

SOMETHING MORE

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UNDERSTANDING THE “SOMETHING MORE” DOCTRINE

During the interviews we conduct with a potential workers' compensation client, one of the questions which commonly arises is whether that individual has a viable civil cause of action against his employer or co-employee for personal liability? Did that co-employee or employer engage in conduct which went beyond simple negligence in causing my client's injuries, such that civil liability attaches?

THE ORIGINS OF “SOMETHING MORE”

Under the Missouri Workers' Compensation Act (“Act”), where an employee is injured in the ordinary course of business, that injury will be compensated without the requirement of proving fault¹ As these benefits are presumably to be given the injured employee without argument, he foregoes the opportunity to hold the employer personally liable in a civil action and relinquishes his right to sue his employer in circuit court for his damages². Generally speaking, the Act does not allow for a civil action against a co-employee when that person's actions cause injuries to another co-worker. Specifically, §287.120 R.S.Mo. states:

“Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and **shall be released from all other liability therefor whatsoever, whether to the employee or any other person.**” [emphasis added].

But, like any good rule, there are always exceptions -- and this statute is one such exception. At some point, the courts realized that an injured worker didn't fully relinquish his rights to a civil action, especially when the facts demonstrated that there was some affirmative action taken by a co-employee which intensified the risk of injury to the worker and was outside the employer's general responsibility to maintain a safe workplace.

BADAMI AND ITS PROGENY - 1982 TO PRESENT

One of the first cases to consider this question was the 1982 *Badami* decision.³ In *Badami*, the injured worker alleged that his injuries were sustained in part, due to the negligence of a co-employee and argued that the co-employee should be held personally liable for those injuries. In examining other states' opinions, the court noted several distinct trains of thought. With the first approach, other states held that the immunity an employer experiences under workers' compensation laws will always extend to the acts of fellow employees, regardless of the nature of the negligence.⁴ The Eastern District found this approach contrary to Missouri law.

The second noted approach was taken by New Jersey and Louisiana, which held that the co-employee's liability was based on (1) whether he had been assigned a specific duty by the employer; and (2) if that specific duty was breached, personal liability would attach.⁵ The Court found that this approach was again contrary to Missouri law.

The third approach was Wisconsin's, which determined that for there to be personal liability imposed on fellow employees, the injured party must allege “something more” than ordinary negligence.⁶ One must provide evidence that the co-employee did “something more” than negligently perform a delegated duty.⁷ When performing a delegated duty, that co-employee steps into the shoes of the employer, and is therefore also protected by the employer's immunity. *Badami* and its progeny ultimately adopted the Wisconsin approach. Missouri courts would thereafter require “something more” for there to be liability on the part of the co-employee or his supervisor. Since *Badami*, the application of the “something more” doctrine has been re-visited in the courts on multiple occasions, with widely varying outcomes, clearly reflecting the difficulty the courts have encountered when presented with allegations that “something more” has arisen and civil liability should attach.

In *Badami*, the injured employee had sued his employer's corporate president and its production manager, alleging their failure to maintain a safe work environment by failing to place certain protective devices on a shredding machine which could have prevented his injury. The Eastern

District, applying the Wisconsin approach, held that the corporate president and the supervisor would not be held liable for damages as a mere allegation of their general failure to fulfill a duty to provide a reasonably safe place to work did not rise to the level of any actionable negligence.⁸

THE 3-PRONG TEST

Following *Badami*, a long succession of cases began to thoroughly investigate this doctrine, each case varying greatly in its outcome. Generally speaking, in order for civil liability to attach it has become necessary to demonstrate the following elements:

- 1) that the co-employee/executive officer/owner/supervisor has engaged in an affirmative act;⁹
- 2) that such an act occurs while the co-employee is acting beyond the scope of the employer's responsibility to generally provide the employee with a safe working environment;
- 3) that such an act breaches a personal duty of care which the co-employee would personally owe to the employee.¹⁰

What constituted either "beyond the scope" or a breach of the "personal duty" elements was, of course, the \$65,000.00 question? Following, are examples where the Courts have found that the co-employee's actions would subject them to civil liability.

In the first, the president (also the principal shareholder) of a company was found to be liable as a co-employee. The company manufactured fuses and "class C" fireworks. When a worker complained that a machine wasn't working properly, the president "jerry-rigged" the defective machine and ordered the employee to continue use of the machine. In doing so, the defective spinning wheel created a huge amount of friction with the wooden board holding the fuse in place, causing a fire that severely injured the employee. The president had intensified the risk of injury by directing his employee to operate machinery in a fashion that breached a personal duty of care.¹¹

In the next, a corporate officer was operating a tree-planting truck and "training" an employee in its use. A stabilizer bar on the truck engaged, striking and crushing the deceased worker's head without the knowledge of the officer. Nearly fifteen (15) minutes elapsed before he discovered the employee's gruesome death. Here, the officer had stepped outside his role of employer and was a co-employee and became subject to civil liability. Because the officer was not training the deceased at the time he was killed, the Court remanded the case because a jury could have found that he owed a separate duty to the deceased, given the inherent hazard of operating the machine.¹²

In yet another, the employee was injured when an elevator cab on which he was standing, fell five to six stories down a shaft. Because the co-employee had arranged a failed make-shift hoist system to hold the elevator in place the Court found that he had breached his personal duty of care, especially given that he both created and was operating the defective equipment at the time of the injuries.¹³

A rather gruesome case involved a worker who fell to his death in a vat of scalding water. Tort liability attached

against the supervisor because he had rigged a forklift to suspend the deceased over the vat and had ordered the employee to suspend himself on the chain to do repair work. These actions had exposed him to an extreme and unreasonable risk of death and was an affirmatively negligent act on the part of the supervisor.¹⁴ This aptly demonstrates how the supervisor's actions breached the personal duty of care which the supervisor owed the deceased.

Yet another forklift case involved an employer being held liable in tort because his affirmatively negligent act of having the employee stand on a wooden pallet on a forklift created a hazardous condition beyond the mere responsibility to provide a safe workplace. The store manager was not immune from suit when the employee fell 15 feet as a result of improperly being told to stand on the forklift, which was not meant for such usage.¹⁵

Other situations where co-employees were held personally liable include:

- 1) supervisor ordered an employee to move a 5000 lb. safe under threat of being fired;¹⁶
- 2) the president of a company knew a forklift was defective and failed to warn the employee of enhanced dangers, due to a leaking hydraulic cylinder which had been modified by other co-employees;¹⁷
- 3) an employer who had been advised of a defective foot-pedal on an injection mold machine told the employee to "quit whining" and continue working; the employee's hand got caught and she lost her hand;¹⁸
- 4) supervisor does repairs on piece of machinery which violates the warning label on the machine; employee severs four of her fingers when safety guard fails. Court found that co-employees who were not present at time of the accident and took no affirmative actions breached no duty; only the supervisor who performed the repairs could have potential liability;¹⁹

Conversely, the Courts have found numerous situations where co-employee liability would not attach as they had not undertaken actions which were purposeful, affirmatively dangerous conduct²⁰ or which had demonstrated anything beyond the mere breach of the general duty to maintain the workplace in a safe condition.²¹ Such examples are:

- 1) simply having an employee remove machinery from a conveyor belt to conduct routine maintenance and repair were not affirmatively negligent acts;²²
- 2) transferring an employee to a night shift was not an affirmative act which was outside the normal duty to provide a safe workplace even though a co-worker on the same shift was a convicted sex-offender;²³
- 3) employee who fell through a skylight hole covered by plywood could not maintain action because a co-employee had simply discharged his employer's duty to provide a safe workplace; what specifically lacked here was any affirmative action on the part of the defendant which was directed at the employee and increased the risk of injury;²⁴

- 4) an employee merely alleged that his injuries were caused as a result of negligent and careless driving by the trash truck driver; there was no purposeful, affirmatively dangerous conduct by the driver;²⁵
- 5) electrocuted employee's family could not bring action against landowner as it did not exercise any significant degree of control over the sub-contractor or its employees and had not demonstrated anything more than a simple failure to provide a reasonably safe work environment;²⁶
- 6) a co-employee's failure to wait for clearance that was safe to proceed with use of a storage container was not the purposeful, affirmatively dangerous creation of a hazardous condition; the co-worker simply failed to discharge a duty to perform safe operation;²⁷
- 7) the cart in which employee was riding flipped when brakes failed; the employer had not done anything to violate safety rules and was, in fact, attempting to avoid accident by having the employee ride in the cart to warn the supervisor of any dangers;²⁷
- 8) a bulldozer slid down a hill, instantly killing the employee; employee had failed to demonstrate a personal duty of care owed by the co-employee separate and apart from the employer's non-delegable duties; here, the use of the bulldozer was within usual scope of employment and co-employee didn't engage in inherently dangerous conduct directed at the deceased;²⁹
- 9) a driver backed into oncoming traffic without taking measures to avoid a collision; nothing suggested the co-employee had directed the deceased to participate in any acts that were dangerous or would be reasonably viewed as hazardous and beyond the normal requirements of the employment;³⁰
- 10) Allegations that co-employees failed to securely hold ladder, failed to properly rig rope to branch that was being cut, failed to create a proper support with rope, and failed to use reasonable care in holding the rope did not amount to the purposeful, affirmatively dangerous conduct that was required to subject them to civil liability.³¹

BURNS AND STATE EX REL. FORD V. NIXON

Recently, the Missouri courts have added valuable insight on this topic in two important decisions. First, the Supreme Court tackled the issue of whether a co-employee's affirmative acts of negligence rose to the level of "something more" in *Burns v. Smith*.³² In *Burns*, the injured employee was severely injured when a water pressure tank exploded on the side of his concrete mixer truck. Burns filed suit against the owner/employer (Smith) alleging that Smith's actions in causing the explosion constituted an "affirmatively negligent act." In affirming the Southern District, the Supreme Court found that Smith's actions had created additional hazards and dangers beyond that which is, or should have been, expected

in the work environment,³³ such that workers' compensation was not the exclusive remedy. What made the actions so egregious was the overwhelming evidence which demonstrated:

- a) the employer knew his welds weren't uniform;
- b) that the employer wasn't a certified welder;
- c) he told his employee to "run it [truck] till it blows;"
- d) his poor vision (uncorrected) made welding a "feeling in the dark thing."

Smith's actions attested to his foreknowledge that his repairs were slipshod at best and that the mixer truck was primed to explode. These facts evidenced that the employer had created the "perfect storm" of conditions which would be subjecting Burns to activities he knew would result in a particularly hazardous event, thereby breaching his personal duty of care to Burns. Hence, the "something more" element sufficient for civil liability was present.

In *State ex rel. Ford v. Nixon*,³⁴ the Western District examined whether the actions of a co-employee would subject him to personal liability under the "something more" standard. Upon review, the Court found that such personal lawsuits were generally pre-empted by the exclusive provisions of the Act, unless it could be demonstrated that the co-worker performed "an affirmative negligent act outside the scope of the employer's duty."³⁵ Citing to the Supreme Court's opinion in *Burns*, the Western District held that "an affirmative 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."³⁶

The plaintiffs in *Ford* had contended that a co-worker met the "something more" requirement by actively concealing information from a worker (now deceased) about the asbestos hazard associated with many items used on the assembly lines in the plant. A civil suit engaged and the Employer filed for a writ of prohibition claiming the Division of Workers' Compensation had exclusive jurisdiction over the matter. The Court held that in those cases "where co-employee liability has been found, a supervisor personally engaged in affirmative negligent conduct by directing the employee to engage in dangerous conditions that a reasonable person would recognize as hazardous beyond the usual requirements of employment."³⁷ The Court found no evidence that the supervisor of the deceased worker had given any directives to him or had any obligation to do so. The employer merely had the duty to provide a safe work environment and the supervisor, as the Industrial Relations Manager at the plant, performed his duty by informing Ford of potential asbestos dangers. These actions did not reflect any conscious effort on the part of the co-worker to expose the deceased to any dangers that were outside of the normal requirement for an employer to provide an employee a safe place to work.

If the supervisor was performing his job duties and warned the employer of the potential asbestos dangers, such a warning fell within the description of his job duties, thereby removing those actions from any definition of an affirmatively negligent act. By warning Ford of these dangers, the supervisor was not engaging in conduct outside the scope of his employer's duty to provide a safe work environment and was not personally liable.

CONCLUSION

There is no bright-line test that can be used in determining when a co-employee's affirmative actions will necessarily rise to the level of "something more." However, what can be gleaned from the various court opinions is that if the actions of the co-employee somehow intensify the risk of injury or subject the employee to a risk that has been enhanced by that co-employee's actions, the Court will weigh that risk against the employer's non-delegable responsibility to provide a safe workplace. As the cases discussed herein amply suggest, whether a court will find those actions rise to the level of "something more" will be intensely fact specific. Judge Mooney may have summed it best when the Eastern District was asked whether workers' compensation immunity shielded a co-employee from civil liability — "Today we offer our answer: It depends."³⁸

ENDNOTES:

1. *Gunnnett v. Girardier Building and Realty Co.*, 70 S.W.3d 632 (Mo.App. E.D. 2002).
2. *Id.*
3. State ex. Rel. Bandami v. Gaertner, 630 S.W.2d 175 (Mo.App. E.D. 1982).
4. *Id.* at 179.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 180.
9. Affirmative actions are found in situations where the employee created a dangerous condition outside the scope of responsibility to maintain a safe workplace, or where an employee directed other employees to engage in dangerous activities. *Graham v. Geisz*, 149 S.W.3d 459 (Mo. App. E.D. 2004).
10. See, *Gunnnett*; *Tauchert v. Boatmen's National Bank*, 849 S.W.2d 573 (Mo.1993).
11. *Craft v. Scaman*, 715 S.W.2d 531 (Mo.App. E.D.1986).
12. *Biller v. Big John Tree Transplanter Mfg. & Truck Sales, Inc.*, 795 S.W.2d 630 (Mo.App. W.D.1990).
13. *Tauchert v. Boatmen's Nat. Bank of St. Louis*, 849 S.W.2d 573 (Mo.1993).
14. *Hedglin v. Stahl Specialty*, 903 S.W.2d 922 (Mo.App. W.D. 1995).
15. *Pavia v. Childs*, 951 S.W.2d 700 (Mo.App. S.D. 1997).
16. *Murry v. Mercantile Bank*, 34 S.W.3d 193 (Mo.App. E.D. 2000).
17. *Logsdon v. Killinger*, 69 S.W. 3d 529 (Mo.App. S.D. 2002).
18. *Groh v. Kohler*, 148 S.W.3d 11 (Mo.App. W.D. 2004).
19. *Arnwine v. Trebel*, 195 S.W.3d 467 (Mo.App. W.D. 2006).
20. *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620 (Mo. 2002).
21. *Butts v. Express Personnel Services*, 73 S.W.3d 825 (Mo. App. S.D. 2002).
22. *Lyon v. McClaughlin*, 960 S.W.2d 522 (Mo.App. W.D. 1998).
23. *Wright v. St. Louis Produce Market, Inc.* 43 S.W.3d 404 (Mo.App. E.D. 2001).
24. *Gunnnett*, at 632.
25. *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620 (Mo. banc 2002).
26. *Logan v. Sho-Me Power*, 122 S.W.3d 670 (Mo.App. S.D. 2003).
27. *Graham v. Geisz*, 149 S.W.3d 459 (Mo.App. E.D. 2004).
28. *Risher v. Golden*, 182 S.W.3d 583 (Mo.App. E.D. 2005).
29. *Nowlin ex rel. Carter v. Nichols*, 163 S.W.3d 575 (Mo.App. W.D. 2005).
30. *State ex rel. Larkin v. Oxenhandler*, 159 S.W.3d 417 (Mo.App. W.D. 2005).
31. *Garza v. Valley Crest Landscape Maintenance, Inc.* 224 S.W.3d 61 (Mo.App. E.D. 2007).
32. *Burns v. Smith*, 214 S.W.3d 335 (Mo. 2007).
33. *Id.* at 340.
34. 219 S.W.3d 846 (Mo.App. W.D. 2007).
35. *Id.* at 850.
36. *Id.*
37. *Id.*
38. *Gunnnett*, at 635.
39. Many thanks are due to Ms. Angela Catron, our law clerk, for her invaluable assistance in helping conduct the research of the surrounding jurisdictions and the status of the "something more" doctrine in those respective states.

SURROUNDING STATES VIEW OF “SOMETHING MORE” DOCTRINE ³⁹

State	Statute	General View
Arkansas	A.C.A. 11-9-410	bars civil liability for employers covered by workers' compensation; allows suits against 3 rd parties, including co-EE, except that co-EE's actions must be more than mere negligence; if co-EE is performing job duties that help the ER provide a safe workplace, no civil liability, even if actions were merely negligent. <i>Brown v. Finney</i> , 932 S.W.2d 769 (Ark. 1996).
Illinois	820 I.L.C.S 305/5(a)	no common law or statutory right to recover damages from an ER, its agents, or co-EE's; HOWEVER, no immunity for intentional torts committed by co-EE. <i>Valentino v. Hilquist</i> , 785 N.E.2d 891 (Ill. Ct. App. 2003); the few cases allowing civil liability involved intentional torts.
Iowa	Iowa Code 85.20(2)	no recovery against a co-EE unless the injury was caused by "gross negligence amounting to such lack of care as to amount to wanton negligence for the safety of another" <i>Forbes v. Hadenfeldt</i> , 648 N.W.2d 124 (Iowa 2002). 3-prong test to establish gross-negligence: a) co-EE's actual knowledge/should have known "of the peril to be apprehended"; b) co-EE knew/should have known injury was probable, not just possible result of co-EE actions; c) co-EE consciously failed to avoid that peril-test is holding in <i>Thompson v. Bohlken</i> , 312 N.W.2d 501, 505 (Iowa 1981)
Kansas	KSA 44-504(a)	bars civil liability against an ER or a co-EE. Civil suits limited to "some person other than the ER or any person in the same employ." Can avoid this bar by demonstrating that the co-EE, at the time of the injury, was not acting out of the course and scope of his employment and that the co-EE would not have been entitled to compensation had he been injured in the same accident. see <i>Servantez v. Shelton</i> , 81 P.3d 1263 (Kan. Ct. App. 2004)
Kentucky	K.R.S. 342.690(1)	general immunity for co-EE's, except when the injury is "proximately caused by the willful and unprovoked physical aggression of such employee." No immunity if co-EE's actions have removed him from acting in the course/scope of his employment, or his actions are so far removed from those expected by the ER. <i>Kearns v. Brown</i> , 627 S.W.2d 589 (Ky.Ct.App. 1982). Can maintain both a civil action/w-c claim per K.R.S. 342.700, but double recovery not allowed.
Nebraska	Neb. Stat. 48-111	general immunity given to an EE, officer, or director of an ER or IR, except when the injury or death is proximately caused by the willful and unprovoked physical aggression the EE, officer, or director. The ER may become liable to EE in tort if, with respect to the tort, the ER occupies a position which places obligations upon it that are independent of and distinct from its ER role. <i>Bennett v. St. Elizabeth Medical Center</i> , —N.W.2d --- (Supreme Court - S-05-1306, 3/30/2007)
Oklahoma	85 Okl.Stat. Ann. 11	bars any civil liability against the ER or co-EE. "3 rd party" recovery is allowed, but only if third-party is NOT in the same employment/not a co-EE. <i>Dolese Bros. v. Tollett</i> , 19 P.2d 570 (1933). Has the strictest approach towards allowing any ER/co-EE liability
Tennessee	T.C.A. 50-6-108 T.C.A. 50-6-112	no civil liability if co-EE negligently causes injury while acting in course and scope of employment. <i>Majors v. Moneymaker</i> , 270 S.W.2d 328 (Tenn. 1954). Co-EE liability DOES attach if there is intentional infliction of injury (<i>Williams v. Smith</i> , 435 S.W.2d 808 (Tenn. 1968)) or if the injury occurred outside the course/scope of employment (<i>Taylor v. Linville</i> , 656 S.W.2d 368 (Tenn. 1983).