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# Current State of Co-Employee Immunity under Workers' Compensation Law, The

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# Comment

# The Current State of Co-Employee Immunity Under Workers' Compensation Law

## I. INTRODUCTION

The exclusivity provision of Missouri's Workers' Compensation Act ("the Act")[1] essentially constitutes a statutory mandated quid-pro-quo agreement amongst employees and their employers. Under the terms of the Act, employers incur the burden of no-fault liability for workplace injuries.[2] The Act states that "[e]very employer . . . shall be liable, *irrespective of negligence*, to furnish compensation . . . for personal injury or death of the employee by accident arising out of and in the course of [his] employment."[3] In exchange for employers incurring this burden, the Act statutorily abrogates any common law right of action the employee may hold against the employer for the injury.[4] In this regard, the Act states that "[e]very employer subject to the provisions of this chapter . . . shall be released from all other liability . . . whatsoever, whether to the employee or any other person."[5]

The exclusivity provision of the Act, however, does nothing to prevent injured employees from bringing suit against negligent third parties for their workplace injuries.[6] The Act recognizes the potential for such situations by providing employers with a right of subrogation against any recovery since they remain liable for the workplace injury under the no-fault scheme.[7]

If the Act provides an injured employee with less in benefits than the employee would have likely recovered as damages under a common law negligence suit, the ability to sue a negligent third party is an attractive option. Many times, workplace injuries occur because of the negligence of an injured party's co-employee. Therefore, to gain the benefits of the third-party suit option, injured parties may argue that their negligent co-employee is a "third person" not entitled to the exclusivity provision of the Act.

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1. The Workers' Compensation Law, MO. REV. STAT. §§ 287.010-287.811 (2000).

2. *Id.* § 287.120.1.

3. *Id.* (emphasis added).

4. *Id.* § 287.120.2.

5. *Id.* § 287.120.1.

6. Zueck v. Oppenheimer Gateway Props., Inc., 809 S.W.2d 384, 390 (Mo. 1991) (en banc).

7. MO. REV. STAT. § 287.150 (2000).

Missouri courts have dealt with the issue of whether negligent co-employees constitute "third persons" many times, but they have struggled to formulate a workable rule. In principle, Missouri courts have accepted the premise that a co-employee can potentially constitute a "third person" subject to a common law suit for acts of workplace negligence.[8] In application, the courts only allow injured employees to bring such suits when they allege that the co-employee committed "something more" than a mere negligent act.[9] This Comment will attempt to identify what constitutes "something more."

## II. LEGAL BACKGROUND

Generally, under Missouri law, employees have enjoyed the same immunity from common law suit as their employers when an employee's negligence has caused another to suffer a workplace injury.[10] The basis for such immunity is the employer's non-delegable duty to provide its employees with a reasonably safe working environment.[11] Since this duty is non-delegable, negligent acts of an employee causing a breach of the duty are imputed to the employer.[12] Accordingly, the exclusivity provisions of the Act apply.[13]

If, however, an employee's negligence constitutes "something more" than a mere breach of the employer's non-delegable duty to provide a reasonably safe work place, the employee will not enjoy the immunity provisions of the Act.[14] This is known as the "something more" doctrine. Rather than formulate an exact rule stating what constitutes "something more," Missouri courts have chosen to make the determination on a case-by-case basis.[15]

### *A. The Beginning of the Doctrine*

While the State of Missouri first enacted the Act in 1926,[16] a Missouri appellate court did not expressly deal with the question of co-employee immunity until the 1982 case, *State ex rel. Badami v. Gaertner*.[17] The plaintiff in *Badami* suffered a workplace injury when his hand was drawn into a shred-

8. State *ex rel.* Badami v. Gaertner, 630 S.W.2d 175, 177 (Mo. Ct. App. 1982) (en banc) ("It is accepted in this state that a co-employee, or fellow servant or foreman is a 'third person' . . . and that he may be sued by an injured co-employee for his negligence resulting in the compensable injury.").

9. State *ex rel.* Taylor v. Wallace, 73 S.W.3d 620, 621-22 (Mo. 2002) (en banc).

10. *Id.* at 621.

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

12. *See id.* at 179-80.

13. *See id.*

14. *Taylor*, 73 S.W.3d at 622.

15. *Id.*

16. MO. REV. STAT. § 287.010 (2000).

17. 630 S.W.2d 175 (Mo. Ct. App. 1982).

ding machine.[18] After receiving workers' compensation benefits from his employer, the plaintiff brought suit against the president and production manager of the company.[19] The plaintiff argued that the employer delegated its duty to provide a safe work environment to these two co-employees, and, by failing to equip the shredding machine with safety devices, they breached the duty delegated to them.[20] The defendants moved to dismiss, arguing that they enjoyed immunity under workers' compensation law.[21] The court framed the issue before it as:

> whether a supervisory employee, including a corporate officer, may be held personally liable for injuries sustained by a fellow employee covered by workermen's compensation where the injuries occur because of the supervisor's failure to perform the duty, assigned to him by the employer, to provide the fellow employee a reasonably safe place to work.[22]

The court identified the question as one of first impression in Missouri.[23]

To determine how the Missouri legislature intended this issue be handled, the *Badami* court began by examining what the state of the law was when Missouri first passed the Act.[24] At common law, parties injured at work could not recover from their employer if the injury was caused by the negligence of a co-employee.[25] Rather, the injured party's sole remedy was against the co-employee whose negligence caused the injury.[26] In an effort to lessen the harsh effect of this rule,[27] Missouri courts formulated a rule that an employer's duty to provide a reasonably safe workplace was non-delegable.[28] Under such a rule, a party injured as a result of a co-employee's negligence in carrying out the employer's duty to provide a reasonably safe workplace was to sue the employer.[29]

The *Badami* court continued by stating that employees were agents of their employers for the purpose of carrying out this non-delegable duty.[30] Under the law of agency as it existed in 1926, agents were only liable to parties

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18. *Id.* at 176.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 177.
25. *Id.* (citing Bender v. Kroger Grocery & Baking Co., 276 S.W. 405, 406 (1925)).
26. *Id.*
27. *Id.*
28. *Id.* at 177 (citing *Bender*, 276 S.W. at 406).
29. *See generally id.*
30. *Id.*

other than their principal for acts of misfeasance in carrying out their duties, i.e., an affirmative act.[31] They were not liable to third parties for mere acts of nonfeasance in carrying out their duties because, in such a circumstance, they only owed a duty to their principal.[32] Thus, employees could only be personally liable to each other for workplace injuries caused by their acts of misfeasance.[33]

While the court acknowledged that the law of agency regarding agent liability to third parties for passive negligence had changed since 1926, the court stated that the change occurred independent of the State's compensation legislation.[34] Given the state of the law at the time the State passed the Act, the court in *Badami* held that the Missouri legislature must have intended that the immunity provisions of the Act apply to co-employees when they merely failed in their assigned duty to provide a reasonably safe workplace since this was a non-delegable duty owed by the employer, not the employee.[35] The court held that suit could be brought against a co-employee only if the plaintiff alleged "something more" than a mere failure to carry out this non-delegable duty.[36] Keeping with the misfeasance/nonfeasance distinction, "something more" would be affirmative acts that caused or increased the risk of injury.[37] The court concluded by stating that whether this "something more" was present would have to be determined on a case-by-case basis.[38]

Since *Badami*, the issue of co-employee immunity has reached the Supreme Court of Missouri three times.[39] Each time, the "something more" doctrine dictated the Court's decision.[40] The application of the doctrine, however, differed slightly with each case.[41]

### *B. Subsequent Evolution*

In *Tauchert v. Boatman's National Bank of St. Louis*, the plaintiff was injured when an elevator cab on which he was standing "fell five or six floors to the bottom of [the] elevator shaft."[42] The plaintiff recovered workers'

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *See id.* at 179.
36. *Id.* at 180.
37. *See id.* at 177-80.
38. *Id.* at 180-81.
39. *See* State *ex rel.* Taylor v. Wallace, 73 S.W.3d 620 (Mo. 2002) (en banc); Tauchert v. Boatman's Nat'l Bank of St. Louis, 849 S.W.2d 573 (Mo. 1993) (en banc) (per curiam); Kelley v. DeKalb Energy Co., 865 S.W.2d 670 (Mo. 1993) (en banc).
40. *See Taylor*, 73 S.W.3d 620; *Tauchert*, 849 S.W.2d 573; *Kelley*, 865 S.W.2d 670.
41. *See Taylor*, 73 S.W.3d 620; *Tauchert*, 849 S.W.2d 573; *Kelley*, 865 S.W.2d 670.
42. *Tauchert*, 849 S.W.2d at 573.

compensation benefits from his employer and later filed suit against the job's foreman for negligence in rigging the faulty elevator system.[43] The foreman argued that the plaintiff's claim was barred by the exclusivity provision of the Act, and the trial court granted the defendant's summary judgment motion.[44] In a short opinion, the Missouri Supreme Court reversed, holding that the foreman was not immune from suit because he had engaged in active negligence outside of the employer's duty to provide a reasonably safe workplace.[45] The court stated that "[t]he creation of a hazardous [work] condition is not merely a breach of an employer's duty to provide a safe place to work."[46] The court continued by stating that if an injured party's co-employee engages in such actions, the co-employee will not be immune from suit by reason of the Act.[47] The court found that allegations that the foreman personally arranged the faulty elevator system were sufficient to preclude summary judgment on workers' compensation exclusivity grounds.[48]

Similarly, in the second Supreme Court of Missouri case on the issue, *Kelley v. DeKalb Energy Co.*,[49] the plaintiff's claim against his co-employees was the result of their design and manufacturing of a workplace item that caused an injury.[50] Injured when a corn flamer exploded, the plaintiff settled his workers' compensation claim and then brought suit against five of his fellow employees.[51] In his complaint, the plaintiff alleged "negligent design, manufacture and construction of the corn flamer."[52] The court recognized 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."[53] However, the court held that the suit was barred under the facts of the case because the design and construction of the corn flamer "was part of the employer's nondelegable duty to provide a safe workplace."[54] The court distinguished *Tauchert* on the grounds that the elevator at issue in that case was "make-shift" or "jerry-rigged" by the foreman.[55] The corn flamer at issue in *Kelley*, on the other hand, was simply designed and manufactured according to company policy.[56]

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43. *Id.* at 573-74.
44. *Id.*
45. *Id.* at 574.
46. *Id.*
47. *Id.*
48. *Id.*
49. 865 S.W.2d 670 (Mo. 1993) (en banc).
50. *See id.*; *Tauchert*, 849 S.W.2d 573.
51. *Kelley*, 865 S.W.2d at 670.
52. *Id.*
53. *Id.* at 672.
54. *Id.*
55. *Id.*
56. *Id.*

In *State ex rel. Taylor v. Wallace*,[57] the court's most recent determination under the "something more" doctrine, the plaintiff was injured while riding in a trash truck driven by one of his fellow employees.[58] The plaintiff fell from the truck and suffered injuries as a result of the driver striking the mailbox.[59] The plaintiff received workers' compensation for his injuries and later brought suit against his co-employee, averring that his injuries resulted from the co-employee's "negligent and careless driving."[60] The court recognized an injured employee's ability to bring suits against a co-employee for affirmative negligent acts beyond the duty to maintain a safe working environment.[61] However, the court held that "an allegation that an employee failed to drive safely in the course of his work and injured a fellow worker is not an allegation of 'something more' than a failure to provide a safe working environment."[62]

### *C. Recent Missouri Court of Appeals Opinions*

Since *Taylor*, the issue of co-employee immunity has reached the Missouri Court of Appeals six times.[63] However, in only one case, *Groh v. Kohler*,[64] did the court find "something more" to exist.

The first of these appellate cases, *Brown v. Roberson*,[65] involved a similar fact pattern as *Taylor*. The plaintiff was injured when the tractor-trailer truck in which he was riding overturned.[66] Suing the co-employee who was driving the truck, the plaintiff alleged that the defendant was:

> (1) operating his vehicle at a speed that was excessive under the existing circumstances; (2) taking a route that was inappropriate for the tractor-trailer; (3) failing to ensure the load was secure and would not shift; and (4) operating his vehicle when he knew the load had shifted thereby creating a substantial risk of overturning.[67]

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57. 73 S.W.3d 620 (Mo. 2002) (en banc).
58. *Id.* at 621.
59. *Id.*
60. *Id.*
61. *Id.* at 621-22.
62. *Id.* at 622.
63. Graham v. Geisz, 149 S.W.3d 459 (Mo. Ct. App. 2004); Groh v. Kohler, 148 S.W.3d 11 (Mo. Ct. App. 2004); Logan v. Sho-Me Power Elec. Coop., 122 S.W.3d 670 (Mo. Ct. App. 2003); Kesterson v. Wallut, 116 S.W.3d 590 (Mo. Ct. App. 2003); Quinn v. Clayton Constr. Co., 111 S.W.3d 428 (Mo. Ct. App. 2003); Brown v. Roberson, 111 S.W.3d 422 (Mo. Ct. App. 2003).
64. 148 S.W.3d 11.
65. 111 S.W.3d 422.
66. *Id.* at 423.
67. *Id.*

The trial court granted the defendant's motion to dismiss on the grounds that Missouri workers' compensation law had exclusive jurisdiction over the claim.[68]

On appeal, the plaintiff argued that the co-employee defendant should not enjoy the immunity provided by the Act.[69] Specifically, the plaintiff asserted that the defendant "was liable for plaintiff's injuries and not cloaked with immunity because his actions causing plaintiff's injuries were an act of misfeasance and a breach of an independent duty to plaintiff, and therefore actionable as something more than a breach of the duty to maintain a safe workplace."[70]

Finding *Taylor* controlling, the appellate court held that the co-employee defendant was immune from liability under the exclusivity provisions of the Act.[71] The court characterized the claims before it as (1) a defendant failing to "discharge his duty to operate [a] vehicle safely," and (2) a defendant failing to "ensure [that a] load was secure and would not shift."[72] Under Taylor, the court said that a failure to drive safely in the course of one's work does not constitute "something more."[73] Therefore, the plaintiff's allegations were merely claims that a co-employee breached the employer's duty to provide a reasonably safe work place, and the immunity provisions of the Act applied.[74]

The next case before the court of appeals, *Quinn v. Clayton Construction Co.*,[75] involved a plaintiff injured when a co-employee threw a piece of steel from a roof at a construction job site. Performing "general cleanup" at the project, one co-employee on the ground told another on the roof to "just throw [the piece of steel] down" while he stood guard.[76] The co-employee on the ground did not see the plaintiff walk through a nearby access door until it was too late, and the plaintiff was struck by the piece of falling steel.[77]

The evidence showed that the co-employees disregarded their employer's promulgated rules.[78] The plaintiff sued the co-employees in their individual capacities, alleging negligence in that they:

> (1) disregarded their employer's safety rules and engaged in an independent and affirmative act of negligence that created an unreasonable risk of harm to their fellow worker, James Quinn; (2) were

68. *Id.*
69. *Id.* at 424.
70. *Id.* at 424 (quotation omitted).
71. *Id.* at 425.
72. *Id.* at 424-25.
73. *Id.* at 424 (quoting State *ex rel.* Taylor v. Wallace, 73 S.W.3d 620, 622 (Mo. 2002) (en banc)).
74. *Id.* at 424-25.
75. 111 S.W.3d 428 (Mo. Ct. App. 2003).
76. *Id.*
77. *Id.*
78. *Id.* at 431.

present at the time of James Quinn's injury; and (3) breached a personal duty of care toward James Quinn.[79]

The trial court held the plaintiff's claim barred by the exclusivity provision of the Act.[80]

On appeal, the court upheld the trial court's determination.[81] Once again, the court of appeals found *Taylor* controlling.[82] The court characterized the plaintiff's claim as "nothing more than an allegation that [defendants] failed to discharge their duty to safely throw iron or steel from a roof."[83] According to the court, this was "not an allegation of 'something more.'"[84] Therefore, workers' compensation law had exclusive jurisdiction over the plaintiff's claim.[85]

In *Kesterson v. Wallut*,[86] the plaintiff was injured when, as a passenger in a pickup truck driven by a co-employee, the truck crossed the median of the interstate and struck an oncoming vehicle.[87] As a result of being ejected from the vehicle, the plaintiff sustained serious injuries, for which she received workers' compensation benefits.[88] Subsequently, she brought a claim against the co-employee driver alleging that his negligence "caused the . . . accident by failing to keep a careful lookout, driving at a speed that was excessive for the circumstances, and failing to drive within his lane of travel."[89] The defendant filed a motion to dismiss on workers' compensation exclusivity grounds which the trial court initially overruled.[90] However, before the case went to trial, the Supreme Court of Missouri decided *Taylor*.[91] Citing *Taylor*, the defendant filed an amended motion to dismiss, which the trial court granted.[92]

On appeal, the plaintiff attempted to distinguish *Taylor* from her case.[93] She argued that *Taylor* was intended "to be limited to situations where the vehicle in question is essentially the workplace, as opposed to simply being a mode of transportation to and from work sites."[94] The court of appeals dis-

79. *Id.* at 432.
80. *Id.* at 431.
81. *Id.* at 430.
82. *See id.* at 432-33.
83. *Id.* at 433.
84. *Id.*
85. *Id.* at 433-34.
86. 116 S.W.3d 590 (Mo. Ct. App. 2003).
87. *Id.* at 592.
88. *Id.* at 592-93.
89. *Id.* at 593.
90. *Id.*
91. *Id.* at 594.
92. *Id.*
93. *Id.* at 596.
94. *Id.*

agreed, stating that the case fell "squarely within the purview of *Taylor*."[95] Interpreting *Taylor*, the court stated that the Missouri Supreme Court was not concerned with whether the vehicle essentially constituted the workplace or was merely a mode of transportation.[96] Rather, the supreme court "simply held without any apparent qualification that 'an allegation that an employee failed to drive safely in the course of his work and injured a fellow worker is not an allegation of 'something more' than a failure to provide a safe working environment.'"[97] Thus, the court of appeals upheld the decision of the trial court.[98]

In *Logan v. Sho-Me Power Electric Coop.*,[99] the court of appeals once again held that the plaintiff's claim against a co-employee was barred by the exclusivity provision of the Act. In *Logan*, a wrongful death suit was brought by an injured employee's parents as the result of the fatal electrocution the employee suffered while installing fiber-optic cable lines.[100] The parents attempted to sue their son's supervisor in his individual capacity under the "something more" doctrine.[101] In particular, the parents alleged that (1) the supervisor ordered their son to work around an energized power line when he knew their son was only an apprentice; (2) the supervisor created a "hazardous condition" by authorizing the line to be energized; and (3) "by directing [their son] to work on the line, [the supervisor] was directing [their son] to engage in a dangerous condition that a reasonable person would recognize as hazardous beyond the usual requirements of employment."[102] The trial court dismissed this complaint because of the exclusivity provision of the Act.[103]

On appeal, the trial court's decision was upheld. The court of appeals found the requirements of the injured employee's job mandated work on energized power lines on certain occasions.[104] Therefore, the defendant did not create a hazardous condition beyond the usual requirements of employment.[105] Additionally the court found that, while the co-employee may have been negligent in failing to supervise the apprentice lineman, this amounted to nothing more than the co-employee's failure to carry out his employer's non-delegable duty to provide a safe work place.[106] Thus, the court of appeals held the claim against the co-employee barred by the Act.[107]

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95. *Id.*
96. *Id.*
97. *Id.* (quoting State *ex rel.* Taylor v. Wallace, 73 S.W.3d 620, 622 (Mo. 2002) (en banc)).
98. *Id.*
99. 122 S.W.3d 670 (Mo. Ct. App. 2003).
100. *Id.* at 672-73.
101. *Id.* at 677.
102. *Id.* at 678 (quotation omitted).
103. *Id.* at 677.
104. *Id.* at 678.
105. *Id.*
106. *Id.* at 678-79.
107. *Id.* at 679.

*Groh v. Kohler*,[108] is the only one of the six appellate cases since *Taylor* in which the court of appeals found "something more" to exist. In *Groh* an employee was injured when a defective machine with which she was ordered to work malfunctioned.[109] The plaintiff's job required her to operate a band molding machine that compressed and "punch[ed] inserted plastic into the desired shape."[110] Over time, the machine would accumulate plastic which the plaintiff was to remove by hand.[111] When in perfect working order, the machine was not supposed to compress unless the operator depressed the foot pedal.[112] The plaintiff's machine, however, occasionally compressed without the plaintiff depressing the pedal, thus posing a risk to the plaintiff when she had to reach into the machine to remove accumulated plastic.[113] The plaintiff had previously informed her supervisor of the defect, but the supervisor told her to "quit whining" and "just deal with it."[114] Subsequent to this conversation, the plaintiff's hand was injured in the machine in the course of doing her job.[115] After her suit against her supervisor was dismissed, the plaintiff appealed alleging that:

> [Her supervisor] knew of the defective nature of the . . . machine and purposefully and affirmatively ordered [her] to continue to work on the machine, and these allegations are sufficient to assert a cause of action over which the courts have subject matter jurisdiction that is not preempted by Missouri's Workers' Compensation Law and for which a remedy can be granted.[116]

The court of appeals held that "something more" was present as a result of the supervisor ordering the employee to work with a machine she knew to be defective.[117] In reaching its decision, the court relied on the Missouri Supreme Court's statement in *Tauchert v. Boatman's National Bank of St. Louis* that "'[t]he creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work. . . . Such acts constitute a breach of [a] personal duty of care owed to plaintiff.'"[118] The court found the creation of a hazardous condition because the plaintiff "was effectively re-

108. 148 S.W.3d 11 (Mo. Ct. App. 2004).
109. *Id.* at 12.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 12-13.
117. *Id.* at 16.
118. *Id.* (quoting Tauchbert v. Boatman's Nat'l Bank of St. Louis, 849 S.W.2d 573, 574 (Mo. 1993) (en banc) (per curiam)).

quired by her supervisor and co-employee to perform an inherently dangerous act although the duties [of] her job were not inordinately dangerous." [119]

The most recent court of appeals case dealing with this issue is *Graham v. Geisz*.[120] The plaintiff, an employee with Fed-Ex, was injured while he and a co-employee were unloading cargo stored in large containers known as "cans" from airplanes.[121] These cans, which moved on rollers onto and off of the plane, could be locked into place.[122] The plaintiff instructed his co-employee to keep each can locked until he told her to unlock it.[123] When the co-employee defendant unlocked a can she was not supposed to, it rolled down and collided with the plaintiff.[124] The plaintiff brought suit against the co-employee as a result of his injuries alleging:

> [the] defendant acted negligently when she a) unlocked the can behind plaintiff when she knew or should have known it was unsafe to do so, b) failed to determine [whether] it was safe to unlock the can prior to doing so, or c) unlocked the can when she knew or should have known that the can would move and create an increased risk of injury to others working in the area.[125]

Further, the "plaintiff alleged that [the] defendant took these actions willfully, wantonly and with a conscious disregard for the safety of others."[126] The trial court granted the defendant's motion to dismiss on exclusivity grounds.[127] The plaintiff's sole point on appeal was that defendant's "conduct was actionable as something more than a breach of the duty to maintain a safe workplace."[128]

Determining that *Taylor* controlled, the court of appeals upheld the trial court's decision.[129] It reasoned that the defendant was simply "engaged in her routine [duties] of unlocking cans so they could move on [the] rollers."[130] The defendant's "failure to wait for clearance or determine that it was safe to proceed before releasing a lock on one of the cans is not the purposeful, affirmatively dangerous creation of a hazardous condition . . . necessary to remove the conduct from the exclusive jurisdiction of the Workers' Compensation

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119. *Id.*
120. 149 S.W.3d 459 (Mo. Ct. App. 2004).
121. *Id.* at 460-61.
122. *Id.* at 460.
123. *Id.* at 460-61.
124. *Id.* at 461.
125. *Id.*
126. *Id.* (quotation omitted).
127. *See id.*
128. *Id.*
129. *Id.* at 463.
130. *Id.* at 462.

Law."[131] Thus, the plaintiff's claim amounted to no more than an allegation that the defendant failed to discharge her employer's duty to provide a reasonably safe workplace.[132]

### *D. Pre-*Taylor *Missouri Court of Appeals Decisions Finding the Existence of "Something More"*[133]

Since *Taylor*, the court of appeals has found "something more" to exist in a claim against a co-employee only once.[134] One must look to earlier court of appeals' decisions to see other situations in which "something more" existed.

*Craft v. Scamen*,[135] involved a worker at a fireworks factory who was injured when the machine with which he was working caught on fire.[136] The fire was the result of a co-employee "jerry rigging" the machine and then ordering the plaintiff to operate the machine faster than the employee had been doing previously.[137] This conduct constituted "something more" in the view of the court.[138] The court reasoned that the co-employee had directed the plaintiff to participate in acts that were dangerous and that a reasonable person would recognize as hazardous and beyond the usual requirements of employment.[139]

In *Hedglin v. Stahl Specialty Co.*,[140] a supervisor required the plaintiff to climb to the top of a vat containing scalding water, enter the vat, and hang from a forklift operated by the supervisor to remove a submerged gate.[141] The plaintiff was fatally injured when he fell from the forklift into the scalding water.[142] When suit was brought against the supervisor as a co-employee, the court held that "something more" was present.[143] The particular averments the court found sufficient were as follows:

> Defendant Corkran deliberately, intentionally, and in conscious disregard for the safety of [Hedglin], subjected [Hedglin] to the extreme and unreasonable risk of injury and death.
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> . . .

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131. *Id.*
132. *Id.* at 462-63.
133. This section does not list all of the pre-*Taylor* opinions finding the existence of "something more." Rather, it is just a sample.
134. *See supra* Part II.C.
135. 715 S.W.2d 531 (Mo. Ct. App. 1986).
136. *Id.* at 532-33.
137. *Id.* at 533.
138. *Id.* at 537.
139. *See id.* at 537-38.
140. 903 S.W.2d 922 (Mo. Ct. App. 1995).
141. *Id.* at 927.
142. *Id.* at 924.
143. *Id.* at 926.

> On July 1, 1992, Defendant Corkran ordered and directed [Hedglin] to undertake responsibilities which created a separate and extreme risk of injury and death, far beyond that anticipated or contemplated by the ordinary duties and responsibilities of [Hedglin's] position of employment. [Hedglin] was directed to remove a screen or grate from the agitator which was submerged in the cooling vat filled with scalding water. The vat was not drained. Using a forklift with a cable or chain, [Hedglin] was ordered or directed to climb to the top of the vat, which was unguarded and unprotected for human use, and hang from the forks of a forklift in order to lift the grate out of the vat of scalding water.[144]

The court found that the defendant's conduct constituted the type of affirmative negligent act required to overcome the exclusivity of the Act.[145]

Another pre-*Taylor* case in which the court found "something more," *Pavia v. Childs*,[146] also involved an injury caused by a forklift. The supervisor had instructed the plaintiff to stand upon a wooden pallet which a forklift raised 15 feet off the ground so the plaintiff could remove certain items in the store's warehouse.[147] When the plaintiff brought suit against the supervisor as a co-employee, the appellate court found "something more" existed.[148] Relying on the proposition that "the creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work,"[149] the court found that "[a]rranging a faulty hoist system for an elevator may constitute an affirmative negligent act outside the scope of the responsibility to provide a safe workplace."[150]

Finally, in *Workman v. Vader*, the court of appeals found "something more" existed when the plaintiff, a jewelry worker, slipped on a piece of cardboard that her co-employee had left on the floor.[151] The defendant co-employee had thrown this debris on the floor and failed to remove it.[152] The court held that leaving the cardboard on the floor constituted "something more" because the co-employee's actions created a hazardous condition.[153] In essence, the co-employee breached her common law duty "to exercise reasonable care in handling or disposing of the packing materials and cardboard box."[154]

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144. *Id.* at 927 (alterations in original).
145. *Id.*
146. 951 S.W.2d 700 (Mo. Ct. App. 1997).
147. *Id.* at 701.
148. *Id.* at 702.
149. *Id.* at 701 (quoting Tauchert v. Boatman's Nat'l Bank of St. Louis, 849 S.W.2d 573, 574 (Mo. 1993) (en banc).
150. *Id.* (citing *Tauchert*, 849 S.W.2d at 574).
151. 854 S.W.2d 560, 561 (Mo. Ct. App. 1993).
152. *Id.* at 561.
153. *Id.* at 564.
154. *Id.*

## III. WHERE THE "SOMETHING MORE" DOCTRINE STANDS TODAY

Following *State ex rel. Taylor v. Wallace*,[155] it appears that the Missouri Supreme Court now requires something even more than was required in *State ex rel. Badami v. Gaertner*.[156] In *Badami*, the court spoke in terms of nonfeasance and misfeasance.[157] The *Badami* opinion suggests that as long as misfeasance was present, a claim for "something more" could be sustained.[158] After *Taylor*, however, that conclusion is far from accurate.[159]

In the first case before it, *Tauchert v. Boatman's National Bank of St. Louis*, the Missouri Supreme Court appeared to endorse the misfeasance/nonfeasance distinction.[160] The determinate fact in that case was that the defendant did not simply fail to take steps to ensure the safety of the work environment.[161] Rather, the co-employee committed an affirmative action that made the work environment unsafe, i.e., "jerry rigging" an elevator shaft.[162]

In *Kelley v. DeKalb Energy Co.*, the Missouri Supreme Court appeared to retreat from this position slightly by holding that the misfeasance must not simply be the result of a co-employee following a company policy.[163] In that case, an affirmative action by the defendant led to the plaintiff's injury, i.e., their negligent design and manufacture of the corn flamers at issue.[164] However, the Court found the employees immune from suit because their actions were in accordance with company policy.[165]

In *Taylor*, the misfeasance/nonfeasance distinction became even more blurred.[166] The co-employee in *Taylor* committed an act of misfeasance, neg-

155. 73 S.W.3d 620 (Mo. 2002) (en banc); *see supra* notes 57-62 and accompanying text for a discussion of *Taylor*.

156. 630 S.W.2d 175 (Mo. Ct. App. 1982); *see supra* notes 17-41 and accompanying text for a discussion of *Badami*.

157. *Id.* at 177.

158. *See id.* at 179.

159. *See Taylor*, 73 S.W.3d 620; Graham v. Geisz, 149 S.W.3d 459 (Mo. Ct. App. 2004); Logan v. Sho-Me Power Elec. Coop., 122 S.W.3d 670 (Mo. Ct. App. 2003); Kesterson v. Wallut, 116 S.W.3d 590 (Mo. Ct. App. 2003); Quinn v. Clayton Constr. Co., 111 S.W.3d 428 (Mo. Ct. App. 2003); Brown v. Roberson, 111 S.W.3d 422 (Mo. Ct. App. 2003).

160. *See* 849 S.W.2d 573, 574 (Mo. 1993) (en banc) (per curiam); *supra* notes 42-48 and accompanying text for a discussion of *Tauchert*.

161. *Id.* at 574.

162. *Id.*

163. 865 S.W.2d 670, 672 (Mo. 1993) (en banc); *see supra* notes 49-56 and accompanying text for a discussion of *Kelley*.

164. *Id.* at 671-72.

165. *Id.* at 672.

166. State *ex rel.* Taylor v. Wallace, 865 S.W.2d 670 (Mo. 1993) (en banc).

ligent driving, that was not simply the result of a faulty company policy.[167] Nevertheless, the Court found the negligent co-employee enjoyed immunity under the Act.[168]

*Taylor* could be read as effectively eliminating any relevant distinction between misfeasance and nonfeasance in the co-employee immunity context. Prior to *Taylor*, the court of appeals found "something more" on several occasions when the co-employee committed an affirmative negligent act. In *Craft*, the court found "something more" as a result of a co-employee "jerry rigging" a fireworks machine and ordering the plaintiff to thereafter operate it in an unsafe manner.[169] In *Hedglin*, the court found "something more" when the co-employee operated a forklift in a manner that injured the plaintiff.[170] Under similar facts, the same result was reached in *Pavia*.[171] Finally, in *Workman*, it was sufficient that the defendant took the affirmative action of simply throwing debris on the floor and failing to pick it up.[172]

Later opinions relied on *Taylor* in denying claims averring facts similar to those averred in cases where "something more" was found. Under *Quinn v. Clayton Construction Co.*, throwing items off a roof did not constitute an affirmative negligent act rising to the level of something more.[173] In *Kelley*, the Supreme Court's exoneration of the co-employees rested on the fact they followed company policy.[174] In *Quinn*, a case following *Taylor*, the co-employees disobeyed company policy, but they were still granted immunity.[175] In *Graham v. Geisz*, the plaintiff was injured as a result of the co-employee defendant taking the affirmative negligent act of unlocking the "cans" at a time she was not supposed to.[176] This conduct was no different and should be no less actionable than the co-employee's affirmative act of throwing debris on the ground that was found sufficient to impose "something more" liability in *Workman*.[177]

A more accurate analysis of *Taylor* is that the misfeasance/nonfeasance distinction is not dead so much as it is applied in a slightly different manner

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167. *Id.* at 622.

168. *Id.* at 622-23.

169. 715 S.W.2d 531, 533 (Mo. Ct. App. 1986).

170. Hedglin v. Stahl Specialty Co., 903 S.W.2d 922, 927 (Mo. Ct. App. 1995); *see supra* notes 140-45 and accompanying text for a discussion of *Hedglin*.

171. Pavia v. Childs, 951 S.W.2d 700 (Mo. Ct. App. 1997); *see supra* notes 146-50 and accompanying text for a discussion of *Pavia*.

172. Workman v. Vader, 854 S.W.2d 560, 564 (Mo. Ct. App. 1993); *see supra* notes 151-54 and accompanying text for a discussion of *Workman*.

173. 111 S.W.3d 428, 433-34 (Mo. Ct. App. 2003); *see supra* notes 75-85 and accompanying text for a discussion of *Quinn*.

174. 865 S.W.2d 670, 672 (Mo. 1993) (en banc).

175. 111 S.W.3d at428, 431, 434 (Mo. Ct. App. 2003).

176. 149 S.W.3d 459, 461 (Mo. Ct. App. 2004); *see supra* notes 120-32 and accompanying text for a discussion of *Graham*.

177. 854 S.W.2d 560, 564 (Mo. Ct. App. 1993).

than it has traditionally been applied. Courts have seemingly altered the literal definition of active versus passive negligence. Apparently passive negligence, i.e., nonfeasance, in the "something more" context includes affirmative actions that create risks an employer would anticipate given the nature of the work. For example, in *Taylor*, the co-employee engaged in a risk-creating action through his careless driving,[178] but an employer should have reasonably anticipated that its trash-truck drivers getting into accidents because of negligent driving. Although the employee engaged in the negligent act of careless driving, this type of action was viewed as nonfeasance because the co-employee was, in effect, simply not carrying out his employer's nondelegable duty to provide a reasonably safe workplace.[179] Therefore, the co-employee in such situations enjoys the immunity provided by the Act. Similarly, since the injured employee's job in *Logan* involved working with potentially live power lines, electrocution was a normal risk of the job despite any affirmative acts taken by the injured employee's supervisor.[180] In *Quinn*, a normal risk of working on a construction job site is the possibility of falling objects.[181] In *Graham*, a normal risk of taking cans off rollers is that a can may not be locked correctly.[182]

Active negligence in the "something more" context, on the other hand, appears to involve those situations in which negligent co-employees willfully and wantonly take actions that they should know will increase the risk of those around them. In these types of situations, the affirmative act, as opposed to risk inherent in the job itself, creates the risk of harm.[183] *Groh v. Kohler* provides a good example. The plaintiff's injury was not the type of injury for which someone in her position was typically at risk.[184] Only a minimal risk of her hand being compressed existed if she was not ordered to work with a knowingly defective machine.[185] However, that risk was drastically increased when her co-employee consciously ordered her to operate a defective machine.[186]

Such an analysis also explains the pre-*Taylor* cases in which courts found "something more." In *Craft*, the fireworks machine would not normally have posed a risk of fire but for the co-employee's conduct.[187] In *Hedglin*, a normal risk of the injured employee's job did not entail hanging from a forklift over a

178. 73 S.W.3d 620, 621 (Mo. 2002) (en banc).

179. *See id.* at 622.

180. Logan v. Sho-Me Power Elec. Coop., 122 S.W.3d 670, 679 (Mo. Ct. App. 2003); *see supra* notes 99-107 and accompanying text for a discussion of *Logan*.

181. 111 S.W.3d 428, 433 (Mo. Ct. App. 2003).

182. 149 S.W.3d 459, 462-63 (Mo. Ct. App. 2004).

183. *See* Groh v. Kohler, 148 S.W.3d 11 (Mo. Ct. App. 2004).

184. *Id.* at 16.

185. *See id.*

186. *Id.*

187. *See* 715 S.W.2d 531, 537-38 (Mo. Ct. App. 1986).

vat of scalding water.[188] Likewise, a normal risk of the plaintiff's job in *Pavia* did not include a fall from a raised forklift.[189] Finally, in *Workman*, the normal risk of a jewelry worker's job did not entail having to walk over cardboard on the floor.[190]

## IV. CONCLUSION

This analysis of the "something more" doctrine attempts to characterize the cases dealing with the doctrine in a workable manner. However, no clear-cut rule exists in spite of the vast amount of litigation surrounding this issue. This creates difficulty for attorneys on both sides of the aisle. Plaintiffs attorneys have a hard time determining whether "something more" exists, and therefore, whether to bring such a suit. Similarly, defense attorneys have difficulty responding to any arguments posed by a plaintiff because it remains unclear exactly what constitutes a sufficient claim. After *Taylor*, however, is it appears plaintiffs will have more difficulty stating a viable claim.[191]

By limiting the "something more" doctrine, the Missouri Supreme Court is restricting the plaintiff's options for recovery and giving the real wrongdoer a free pass. Instead of restricting the availability of the doctrine back any further, the court should formulate a hard and fast rule that focuses on expectant hazards. By formulating such a rule, the court would protect the interests of plaintiffs while at the same time not overexposing co-employees to liability. Such a rule is in line with the trend identified in the previous section, and, by expressly adopting this rule, all parties involved in such actions would have more guidance in determining the validity of claims.

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188. *See* 903 S.W.2d 922, 926-27 (Mo. Ct. App. 1995).

189. *See* Craft v. Scamen, 951 S.W.2d 700, 701 (Mo. Ct. App. 1997); *see supra* notes 135-39 and accompanying text for a discussion of *Craft*.

190. 854 S.W.2d 560, 564 (Mo. Ct. App. 1993).

191. *See generally*, Graham v. Geisz, 149 S.W.3d 459 (Mo. Ct. App. 2004); Logan v. Sho-Me Power Elec. Coop., 122 S.W.3d 670 (Mo. Ct. App. 2003); Kesterson v. Wallut, 116 S.W.3d 590 (Mo. Ct. App. 2003); Quinn v. Clayton Constr. Co., 111 S.W.3d 428 (Mo. Ct. App. 2003); Brown v. Roberson, 111 S.W.3d 422 (Mo. Ct. App. 2003).