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Unreasonable? Missouri Rejects a Reasonable Person Standard for Determining Co-Employee Liability Under *Badami*'s Something More Test

I. INTRODUCTION

Missouri's workers' compensation law has changed dramatically since its common law inception. Co-employee liability for injuries caused to fellow employees has shadowed this change. At common law, employers were not liable for injuries to their employees caused by the actions of fellow employees. However, Missouri's adoption of the Workers' Compensation Act in 1926 shifted the burden of liability for work-related injuries from employees to employers and the general public. Although employers now bear the burden of work-related injures to their employees, Missouri has continued to recognize co-employee liability, but only under limited circumstances. For an employee to lose immunity from liability, Missouri courts maintain that the employee must do "something more" than mere negligence.[1] Specifically, the injured employee must show that the co-employee engaged in an affirmative negligent act.[2] In its landmark decision, *Badami v. Gaertner*, the Missouri Supreme Court provided little guidance for determining what satisfies the something more test, stating simply that courts should decide the issue on a case-by-case basis.[3] Consequently, *Badami* has created confusion for Missouri courts in applying the something more test, thus leading to inconsistent interpretations.

Recent Missouri decisions exhibit the ambiguity inherent in the something more test. For instance, the Missouri Courts of Appeals recently began considering the reasonableness of employees' actions when determining liability under the something more test. However, in an effort to better protect injured employees, the Missouri Supreme Court, in *Burns v. Smith*, explicitly rejected a reasonable person standard.[4] The Missouri Supreme Court's decision, although sympathetic towards injured employees, serves to undermine the primary purpose of Missouri's workers' compensation law. Part II of this article explores the evolution of co-employee liability in Missouri. Part III analyzes the recent development by the Missouri Courts of Appeals of a reasonableness element within the something more test. Finally, Part IV pro-

1. State *ex rel.* Badami v. Gaertner, 630 S.W.2d 175, 180 (Mo. App. E.D. 1982) (en banc).

2. *See infra* notes 62-74 and accompanying text for an explanation of what constitutes an affirmative negligent act.

3. *Badami*, 630 S.W.2d at 180-81.

4. Burns v. Smith, 214 S.W.3d 335, 339 (Mo. 2007) (en banc).

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vides arguments both for and against a reasonable person standard. This article ultimately concludes that the Missouri Supreme Court's rejection of the reasonable person standard in *Burns* is unreasonable because not only is it unjust toward employees who unintentionally cause injury to fellow employees, but it also conflicts with the underlying purpose of Missouri's workers' compensation law.

II. LEGAL BACKGROUND

Before workers' compensation laws developed, common law principles guided the remedies for work-related injuries caused by co-employees.[5] However, during the beginning of the twentieth century, states began supplanting common law work-related injury rules with workers' compensation statutes. Missouri was no exception. In the mid-1920s, the Missouri legislature adopted a new legal framework for determining the proper remedies for work-related injuries.[6] Specifically, the legislature enacted the Workers' Compensation Act.[7] Recognizing the importance of Missouri's adoption of the Act, an analysis of Missouri's worker's compensation law and its evolution follows.

A. Co-Employee Liability Before the Workers' Compensation Act

Prior to the enactment of the Workers' Compensation Act, Missouri employers were not liable for injuries employees suffered due to the negligence of their co-workers.[8] The breadth of employer immunity during this period was relatively unforgiving to employees injured at the workplace.[9] To remedy this problem, courts began recognizing employees in a dual capacity: as both fellow servants and as "vice principals."[10] This distinction created employee liability "for failure to provide a safe work environment, which was previously a non-delegable duty owed to the co-employee by the employer."[11] Significantly, an employee who performed such a duty under the direction of the master/employer was not acting as a fellow servant, but rather "th[e] servant was functioning as the master himself."[12] Hence, when employees breached the duty to provide a safe work environment, courts viewed

5. Donald L. O'Keefe & Timothy W. Callahan, *Something More Than What? A Primer for the Missouri Lawyer*, 61 J. MO. B. 246, 246-47 (Sept.-Oct. 2005).

6. *See Badami*, 630 S.W.2d at 177.

7. *Id.*

8. *Id.* (citing Bender v. Kroger Grocery & Baking Co., 276 S.W. 405, 406 (Mo. 1925)).

9. *See id.*

10. *Bender*, 276 S.W. at 406; *see* O'Keefe & Callahan, *supra* note 4, at 246.

11. *See* O'Keefe & Callahan, *supra* note 5, at 246-47.

12. Paul J. Passanante & Sara Stock, *Help! We're Lost! Co-Employee Immunity in Missouri*, 57 J. MO. B. 64, 65 (2001).

the employees' breaches not as negligence of fellow servants, but as negligence of masters themselves.[13] Accordingly, failure by employees to provide a safe work environment resulted in liability for the master for injuries caused to co-employees as a result of such failure.[14]

In contrast, *employees* were not personally liable merely for failure to fulfill their duty to provide a safe work environment.[15] Rather, courts recognized employee liability only under limited circumstances.[16] Specifically, an agent/employee was liable to co-employees for misfeasance, but not for nonfeasance.[17] An agent committed misfeasance only when that agent "committed an affirmative act in furtherance of [his] duty."[18] As one court noted, the misfeasance-nonfeasance distinction was problematic in that negligent employees incurred no personal liability as long as they did not engage in *affirmative* negligence.[19] Although the distinction was criticized, Missouri's adoption of workers' compensation laws in the mid-1920s made the misfeasance-nonfeasance meaningless.[20]

B. Co-Employee Liability After the Workers' Compensation Act

In an effort to improve upon the common law approach to remedying work-related injury claims, the Missouri Legislature enacted the Workers' Compensation Act in 1926.[21] The legislature's intention was in part to increase efficiency in the workplace by providing a "rapid resolution of employee claims of job-related injury."[22] Maintaining Missouri's policy of placing the loss on the wrongdoer, the Act provides injured employees with a cause of action against fellow employees under limited circumstances.[23] However, ambiguous language in the statute, combined with broad, inconsistent court decisions, has led to unpredictable remedies for employees who sustain work-related injuries due to the negligence of co-employees.

13. *Badami*, 630 S.W.2d at 177.
14. *Id.*
15. *Id.* at 178.
16. *See id* at 177.
17. *Id.*
18. *See* O'Keefe & Callahan, *supra* note 5, at 247 (quoting *Badami*, 630 S.W.2d at 177).
19. *Badami*, 630 S.W.2d at 177.
20. *See* Passanante & Stock, *supra* note 12, at 65.
21. *Id.* at 64.
22. *Id.*
23. Zueck v. Oppenheimer Gateway Props., Inc., 809 S.W.2d 384, 390 (Mo. 1991) (en banc).

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1. Applicable Missouri Workers' Compensation Law Provisions

With the enactment of the Workers' Compensation Act in Missouri, the Act became the "exclusive remedy for injury or death in the course and scope of employment."[24] To properly evaluate co-employee liability as provided within the Act, it is important to understand the applicable provisions at issue. Missouri Revised Statute section 287.120, which establishes employer liability, is the statute most frequently relied upon by Missouri courts when determining co-employee liability.[25] The statute provides, in relevant part:

> 1. 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 . . .
>
> 2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee . . . at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.[26]

Although the statute does not explicitly prohibit actions against co-employees for work-related injuries, Missouri has interpreted the provision broadly in holding that it does provide co-employees with immunity from liability for their work-related actions *except under limited circumstances*.[27]

If such limited circumstances exist, an injured employee may bring suit against a fellow employee under Missouri Revised Statute section 287.150, which provides in pertinent part that "[w]here a *third person* is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee . . . against such third person."[28] Not unlike their construal of section 287.120, the Missouri courts have given section 287.150 a broad interpretation. Missouri has defined "third person" within the meaning of the statute as including co-employees, thus giving in-

24. O'Keefe & Callahan, *supra* note 5, at 247.

25. *See e.g.*, Burns v. Smith, 214 S.W.3d 335, 337 (Mo. 2001) (en banc); Lyon v. McLaughlin, 960 S.W.2d 522, 525 (Mo. App. W.D. 1998); *Badami*, 630 S.W.2d at 176.

26. MO. REV. STAT. § 287.120(1)-(2) (2000).

27. *Burns*, 214 S.W.3d at 337-38. An explanation of the limited circumstances at issue is provided below. *See infra* Part II.B.2-3.

28. § 287.150(1) (emphasis added).

jured employees the authority to sue co-workers under the limited circumstances exception to section 287.120.[29]

2. Judicial Interpretations of Section 287.120 – The Something More Test

After the enactment of the Workers' Compensation Act, the issue of co-employee liability did not reach the appellate level for five years.[30] In 1931, the Missouri Court of Appeals for the Eastern District, in *Sylcox v. National Lead Co.*, reaffirmed Missouri's common law recognition of co-employee liability for misfeasance, stating that "there is nothing in the [Workers'] Compensation Act which destroys such liability, or in any way disturbs the common-law relationship existing between coemployees."[31] Accordingly, *Sylcox* firmly established that the Act does not provide co-employees with immunity from liability for their work-place misfeasance.[32] For the next fifty years, the scope of co-employee liability established in *Sylcox* was consistently upheld by Missouri courts.[33]

However, a 1982 decision by the Missouri Court of Appeals for the first time limited the scope of co-employee liability as provided in *Sylcox*.[34] Significantly, in *State ex rel. Badami v. Gaertner*, the Eastern District Court of Appeals created what came to be known as the "something more" test.[35] *Badami* involved a plaintiff who severed three fingers when the plaintiff's hand became entangled in a shredding machine while on the job.[36] After receiving workers' compensation benefits, the plaintiff brought suit for negligence against the corporate president and the production manager of the plaintiff's company.[37] The issue on appeal was:

> [W]hether a supervisory *employee*, including a corporate officer, may be held *personally liable* for injuries sustained by a fellow employee covered by workmen's compensation where the injuries occur because of the supervisor's *failure* to perform the duty, as-

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29. *Badami*, 630 S.W.2d at 177.
30. Sylcox v. Nat'l Lead Co., 38 S.W.2d 497 (Mo. App. E.D. 1931).
31. *Id.* at 502.
32. Passanante & Stock, *supra* note 12, at 65.
33. *See, e.g.*, Lamar v. Ford Motor Co., 409 S.W.2d 100 (Mo. 1966); Schumacher v. Leslie, 232 S.W.2d 913 (Mo. 1950) (en banc); Workman v. Vader, 854 S.W.2d 560, 562 (Mo. App. S.D. 1993).
34. *Workman*, 854 S.W.2d 560 (citing *Badami*, 630 S.W.2d 175).
35. *Badami*, 630 S.W.2d at 180.
36. *Id.* at 176.
37. *Id.*

> signed to him by the employer, *to provide the fellow employee a reasonably safe place to work.*[38]

In its decision, the Eastern District traced the history of co-employee liability in Missouri, noting the early common law misfeasance-nonfeasance distinction.[39] The *Badami* court then examined three distinct jurisdictional approaches to the issue of co-employee liability.[40]

Under the first approach, employer immunity under workmen's compensation law extended to employees' negligence, "regardless of the nature of that negligence."[41] The Eastern District quickly dismissed this rule, stating that it is "clearly contrary to Missouri law."[42] The second approach, typified by the Wisconsin courts, held employees liable for their actions only where they committed an *affirmative act* which caused or increased the risk of injury to co-employees.[43] The act must have been beyond the supervising employee's duty to provide a safe work environment.[44] Finally, the third approach asked whether the employee had breached a specific duty assigned to the employee by the employer.[45] If the employee did breach a specific duty, that employee was personally liable to the injured co-employee.[46]

Ultimately, the Missouri Court of Appeals for the Eastern District adopted the approach expounded by the Wisconsin courts.[47] In doing so, the Eastern District opined that the New Jersey approach did not sufficiently emphasize workmen's compensation law.[48] Further, the majority noted that there was an important distinction between "those duties which arise solely because of the relationship of employment and those which exist independently of that relationship albeit occurring during the employment."[49] The *Badami* court explained that the intent behind workmen's compensation law was not simply to transfer liability for on-the-job injuries from one employee to another.[50] Instead, workmen's compensation law placed the burden on the employer and upon the "consuming public generally."[51]

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38. *Id.* (emphasis added).
39. *Id.* at 177-79; *see supra* Part II.A.
40. *Badami*, 630 S.W.2d at 179.
41. *Id.*
42. *Id.*
43. *Id.* This is the heart of the "something more" test in Missouri. *See id.* at 180-81.
44. *Id.* at 179.
45. *Id.* The Eastern District refers to this approach as the "New Jersey approach." *Id.* at 180.
46. *Id.* at 179.
47. *Id.* at 180.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

Accordingly, the Eastern District ruled in favor of the defendant in holding that an employee was not personally liable merely for breaching the duty to provide a safe place to work; rather, "[*s*]*omething more* must be charged."[52] Since the plaintiff only charged the defendant with failing to provide a safe work environment, there was no charge of actionable negligence as required under the something more test.[53] In its holding, the majority failed to provide guidance as to what employee actions give rise to liability under the something more test.[54] Instead, the court said that such determinations must be determined on a case-by-case basis.[55] This case-by-case analysis of the something more test has proven problematic for Missouri courts since *Badami* was handed down.[56]

3. Interpreting the Something More Test – Important Cases

Since *Badami*, the Missouri Courts of Appeals have been inconsistent in their interpretations of the something more test, finding the test satisfied by alternative criteria.[57] Specifically, the Eastern District found that "something more" under *Badami* meant misfeasance,[58] while the Southern District interpreted "something more" in a narrower sense to mean an intentional act.[59] Later, in *Craft v. Scaman*, the Missouri Court of Appeals for the Eastern Dis-

52. *Id.* at 180-81 (emphasis added).

53. *Id.*

54. *See id.*

55. *Id.*

56. *See, e.g.*, Kelley v. DeKalb Energy Co., 865 S.W.2d 670 (Mo. 1993) (en banc) (holding that the plaintiff failed to show something more than mere employer negligence when the plaintiff was injured from an exploding corn flamer designed pursuant to industry standards); Tauchert v. Boatmen's Nat'l Bank of St. Louis, 849 S.W.2d 573 (Mo. 1993) (en banc) (finding the something more test satisfied when the plaintiff was injured due to a faulty "make-shift" elevator hoist system); Sexton v. Jenkins & Assocs., Inc., 41 S.W.3d 1 (Mo. App. W.D. 2000) (holding in favor of the defendant employer because the plaintiff's injury was a result of negligent construction of an elevator shaft railing, not a specific act of negligence); Hedglin v. Stahl Specialty Co., 903 S.W.2d 922 (Mo. App. W.D. 1995) (holding the defendant employer liable under the something more test for ordering the plaintiff to hang over a vat of scalding water); Felling v. Ritter, 876 S.W.2d 2 (Mo. App. W.D. 1994) (refusing to hold the defendant employer liable under the something more test for ordering the plaintiff to perform services on a rewinder machine which would not have been possible had proper safety mechanisms been in place).

57. *See* Passanante & Stock, *supra* note 12, at 66-68; *See also* note 56 and accompanying text.

58. McCoy v. Liberty Foundry Co., 635 S.W.2d 60, 63 (Mo. App. E.D. 1982).

59. Rhodes v. Rogers, 675 S.W.2d 107, 108-09 (Mo. App. S.D. 1984).

trict rejected the previous interpretations, emphasizing that the true test was whether a co-employee committed an "affirmative act."[60]

Finally, in 1993, the Missouri Supreme Court clarified the meaning of "something more" under the something more test. In *Tauchert v. Boatmen's Nat'l Bank*, the Missouri Supreme Court followed the interpretation in *Craft* and adopted the Wisconsin courts' language, stating that the something more requirement is satisfied by some kind of affirmative negligent act.[61] *Tauchert* involved a worker who was injured when an elevator hoist system malfunctioned, causing the elevator cab he was standing on to fall five or six stories down the elevator shaft.[62] After settling his workers' compensation claim against the employer, Plaintiff brought suit against a fellow employee for active negligence in rigging the elevator hoist system.[63] The trial court granted summary judgment in favor of the defendant.[64] On appeal, Plaintiff argued that the trial court's ruling was erroneous because the defendant had engaged in an affirmative negligent act.[65] In its reversal of the grant of summary judgment, the Missouri Supreme Court held that the creation of a hazardous condition by a fellow employee constitutes an affirmative negligent act for purposes of the something more test.[66] Accordingly, the Supreme Court found that an issue of material fact existed and remanded the case to the trial court.[67]

The Missouri Supreme Court's ruling in *Tauchert* established that "something more" requires some type of affirmative negligent act. A decade later, in *State ex rel. Taylor v. Wallace*, the Missouri Supreme Court clarified the holding in *Tauchert* by expressly limiting co-employee liability to *pur-*

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60. Passanante & Stock, *supra* note 12, at 66 (citing Craft v. Scaman, 715 S.W.2d 531, 537 (Mo. App. E.D. 1986)).

61. Tauchert v. Boatmen's Nat'l Bank of St. Louis, 849 S.W.2d 573, 574 (Mo.1993) (en banc); *see supra* notes 42-43 and accompanying text. To clarify, Missouri courts have determined that two variations of affirmative negligent acts exist: those that affirmatively increase risk of injury and those that constitute a "'breach of [the] personal duty of care.'" Hedglin v. Stahl Specialty Co., 903 S.W.2d 922, 928 (Mo. App. W.D. 1995) (citing Felling v. Ritter, 876 S.W.2d 2, 5 (Mo. App. W.D. 1994) and Marshall v. ETI Explosives Techs. Int'l., 874 S.W.2d 442, 444 (Mo. App. W.D. 1994)) (alterations in original). Furthermore, an affirmatively negligent act is a "purposeful act 'directed' at a co-employee." Nowlin *ex rel.* Carter v. Nichols, 163 S.W.3d 575, 579 (Mo. App. W.D. 2005) (quoting Gunnett v. Girardier Bldg. & Realty Co., 70 S.W.3d 632, 641 (Mo. App. E.D. 2002)).

62. *Tauchert*, 849 S.W.2d at 573-74.

63. *Id.*

64. *Id.*

65. *Id.* at 574.

66. *Id.* The Missouri Supreme Court stressed that the employee's conduct in *Tauchert* did not constitute mere passive negligence. *Id.*

67. *Id.*

poseful conduct.[68] In that case, the plaintiff worked as a "trash helper" and was injured while riding in a trash truck driven by the defendant, a co-employee.[69] Defendant drove the truck into a mailbox, causing the plaintiff to fall out of the truck and sustain serious injuries.[70] In its decision, the Missouri Supreme Court noted that the facts of the case described no more than simple negligent driving by the defendant.[71] The majority held that a mere failure to drive safely does not constitute "something more" for purposes of co-employee liability under Missouri law.[72] Instead, the test requires "purposeful, affirmatively dangerous conduct."[73]

In an attempt to circumvent the affirmative negligence requirement, Plaintiff argued that reckless driving is distinguishable from other types of negligence in that Missouri drivers are required by statute to "exercise the highest degree of care" while behind the wheel of an automobile.[74] However, the Missouri Supreme Court dismissed the plaintiff's argument, stating that the relevant provision of the statute does not create a separate duty of care.[75] Significantly, the majority applied the plaintiff's argument to co-employee liability law generally in holding that an act "is not converted into 'something more' merely because fulfilling that duty may require more careful conduct than carrying out some other aspect of one's duty to maintain a safe working environment."[76]

The Missouri Supreme Court, in *Tauchert* and *Taylor*, articulated explicit rules for Missouri courts to follow. However, recent Missouri interpretations of the something more test have resulted in less clear-cut rules, thus creating difficulty for courts when applying *Badami*'s case-by-case analysis.[77]

III. RECENT DEVELOPMENTS

After *Badami*, the Missouri Supreme Court resolved inconsistencies in the lower courts by adopting an affirmatively dangerous conduct analysis to determine whether the something more requirement had been satisfied. Recent Missouri cases added an element of reasonableness to the equation, thus creating greater co-employee immunity and less favorable protection for in-

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68. *See* State *ex rel.* Taylor v. Wallace, 73 S.W.3d 620 (Mo. 2002) (en banc). Purposeful conduct should be distinguished from conduct with the intent to cause injury, which is not required under the something more test.

69. *Id.* at 621.

70. *Id.*

71. *Id.* at 622-23.

72. *Id.*

73. *Id.*

74. *Id.* (quoting MO. REV. STAT. § 304.012 (2000)).

75. *Id.*

76. *Id.*

77. *See e.g.*, Lyon v. McLaughlin, 960 S.W.2d 522 (Mo. App. W.D. 1998).

jured employees under Missouri's workers' compensation law.[78] However, the Missouri Supreme Court's latest response to the lower courts rejected Missouri's current trend and turned the tide back in favor of injured employees.[79]

A. The Reasonable Person Standard

Recent Missouri decisions have given weight to a standard of reasonableness in their case-by-case analyses of co-employee liability. For instance, in *Lyon v. McLaughlin*, the Missouri Court of Appeals for the Western District relied on what amounted to a reasonable person standard in its decision.[80] Plaintiff brought suit against a supervisor for injuries incurred while removing a bent tin cover in order to repair a stopped conveyer belt.[81] Plaintiff's supervisor had ordered the plaintiff to remove the tin cover, which the Missouri Supreme Court recognized as part of the plaintiff's normal job requirements.[82] The majority acknowledged that removing the tin cover was something that the defendant "could justifiably expect [Plaintiff] to perform."[83]

In its opinion, the Western District noted a common trend among Missouri cases in which the something more requirement had been satisfied.[84] Specifically, the majority in *Lyon* recognized that the supervisors in each case had personally "direct[ed] the employees to engage in dangerous conditions that a *reasonable person* would recognize as hazardous and beyond the usual requirements of the employment."[85] Relying on this standard, the Missouri Supreme Court found that the something more test had not been satisfied since the plaintiff's repair of the conveyer belt was reasonably within the usual requirements of his employment.[86]

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78. Arnwine v. Trebel, 195 S.W.3d 467, 477-78 (Mo. App. W.D. 2006); Nowlin v. Nichols, 163 S.W.3d 575, 578-79 (Mo. App. W.D. 2005); Groh v. Kohler, 148 S.W.3d 11, 14 (Mo. App. W.D. 2004); Graham v. Geisz, 149 S.W.3d 459, 462 (Mo. App. E.D. 2004); Quinn v. Clayton Constr. Co., 111 S.W.3d 428, 432 (Mo. App. E.D. 2003); Logan v. Sho-Me Power Elec. Coop., 122 S.W.3d 670, 678 (Mo. App. S.D. 2003); *Lyon*, 960 S.W.2d at 576. Further, as some commentators have acknowledged, Missouri courts since *Taylor* have favored co-employee immunity, finding the something more test established "only [in] exceptional cases." O'Keefe & Callahan, *supra* note 5, at 253.

79. Burns v. Smith, 214 S.W.3d 335, 339 (Mo. 2007) (en banc).

80. *Lyon*, 960 S.W.2d at 526.

81. *Id.* at 524.

82. *Id.* at 524, 526.

83. *Id.* at 526.

84. *Id.*

85. *Id.* (emphasis added).

86. *Id.*

Since *Lyon*, the Missouri Courts of Appeals have applied similar interpretations of the reasonableness standard to guide their decisions in co-employee liability cases under workers' compensation law.[87] Generally, courts have merely recognized the reasonable person standard as a trend among cases in which something more has been found, without establishing the standard as an actual rule of law.[88] However, in *Graham v. Geisz*, the Missouri Court of Appeals for the Eastern District distinguished the reasonable person standard by referencing it as an alternative criterion to the "hazardous condition" analysis set out in *Tauchert*.[89] The Eastern District stated that cases that have found affirmative conduct have involved co-employees who "personally took part in the 'affirmative act' either by 1) creating a hazardous condition . . . or 2) 'directing employees to engage in dangerous activity that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment.'"[90]

In addition to the Eastern District's interpretation, the Missouri Court of Appeals for the Western District has also recognized the reasonable person standard as a rule. Specifically, in *Arnwine v. Trebel*, the Western District unequivocally characterized the reasonable person standard as a "general rule" among Missouri courts.[91]

As is evident, the application of the reasonableness approach set out in *Lyon* has created inconsistencies among Missouri courts. Some courts have simply applied the reasonableness element as a way to establish what might constitute "something more," while others have interpreted *Lyon* as creating a new reasonable person standard. A recent Missouri Supreme Court decision clarified the confusion.

B. Burns v. Smith[92]

In a reversal of the modern trend of the Missouri Courts of Appeals, the Missouri Supreme Court recently eliminated the reasonable person standard for determining satisfaction of the something more test.[93] In *Burns v. Smith*, Plaintiff brought suit against Defendant supervisor for injuries incurred when

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87. *See supra* note 78 and accompanying text.

88. *See* Nowlin v. Nichols, 163 S.W.3d 575, 578 (Mo. App. W.D. 2005); Groh v. Kohler, 148 S.W.3d 11, 14 (Mo. App. W.D. 2004); Quinn v. Clayton Constr. Co., 111 S.W.3d 428, 432 (Mo. App. E.D. 2003); Logan v. Sho-Me Power Elec. Coop., 122 S.W.3d 670, 678 (Mo. App. S.D. 2003); *Lyon*, 960 S.W.2d at 526.

89. Graham v. Geisz, 149 S.W.3d 459, 462 (Mo. App. E.D. 2004); *see supra* notes 62-68 and accompanying text. In *Sexton v. Jenkins & Associates, Inc.*, 41 S.W.3d 1, 6 (Mo. App. W.D. 2001), the Missouri Court of Appeals for the Western District distinguished the reasonableness element in a similar fashion.

90. *Graham*, 149 S.W.3d at 462.

91. Arnwine v. Trebel, 195 S.W.3d 467, 477 (Mo. App. W.D. 2006).

92. Burns v. Smith, 214 S.W.3d 335 (Mo. 2001) (en banc).

93. *Id.* at 339.

a water pressure tank on a concrete delivery truck exploded.[94] The plaintiff was employed as the driver of the truck, and Plaintiff's duties included driving and cleaning the truck.[95] A month or two before the incident, Defendant placed a weld over a rusty and corroded area of the water pressure tank which was leaking water.[96] Importantly, the water pressure tank was more than twenty years old, and the defendant admitted that he could not see well while he was welding the tank.[97] After welding the tank, Defendant ordered Plaintiff to run the water tank "till it blows."[98] Eventually, the tank exploded, causing serious and permanent injuries to the plaintiff.[99]

The issue on appeal was whether the plaintiff could bring an action against the defendant even though the plaintiff had already settled his workers' compensation claim.[100] On appeal, Defendant argued in part that Plaintiff failed to prove that a reasonable person would have realized that running the newly welded water tank was hazardous "beyond the usual requirements of employment as a cement-truck driver."[101] According to the defendant, no reasonable person who worked in the business of the plaintiff would think the welded water pressure tank was hazardous.[102]

The Missouri Supreme Court dismissed Defendant's arguments and declined to adopt a reasonable person standard, stating that the *Lyon* court did not actually intend to create a reasonable person standard.[103] Instead, *Lyon*'s reference to the element of reasonableness was merely an observation about what prior cases had in common.[104] Hence, the line of cases decided after *Lyon* simply misconstrued a statement that was meant to be "a comment on the kind of evidence that *might* satisfy the 'something more' element."[105] Moreover, the majority noted that since the something more test is satisfied only by affirmatively *negligent* conduct, a determination of the reasonableness of a defendant's actions is implicit in the case-by-case analysis.[106]

Accordingly, the Missouri Supreme Court analyzed the facts of the case according to the something more test established in *Taylor*,[107] requiring an "affirmative negligent [act] outside the scope of an employer's responsibility

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94. *Id.* at 336.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 335-36.
101. *Id.* at 337.
102. *Id.* at 339.
103. *Id.*
104. *Id.*
105. *Id.* (emphasis added).
106. *Id.*
107. *Id.*

to provide a safe workplace."[108] The majority ultimately held that since the defendant 1) acknowledged that the water pressure tank would explode at some point, 2) should have known that placing a weld over corrosion and rust is hazardous, and 3) ordered the plaintiff to run the newly welded water tank until it blew, the defendant's actions were affirmatively negligent because they "creat[ed] an additional danger beyond that normally faced in [Plaintiff's] job-specific environment."[109] The Missouri Supreme Court's decision in *Burns* clearly expanded the scope of co-employee liability by rejecting the reasonable person standard established in *Lyon*. Whether the decision was rational in light of established Missouri workers' compensation law is debatable.

IV. DISCUSSION

In *Burns,* the Missouri Supreme Court rejected Missouri's adoption of a reasonable person standard for determining co-employee liability under the something more test. The decision raises important questions about the advantages and disadvantages of recognizing a reasonable person standard for determining co-employee liability. However, a close analysis reveals that the arguments in support of the reasonable person standard are more rational.

A. Arguments Against a Reasonable Person Standard

The arguments against recognizing a reasonable person standard under the something more test warrant consideration. For instance, the importance of just compensation for injured employees provides an incentive to abandon a reasonable person standard. The main argument from a fairness standpoint is that Missouri should not allow negligent employees to avoid liability when their negligence was not merely passive, but rather affirmative, directed negligence. As the *Badami* court noted, Missouri has effectively eliminated employee liability for passive negligence.[110] More specifically, *Badami* held that a negligent employee was immune from liability unless the injured employee alleged "something more" than mere negligence.[111] When an employee directs a fellow employee to engage in hazardous – or affirmatively dangerous – conduct that is outside the employer's responsibility to provide a

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108. *Id.* at 337-38 (quoting State *ex rel.* Taylor v. Wallace, 73 S.W.3d 620, 621-22 (Mo. 2002) (en banc)).

109. *Id.* at 340.

110. State *ex rel.* Badami v. Gaertner, 630 S.W.2d 175, 178 (Mo. App. E.D. 1982) (en banc).

111. *Id.* at 180.

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safe workplace, that employee's actions do not constitute passive negligence, but rather purposeful conduct under Missouri law.[112]

Significantly, an employee's affirmative, directed negligence of this sort more closely resembles an intentional tort than ordinary negligence.[113] This is an important distinction, as Missouri and other jurisdictions have implicitly recognized that holding employees liable for intentional torts does not undermine the purpose of workers' compensation laws.[114] Therefore, since affirmative negligence is more analogous to an intentional tort than passive negligence, one can make a plausible contention that requiring purposeful, affirmative conduct for employee liability does not conflict with workers' compensation laws. An abandonment of the reasonableness requirement within the something more test makes it more consistent with an intentional tort, as the reasonableness of the wrongdoer's actions is not an essential factor for determining liability for intentional torts. Hence, the rejection of a reasonable person standard does not fail for public policy reasons in this respect.

With this in mind, an analysis of why the reasonable person standard may be unfair for injured employees is appropriate. It is important to remember that under the something more test, an employee is liable for injuries caused to a co-worker only if the employee engaged in an affirmative act which caused risk to a fellow employee *above and beyond* the risk created by the normal job duties.[115] In other words, whether reasonable under the circumstances or not, the employee who caused the injury must have directed the injured employee to engage in actions which were beyond the scope of normal job responsibilities. Therefore, the employee who committed the affirmative act should not receive a "free pass" from liability under Missouri's workers' compensation law, which requires that an employee's actions be within the course and scope of employment.[116] Instead, the injured employee should have a direct action against the wrongful co-employee who

112. Tauchert v. Boatmen's Nat'l Bank of St. Louis, 849 S.W.2d 573, 574 (Mo. 1993) (en banc).

113. In *Burns*, the Missouri Supreme Court recognized that "the notion of an 'affirmatively negligent act' certainly includes the commission of an intentional tort." Burns v. Smith, 214 S.W.3d 335, 338 (Mo. 2007) (en banc).

114. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1022(A) (1984); CONN. GEN. STAT. § 31-293a (1984); DEL. CODE ANN. tit. 19, § 2304 (1953); FLA. STAT. § 440.11(1)(b) (2003); 820 ILL. COMP. STAT. 305/11 (2004); ME. REV. STAT. ANN. tit. 39, § 408 (2003); MASS. GEN. LAWS ch. 152, § 24 (1991); MICH. COMP. LAWS § 418.131 (1994); MINN. STAT. § 176.031 (1986); MISS. CODE ANN. § 71-3-9 (1990); MO. REV. STAT. § 287.120(1) (2000); N.J. REV. STAT. § 34:15-1 (2000); OKLA. STAT. tit. 85, § 12 (2006); 77 PA. CONS. STAT. § 51 (1979); WASH. REV. CODE § 51.04.010 (1977); WIS. STAT. § 102.03 (2005).

115. *Badami*, 630 S.W.2d at 180.

116. MO. REV. STAT. § 287.120(1).

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directly participated in the creation of a hazardous condition which was beyond the scope of the job duties.

Under such circumstances, one can make a valid argument that the law should not take into account whether a reasonable person would have believed the conduct to be hazardous and beyond the scope of employment.[117] When an employee directs a fellow employee to engage in hazardous conduct beyond the scope of employment, that employee is not simply negligent by failing in the general duty of care;[118] rather, that employee is actively creating an unnecessary risk of injury. Accordingly, a form of strict liability should be invoked when employees, through purposeful, affirmative acts, place fellow employees in hazardous conditions which are outside the scope of normal job duties. The policy behind this viewpoint is that only if injured employees maintain a direct cause of action against their fellow employees for these purposeful, affirmative acts under the something more test will the injured employees be truly remunerated.[119]

In addition to the importance of just compensation for injured employees, the Missouri Supreme Court in *Burns* discussed an important rationale for abandoning the reasonable person standard under the something more test.[120] The majority in that case recognized that implicit in determining

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117. *See* Lyon v. McLaughlin, 960 S.W.2d 522, 527 (Mo. App. W.D. 1998).

118. Tauchert v. Boatmen's Nat'l Bank of St. Louis, 849 S.W.2d 573, 574 (Mo. 1993) (en banc).

119. Some may contend that an employee who is given an order to perform work that a reasonable person would understand is hazardous and beyond the scope of employment will generally refuse to follow the command for fear of bodily injury. Such a premise, if true, would benefit a supervisor under the reasonable person standard; because if one accepts the premise as true, it is difficult to claim that a supervisor's order violated the reasonable person standard when the employee performed the act without question. If the direction was truly one that a reasonable person would have found hazardous and beyond the scope of employment, the employee, acting as a reasonable person, simply would not have performed the work. Hence, since the supervisor did not act unreasonably under the reasonable person standard, the supervisor should not be held liable under the something more test. However, this argument is problematic. Even if an employee realizes the risk of a particular order from a supervisor, it is difficult for that employee to disobey the supervisor's direction.

For instance, under the RESTATEMENT (FIRST) OF AGENCY, employees have a duty to obey all "reasonable directions in regard to the manner of performing a service that [they have] contracted to perform." RESTATEMENT (FIRST) OF AGENCY § 385(1) (1933). Although the plain language of the provision provides that an employee need only obey *reasonable* orders, employees will probably still perform acts that they personally find unreasonable. Employees may feel uncomfortable making on-the-job judgments as to the reasonableness of supervisory orders. Although they feel that an order creates an unreasonable risk of injury, employees may not be confident that their employers hold similar beliefs. Accordingly, the argument that employees generally will not perform unreasonably dangerous acts fails.

120. Burns v. Smith, 214 S.W.3d 335, 339 (Mo. 2007) (en banc).

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whether an employee committed an affirmatively negligent act was an element of reasonableness.[121] The court presumably came to this conclusion by recognizing that negligence under Missouri law requires an unreasonable act.[122] Therefore, since Missouri courts are already analyzing an employee's reasonableness in their assessment of the something more test, the Missouri Supreme Court argued that there is no need to adopt a reasonable person standard.

B. Justifications for a Reasonable Person Standard

Although the arguments in opposition to a reasonable person standard are well-founded, the justifications for the standard are more plausible. Perhaps the best rationale for the adoption of a reasonable person standard is that the something more test requires an affirmative *negligent* act.[123] Accordingly, Missouri courts should treat co-employee liability like normal negligence in tort. Under Missouri law, a plaintiff bringing a negligence action must establish that the defendant failed to perform a duty owed by the defendant to protect the plaintiff from injury, and that the plaintiff's injury was a direct result of the defendant's failure to perform such duty.[124] To determine whether a duty existed to a plaintiff, the fact-finder must determine whether the risk was foreseeable.[125] The Missouri Supreme Court has defined foreseeability "as the presence of some probability or likelihood of harm sufficiently serious that *ordinary persons would take precautions to avoid it.*"[126] In other words, if a Missouri court finds that a defendant acted in a reasonable manner to avoid injury to a plaintiff, that defendant will survive a negligence action.[127]

Negligence law provides an important foundation for an argument in support of a reasonable person standard: an employee has not necessarily acted negligently merely because that employee's decision led to the injury of a fellow employee.[128] The test is whether an ordinarily prudent person in the employee's position would have acted similarly.[129] It is against public policy to hold an individual accountable for actions which were reasonable, but simply led to an unfortunate occurrence. In comparing Missouri's negligence

121. *Id.*

122. *See infra* notes 128-29 and accompanying text.

123. *Tauchert*, 849 S.W.2d at 574.

124. Thompson v. Brown & Williamson Tobacco Corp., 207 S.W.3d 76, 98 (Mo. App. W.D. 2006).

125. Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 156 (Mo. 2000) (en banc).

126. *Thompson*, 207 S.W.3d at 98 (quoting *Lopez*, 26 S.W.3d at 156) (emphasis added).

127. *See id.*

128. *See* 57A AM. JUR. 2D *Negligence* § 134 (2007).

129. *See Lopez*, 26 S.W.3d at 156; 57A AM. JUR. 2D *Negligence* § 134 (2007).

law to the reasonable person standard established in *Lyon*, the similarities are immediately apparent. As discussed earlier, the reasonable person standard recently recognized by Missouri Courts of Appeals provides for co-employee liability when an employee directed another employee "to engage in dangerous conditions that a *reasonable person* would recognize as hazardous and beyond the usual requirements of the employment."[130]

As is evident from the plain language of the doctrine, the reasonable person standard does not impose co-employee liability when an employee merely directs a fellow employee to engage in hazardous conduct beyond the usual scope of employment. Instead, for liability to arise the employee must direct a fellow employee to engage in activity that is both hazardous to a reasonable person and beyond the scope of employment to a reasonable person. As with general Missouri negligence law, the language of the reasonable person standard recognized in *Lyon* is consistent with public policy considerations by ensuring that an employee will not be personally liable for actions that any other reasonable employee would have taken.

Further, the Missouri Supreme Court's assertion in *Burns* of implicit reasonableness within the something more test is flawed.[131] Although some Missouri Courts of Appeals have recognized an implicit element of reasonableness in the something more test,[132] Missouri courts have been inconsistent in their application of a reasonableness test. As previously discussed, two alternative definitions that some Missouri courts have given to the term, "affirmative negligent act," include 1) the creation of a hazardous condition, and 2) "purposeful, affirmatively dangerous conduct."[133] A literal reading of the definitions concludes that neither definition requires an analysis of reasonableness when applying the something more test. More importantly, neither definition contains even an implicit element of reasonableness. Instead, Missouri courts that have adopted either definition should recognize that an employee's purposeful creation of a hazardous condition, whether reasonable or not, satisfies the something more test. Since Missouri courts have been unpredictable in their application of a reasonableness standard, the Missouri Supreme Court erred in recognizing an implicit element of reasonableness in the determination of whether or not an employee committed an affirmative negligent act.

Moreover, it is important to understand that supervisors are hired in part to give orders to employees. If a supervisor gives a reasonable but unfortunately hazardous order to an employee that causes injury, it is against the purpose of the workers' compensation law to impose liability on the supervi-

130. Lyon v. McLaughlin, 960 S.W.2d 522, 526 (Mo. App. W.D. 1998) (emphasis added).

131. *See supra* note 106 and accompanying text.

132. *See supra* note 61 and accompanying text; *see also supra* note 79 and accompanying text.

133. Graham v. Geisz, 149 S.W.3d 459, 462 (Mo. App. E.D. 2004).

sor. As the court in *Badami* acknowledged, workers' compensation law was originally enacted "to place the burden of employment accidents upon the employer and ultimately upon the consuming public generally," not merely to transfer the burden from one employee to another.[134] Employers and the consuming public are in better financial positions to compensate injured workers than are fellow employees. Therefore, courts should not place the burden of liability on employees whose conduct leads to injuries of co-employees unless the employees acted both affirmatively *and* unreasonably in causing injury to their fellow employees.

Similarly, if Missouri courts allow injured employees to bring suit against co-employees for their reasonable, but hazardous acts, the basic rationale behind workers' compensation law is undermined.[135] If an employee can be liable for such acts, employers may feel responsible for providing indemnity to their employees.[136] Consequently, employers will be responsible for a "double liability": they will have to pay for the injured employee's workers' compensation claim and then indemnify the allegedly wrongful employee when the injured employee brings suit.[137] This double liability may lead to employers seeking subrogation from their employees, thus creating a form of indirect liability for employees.[138] In addition, if the employer decides to indemnify its employees, such double payment will "undermine the immunity provisions of the worker's compensation laws."[139] Proponents of the "double liability" argument propose that in order to be consistent with the underlying scheme of workers' compensation law, co-employees should only be liable for "intentional torts or misconduct tantamount thereto."[140] Under this approach, employers need not worry about indemnifying their employees, as it is not immoral or disloyal to hold intentional wrongdoers accountable for their actions.

Another argument in support of the reasonable person standard centers around the importance of consistent interpretations of the something more test. Until the Missouri Supreme Court rejected a reasonable person standard in *Burns*, Missouri Courts of Appeals since *Lyon* had recognized, and sometimes applied as law, such a standard for determining co-employee liability.[141] However, the decision in *Burns* has once again created inconsistency within the case-by-case analysis for the something more test. As some com-

134. State *ex rel.* Badami v. Gaertner, 630 S.W.2d 175, 180 (Mo. App. E.D. 1982).

135. Hedglin v. Stahl Specialty Co., 903 S.W.2d 922, 929 (Mo. App. W.D. 1995) (Smart, J. concurring).

136. *Id.*

137. *Id.*

138. *Id.* (citing Rylander v. Chicago Short Line Ry. Co., 161 N.E.2d 812, 817-18 (Ill. 1959)).

139. *Id.*

140. *Id.*

141. *See supra* Part III.A.

mentators have noted, due to the ambiguity with regard to the scope of the something more test, it has been problematic for practioners since its adoption.[142] By rejecting a standard which is supposedly embedded within the something more test implicitly, the Missouri Supreme Court's abandonment of the reasonable person standard in *Burns* has added to the complexity of the something more test. Specifically, the decision in *Burns* will make it difficult in future cases for Missouri courts to refrain from using a reasonable person standard in their analyses of the something more test. As the Missouri Supreme Court implied, the reasonable person standard, although not a rule, can still be used as evidence to satisfy the something more test.[143] To avoid confusion, if Missouri courts have authority to use the reasonableness element in their analyses of co-employee liability, it makes sense to adopt a reasonable person standard as well.

As a final note, one must keep in mind that if the aforementioned limitations of the reasonable person standard bar an injured employee from bringing action against a fellow employee, the injured employee is not left without recourse. Rather, the injured employee can still recover against the employer under Missouri's Workers' Compensation Act.[144] In response, some argue that injured employees may not be able to receive full compensation if workers' compensation law is their sole remedy.[145] However, Missouri should not protect injured employees at the expense of fellow employees whose conduct was not unreasonable under the circumstances. Further, even with the adoption of a reasonable person standard, injured employees in Missouri would nonetheless enjoy more protection than employees elsewhere. Significantly, "Missouri is one of a distinct minority of jurisdictions which allow an injured employee to sue a co-employee for negligence."[146] In contrast, many states remove employee immunity only for intentional torts.[147] Presumably, other jurisdictions refuse to undermine the purpose of workers' compensation law by holding employees, rather than employers and the general public, accountable merely for their negligence, whether affirmative or not.[148]

Arguments in support of a reasonable person standard generally focus on providing justice for the injured employee while ensuring fairness for the alleged wrongful employee. For the foregoing reasons, the Missouri Supreme Court's abandonment of the reasonable person standard in *Burns* was irrational and serves to undermine Missouri workers' compensation law.

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142. *See* O'Keefe & Callahan, *supra* note 5, at 248.

143. *Id.* at 253.

144. *See* MO. REV. STAT. § 287.120(1) (2000).

145. State *ex rel.* Badami v. Gaertner, 630 S.W.2d 175, 180 (Mo. App. E.D. 1982).

146. Hedglin v. Stahl Specialty Co., 903 S.W.2d 922, 928 (Mo. App. W.D. 1995) (Smart, J. concurring).

147. *Id.* at 928 n.2.

148. *See supra* notes 117-22 and accompanying text.

V. CONCLUSION

The vague standard for determining "something more" under Missouri's something more test has created problems for Missouri Courts in establishing a consistent case-by-case analysis of co-employee liability. Recently, Missouri Courts of Appeals have narrowed the scope of co-employee liability by recognizing an element of reasonableness in the something more test. However, in *Burns v. Smith*, the Missouri Supreme Court added to the inconsistency of Missouri's co-employee liability law by expressly rejecting a reasonable person standard. The decision will once again inevitably expand co-employee liability by providing more opportunities for injured employees to bring suit against fellow employees instead of against their employers.[149]

Although the Missouri Supreme Court's holding provides injured workers with better access to full compensation, the decision is unfair to employees whose actions were not beyond the scope of employment to a reasonable person. Moreover, the holding in *Burns* undermines the main scheme of Missouri's workers' compensation law by further shifting the burden of work-related injuries to employees rather than employers and the public. Missouri's workers' compensation law exists in part to ensure that Missouri courts do not protect injured employees at the expense of fellow employees whose affirmative, purposeful actions were not unreasonable under the circumstances.

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149. A recent decision by the Missouri Court of Appeals for the Western District illustrates the immediate effect of the holding in *Burns*. State *ex. rel* Ford Motor Co. v. Nixon, 219 S.W.3d 846, 850 (Mo. App. W.D. 2007). In that case, the Western District abandoned its application of the reasonable person standard and applied a more expansive something more test: whether the employee's "affirmative act created an 'additional danger beyond that normally faced in the job-specific work environment.'" *Id.* (quoting Burns v. Smith, 214 S.W.3d 335, 338 (Mo. 2007) (en banc)).