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## Trapped: Missouri Legislature Seeks to Close Workers' Compensation Loophole with Some Co-Employees Still Inside

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## NOTE

# Trapped: Missouri Legislature Seeks to Close Workers' Compensation Loophole with Some Co-Employees Still Inside

*Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010), *transfer denied*, No. SC91216, 2010 Mo. LEXIS 291 (2010) (Mo. Nov. 16, 2010).

ALEXANDER CORNWELL\*

*"Currently, all Missouri workers are at risk of being sued and held liable for honest accidents at work and that is simply unfair . . . ."*<sup>1</sup>

### I. INTRODUCTION

Century-old judicial precedent in Missouri clearly establishes that an injured worker may not bring a personal injury action against his or her co-employee for negligently failing to provide a safe workplace.<sup>2</sup> Providing a safe working environment is a non-delegable duty of the employer, so when an employee performs in the employer's stead, the law treats the employee as stepping in the shoes of the employer.<sup>3</sup>

When Missouri passed its workers' compensation statute in 1926, employers were granted immunity from civil actions their employees brought in exchange for providing guaranteed compensation to injured employees, irrespective of negligence.<sup>4</sup> The legislature read the common law treatment of an employer's non-delegable duty into the Act, and co-employees remained immune from civil actions insofar as a compensable injury occurred as a re-

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1. *Senate Votes to Protect Employees*, MO. ST. SEN. ROBERT N. MAYER, <http://www.senate.mo.gov/media/11info/mayer/releases/031711-EmployeeProtectionApproved.html> (last visited Dec. 31, 2011) (internal quotation marks omitted) (statement of Missouri Senate Assistant Majority Floor Leader Jack Goodman referencing the fallout of the *Robinson v. Hooker* decision).

2. *See Carson v. Quinn*, 105 S.W. 1088, 1090-91 (Mo. App. 1907).

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

4. *See* MO. REV. STAT. § 287.120.1 (2000).

sult of their negligent performance of the employer's duty.<sup>5</sup> However, in Missouri, this is the only instance where a co-employee is granted immunity from civil suit.<sup>6</sup> Thus, if a worker is injured by a co-employee's action that constitutes "something more" than a mere failure to provide a safe workplace, a civil action will lie.<sup>7</sup> In this respect, Missouri is in the distinct minority of jurisdictions that allow injured workers to bring personal negligence actions against co-employees.<sup>8</sup>

It is necessary to hold co-employees immune for a failure to correctly carry out the employer's duty to provide a safe work environment because employers, under many circumstances, remain obligated to indemnify their employees for judgments rendered against them.<sup>9</sup> If an employee can be sued for negligently failing to perform the employer's duty and the employer then has to pay damages for injuries resulting from a breach of that duty, the employer would in effect be paying civil damages for its own breach.<sup>10</sup> Since workers' compensation is intended to grant employers immunity under those exact circumstances, allowing such claims is in direct contravention of the whole Act.<sup>11</sup>

As a result of the Western District Court of Appeals' decision in *Robinson v. Hooker*, co-employee liability in Missouri has changed from being somewhat permissive to utterly submissive.<sup>12</sup> The court, for the first time, focused entirely on the definition of "employer" in the workers' compensation statute and found that employees are not included.<sup>13</sup> By doing so, the court destroyed co-employee immunity in every context, and employees are now amenable to civil suit even if the breach was that of an employer's non-delegable duty.<sup>14</sup> As a result, Missouri is currently the *only state in the entire nation* to allow a civil action against a co-employee who negligently performs

5. State *ex rel.* *Badami v. Gaertner*, 630 S.W.2d 175, 177 (Mo. App. E.D. 1982) (en banc), *superseded by statute*, S.B. 1, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005), *as stated in* *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010).

6. In the context of a failure to provide a safe workplace, it should be noted that "co-employee immunity" is somewhat of a misnomer. As indicated, a co-employee is granted immunity by virtue of that employee acting in place of his employer. *Id.* at 177. The law treats the employee as stepping in the shoes of the employer. *See id.* Thus, it is actually the employer's immunity that is extended to an employee by virtue of that legal distinction. *See id.*

7. *See id.* at 180.

8. *See infra* Part III.D.

9. State *ex rel.* *Larkin v. Oxenhandler*, 159 S.W.3d 417, 421 (Mo. App. W.D. 2005).

10. *See id.*

11. *See id.*

12. *See* 323 S.W.3d 418, 422, 424-25 (Mo. App. W.D. 2010), *transfer denied*, No. SC91216, 2010 Mo. LEXIS 291 (2010) (Mo. Nov. 16, 2010).

13. *See id.* at 423-25.

14. *See id.* at 425.

the employer's duty to provide a safe workplace.<sup>15</sup> The court's seismic doctrinal shift is matched only by its immense practical consequences.

This Note is a primer for Missouri practitioners to better understand the practical effect *Robinson* has had on co-employee liability in Missouri. Part II provides the unassuming factual background giving rise to *Robinson's* substantial departure from previous case law. To understand the context in which the court decided *Robinson*, Part III outlines Missouri's historical approach to co-employee liability and the recent statutory amendments mandating strict construction of the workers' compensation act that prompted the court's holding. In response, Part IV considers whether that extensive departure was warranted. After illustrating that the holding is not congruent with legislative intent and historical context, this Note will examine the pragmatic effect of *Robinson*. Lastly, this Note will analyze whether *Robinson* – monumental in its own right – is indicative of a larger problem with workers' compensation in Missouri ushered in by the 2005 amendments requiring strict interpretation of the Act.

## II. FACTS AND HOLDING

In October 2007, two co-workers, Richard Robinson and Cheryl Hooker, were performing their duties as street cleaners in Kansas City, Missouri, when Hooker lost her grip on a high pressure hose used to perform her work-related tasks.<sup>16</sup> The hose swung wildly, struck Robinson in his eye, and caused permanent blindness.<sup>17</sup> In response to the eye injury, Robinson filed a workers' compensation claim against his employer, the City of Kansas City.<sup>18</sup> On January 30, 2009, a settlement was reached and approved by a judge within the Division of Workers' Compensation.<sup>19</sup>

After Robinson received an award for his injuries by way of workers' compensation benefits, he brought a civil claim against his co-worker, Hooker, in Jackson County Circuit Court.<sup>20</sup> In his petition, Robinson alleged that his eye injury was the result of Hooker's negligent operation of the high pressure hose.<sup>21</sup> Hooker filed a motion to dismiss Robinson's petition, declaring that the court lacked subject matter jurisdiction to hear the action.<sup>22</sup> Specifically, Hooker claimed the court lacked jurisdiction because Hooker shared

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15. See *infra* Part III.D.

16. *Robinson*, 323 S.W.3d at 421.

17. *Id.*

18. Appellant Richard Robinson's Brief at 1, *Robinson*, 323 S.W.3d 418 (No. WD71207), 2009 WL 3751947, at \*1.

19. *Id.* at 1-2.

20. *Robinson*, 323 S.W.3d at 421.

21. *Id.*

22. *Id.*

immunity with her employer under workers' compensation law.<sup>23</sup> In addition, she claimed that *res judicata* and estoppel barred Robinson's cause of action because the prior settlement award he received from the Department of Labor and Industrial Relations arose out of the same alleged incident and injury.<sup>24</sup> Further, Hooker relied on the doctrine of official immunity and stated that she could not be liable because the injury occurred while she was a public official performing a discretionary act.<sup>25</sup> The trial court agreed with Hooker and granted her motion to dismiss without explanation.<sup>26</sup> Thereafter, Robinson appealed the dismissal of his petition.<sup>27</sup>

The Missouri Court of Appeals for the Western District found that the circuit court erred in granting the defendant's motion to dismiss.<sup>28</sup> With respect to defendant Hooker's claim that the Workers' Compensation Act bars civil claims against co-employees, the court held that the judicial extension of co-employee liability was no longer appropriate after a 2005 amendment to the Act requiring courts to use strict construction in applying the provisions of the workers' compensation statute.<sup>29</sup> The court held immunity only applies to employers under the Act, and co-employees, strictly interpreted, do not fall within the statutory definition of an employer.<sup>30</sup> The court held that the workers' compensation statute does not preclude an injured employee from bringing an action in tort against a co-employee, and therefore, Robinson's claim was not within the exclusive jurisdiction of the Division of Workers' Compensation.<sup>31</sup>

### III. LEGAL BACKGROUND

#### A. Co-Employee Liability Pre-Dating Workers' Compensation

Prior to the passage of Missouri's Workers' Compensation Act in 1926, employees who sustained an injury at work were severely limited in their ability to recover from their employer.<sup>32</sup> An injured employee could bring a common law negligence action against his employer; however, employers were minimally obligated to exercise reasonable care.<sup>33</sup> Employees were

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23. *See id.*

24. *See id.*

25. *See id.* at 426.

26. *Id.* at 421.

27. *Id.*

28. *Id.* at 427.

29. *Id.* at 423-25.

30. *Id.* at 424.

31. *See id.* at 425.

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

33. 1 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 2.03 (2011).

further limited from obtaining redress by the “unholy trinity” of common law defenses.<sup>34</sup> One such defense included the fellow-servant exception.<sup>35</sup> Under this common law defense, employers were absolved from liability to employees “for injuries incurred or suffered solely as the result of the negligence, carelessness, or misconduct of others who are in the service of the employer and who are engaged in the same common or general employment as the injured employee.”<sup>36</sup> It represented an exception to the well-established rule of *respondereat superior*, whereby employers are liable for negligent acts or omissions of their employees if committed within the scope of their employment.<sup>37</sup> The converse of the employer’s ability to avoid liability is that an injured employee *could* bring an action against a co-employee.<sup>38</sup>

Since employers were practically insulated from any adverse judgments for workplace injuries,<sup>39</sup> Missouri courts began decreasing the level of employer protection. Courts utilized the dual-capacity doctrine to find that an employee could serve concurrently as both a servant (employee) and a vice-principal of the master (employer).<sup>40</sup> The doctrine provided that the employer owed a duty to exercise ordinary care in furnishing his or her employee a reasonably safe place to work.<sup>41</sup> In addition, this duty could not be delegated to a co-employee in order to relieve the employer from liability for the negligent performance by that co-employee.<sup>42</sup> When an employer had an employee perform an act that was non-delegable, the employee himself was acting merely as a conduit of the employer rather than acting in his capacity as a servant.<sup>43</sup> Therefore, when a co-employee negligently failed to provide a safe

34. *Gunnelt*, 70 S.W.3d at 635.

35. 1 LARSON & LARSON, *supra* note 33, § 2.03. The rule was established in England by *Priestly v. Fowler* in the mid-nineteenth century. 150 Eng. Rep. 1030, 1031 (1837). Shortly thereafter, it was adopted by an American court in *Farwell v. Boston & Worcester Rail Rd. Corp.* 45 Mass. (4 Met.) 49, 59 (1842). By the end of the century, nearly every state in the nation had recognized the defense. *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579, 579 (1984). For a Missouri case recognizing the common law defense, see *Rohback v. Pac. R.R.*, 43 Mo. 187 (1869).

36. 27 AM. JUR. 2D *Employment Relationship* § 340 (2011).

37. *Studebaker v. Nettie’s Flower Garden, Inc.*, 842 S.W.2d 227, 229 (Mo. App. E.D. 1992).

38. *See McGinnis v. Chicago, Rock Island & Pac. Ry. Co.*, 98 S.W. 590, 592-93 (Mo. 1906).

39. Joan T.A. Gabel & Nancy R. Mansfield, *Practicing in the Evolving Landscape of Workers’ Compensation Law*, 14 LAB. LAW. 73, 74 (1998).

40. *See, e.g., Bender v. Kroger Grocery & Baking Co.*, 276 S.W. 405, 406 (Mo. 1925).

41. *Id.*

42. *Id.*

43. *See Zellars v. Mo. Water & Light Co.*, 92 Mo. App. 107, 125 (1902) (stating that “[w]hoever the master selects to act in his stead, becomes, as to that duty, the master himself”).

workplace and another employee was injured as a result thereof, liability attached to the employer and not the co-employee.<sup>44</sup>

The distinction between employer liability and co-employee liability was further explained by distinguishing between a co-employee's acts that constituted nonfeasance versus those that were misfeasance.<sup>45</sup> A co-employee was held personally liable to a fellow employee who sustained an injury resulting from the co-employee's misfeasance but not his nonfeasance.<sup>46</sup> Nonfeasance is defined as "the omission on the part of the agent to perform a duty which he owes to the principal by virtue of the relationship existing between them."<sup>47</sup> If a fellow employee's injury arose from the negligent non-performance of this duty, a co-employee was not held liable.<sup>48</sup> In contrast, misfeasance is found in instances where an employee "has actually entered upon the performance of his duties to his principal and in so doing, fails to respect the rights of others . . . . [H]e will be personally responsible to a third person who is injured by reason of such misfeasance."<sup>49</sup> This different treatment between omissions of a duty and positive wrongs is premised on the principles of privity.<sup>50</sup> Courts held that an employee is in privity of contract with his employer, and thus, a party external to that contractual relationship cannot maintain an action to recover damages sustained by reason of nonperformance of the co-employee's contractual duty to the employer.<sup>51</sup>

### *B. The Quid Pro Quo of the Missouri Workers' Compensation Act of 1926*

The fact that employees were granted the right to seek recovery from their employers for a co-employee's failure to provide a safe workplace was a small victory for injured employees in the overall context of workplace injuries. Even with this limitation on employer insulation from common law

44. *See id.* at 125-27; *see also* *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 178 (Mo. App. E.D. 1982) (en banc) (The court summarized co-employee liability prior to workers' compensation as that in which "the duty to provide a safe place to work was upon the employer, not the employee. . . . An employee . . . owed his duty to the employer and he incurred no personal liability for failure to fulfill his duty to provide a reasonably safe place for employees to work."), *superseded by statute*, S.B. 1, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005), *as stated in* *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010).

45. *Badami*, 630 S.W.2d at 178.

46. *Id.* at 177.

47. *McCarver v. St. Joseph Lead Co.*, 268 S.W. 687, 690 (Mo. App. 1925) (internal quotation marks omitted).

48. *See id.*

49. *Orcutt v. Century Bldg. Co.*, 99 S.W. 1062, 1068 (Mo. 1906) (internal quotation marks omitted).

50. *Badami*, 630 S.W.2d at 177.

51. *See, e.g., Carson v. Quinn*, 105 S.W. 1088, 1090-91 (Mo. App. 1907).

remedies, workers were still unable to recover in ninety percent of cases involving workplace injuries.<sup>52</sup> Further, if employees were fortunate enough to obtain a judgment against their employer, they were still ill-equipped to bear the expense and delay of litigation.<sup>53</sup> To remedy these substantive and procedural inequities, the legislature enacted the Missouri Workers' Compensation Act.<sup>54</sup>

The goal of the Act is to provide an injured worker with "rapid, definite and certain compensation for workplace injuries, and to place the burden of such losses on the industry."<sup>55</sup> While employer liability was extremely limited prior to the Act,<sup>56</sup> under a workers' compensation action, an employee need not prove any fault on the part of his or her employer in order to recover compensation for a workplace injury.<sup>57</sup> With respect to employer liability, workers' compensation is not meant to supplement the rights and remedies available at common law but rather supplant them entirely.<sup>58</sup> Therefore, in exchange for employers accepting absolute liability, irrespective of fault, employees forgo the opportunity to pursue a common law action against the employer.<sup>59</sup> Employers are conferred a benefit because, although they must invariably compensate their employees if they suffer an injury covered under the Act, employers are able to avoid the possibility of paying the entire amount of common-law damages.<sup>60</sup> Hence, there is a greater amount of com-

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52. *Gunnett v. Girardier Bldg. & Realty Co.*, 70 S.W.3d 632, 635 (Mo. App. E.D. 2002) (noting that in 1921, shortly before the enactment of the Workers' Compensation Act, 50,000 accidents were reported but only ten percent of those employees received any compensation from their employer).

53. *McCormack v. Stewart Enters., Inc.*, 916 S.W.2d 219, 226 (Mo. App. W.D. 1995) ("The system was enacted to provide quick recovery to those who were injured without their incurring the cost and delay associated with litigation."), *overruled on other grounds by* *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc).

54. *Gunnett*, 70 S.W.3d at 635-36 (stating that "[w]orkers' compensation statutes were enacted to ameliorate these harsh realities").

55. *Id.* at 636.

56. *See supra* Part III.A.

57. MO. REV. STAT. § 287.120.1 (2000) (providing 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 the employee's employment").

58. *Todd v. Goostree*, 493 S.W.2d 411, 416 (Mo. App. 1973), *superseded by statute*, Missouri Employers Mutual Insurance Company Act, S.B. 251, 87th Gen. Assemb., 1st Reg. Sess. (Mo. 1993), *as recognized in* *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. 1999) (en banc).

59. MO. REV. STAT. § 287.120.2 (providing that "[t]he rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee . . . at common law or otherwise").

60. *Gunnett*, 70 S.W.3d at 636.



pensable injuries, yet the amount of damages an employee otherwise could have received at common law is often much less.

This compromise is unique to the employee and employer.<sup>61</sup> Even if an employee suffers a compensable injury under the workers' compensation statute, the injured employee retains his common law right to bring suit against a negligent third party for that same injury.<sup>62</sup> Thus, after Missouri adopted its workers' compensation statute, courts were forced to determine whether co-employees were considered third parties under the Act.

### *C. The Survival of Co-Employee Liability After Workers' Compensation*

In 1931, *Sylcox v. National Lead Co.* became the first Missouri case to address the issue of co-employee liability following the enactment of the workers' compensation statute.<sup>63</sup> In *Sylcox*, an employee was being transported from his employer's workplace back to his home on the company-provided bus.<sup>64</sup> The driver of the bus was also employed by the same corporation.<sup>65</sup> While the plaintiff was attempting to exit the bus, his co-employee accelerated and threw the plaintiff onto the concrete roadway.<sup>66</sup> As a result, the injured employee sued both his employer and co-employee for the injuries he sustained in connection with the accident.<sup>67</sup>

The court was forced to answer the question of whether the defendant co-employee was a third person under the Act.<sup>68</sup> The defendant co-employee argued, unsuccessfully, that third persons constitute those "not in the same

61. *See id.* Because third parties do not partake in the give and take of the relationship and are not subject to making payments to the state's compensation fund, limiting the immunity from common law suits to the employer is a logical outcome. *Id.* at 636-37.

62. *Zueck v. Oppenheimer Gateway Props., Inc.*, 809 S.W.2d 384, 390 (Mo. 1991) (en banc) ("Workers' compensation laws have not been barriers to suits by injured employees against negligent third parties."). If an injury covered under the Act is caused by a third party, after the employer fulfills its obligation to compensate its employee, the employer has a right of subrogation. *See* MO. REV. STAT. § 287.150.3. However, the subrogation interest is limited to the amount the employer paid under the workers' compensation statute and does not include the damages available to the injured employee under common law. *See* *Ryder Integrated Logistics, Inc. v. Royse*, 125 F. Supp. 2d 375, 379 (E.D. Mo. 2000).

63. *See* *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 178-79 (Mo. App. E.D. 1982) (en banc), *superseded by statute*, S.B. 1, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005), *as stated in* *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010); *Sylcox v. Nat'l Lead Co.*, 38 S.W.2d 497 (Mo. App. E.D. 1931).

64. *Sylcox*, 38 S.W.2d at 498.

65. *Id.*

66. *Id.* at 499.

67. *See id.* at 498.

68. *Id.* at 501.

employ” such that immunity from civil actions also extends to co-workers.<sup>69</sup> Relying on the common law distinction between nonfeasance and misfeasance, the court disagreed and held that “at common law one servant is liable to another for his own misfeasance, and there is nothing in the Compensation Act which destroys such liability, or in any way disturbs the common-law relationship existing between co[-]employees.”<sup>70</sup>

Subsequent to this early decision, Missouri courts have consistently reaffirmed the view that co-employees are considered third persons under the Act and, absent limited circumstances, are amenable to a common law action.<sup>71</sup> The treatment of co-employee liability went largely unchanged until 1982, when the Missouri Court of Appeals for the Eastern District established Missouri’s current framework in *State ex rel. Badami v. Gaertner*.<sup>72</sup>

In *Badami*, Missouri, for the first time since adopting its workers’ compensation statute, addressed whether a co-employee can be held personally liable for injuries a fellow employee sustained that were a result of the co-employee’s failure to provide a safe workplace.<sup>73</sup> The injury at issue in *Badami* occurred when the plaintiff’s hand was drawn into a shredding machine at the workplace.<sup>74</sup> After recovering workers’ compensation benefits, the plaintiff brought suit against two supervisory co-employees for a failure to equip appropriate safety devices.<sup>75</sup> The co-employees argued that the case was governed exclusively under workers’ compensation, and they moved to dismiss the case based on a lack of subject matter jurisdiction.<sup>76</sup>

To aid in its understanding of the Act’s legislative intent, the court looked to the state of the common law as it existed at the time the statute was

69. *Id.* at 501-02.

70. *See id.* at 502. Because the facts of the case dealt with misfeasance, despite being implicit in its analysis, the court never expressly stated that a co-employee is immune to common law actions if the injury was a result of his nonfeasance. *See id.* However, an express statement of this view was made in *Badami v. Gaertner*, which has become Missouri’s foundational approach for co-employee liability. *See supra* notes 44-50 and accompanying text.

71. *See, e.g.*, *Tauchert v. Boatmen’s Nat’l Bank of St. Louis*, 849 S.W.2d 573, 574 (Mo. 1993) (en banc) (per curiam); *Schumacher v. Leslie*, 232 S.W.2d 913, 917-18 (Mo. 1950) (en banc); *Gardner v. Stout*, 119 S.W.2d 790, 792 (Mo. 1938); *Gunnert v. Girardier Bldg. & Realty Co.*, 70 S.W.3d 632, 637 (Mo. App. E.D. 2002).

72. 630 S.W.2d 175 (Mo. App. E.D. 1982) (en banc), *superseded by statute*, S.B. 1, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005), *as stated in* *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010).

73. *Id.* at 176. As noted by the court, the subsequent cases after *Sylcox* holding that an employee does not obtain employer immunity under workers’ compensation all involved instances in which the co-employee breached a personal duty owed to the injured employee irrespective of a duty which was assigned to the co-employee by the employer. *Id.* at 179.

74. *Id.* at 176.

75. *Id.*

76. *Id.*

enacted.<sup>77</sup> The court found that when the Act was passed, “the duty to provide a safe place to work was upon the employer, not the employee.”<sup>78</sup> Consequently, an employee chosen to carry out this duty owed his duty to the employer, and thus, he incurred no personal liability for failing to fulfill this employer-delegated duty to provide fellow employees with a reasonably safe workplace.<sup>79</sup> Based on this understanding of the law, the court articulated the seminal “something more” doctrine that Missouri has since utilized in analyzing co-employee liability: “Charging the employee chosen to implement the employer’s duty to provide a reasonably safe place to work merely with the general failure to fulfill that duty charges no actionable negligence. *Something more* must be charged.”<sup>80</sup> The court held that the plaintiff’s action fell squarely within the contemplated instance where a plaintiff does not allege something more than a mere failure to provide a safe workplace and dismissed the civil action accordingly.<sup>81</sup>

After *Badami*, the Supreme Court of Missouri consistently retained the “something more” framework when the issue of co-employee liability arose. However, what constitutes “something more” in terms of providing a safe workplace is very fact-specific and susceptible to reasonable disagreement.<sup>82</sup> The *Badami* court even recognized that the “extent and nature” of an alleged breach of duty by a co-employee can only be determined on a “case-by-case basis.”<sup>83</sup> In response, the Supreme Court of Missouri has attempted to further delineate the moment a co-employee’s actions constitute “something more.”

The Supreme Court of Missouri decided two cases in 1993 concerning the “something more” doctrine after a number of appellate decisions subsequent to *Badami* applied the test with less than uniform results.<sup>84</sup> In *Tauchert v. Boatmen’s National Bank of St. Louis*, the court discussed the “something more” test in terms of affirmative negligent acts.<sup>85</sup> The plaintiff in *Tauchert* was injured at his workplace when he fell down an elevator shaft while standing on the top of an elevator cab.<sup>86</sup> Prior to his accident, the plaintiff’s super-

77. *Id.* at 178.

78. *Id.*

79. *Id.* The court noted that the failure to provide a safe workplace was also framed in terms of nonfeasance by courts at the time the Act was passed. *See id.* at 179. The court acknowledged that courts in Missouri no longer distinguish between misfeasance and nonfeasance. *See id.* at 178. However, since the elimination of the distinction occurred subsequent to the statute’s enactment, this change in agency and tort law developed “independent of our compensation legislation.” *See id.*

80. *Id.* at 180 (emphasis added).

81. *Id.* at 181.

82. *See generally* Paul J. Passanante & Sara Stock, *Help! We’re Lost! Co-Employee Immunity in Missouri*, 57 J. MO. B. 64 (2001).

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

84. Passanante & Stock, *supra* note 82, at 66-67.

85. 849 S.W.2d 573, 574 (Mo. 1993) (en banc) (per curiam).

86. *Id.* at 573.

vising co-employee personally rigged up a makeshift system to raise the elevator, which ultimately failed and was the cause of the elevator cab falling.<sup>87</sup> The plaintiff brought a personal injury action against his co-employee, which the co-employee defended by claiming that the accident was the result of nothing more than the employer's non-delegable failure to provide a safe workplace, and consequently, was within the exclusive jurisdiction of workers' compensation.<sup>88</sup> The court disagreed, finding that the defendant co-employee not only passively allowed a hazardous working condition, but also affirmatively engaged in creating that condition, which represented more than an employer's failure to provide a safe workplace.<sup>89</sup> The court held that such affirmative acts constituted a breach of a personal duty of care owed to the plaintiff, and therefore, the co-employee was not immune from liability under workers' compensation.<sup>90</sup>

The court's holding in *Tauchert* was not entirely novel or without common law support in that, at common law, misfeasance was described as being a positive wrong whereas nonfeasance was framed as an omission.<sup>91</sup> Viewed in light of this historical treatment, *Tauchert's* use of affirmative negligent acts creating an unsafe workplace in order to find "something more" was entirely consistent.

The Supreme Court of Missouri next addressed co-employee liability in *Kelley v. DeKalb Energy Co.*<sup>92</sup> The facts in *Kelley* were similar to those in *Tauchert* insofar as they dealt with a hazardous condition at the workplace.<sup>93</sup> The plaintiff in *Kelley* was severely burned when a corn flamer manufactured by his employer exploded.<sup>94</sup> After recovering workers' compensation benefits, the plaintiff brought a personal injury action against five of his co-employees.<sup>95</sup> One of the plaintiff's co-employees initially presented the design of the corn flamer to executives of the employer who subsequently adopted the design for use at the workplace.<sup>96</sup> Thereafter, the employer built twenty corn flammers and used the equipment for four years leading up to the plaintiff's injury.<sup>97</sup>

Under these facts, the plaintiff asserted that the negligent design, manufacture, and construction of the corn flamer by his co-employees was actionable as being an affirmative negligent act outside of the employer's duty to

87. *Id.* at 574.

88. *Id.* at 573-74.

89. *Id.* at 574.

90. *Id.*

91. *See supra* Part III.A.

92. 865 S.W.2d 670 (Mo. 1993) (en banc).

93. *See id.* at 671.

94. *Id.* Corn flammers are "flame-making machines" which are mounted "on tractors, for the purpose of flaming corn plants just enough to retard their growth." *Id.*

95. *See id.*

96. *Id.* at 672.

97. *See id.*

provide a safe place to work.<sup>98</sup> The court disagreed, and it distinguished its holding from that in *Tauchert* by focusing on the fact that the hazardous condition in that case occurred when the defendant co-employee personally modified the instrument that led to the plaintiff's injury.<sup>99</sup> In contrast, in *Kelley*, the corn flamer was the result of a company-wide policy, which had been in effect for a significant period of time.<sup>100</sup> Thus, the breach was that of the employer for a failure to provide a safe workplace and, accordingly, could not be delegated to co-employees in order to expose them to personal liability.<sup>101</sup>

Nearly a decade passed before the Supreme Court of Missouri again ruled on the issue of co-employee liability in *State ex rel. Taylor v. Wallace*.<sup>102</sup> In *Taylor*, the plaintiff was riding on the rear of a trash truck driven by his co-employee.<sup>103</sup> The vehicle struck a mailbox, which caused the plaintiff to fall and incur personal injuries.<sup>104</sup> In determining whether the conduct represented an affirmative negligent act, the court found that the employee's duty to drive safely, delegated to him by his employer, was no more than an extension of the duty to furnish a safe workplace.<sup>105</sup> As a result, the court held that the co-employee was immune to a common law action.<sup>106</sup>

The Supreme Court of Missouri's most recent treatment of co-employee liability occurred in *Burns v. Smith*.<sup>107</sup> The plaintiff in *Burns* sustained his workplace injury when the water pressure tank on the side of his concrete truck exploded.<sup>108</sup> Prior to the accident, the plaintiff's supervisor noticed multiple leaks in the truck's pressure tank and welded the corroded portions of the tank shut.<sup>109</sup> To test the soundness of the weld, the plaintiff's supervising co-employee directed him to get in the truck and "[r]un it till it blows."<sup>110</sup>

98. *Id.* at 671-72.

99. *Id.* at 672.

100. *Id.*

101. *Id.*

102. 73 S.W.3d 620 (Mo. 2002) (en banc), *overruled on other grounds by* *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473 (Mo. 2009).

103. *Id.* at 621 & n.2.

104. *Id.*

105. *See id.* at 622.

106. *See id.* Some have stated that the court's decision in *Taylor* has blurred the line between nonfeasance and misfeasance when deciding whether a co-employee's actions arise to "something more." *See* Michael S. Kruse, Comment, *The Current State of Co-Employee Immunity Under Workers' Compensation Law*, 70 MO. L. REV. 1315, 1330 (2005) (noting the blurred distinction but offering the clarification that "[a]lthough 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.").

107. 214 S.W.3d 335 (Mo. 2007) (en banc).

108. *Id.* at 336.

109. *Id.*

110. *See id.*

The court's decision in *Burns* often garners more interest based on what it did not hold as opposed to what it actually did hold. Specifically, the defendant asked the court to adopt a reasonable person test, which a number of Missouri Court of Appeals cases had implemented.<sup>111</sup> Applying the reasonable person standard, the defendant co-employee claimed that the practice of welding tanks is commonplace in the industry, and therefore, those engaged in the business would recognize his actions as reasonable and non-hazardous.<sup>112</sup> The court declined to add a reasonableness element to the test and instead reaffirmed the "something more" test as stated in *Badami* and subsequent decisions.<sup>113</sup> Under the traditional "something more" analysis, the court held that directing a co-employee to encounter a hazard constituted an affirmative negligent act that created an additional danger beyond that normally faced in the job-specific workplace.<sup>114</sup>

In sum, Missouri has retained the common law treatment of whether a co-employee can be held personally liable by a fellow employee based on the understanding of the legislature, as it existed when workers' compensation was first enacted.<sup>115</sup> In addition, the Supreme Court of Missouri has applied the "something more" test to individual factual scenarios to help give contextual guidance.<sup>116</sup> Based on the foundational "something more" test and the court's subsequent treatment, the state of the law in which *Robinson* was decided requires "an affirmative act that creates additional danger beyond that normally faced in the job-specific work environment."<sup>117</sup> Thus, cases that have recognized that the "something more" element is met usually involve instances where the co-employee "was present with the plaintiff and was performing an act or operating a piece of equipment that resulted in the injury, or employees were directed to engage in dangerous conditions that a reasonable

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111. *Id.* at 338-39 (the offered standard for determining whether "something more" occurred would require courts "to review directives given by supervisors to employees that required those employees to engage in dangerous activities beyond the scope of their usual duties" to determine if "what occurred was hazardous beyond the usual requirements of employment").

112. *Id.* at 339.

113. *Id.*

114. *See id.* at 340. The court chose not to answer whether the act of welding the pressure tank, in and of itself, would have been sufficient to find something more because the co-employee's direction to run the tank till it blew clearly met the test. *Id.*

115. *See State ex rel. Badami v. Gaertner*, 630 S.W. 175, 179-80 (Mo. App. E.D. 1982) (en banc), *superseded by statute*, S.B. 1, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005), *as stated in Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010).

116. *See supra* notes 80-114 and accompanying text.

117. *Burns*, 214 S.W.3d at 338.

person would recognize as hazardous beyond the usual requirements of employment.”<sup>118</sup>

#### *D. Putting Missouri’s Co-Employee Liability into Perspective*

By only granting immunity to co-employees in the singular circumstance in which they fail to provide a safe workplace, Missouri is in the “distinct minority of jurisdictions” that allow negligence actions to be brought against co-employees.<sup>119</sup> Representing the most liberal approach to immunity, several states allow co-employees to be immune from personal liability even if they commit an intentional tort.<sup>120</sup> However, the vast majority of states allow co-employees to be immune from civil action unless the fellow employee’s injury was the result of an intentional wrong.<sup>121</sup> Further down the spectrum, a few states draw the line at gross negligence and only allow co-employee immunity if it does not rise to that level.<sup>122</sup> That leaves Missouri as one of only eight states that extends immunity to co-employees only insofar as the co-employee’s negligent act occurs in furtherance of his or her employer’s duty to provide a safe work environment.<sup>123</sup>

The fact that Missouri represents the bookend as the most amenable for co-employee liability is not a random creation but rather compelled by the very nature of workers’ compensation. Stated alternatively, courts have recognized that if employees were permitted to bring negligence actions against their own co-employees for a mere failure to effectuate the *employer’s* duty to provide a safe workplace, such an approach would conflict with the underlying purpose of workers’ compensation statutes.<sup>124</sup> This self-evident result is predicated on the principle of employer indemnification.<sup>125</sup> Either by contract or by virtue of agency law, there are instances in which an employee’s negligence may require indemnification by his or her employer.<sup>126</sup> In such

118. *Sexton v. Jenkins & Assocs., Inc.*, 41 S.W.3d 1, 5 (Mo. App. W.D. 2000).

119. *See Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922, 928 (Mo. App. W.D. 1995).

120. 6 LARSON & LARSON, *supra* note 33, at § 111.03[1] & n.1; *see, e.g.*, N.Y. WORKERS’ COMP. LAW § 29(6) (West, Westlaw through L.2011) (stating that “[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ . . .”).

121. *See* 6 LARSON & LARSON, *supra* note 33, at § 111.03[1] & n.1 (providing that thirty-five states have either by statute or judicial decision held that co-employee immunity extends up to intentional torts).

122. *Id.* § 111.03[1].

123. *See id.*

124. *Hedglin*, 903 S.W.2d at 929.

125. *See id.*

126. *See State ex rel. Larkin v. Oxenhandler*, 159 S.W.3d 417, 421 (Mo. App. W.D. 2005).

circumstances, the employer is responsible for the worker's compensation claim and will also be forced to pay the employee's common law judgment.<sup>127</sup> If an injured employee is able to bring a civil suit against his co-employee for a failure to provide a safe workplace, an employer may be required to indemnify the co-employee, "thus effectively emasculating the immunity granted to employers from civil liability."<sup>128</sup> Although workers' compensation was structured to be a compromise, this would represent the employer giving guaranteed compensation but not receiving the immunity for civil suit in return.<sup>129</sup>

Thus, to uphold the integrity of workers' compensation, co-employees must be immune to civil suit, at the very least, when performing the employer's non-delegable duty to provide a safe workplace. As a result, and as case law in Missouri indicates, when determining whether a co-employee is liable under the Act, courts focus on whether the alleged breach was by an employer or employee, as determined by the nature of that duty.<sup>130</sup> This approach had been consistent until the court's decision in *Robinson v. Hooker*. Specifically, instead of distinguishing between duties, the court in *Robinson* chose to determine whether the statutory definition of "employer" includes a co-employee – a distinction no Missouri court had ever relied on prior to the decision.<sup>131</sup>

### *E. Looking Through the Lens of Strict Construction*

In fairness to the *Robinson* court, its doctrinal shift was not the result of an unprovoked, random decision. Instead, the Missouri legislature's 2005 amendment to the Workers' Compensation Act was the impetus that prompted such an unforeseen holding.

The permissive nature of Missouri's co-employee liability is indicative of the perception of the Act as a whole leading up to its 2005 amendments. Formerly, courts liberally construed the provisions of the Act, favoring coverage of the statute to injured employees.<sup>132</sup> In 2005, the legislature changed the Act by narrowing the definitions of "injury," "accident," and "injury arising out of and in the course of"; it also altered the interpretation of the Act by requiring strict statutory construction rather than liberal statutory construction.<sup>133</sup> The intended and actual effect of the amendments was to limit employers' exposure to workers' compensation claims and create an attractive

127. *Hedglin*, 903 S.W.2d at 929.

128. Michael B. Korte, *Workers' Compensation Law and Practice*, 29 MO. PRAC. § 8.10 (2010).

129. *See id.*

130. *Gunnnett v. Girardier Bldg. & Realty Co.*, 70 S.W.3d 632, 637 (Mo. App. E.D. 2002).

131. *See infra* Part IV.

132. *Allcorn v. Tap Enters., Inc.*, 277 S.W.3d 823, 830 (Mo. App. S.D. 2009).

133. *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463, 466 (Mo. App. S.D. 2010).



environment for business development in Missouri.<sup>134</sup> The amendments were thought to be so beneficial to employers and so restrictive to employees that they prompted constitutional challenges.<sup>135</sup> However, while the cumulative effect of the amendments limited businesses' exposure, strict construction ultimately reared its head and elicited unintended consequences with the court's decision in *Robinson v. Hooker*.

In *Robinson*, the court's interpretation of section 287.120 eliminated the co-employee liability immunity previously available under *Badami* and its progeny.<sup>136</sup> In Missouri, the availability to file a civil action against a co-employee was always possible when the plaintiff alleged his co-employee breached a personal duty of care.<sup>137</sup> As recognized in *Badami*, the ability to sue a co-employee requires a plaintiff to prove something more than a breach of the employer's non-delegable duty to provide a safe workplace.<sup>138</sup> However, as a result of the *Robinson* decision, co-employees no longer even possess immunity from civil suits for a failure to provide a safe workplace;<sup>139</sup> effectively abrogating Missouri's century-old approach to co-employee liability.<sup>140</sup>

#### IV. INSTANT DECISION

After deciding that the trial court had jurisdiction to rule on the defendant's motion to dismiss,<sup>141</sup> the court began its analysis by providing the back-

134. Wilbur Tomlinson, *No Coworker Immunity – More Casualties in the Workers' Comp War*, 20 MO. EMP. L. LETTER, Oct. 2010, at 1, 1.; see also Kelly Wiese, *Ruling by Missouri Court of Appeals Eastern District Moves Diseases out of Workers' Comp*, MO. LAW. MEDIA, Feb. 1, 2010 (stating that in 2005 “[l]awmakers quickly pushed through changes . . . revamping a workers’ comp system that leaders believed had tilted too far toward injured workers, imposing too high of costs on businesses”).

135. See Mo. Alliance for Retired Ams. v. Dep’t of Labor & Indus. Relations, 277 S.W.3d 670, 673 (Mo. 2009) (en banc).

136. See *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. W.D. 2010), *transfer denied*, No. SC91216, 2010 Mo. LEXIS 291 (2010) (Mo. Nov. 16, 2010).

137. See *supra* Part III.C.

138. See *supra* note 80 and accompanying text.

139. *Robinson*, 323 S.W.3d at 425.

140. See *supra*, Part II.

141. *Robinson*, 323 S.W.3d at 422. The court noted that in *McCracken v. Wal-Mart Stores East, LP*, the Supreme Court of Missouri held that the Workers’ Compensation Act could not overrule article V, section 14 of the Missouri Constitution, giving circuit courts jurisdiction over personal injury claims. *Id.* Therefore, any claim of immunity under the Act should be raised as an affirmative defense rather than being raised in a motion to dismiss. *Id.* However, since *McCracken* was decided while the instant case was pending, the court found that the defendant’s claim of immunity was preserved by filing her motion to dismiss and, therefore, did not raise a jurisdictional defect. *Id.*

ground to Missouri's co-employee immunity.<sup>142</sup> The court stated that, historically, Missouri courts have extended employers' immunity under the Act to co-employees for breach of a non-delegable duty to provide a safe place to work.<sup>143</sup> However, as the court noted, the judicial extension of immunity to co-employees was based on the pre-2005 version of the Act, which mandated that the Act "shall be *liberally* construed with a view to the public welfare."<sup>144</sup>

Turning to amended section 287.800, the court explained that the requirement of liberal construction had been eliminated.<sup>145</sup> The court pointed out that section 287.800 now provides that courts "*shall construe the provisions [of the Workers' Compensation Act] strictly.*"<sup>146</sup> Expounding on the amendments made to the Act, the court then went on to apply the principles of strict construction to the relevant terms of the Act.<sup>147</sup>

Because the first paragraph of section 287.120 refers to immunity extending to *employers* and there is no related provision releasing *employees* from liability, the court found that the extension of immunity ultimately depends on the meaning of the term "employer" as it is used in the statute.<sup>148</sup> The court stated that for a co-employee to be able to share the immunity granted under the Act, he or she must be a "person . . . using the service of another for pay" and "hav[e] five or more employees."<sup>149</sup> In attempting to understand the legislature's intent, the court relied on "the plain and ordinary language of the statute."<sup>150</sup> While the legislature did not alter the language of the exclusivity provision, the meaning of that language and the scope of employer immunity, as the court explained, was narrowed "by the new lens of strict construction."<sup>151</sup> The court concluded that co-employees do not fall

142. *Id.*

143. *Id.*

144. *Id.* at 423 (emphasis added).

145. *Id.*

146. *Id.*

147. *Id.* at 424-25.

148. *Id.*

The Act defines "employer" . . . as:

(1) Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;

. . . .

(3) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter . . . .

*Id.* at 424 (quoting MO. REV. STAT. § 287.030.1 (2000)) (emphasis omitted).

149. *Id.* at 424 (quoting MO. REV. STAT. § 287.030.1) (internal quotation marks omitted).

150. *Id.*

151. *Id.* at 424-25.

within the plain and ordinary meaning of “employer” as defined under the Act and, consequently, “are not entitled to invoke the employer immunity under [s]ection 287.120.”<sup>152</sup>

After holding that the circuit court erred in dismissing the plaintiff’s petition by relying on the employer immunity provision, the court next addressed whether there was a valid alternate ground for dismissal.<sup>153</sup> Of the two remaining grounds for dismissal, the court first analyzed the defendant’s assertion that *res judicata* barred the cause of action because of the workers’ compensation claim settlement.<sup>154</sup> The court found the defense was not available since *res judicata* only bars claims that are previously litigated between the same parties; in the instant case, both the claims and the parties were different from the workers’ compensation action and the civil suit.<sup>155</sup> The court lastly discussed the applicability of the official immunity defense.<sup>156</sup> Since the defendant was merely working beside the plaintiff when the injury occurred rather than operating a supervisory role, the court maintained that the threshold requirement demonstrating that the defendant was a public official was not met.<sup>157</sup> Since the defendant was not a public official, nor was she performing a discretionary act at the time the injury occurred, the court held that she was not entitled to official immunity.<sup>158</sup>

In summary, the court held that the trial court’s order granting the defendant’s motion to dismiss was in error.<sup>159</sup> The court found that the judicial extension of immunity to co-employees was no longer justified in light of strictly construing “employer” as it is defined under the Act.<sup>160</sup> Moreover, no

152. *Id.* at 424.

153. *Id.* at 425.

154. *Id.* at 426-27.

155. *See id.* at 425. Specifically, in the workers’ compensation proceeding, the plaintiff “sought permanent partial disability benefits . . . to cover his loss of income and medical expenses from his work-related injury,” while in the instant case he sued his co-worker for her personal negligence and sought “compensation for pain and suffering, loss of consortium, and other tort-related damages that are not available under the Workers’ Compensation Act.” *Id.* With respect to barring claims against the same *party*, the court relied on its earlier conclusion in holding that the defendant did not fall under the term “employer” as it is defined in the statute. *Id.* Because the plaintiff settled his claim with his employer, not his co-employee, the court reasoned that the employer and co-employee are two different parties and, therefore, the plaintiff could still sue the defendant for personal negligence. *See id.*

156. *Id.* at 426-27.

157. *Id.* at 426. Even had the defendant established the she was a public official, the court stated that she still would have to show that “she was performing a discretionary act and not a ministerial act.” *Id.* The court reasoned that operating a high pressure hose was more in line with a ministerial act as opposed to a discretionary act. *See id.* at 426-27.

158. *Id.* at 427.

159. *Id.*

160. *Id.* at 424-26.

other grounds for dismissal were warranted under the facts of the case.<sup>161</sup> Subsequent to the decision, on September 28, 2010, the appellate court denied a motion for rehearing on the issue.<sup>162</sup> The decision ultimately became binding when the Supreme Court of Missouri denied a motion to hear the case on November 16, 2010.<sup>163</sup>

In response to the court's holding in *Robinson*, both the Missouri Senate and Missouri House of Representatives introduced bills as a legislative fix to restrict co-employee liability and restore the corresponding immunity. Senate Bill 8 was introduced just a few months after the *Robinson* decision and was passed by the Senate on March 17, 2011.<sup>164</sup> As originally introduced, the statute would have restored the co-employee liability standard back to its previous state in that co-employees would be amenable to civil suit only if something more than a breach of an employer's non-delegable duty is alleged.<sup>165</sup>

The introduction of Senate Bill 8 was followed by House Bill 162, which would have broadened co-employee immunity past any level ever possessed in Missouri. Specifically, the proposed bill provided immunity to co-employees for *any act* that caused an "injury or death for which compensation is recoverable under this chapter."<sup>166</sup> Under this language, the bill would have allowed co-employee immunity even in instances of intentional wrongs.<sup>167</sup> In that respect, it would change the landscape of Missouri's co-

161. *See id.* at 427.

162. *Id.* at 418.

163. *See id.*

164. *Measure to Protect Employees Advances in the Missouri Legislature*, MO. SENATE NEWSROOM (Mar. 17, 2011), <http://www.senate.mo.gov/Newsroom/Documents/PressReleases/2011/SenateBill8-031711.htm> (providing that the Senate acted swiftly and introduced the bill on January 5, 2011, the first day of the Senate's session).

165. *See* S.B. 8, 96th Gen. Assemb., Reg. Sess. (Mo. 2011). The bill provided, in relevant part:

Co-employees shall be released from liability for negligence in performing the non-delegable duty of an employer to provide a safe workplace when the negligence contributes to a co-employee's personal injury or death by accident arising out of and in the course of the injured or deceased employee's employment, unless the co-employee engaged in purposeful, affirmatively, dangerous conduct.

*Id.*

166. H.B. 162, 96th Gen. Assemb., Reg. Sess. (Mo. 2011). The bill provided, in relevant part:

The employer, or employee of such employer, shall not be liable for any injury or death for which compensation is recoverable under this chapter and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

*Id.*

167. *See id.*

employee liability from one of the most permissive states to one of the most restrictive.<sup>168</sup>

More importantly, each bill was meant to remedy the void created by the *Robinson* decision. Proponents of the Senate's bill asserted that it would restore the status quo by expressly reinstating the "something more" test within the legislative text.<sup>169</sup> Proponents of the House Bill argued that allowing any co-employee liability seriously undermines the exclusive remedy provision of the Act, and thus a blanket exclusion is preferable.<sup>170</sup>

On May 13, 2011, the last day of the legislative session, the Missouri Senate proposed a version of the bill that provided a compromise between the original versions of Senate Bill 8 and House Bill 162.<sup>171</sup> Specifically, the version did not provide co-employee immunity for *all* conduct that causes an injury covered under the Act; it did limit co-employee liability to intentional acts.<sup>172</sup> The relevant portion amending section 287.120.1 stated that:

Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability therefor whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.<sup>173</sup>

This legislation would have extended co-employee immunity past any level that Missouri has historically provided.<sup>174</sup> Under this language, not only would co-employees be immune for negligently failing to fulfill the employer's duty of providing a safe workplace as they were prior to *Robinson*, they

168. See *supra* Part III.D.

169. See *Missouri Bills Address Employee Liability in Workers' Comp*, INS.J., Apr. 1, 2011), <http://www.insurancejournal.com/news/midwest/2011/04/01/192763.htm> [hereinafter *Missouri Bills*]. Compare S.B. 8 (text providing that co-employees will be released from liability in performing the employer's non-delegable duty to provide a safe workplace unless they engage in conduct that is "purposeful, affirmatively dangerous conduct") with *Tauchert v. Boatmen's Nat'l Bank of St. Louis*, 849 S.W.2d 573, 574 (Mo. 1993) (en banc) (defining something more as an "affirmative negligent act" which is "not merely a breach of an employer's duty to provide a safe place to work").

170. See *Missouri Bills*, *supra* note 169.

171. See Senate Bill 8 Summary, MO. SENATE, [http://www.senate.mo.gov/11info/BTS\\_Web/Actions.aspx?SessionType=R&BillID=4065316](http://www.senate.mo.gov/11info/BTS_Web/Actions.aspx?SessionType=R&BillID=4065316) (last visited Nov. 30, 2011).

172. See S.B. 8, 96th Gen. Assemb., Reg. Sess. (as passed by Senate, Mo. May 13, 2011), available at <http://www.senate.mo.gov/11info/pdf-bill/reperf/SB8.pdf>.

173. *Id.*

174. See *supra* Part III.D.

would be immune from civil action as long as their fellow employee's injury was not the result of an intentional act. In that respect, the proposed amendment would have placed Missouri in accord with the majority of states' approaches to co-employee liability.<sup>175</sup>

Debate of the workers' compensation amendments continued into the legislative session's final hours, but ultimately the bill did not pass.<sup>176</sup> The reason for the bill's failure was unrelated to the amendments concerning co-employee immunity.<sup>177</sup> Thus, if the legislature does amend co-employee immunity during its next session, this language is likely representative of the type of amendment that would occur. Further, most consider legislative action with respect to co-employee immunity a top priority going forward.<sup>178</sup>

Notably absent from the proposed legislation is any mention of retroactive application of the amended statute. As a result, if the legislature were to provide for co-employee immunity, it may only apply prospectively.<sup>179</sup> Therefore, even if the legislature is able to amend the Act in the next legislative session to expressly provide for co-employee immunity, absent a decision by the Supreme Court of Missouri ruling otherwise, *Robinson's* interpretation of co-employee liability may still be binding on a large amount of current and potential defendants.<sup>180</sup>

## V. COMMENT

The court in *Robinson* overturned nearly one hundred years of judicial precedent when it decided to focus on the strict classification of "employer" and "co-employee" as opposed to determining whether a duty existed. This Part will examine whether that extensive departure was supported by Missouri's approach to co-employee liability and the legislative intent of Missouri's 2005 amendments requiring strict interpretation. After illustrating that the holding is not in accord with either, this Part will examine the temporal and jurisdictional scope of *Robinson*. Finally, this Part will analyze whether

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175. See *supra* note 121 and accompanying text.

176. *Chamber Calls Session Success, Cites \$200m in Savings*, MO. NEWS HORIZON (May 14, 2011), <http://missouri-news.org/press-releases/chamber-calls-session-success-cites-200m-in-savings/4990>.

177. *Id.* ("The Senate presented a position that did not include the occupational disease language, which made the bill unacceptable for the business community.")

178. See, e.g., Missouri Court of Appeals Strikes Another Blow at Employer Immunity Under the Workers' Compensation Act, CLIENT ALERT (Spencer Fane Britt & Browne LLP, Kansas City, Mo.) Sept. 19, 2011, available at <http://www.spencerfane.com/News/Headline.asp?Key=309> ("Efforts to address this issue through legislative changes were unsuccessful in the 2011 General Assembly, but will likely be revived in the next legislative session.")

179. See *infra* Part V.B.

180. See *infra* Part V.B.

the unintended consequences of *Robinson* are indicative of a larger problem with the statutory construction of workers' compensation in Missouri.

### A. *Did Robinson Get it Right?*

#### 1. Analyzing *Robinson v. Hooker* Under Current Case Law

As discussed in *Badami* and illustrated by the four Supreme Court of Missouri cases decided in its wake, an injured worker may not maintain a civil action at common law against his co-employee merely for furnishing an unsafe workplace.<sup>181</sup> Something more must be alleged.<sup>182</sup> In contrast, immunity is not granted when a co-employee breaches a personal duty of care, which is personally owed to the employee by that co-employee.<sup>183</sup> When considering the facts of the instant decision, that is precisely the type of factual predicate on which the *Robinson* court decided the case.

*Robinson v. Hooker* is not an instance where the co-employee failed to discharge a duty that was delegated by the employer. At the time of the accident, the defendant, Hooker, was not carrying out a general, non-delegable duty of her employer. Rather, Hooker was performing a personal, albeit employment-related duty.<sup>184</sup> Specifically, Hooker was operating a high pressure hose when she lost her grip, and the hose struck her coworker, causing partial blindness.<sup>185</sup> Accordingly, she had a personal, common law duty to exercise reasonable care in handling the pressure hose. As discussed, cases that have recognized that the "something more" element was met usually involved instances where the co-employee "was present with the plaintiff and was performing an act or operating a piece of equipment that resulted in the injury."<sup>186</sup> This is exactly what occurred in the instant case. The plaintiff and defendant were working together, the defendant was operating a piece of equipment, and the defendant's negligent operation of the equipment ultimately caused the plaintiff's injury.<sup>187</sup>

Thus, Missouri case law makes it clear that *Robinson*, while sound on its facts because it involved the breach of a personal duty of care, used improper reasoning to come to its conclusion. Specifically, instead of determining whether the statutory definition of "employer" includes a co-employee (which no court previously held), the court should have focused on whether

181. *See supra* Part III.C.

182. *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 180 (Mo. App. E.D. 1982) (en banc), *superseded by statute*, S.B. 1, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005), *as stated in* *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010).

183. *See id.* at 180-81.

184. *Robinson v. Hooker*, 323 S.W.3d 418, 421 (Mo. App. W.D. 2010), *transfer denied*, No. SC91216, 2010 Mo. LEXIS 291 (2010) (Mo. Nov. 16, 2010).

185. *Id.*

186. *Sexton v. Jenkins & Assocs. Inc.*, 41 S.W.3d 1, 5 (Mo. App. W.D. 2000).

187. *Robinson*, 323 S.W.3d at 421.

the alleged breach was by an employer or employee, as determined by the nature of that duty. Since this analysis, however, is ultimately a construction of the workers' compensation statute, it is also important that the case law is consistent with a strict interpretation of the Act.

## 2. Analyzing *Robinson v. Hooker* Under Statutory Law

In applying any statute, the overarching goal is to give effect to the intent of the legislature, which courts accomplish through statutory interpretation.<sup>188</sup> However, only upon statutory ambiguity can courts apply rules of construction.<sup>189</sup> While courts must certainly follow statutory definitions and give words their "plain and ordinary meaning,"<sup>190</sup> ambiguity is not solely concerned with "whether a particular word in a statute, considered in isolation, is ambiguous, but whether the *statute* itself is ambiguous."<sup>191</sup> Thus, a well-defined or unambiguous word by itself may become ambiguous "in the context of the entire statute in which it appears,"<sup>192</sup> including when the language "would lead to an illogical result."<sup>193</sup> In these circumstances, "the ultimate guide is the intent of the legislature."<sup>194</sup> Thus, a strict interpretation still must not provide an illogical result and must be in accordance with legislative intent.<sup>195</sup>

Under these rules of interpretation, the most sensible interpretation of Missouri's current workers' compensation statute is that statutory immunity for co-employees is based upon the particular nature of the underlying duty and not simply whether they fit neatly under the definition of "employer" or "co-employee." As the court found in *Robinson*, the definition of "employer" in section 287.030 unambiguously defines an employer in a manner that does not include any employees: "Every person, partnership, association, corporation . . . using the service of another for pay."<sup>196</sup> However, if one were to

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188. See *Cook v. Newman*, 142 S.W.3d 880, 886 (Mo. App. W.D. 2004) (en banc).

189. *Id.*

190. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 251 (Mo. 2003) (en banc), *overruled on other grounds by* *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc).

191. *J.B. Vending Co. v. Dir. of Revenue*, 54 S.W.3d 183, 187 (Mo. 2001) (en banc).

192. *Id.*

193. *State ex rel. Broadway-Washington Assocs., Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. 2006) (en banc).

194. *Lincoln Indus., Inc. v. Dir. of Revenue*, 51 S.W.3d 462, 465 (Mo. 2001) (en banc).

195. 82 C.J.S. *Statutes* § 366 (2011).

196. *Robinson v. Hooker*, 323 S.W.3d 418, 424-25 (Mo. App. W.D. 2010) (emphasis omitted) (quoting MO. REV. STAT. § 287.030.1(1) (2000)), *transfer denied*, No. SC91216, 2010 Mo. LEXIS 291 (2010) (Mo. Nov. 16, 2010).



look at the definition of employer “in the context of the entire statute in which it appears” it becomes evident that relying on strict interpretation of this definition in isolation yields “illogical results.”

The purpose of Missouri’s workers’ compensation law is “to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment.”<sup>197</sup> The Act represents an exchange in interests: the employee is given certain compensation without a need to prove fault while the employer is protected from the uncertainty of common-law damages.<sup>198</sup> In essence, the employer assumes absolute liability for a broad range of injuries beyond that recognized at common law, yet receives protection from having to pay out the full possibility of common-law damages.<sup>199</sup> With this in mind, it becomes unavoidably clear that a categorical “employer” or “employee” analysis without regard to the nature of the duties performed would circumvent the fundamental purpose of the workers’ compensation statute. Such an interpretation would “lead to an illogical result,” even though the plain meaning of the term “employer” is not ambiguous by itself.<sup>200</sup> Particularly with concern to the non-delegable duty to provide a safe workplace, employees would be unable to satisfy this duty without personally assuming the duty themselves. Thus, there would be no pure give-and-take, as plaintiffs could both place upon industry losses sustained as well as collect common law remedies from co-employees that were required to act in order to satisfy the employer’s non-delegable duty.

This illogical result is most readily apparent when considering the actions of an employee working within a corporation. A corporation is an artificial creature of the law, and, therefore, it can “only speak and act through its agents and employees.”<sup>201</sup> Thus, any act by an “employer” will necessarily be a result of an action by its employee. To treat this activity as something different than employer action (which would otherwise be immune under workers’ compensation) is against the purpose of the statute.<sup>202</sup>

The illogical results of focusing on the dichotomy between an employer and employee are even more apparent when viewing the consequences the *Robinson* holding has on Missouri employers. The *Robinson* construction of the workers’ compensation statute severely limits employers’ protection from common-law suit because, in many circumstances, employers are contractually or legally obligated to indemnify employees for judgments rendered against them.<sup>203</sup> Even when indemnification is not compulsory, if the em-

197. *Schoemehl v. Treasurer*, 217 S.W.3d 900, 901 (Mo. 2007) (en banc).

198. *See supra* notes 56-60 and cases cited therein.

199. *See supra* notes 56-60 and cases cited therein.

200. *See State ex rel. Broadway-Washington Ass’n, Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. 2006) (en banc).

201. *See Blasinay v. Albert Wenzlick Real Estate Co.*, 138 S.W.2d 721, 725 (Mo. App. St. Louis 1940).

202. *See supra* note 197 and accompanying text.

203. *See supra* notes 125-27 and cases cited therein.

ployer chooses not to indemnify its employee, “the employer risks creating morale problems by appearing to be disloyal to its workers.”<sup>204</sup> In each circumstance, the employer is subject to either a direct or indirect cost resulting from a civil lawsuit. The basic scheme of workers’ compensation is to grant employers immunity from any costs arising from civil suits.<sup>205</sup> Consequently, a rule allowing a co-employee to be sued for a failure to provide a safe workplace tends to undermine the basic scheme of the workers’ compensation statutes. A statutory construction that displaces the very foundation on which the statute is based upon is illogical.

Since ambiguity is readily present, it is next necessary to consider the legislature’s intent with respect to the 2005 amendments requiring strict construction of the workers’ compensation statute. The very nature of strict interpretation evinces that the legislature intended to restrict workers’ compensation recovery and employers’ corresponding costs in order to create a more favorable environment for employers.<sup>206</sup> In addition, aided by hindsight, the fact that the legislature acted so expediently to address the *Robinson* court’s decision lends considerable support to this conclusion.<sup>207</sup>

Furthermore, when the legislature enacts or amends a statute with terms that have or have had particular judicial meanings, “a presumption exists that [the legislature] acts with knowledge of that judicial or legislative action.”<sup>208</sup> Since courts presume that the legislature acts with knowledge of prior judicial meanings,<sup>209</sup> it is reasonable to infer that a lack of legislative amendment in 2005 with regard to the court’s practice of distinguishing employer and employees based upon the nature of the duty indicates legislative intent for it to continue. The “something more” doctrine is of judicial origin,<sup>210</sup> and an act of the legislature to change the method of judicial construction does not necessitate a corresponding judicial shift away from the prior doctrine. Had the legislature wished to directly change the substantive law concerning co-employee liability, which has been in existence longer than the Act itself, the legislature would have explicitly done so.

From these rules of statutory construction, it becomes quite clear that there is no actionable wrong when an employee purportedly breaches the employer’s non-delegable duty of providing a safe workplace. Under Mis-

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204. *Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922, 929 (Mo. App. W.D. 1995).

205. *Gunnnett v. Girardier Bldg. & Realty Co.*, 70 S.W.3d 632, 636 (Mo. App. E.D. 2002).

206. *See supra* Part III.E.

207. *See supra* Part IV (discussing the Missouri Senate and House of Representatives’ proposed legislative fixes).

208. *Cook v. Newman*, 142 S.W.3d 880, 889-90 (Mo. App. W.D. 2004) (en banc).

209. *Id.*

210. *See State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 178-79 (Mo. App. E.D. 1982) (en banc), *superseded by statute*, S.B. 1, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005), *as stated in Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010).

souri case law, the breach of this duty constitutes a breach by the employer, not the employee.<sup>211</sup> Since the application of strict construction does not change this analysis under the Act, *Robinson's* complete overruling of *State ex rel. Badami v. Gaertner* was excessive. Instead, *Robinson* should be narrowly read to affirm the principle that co-employees are not immune under workers' compensation statutes for breaching a personal duty of care owed to another.

### B. *Robinson's Temporal and Jurisdictional Scope*

Many Missouri litigants are and will continue to be in the following unfortunate position: (1) the circumstances giving rise to their lawsuit occurred *after* the legislature's change to strict construction in 2005; (2) the litigation for their case occurred during or after the substantive legal change expounded by *Robinson v. Hooker*; and (3) the action which gave rise to their lawsuit arose *before* any legislative fix that could remedy the *Robinson* decision.<sup>212</sup>

The general rule concerning a judicial decision is that it has retroactive effect, thus applying to both future events as well as to past occurrences.<sup>213</sup> In addition, the general rule concerning statutes is that they are to be applied prospectively.<sup>214</sup> Viewing these two rules in conjunction creates a very dire state of affairs for employees in Missouri. If the court's decision in *Robinson* is applied retroactively in accordance with the general rule, every worker injured by a co-employee's negligence since the adoption of the 2005 amendments to the Act may sue that co-employee at common law, regardless of the nature of the breach.<sup>215</sup> Further, even if the Missouri legislature enacts a bill that expressly provides for co-employee immunity, such an enactment will be prospective. Therefore, the legislative fix would provide immunity only for those co-employees whose negligent act caused an injury after the amendment became effective. The combination of judicial retroactivity and legislative prospectivity traps co-employees in the following liability limbo: co-employees who negligently performed their employer's duty to provide a safe work environment and injured a fellow employee will be amenable to

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211. See *Bender v. Kroger Grocery & Baking Co.*, 276 S.W. 405, 406 (Mo. 1925).

212. See *supra* Part IV.

213. *Summers v. Summers*, 701 S.W.2d 720, 722 (Mo. 1985) (en banc) (the seminal case on the matter).

214. See *Stark v. Mo. State Treasurer*, 954 S.W.2d 645, 647 (Mo. App. W.D. 1997). An exception exists to prospective-only application where the statute expressly provides for retrospective application. *Id.* The proposed bills in the Senate and House do not contain any express provisions, so it is likely that any legislative action would be prospective. See *supra* Part IV.

215. That is not to say that an injured employee is still not subject to Missouri's five-year statute of limitations. MO. REV. STAT. § 516.120 (2000).

civil action if the injury occurred after August 28, 2005,<sup>216</sup> and before the legislative fix. This creates a situation where some co-employee defendants will be arbitrarily liable just by virtue of unfortunate timing.

The scope of the *Robinson* decision must be qualified somewhat by noting that, at this point in time, it is only binding precedent for cases filed in the Western District of Missouri; just because the Supreme Court of Missouri denied transfer, “[t]hat denial does not necessarily denote approval of the decision.”<sup>217</sup> This may in fact be more of an academic distinction than a practical one because the other Courts of Appeals may find the Western District’s holding persuasive and convincing. And more certainly, plaintiffs’ attorneys, seeing that at least one court is sympathetic to the argument, will file claims based on the *Robinson* holding even in cases filed in other districts.<sup>218</sup>

As discussed, a judicial decision has retroactive effect, so the Supreme Court of Missouri could always remedy the current situation by expressly overruling the rationale employed in *Robinson v. Hooker*. However, there exists some uncertainty as to whether the Supreme Court of Missouri would rule on such a case. Directly following the *Robinson* decision, commentators almost universally accepted that the Supreme Court of Missouri would surely grant transfer and either affirm the Western District’s ruling or expressly reject the court’s rationale and reinstate co-employee immunity to its appropriate level.<sup>219</sup> Surprisingly, the court denied transfer, and *Robinson* became

216. August 28, 2005 was the effective date of the 2005 workers’ compensation amendments. CARL MUELLER, REVIEW OF THE NEW WORKERS’ COMPENSATION LAW 3 n.2 (2005), available at <http://www.kcmba.org/PDF%20Files/WorkersCompLawReview.pdf>.

217. *Tatum v. St. Louis Metro Delivery, Inc.*, 887 S.W.2d 679, 683 (Mo. App. E.D. 1994) (illustrating a similar circumstance in which the Western District interpreted a term in the workers’ compensation statute, and the interpretation was expressly declined by the Eastern District Court of Appeals). That being said, there is a school of thought that while the Missouri appellate court system contains three separate courts, the Courts of Appeals are all technically one court. Ryan Westhoff, *Missouri’s One and Only Court of Appeals*, 64 J. MO. B. 294, 294 (2008). Thus, the decision of one court is supposed to be binding on the other. *Id.* at 295, 298 (but also noting that “there are several opinions from the Court of Appeals that flatly reject precedent arising out of other districts when the facts are not significantly distinguishable”).

218. See, e.g., Brief of Plaintiff/Appellant Camille Gerstner, by and through Her Next Friend, Kirsten Luster at 23, *Gerstner v. Matheny*, 347 S.W.3d 550 (Mo. App. E.D. 2011) (No. ED95881), 2011 WL 1161448, at \*23 (trying to utilize the *Robinson* decision in the Eastern District Court of Appeals to show that “[a]fter *Robinson v. Hooker*, there is no immunity for a co-employees [sic] breach of duty”).

219. See, e.g., Kyle Roehler, *Be Careful what You Ask for: Missouri Employees Are No Longer Protected from Co-Employee Tort Liability Because of Tort Reform’s Amendments to the Workers’ Compensation Act*, COVERED EVENTS (DRI, Chicago, Ill.) 2010, available at <http://clients.criticalimpact.com/newsletter/newslettercontent>

binding.<sup>220</sup> While it is difficult to opine on the exact reason for the court's decision to deny transfer, it is reasonable to assume the court found the facts surrounding *Robinson* to be an inappropriate vehicle to make a ruling on the law. The negligent act in *Robinson* involved a breach of a personal duty.<sup>221</sup> The Supreme Court of Missouri may wait to accept a case that actually provides for a civil claim to be brought against a co-employee for a failure to provide a safe workplace.

Considering the nature of the legislative response, absent involvement by the Supreme Court of Missouri, a vast number of Missouri workers will remain subject to the current anomalous approach to co-employee liability despite the legislature's patchwork.

### C. *The Unintended Consequences of Strict Interpretation*

In 2005, the legislature amended Missouri's workers' compensation statute to eliminate the requirement of liberal construction and mandated that any courts shall construe the provisions of the Act strictly.<sup>222</sup> The amendment was meant to limit the prior application of the Act in which courts broadly interpreted the Act to extend benefits to the largest possible class and resolved any doubts as to the right of compensation in favor of the employee.<sup>223</sup> Without even attempting to take a stance as to the political correctness of the legislature's switch to the strict interpretation of the workers' compensation statute,<sup>224</sup> a significant question still exists as to its practical effectiveness. Assuming the ends are justified, have the means actually been successful?

Upon first glance, the legislative goal of creating a favorable business environment seems to have taken place. In 2011, based on the forecast that the cost of workers' compensation claims in Missouri would decrease by

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show1.cfm?contentid=2576&id=414 (stating that “[o]ne would expect the Missouri Supreme Court to have substantial interest in this issue and accept transfer of the *Robinson* case”); see also David T. Ahlheim, *Court of Appeals Eliminates Protection for Co-Employees in Civil Suits from Workplace Accidents*, CAC ADVISOR MO. AND ILL. UPDATES (Childress Ahlheim Cary LLC, St. Louis, Mo.), Aug. 2010, at 5 (*Robinson* “is a dramatic opinion and is clearly going to be heard by the Supreme Court. Indeed, the Western District’s opinion would contradict even the most recent Supreme Court decisions on the issue.”); Tomlinson, *supra* note 134, at 1. (“Hopefully, the Missouri Supreme Court will realize what a Pandora’s box the *Robinson* verdict has opened and will reverse the appellate court’s ill-conceived decision.”).

220. 323 S.W.3d 418, 418 (Mo. App. W.D. 2010), *transfer denied*, No. SC91216, 2010 Mo. LEXIS 291 (2010) (Mo. Nov. 16, 2010).

221. See *supra* note 185 and accompanying text.

222. See *supra* note 133 and accompanying text.

223. See *supra* note 132 and accompanying text.

224. For authority critical of the amendments, see Mo. Alliance for Retired Ams. v. Dep’t of Labor & Indus. Relations, 277 S.W.3d 670, 684-86 (Mo. 2009) (en banc) (Teitelman, J., dissenting).

eleven percent, insurance regulators recommended that insurance providers lower employer's rates accordingly.<sup>225</sup> Also, consider that the amendments requiring strict construction occurred in 2005, and that 2011 was the fifth year in a row that experienced a decrease in recommended workers' compensation rates.<sup>226</sup> Based on these figures, it was projected that for 2011, Missouri employers avoided paying as much as eighty million dollars in workers' compensation premiums.<sup>227</sup>

However, given how favorable the current workers' compensation environment is to employers, there may be some backlash, which *Robinson v. Hooker* arguably represents. Some commentators have suggested that the *Robinson* decision was the product of a judicial pushback in response to the heavy-handed legislative reform to create a more favorable business environment by limiting workers' compensation costs.<sup>228</sup> The fact that the *Robinson* court did not need to base its decision on a definitional dichotomy between employer and employee and could have much more easily followed established case law tends to support this contention. And while *Robinson v. Hooker* has garnered the most attention, it is not the only case to use strict construction under workers' compensation to allow an employee to bring a civil action for workplace injuries.

For example, in *Franklin v. Certain-Teed Corp.*, a group of injured employees filed a class action lawsuit over workplace asbestos exposure.<sup>229</sup> The defendant employers moved to dismiss the case, arguing that asbestos exposure is an "occupational disease" under the Act, and, therefore, workers' compensation is the exclusive remedy.<sup>230</sup> The plaintiffs countered by asserting that after the 2005 amendments calling for strict construction, occupational diseases are no longer under the province of the workers' compensation

225. David Kerr, *Falling Workers' Comp Rates Bode Well for Missouri*, COLUMBIA DAILY TRIB., Feb. 6, 2011, at D3, available at <http://www.columbiatrib.com/news/2011/feb/06/falling-workers-comp-rates-bode-well-for-missouri/>.

226. *Id.*

227. *Missouri Recommends 11% Drop in Workers' Comp Insurance Rates*, INS. J., Dec. 16, 2010, available at <http://www.insurancejournal.com/news/midwest/2010/12/16/115742.htm>.

228. Tomlinson, *supra* note 134, at 1 ("The seemingly unnecessary judicial activism expressed in the *Robinson* decision is likely explained by the growing war over workers' comp between the judiciary and the General Assembly.").

229. See *Missouri Workers' Compensation Law Update*, SIMON & HUDSON, P.C. (Apr. 15, 2010, 4:33 AM), <http://nwcndn.com/wordpress/?p=603>. The defendants initially filed a summary judgment motion which was denied without explanation. *Unintended Results of the New Missouri Workers Compensation Act*, INJURED WORKERS' RESOURCE BLOG (Feb. 18, 2010), <http://workinjurylawblog.com/2010/02/18/unintended-results-of-new-work-comp-act/#>. The defendants then appealed that denial to the Missouri Court of Appeals for the Eastern District, which allowed the ruling to stand. *Id.* The trial judge then denied the motion to dismiss and ruled on the jurisdictional issue. See *id.*

230. *Missouri Workers' Compensation Law Update*, *supra* note 229.

system.<sup>231</sup> The term “accident” as used in the Act means “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.”<sup>232</sup> Accordingly, the trial court judge noted that occupational diseases, which by nature occur over a period of time, do not seem to be covered under workers’ compensation, and, thus, a civil tort claim is available.<sup>233</sup>

Similarly, in *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, the Missouri Court of Appeals for the Western District – the same court that decided *Robinson v. Hooker* – was also presented with the question of whether an employee’s asbestos exposure claim fell within the exclusive-remedy provision of Missouri’s workers’ compensation law.<sup>234</sup> In *Cook*, just as the trial court noted in *Franklin*, the court held that repeat exposure claims do not fall under the definition of “accident” as provided under the Act, and, therefore, section 287.120’s exclusivity provisions do not apply to occupational disease claims.<sup>235</sup> In so holding, the court expressly acknowledged that its conclusion may be in conflict with the Missouri legislature’s intent in amending the Act to provide for strict construction.<sup>236</sup> However, the court stated that “[w]hatever our belief as to the 2005 legislature’s ‘true’ intent, this Court ‘cannot rewrite the statute’ to effectuate that intent.”<sup>237</sup>

Although the legislature intended to restrict workers’ benefits under the Act – an intention that even the courts recognize – strict construction has led to the unintended result of allowing civil claims for occupational diseases. Thus, employers are subject to workers’ compensation damages, irrespective of fault, for workplace injuries covered under the Act *and* are still confronted with the possibility of paying out the full measure of common-law damages for workplace injuries that strict construction deems to be outside the Act.

Not so surprisingly, during the last legislative session, the Missouri legislature also included a provision in its proposed amendments to the Act which would have once again made workers’ compensation the exclusive remedy for occupational diseases.<sup>238</sup> The reactive legislative amendments

231. *Id.*

232. MO. REV. STAT. § 287.020 (2000).

233. See *Unintended Results of the New Missouri Workers Compensation Act*, *supra* note 229.

234. 353 S.W.3d 14, 16 (Mo. App. W.D. 2011).

235. *Id.* at 14, 30.

236. *Id.* at 26-27.

237. *Id.* at 27.

238. S.B. 8, 96th Gen. Assemb., Reg. Sess. (Mo. 2011). The bill provided, in relevant part:

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 **or by**

may be the appropriate immediate response to the courts' use of strict construction to reduce the Act's exclusivity provision. However, the willingness of other Missouri courts to use strict construction to reduce the Act's exclusive remedy provision indicates that *Robinson* is not just an isolated incident and is truly indicative of a judicial backlash. Thus, the legislature may have to revisit the issue of strict construction and not just treat the symptom but also cure the cause.

## VI. CONCLUSION

The court in *Robinson v. Hooker* interpreted Missouri's workers' compensation statute in a manner that provides absolutely no co-employee immunity under its provisions. By doing so, the court diverged from every accepted approach to co-employee immunity in not only Missouri but also the rest of the nation. The holding forces employers to bear all of the cost of workers' compensation with potentially none of the protection. Thus, the very foundation of workers' compensation has been uprooted.

To complicate matters, any legislative response is likely only to apply prospectively. Few would disagree with the fact that *Robinson's* holding is doctrinally and practically problematic. But ultimately a large amount of co-employees will still be personally liable for actions that have never previously given rise to liability. Hopefully the Supreme Court of Missouri will hear a case calling into question the *Robinson* holding, find convincing arguments akin to those presented in this Note, and expressly overrule the decision.

In the broader context, given the fact that the fallout from *Robinson* is still in its infancy, it is impossible to quantify the costs its decision will impose on the workers' compensation system. If the floodgates have truly opened, expensive legal costs, potentially high common law damage awards, and overall uncertainty are sure to follow. This is ironic considering that over eighty years ago, workers' compensation was enacted to remedy some of these very same concerns. Ultimately, the unintended consequences of strict interpretation may swallow the intended effect.

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**occupational disease** arising out of and in the course of the employee's employment.

*Id.*



