circumstances for negligent conduct. Such an action continued to exist even after the General Assembly passed the Workers' Compensation Act ("the Act"). *See, e.g., Kelley v. DeKalb Energy Co.*, 865 S.W.3d 670, 672 (Mo. banc 1993) (stating that an employee "may sue a fellow employee for affirmative negligent acts outside the scope of an employer's responsibility to provide a safe workplace."). While the Act has now fully codified when a co-employee can and cannot be held liable in a negligence lawsuit, for the



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period between 2005 and 2012, co-employees remain potentially liable for common law negligence claims brought against them by fellow employees. This is because in 2005, the General Assembly amended the Act to require any reviewing court to strictly construe the Act's provisions. Section 287.800, RSMo. Supp. 2006. Previous versions of the Act had required reviewing courts to liberally construe the Act's provisions. *See, e.g.*, section 287.800, RSMo 2000.

In the wake of this change in the required mode of interpretation, the Western District held that co-employees were not immune under the Act from suits by fellow employees that they allegedly injured through some negligent act on the job site. *Robinson v. Hooker*, 323 S.W.3d 418, 423-25 (Mo. App. W.D. 2010). However, the Western District later made clear that a co-employee would not be open to all suits alleging negligence of any kind, but instead that the co-employee would only be liable to suits for the same conduct that a co-employee would have been liable for at common law. *See Hansen v. Ritter*, 375 S.W.3d 201, 207-08 (Mo. App. W.D. 2012). In 2012, the Act was amended to clarify that it also served to extinguish co-employee liability unless "the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." Section 287.120, RSMo. Supp. 2013. The legislature, thus, codified the "something more" test discussed further below.

Since *Hansen*, the Eastern District and the Western District of the Missouri Court of Appeals have issued significantly different opinions regarding how to determine whether a co-employee owes a fellow employee an independent duty



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of care under the common law. *Compare Leeper*, 2014 WL 2190966, with *Carman v. Wieland*, 406 S.W.3d 70 (2013). There are, however, some universal principles accepted by Missouri courts.

It is well-settled that to establish a common-law negligence action against a co-employee, a 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." *Carman v. Wieland*, 406 S.W.3d 70, 76 (Mo. App. E.D. 2013) (citing *Hansen*, 375 S.W.3d at 208). The existence of a duty owed by the co-employee is a threshold matter. *Id.* If the co-employee owes no duty, then there can be no negligence.

Establishing that a co-employee owed an independent personal duty to his or her fellow employee, however, has an interesting wrinkle. As a matter of law, "a co-employee's personal duties to fellow employees do not include a legal duty to perform the non-delegable duties belonging to the employer under the common law." *Id.* As discussed above, it is settled law in Missouri that an employer owes his or her employees certain duties that the employer may not delegate. *Hansen*, 375 S.W.3d 201 (2012); *Carman*, 406 S.W.3d at 77. Each of these duties is related to safety, and include the duty to: 1) provide a safe workplace; 2) provide safe equipment in the workplace; 3) to warn employees about the existence of dangers of which the employees could not reasonably be expected to be aware; 4) to provide a sufficient number of competent fellow



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employees; and 5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety. *Hansen*, 375 S.W.3d at 208; *Carman*, 406 S.W.3d at 76. Importantly,

> The duty to provide a safe place to work is only one of the non-delegable duties that an employer owes to its employees, and the employer cannot escape its duty by delegating the task to another. Thus, when an employee fails to perform the employer's nondelegable duty, the failure rests with the employer, not the employee.

*Carman*, 406 S.W.3d at 76-77 (citation omitted).

At common law, and throughout the history of co-employee liability, a co-employee defendant could only be held liable where that defendant breached an *independent duty* that was personally owed to an injured employee. *Id.* at 77; *Hansen*, 375 S.W.3d at 213. Importantly, co-employees owe no independent duty to their fellow employees "to perform the employer's nondelegable duties because those necessarily derive from the master-servant relationship and are not independent of it." *Carman*, 406 S.W.3d at 77; *Hansen*, 375 S.W.3d at 214. Therefore, in order to sustain an action against an allegedly negligent co-employee, an injured employee must establish that the co-employee owed a duty that is independent of any of the employer's non-delegable duties.

Unsurprisingly, every court of appeals decision over the course of the last few years that has addressed co-employee liability has agreed that this is the



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current state of the law. The requirement that an injured employee must establish that his or her co-employee owed an "independent duty" was stated by the Western District in *Hansen*, 375 S.W.3d at 213, and in *Leeper*, 2014 WL 2190966, at *4. That same requirement was noted by the Eastern District in *Carman*, 406 S.W.3d at 77, and *Amesquita*, 408 S.W.3d at 303-04. *See also Peters v. Wady Industries*, (Slip Op. pp. 4-5).

The conflict among the districts of the court of appeals involves only the issue of how to determine whether an allegedly negligent co-employee owes an independent duty to the injured employee. That is to say, the apparent conflict involves how to determine whether the alleged duty is independent from, or part and parcel of, the employer's non-delegable duties. This conflict is at the very heart of this appeal because the circuit court granted summary judgment in favor of Barrett precisely because it determined that Appellant failed to allege that Barrett owed him a duty that was independent from his employer's non-delegable duty to maintain a safe workplace.

**1) The Eastern District approach**

The Eastern District applies the "something more" test to determine whether the alleged duty was independent of the employer's non-delegable duties to provide a safe workplace. *Carman*, 406 S.W.3d at 77-79; *Amesquita*, 408 S.W.3d at 302-03. The something more test developed in the early 1980's as a method for determining when an employee owed a duty independent of the employer's non-delegable duties to his or her fellow employees. *See State ex rel.*



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*Badami v. Gaertner*, 630 S.W.2d 175, 179-181 (Mo. App. en banc 1982).[3] The "something more" test states that "[t]o charge actionable negligence against a co-employee, something 'extra' is required beyond a breach of the employer's duty of general supervision and safety." *Carman*, 406 S.W.3d at 77. Under the something more test, an independent duty of a co-employee will arise only when the co-employee engages in "an affirmative act, outside the scope of the employer's non-delegable duties, directed at a worker, increasing the risk of injury." *Amesquita*, 408 S.W.3d at 293 (quoting *Gunnet v. Giardier Bldg. and Realty Co.*, 70 S.W.2d 632, 638 (Mo. App. E.D. 2002)).

In its discussion of co-employee liability in light of the 2005 Amendments to the Act, the Eastern District recognized that, despite the change, the "something more" test still comports with the common law. In *Carman*, the Eastern District stated:

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[3] In *Hansen*, the court recognized that, to the extent *Badami* could be read to afford co-employees immunity under the Act, it had been abrogated by the 2005 amendments. *Hansen*, 375 S.W.3d at 207. However, *Hansen* also recognized that "*Badami*'s recognition of the underlying (and long standing) common law principle that a co-employee owes no duty to fellow employees to perform an employer's non-delegable duties remains good law." *Id.* at 216; *see also Carman*, 406 S.W.3d at 78 n.4.



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> *Badami*'s "something more" test simply restated the pre-existing common law regarding co-employee liability to fellow workers for breach of the employer's non-delegable duties. Where *Badami* required "something more" than a co-employee's breach of a duty of general supervision and safety because that duty is a non-delegable duty of the employer, the common law requires something "independent" for the same reason. Construing "something more" as a breach of a personal duty of care that one employee owes to another comports with the foundational principle of common-law negligence actions—that the defendant owed some duty to the plaintiff, the observance of which would have avoided the injury. *Badami*'s recognition of the underlying common-law principle that a co-employee owes no duty to fellow employees to perform the employer's non-delegable duties remains good law.

*Carman*, 406 S.W.3d at 77. Likewise, *Amequista* stated that the effect of the 2005 Act on co-employee liability was to restore the common law regarding co-employee liability to the extent it had been displaced. 408 S.W.2d at 304. *Amequista* holds that "the revisions merely restore the relevant inquiry to whether the co-employee had any independent duty to the plaintiff." *Id.* According to *Amequista*, in order to appropriately allege an independent duty owed by the co-employee, the plaintiff employee must allege facts that, if true,



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"establish an affirmative act by [the co-employee] that gave rise to a personal duty of care to [the plaintiff]." *Id.*

Each of these cases made two significant holdings. First, they both held that, under the common law, for a co-employee to be liable he or she must have owed an independent duty to the plaintiff. To meet that standard, a plaintiff must allege that the co-employee owed a duty that is independent from the non-delegable duties owed by his or her employee. Second, both cases hold, independently of one another, that the appropriate manner to determine whether a co-employee owed an independent duty to the injured employee is to use the "something more" test. Therefore, under these cases, a plaintiff employee can only allege that a co-employee was acting outside the scope of the employer's non-delegable duties by alleging that that the co-employee engaged in "an affirmative act, outside the scope of the employer's non-delegable duties, directed at a worker, increasing the risk of injury."

**2) The Western District approach**

The Western District has rejected the "something more" test, under the belief that the test does not comport with the common law. In *Leeper*, the Western District held that an employee, injured while operating a drilling rig, had stated a claim for negligence against his co-employee. *Leeper*, 2014 WL 2190966, at *17. The two employees were working together to place a 500-pound pipe into position on a drilling rig. *Id.* at *2. The defendant co-employee was operating the drilling rig's winch while the plaintiff was guiding the pipe into the



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drilling rig tower. *Id.* The plaintiff alleged that, prior to lifting the pipe into position with the winch, the defendant was supposed to tighten the cable around the pipe. *Id.* According to the plaintiff's allegations, the defendant had failed to tighten the cable, and once the defendant began to lift the pipe with the winch, the pipe broke free and crushed the plaintiff's arm. *Id.* The plaintiff alleged in his amended petition that the defendant had failed to follow his employer's specific instructions imposed to ensure a safe work place by failing to tighten the cable, and the failure to do so resulted in the plaintiff's injury. *Id.* at * 17. The defendant moved to dismiss the petition for failure to state a claim, arguing that he did not owe the plaintiff a personal duty of care that was independent from the employer's non-delegable duty to provide a safe workplace. *Id.* at *3. The defendant employee also specifically argued that the petition failed to satisfy the "something more test" because it failed to allege purposeful, affirmative conduct directed at the plaintiff. *Id.* The circuit court dismissed the case, and the plaintiff appealed. *Id.*

On appeal, the Western District reversed, holding that the common law regarding co-employee negligence controlled and the "something more" test was not in line with the common law. *Id.* at *4. The Western District held that the "something more" test, was based on the Workers' Compensation Act's provision stating that the Act should be construed liberally with a view to the public welfare. *Id.* at *12. In light of the 2005 amendment to the Act, the Western District stated that the common law should control and the "something more"



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test should be abandoned. *Id.* at *15. The Western District also, somewhat unconvincingly, determined that the "something more" test should be abandoned because it could lead to different results from those reached under the common law. *Id.*

*Leeper* concluded that the common law demanded a more fact-centered approach. According to *Leeper*, in order to determine whether a defendant co-employee owed a duty to the plaintiff, the common law required that it first be determined whether the employer breached one of the non-delegable duties it owed to its employees. *Id.* at *15. To that end, the Western District stated that in order to determine whether the defendant co-employee owed a duty to the plaintiff,

> [I]t 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.* (footnotes omitted).

After concluding that the "something more" test was not in line with the common law, the Western District declined to follow *Carman* and *Amesquita*.



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*Leeper* stated that these cases incorrectly followed the "something more" test and, as a result, were not in line with the common law. *Id.* at *15-16.

The Western District then examined the amended petition to determine whether the plaintiff had stated a claim upon which relief could be granted. In finding the allegations sufficient, the Western District heavily relied on the plaintiff's allegation that it was the defendant employee's job duty to "ensure that the cable is tight as the 500-pound pipe is lifted, otherwise the 500-pound pipe will become unsecure and fall." *See Id.* at *16. The plaintiff alleged that the defendant was independently negligent because he violated his job duty in failing to ensure that the cable was tight and that the pipe falling was not a normal risk of working on the drilling rig. *Id.* The Western District concluded that these facts established that the defendant owed a duty to the plaintiff independent of the employer's nondelegable duties to maintain a safe workplace. *Id.* at *17. The court stated:

> The amended petition alleges that [defendant] failed to perform his job as he had been instructed, and that as a result he made what was otherwise a safe workplace and safe instrumentality of work unsafe. Construed favorably to [plaintiff], these allegations support a conclusion that a safe drilling rig, safe methods for operation of the drilling rig, and a sufficiently trained operator of the drilling rig, were only made unsafe because [defendant] failed to follow specific instructions imposed to insure safe operation of the drilling rig.



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*Id.* (footnote omitted).

**3) Appellant's reliance on *Leeper* is misplaced.**

Appellant apparently concedes that if this Court follows the Eastern District approach, summary judgment was proper. As noted above, he hinges his entire argument on this Court applying the Western District's holding in *Leeper*. *See* A.B. 50-52. *Leeper*'s holding is flawed, however, in that it is based on two erroneous assumptions. First, it is based on the assumption that the "something more" test developed as a result of the Act's previous requirement that its provisions must be liberally construed. Second, it is based on the erroneous assumption that the "something more" test is not "common law" because that test might lead to different results if applied to cases decided long ago.

Concerning the first assumption, *Leeper* states "the post-*Badami* refinements of the "something more" test were fashioned at a time when section 287.800 required our courts to liberally construe the Act 'with a view to the public welfare.' Given this legislative directive, it is understandable that the 'something more' test evolved to reduce the circumstances where both the employer and a co-employee could face liability for a workplace injury." *Id.* at *12. While this is true, it does not directly follow that the "something more" test is a *result* of the liberal construction of the statute. Significantly, *Badami*, the case that is attributed with brining the "something more" test into Missouri's jurisprudence says nothing about the liberal construction of the Act. Moreover, *Badami* recognized that "an employee becomes liable to a fellow employee when



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he breaches a common law duty owed to the fellow employee independent of any master-servant or agent-principal relation." *Badami*, 630 S.W.2d at 179. *Badami* finally concluded with the rather unremarkable determination that a co-employee cannot be held liable for discharging his or her employer's non-delegable duties. *Id.* at 180-81.

*Leeper* also criticizes the "something more" test as having no "common law origin." *Id.* at *13. However, the test was adopted in *Badami* expressly in light of "[Missouri] law which existed at the time our compensation act was passed" to determine whether an allegedly negligent co-employee could be held liable. 630 S.W.2d at 180. That test then developed through judicial decision-making over the years until it reached its current iteration. *See, e.g.*, *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620 (Mo. banc 2002), overruled on other grounds by *McCracken v. Wal-Mart Stores East, L.P.*, 298 S.W.3d 473 (Mo. banc 2009); *Tauchert v. Boatmen's Nat'l Bank of St. Louis*, 849 S.W.2d 573 (Mo. banc 1993); *Gunnet*, 70 S.W.2d at 638.

While the "something more" test might not have been introduced into the common law until 1982, it is undeniably a part of the common law of co-employee liability. Moreover, as noted by both *Carman* and *Amesquita*, the "something more" test fully comports with the common law and operates only to help determine when an allegedly negligent co-employee owes a duty of care independent of the employer's non-delegable duties to provide a safe workplace.



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Concerning the second assumption, *Leeper* rejected the "something more" test in part because it perceived that some of the cases decided prior to the introduction of the "something more" test could conceivably come out differently if decided using the "something more" standard. *Leeper*, at *15. Over the course of several pages, the court points to certain cases that might have been decided differently. *See Id.* at *13-15. However, evolving common law and the introduction of new judicial tests are fairly common place. There are many legitimate reasons for such changes. That the law changes over time does not indicate that modern principles do not align with the common law. Rather, the changes in common law are merely a necessary and common part of a constantly changing world.

To the extent that *Leeper* suggests that the "something more" test should no longer be applied in Missouri, the case was incorrectly decided. As both *Carman* and *Amesquita* recognized, the "something more" test comports with the common law of Missouri regarding co-employee liability. Both of those cases recognized that the "something more" test serves to aid in determining when a co-employee owes a fellow employee an independent duty of care. This test developed through the common law of this state, is in line with the common law of this state, and should continue to be applied in order to reach consistent results under Missouri law.



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**4) The Eastern District's holding in *Carman* is dispositive.**

Here, the circuit court correctly applied the "something more" test to Appellant's claim and determined that Barrett was discharging his employer's non-delegable duties when Appellant was injured. The court concluded that the duty to operate the forklift in a safe manner was owed to Appellant by his employer. Because that was the only allegation made, the circuit court determined that Appellant "failed to allege any duty independent of the employer's non-delegable duty to provide a safe working environment." (LF 472). The circuit court, therefore, granted summary judgment in favor of Barrett.

The circuit court's ruling is directly in line with *Carman*. In *Carman*, the plaintiff, a firefighter, alleged that a co-employee had backed a fire truck over her while the co-employee was attempting to back the truck into the fire station. The plaintiff alleged that the defendant owed her a personal duty of care to drive the fire truck in a non-negligent manner. *Id*. at 72-73. The Eastern District found that the allegations were insufficient to state a claim for co-employee negligence. *Id*. at 78-79. In so holding, the court stated that "the plaintiff has alleged nothing more than that the defendant negligently drove the fire truck." *Id*. at 78. The court then held that "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." *Id*. at 79. The court held that such a duty is "subsumed within an employer's nondelegable duty to provide a safe working environment." *Id*.

Similarly here, Appellant's only allegations are that Barrett negligently operated the forklift he was using, at the direction of his employer, to lift trusses onto the top of a building, that he was not adequately trained, and that he allowed the forklift to come into contact with Plaintiff's body. (LF 18). According to *Carman*, the duty to operate the forklift safely, absent an allegation of "something more," was owed to Appellant by his employer, as was the duty to provide properly trained employees. Because Appellant has not alleged "something more," he has not properly alleged or proven that Barrett owed him an independent duty of care. Thus, summary judgment was proper.



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## CONCLUSION

Appellant has alleged nothing more than a breach of his employer's non-delegable duty to maintain a safe workplace. The undisputed material facts do not support a claim of an independent duty owed by Barrett. Accordingly, the circuit court correctly granted summary judgment. This Court should affirm.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was filed via the Court's electronic filing system this 9th day of September, 2014, which served the filing upon the following:

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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 Brief includes the information required by Rule 55.03.

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

3. The Respondent's Brief, excluding cover page, signature blocks, certificate of compliance, affidavit of service, and contains 6,698 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Respondent's Brief was prepared; and

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

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