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Have Your Cake and Eat It Too (Unless You Are Danny Brock): The Irony of Missouri's Co-Employee Liability Statute

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NOTE

Have Your Cake and Eat It Too (Unless You Are Danny Brock): The Irony of Missouri's Co-Employee Liability Statute

Brock v. Dunne, 637 S.W.3d 22 (Mo. 2021).

Taylor M. Harrington[*]

I. INTRODUCTION

April 30, 2013, started like any other day for Danny Brock.[1] Like each day before, he woke up, drove to work, and clocked in.[2] A few hours later, he looked down to see his thumb completely detached from his hand, barely hanging on by the skin.[3] When the injury occurred, Brock was following direct orders from his supervisor, Mark Edwards.[4] Citing safety concerns, Brock opposed the request.[5] But Edwards demanded that Brock proceed.[6] Fearing loss of employment, Brock did as he was told.[7] As predicted, injury ensued.[8] Within seconds, Brock's hand was crushed.[9] Brock underwent three surgeries and sustained permanent nerve and structural damage to his hand.[10] Today, Brock still suffers from chronic pain and is permanently restricted from doing any heavy labor.[11]

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[1] *See* Brock v. Dunne, 637 S.W.3d 22, 25 (Mo. 2021) (en banc).

[2] *Id.*

[3] Brock v. Dunne, 2018 WL 4309412, at *2 (Mo. Ct. App. 2018).

[4] *Brock*, 637 S.W.3d at 25.

[5] *Id.* at 26.

[6] *Id.*

[7] *Id.* at 25.

[8] *Id.*

[9] *Id.* at 25–26.

[10] *Id.*

[11] *Id.*

Day in and day out, Missourians like Brock attend work with the reasonable expectation of a safe working environment. On occasion, those standards are not realized. By no fault of the employer, an employee may be injured by the actions of a co-employee. Although the Missouri Workers' Compensation Act (the "Act") was adopted to serve as the exclusive remedy for workplace injuries, it does not operate as an exclusive remedy when injuries arise from the affirmative negligent acts of a co-employee.[12] Section 287.120.1 of the Revised Missouri Statutes expressly states this exception.[13] The statute, however, is riddled with confusing and inherently contradictory language.[14]

In *Brock v. Dunne*, the Supreme Court of Missouri interpreted section 287.120.1 for the first time.[15] Claiming to adhere to principles of strict construction, the court held that section 287.120.1 requires a plaintiff to prove that the co-employee acted *both* negligently (meaning with heedlessness) and purposefully (meaning with a conscious object to injure the plaintiff).[16] A first-year law student immediately recognizes the clear contradiction. *Brock*'s holding highlights the irony of the statute's plain language and poses a paradoxical question about the statute's legislative intent: did the General Assembly really expect a co-employee to avoid liability only if they acted both negligently and purposefully? Or did the General Assembly, more logically, seek to extend co-employee immunity unless the co-employee engaged in an act that constituted affirmative negligence, as opposed to mere passive negligence? Had the *Brock* court determined the latter, the court would have rendered meaningful section 287.120.1 in its entirety, in accord with its duty to strictly construe the Act. However, the Supreme Court of Missouri expressly declined to adopt such a holding, exasperating the statute's conflicting language and violating its duty to strictly construe section 287.120.1.[17]

Part II of this Note first explores the facts and holding of *Brock v. Dunne*. Next, Part III analyzes the legal background surrounding the general principles of statutory interpretation, the Missouri Workers' Compensation Act, and the history of co-employee liability in Missouri.

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[12] State *ex rel.* Taylor v. Wallace, 73 S.W.3d 620, 622 (Mo. 2002) (en banc) (overruled on other grounds); *Brock*, 637 S.W.3d at 28.

[13] MO. REV. STAT. § 287.120.1 (2022).

[14] *See id.* (emphasis added). Any employee of such employer shall not be liable for any injury. . . except that an employee shall not be released from liability for injury. . . if the employee engaged in an *affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. Id.*

[15] *Brock*, 637 S.W.3d at 28.

[16] *Id.* at 29. *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 28 161 (5th ed. 1984). In most cases, these [negligent] injuries are caused by "heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act." *Id*. at 169.

[17] *Id.*

Part IV then discusses the majority and dissenting opinions of the Supreme Court of Missouri in *Brock*. Finally, Part V analyzes the soundness of the majority's opinion, as applicable under principles of strict construction. This Note argues that the Supreme Court of Missouri failed to apply common principles of strict construction when interpreting Missouri Revised Statute section 287.120.1 and suggests that policy considerations provide one possibility for the court's deviation from the rule. This Note concludes, however, that the court's potential policy considerations are not viable rationales for the court's departure from well-established principles of strict construction.

II. FACTS AND HOLDING

In April 2013, appellee Danny Brock ("Brock") sustained an injury during the course of his employment at JMC Manufacturing ("JMC").[18] At the time of the injury, Brock worked on a lamination line under the supervision of Mark Edwards ("Edwards").[19] Work on the lamination line required employees to use a high-pressure laminating machine manufactured by Black Bros. Co.[20] The machine's design created a pinch point, where objects could easily become stuck if the machine's safety guard was removed.[21] JMC employees often needed to detach the guard to remove excess glue that built up on the bottom rollers.[22]

On the day of the injury, Brock, Edwards, and two other employees used the laminating machine to apply glue to pieces of particle board.[23] While feeding the boards through the machine, Edwards noticed that glue was dripping onto the bottom rollers.[24] Edwards removed the safety guard, leaving the pinch point exposed, and instructed Brock to clean the rollers.[25] At the time of Edward's request, the machine was still on.[26] Brock expressed concerns about the safety of cleaning the machine in this state.[27]

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[18] *Id.* at 25.

[19] *Id.*

[20] *Id.* This machine is used to apply glue to wood pieces that are fed through the machine. Brock v. Dunne, No. ED 105739, 2018 WL 4309412, at *1 (Mo. Ct. App. 2018).

[21] *Id.* at *2. The safety guard sought to minimize the risk of injury by blocking the "pinch point" created where the rollers meet each other. *Brock*, 637 S.W.3d at 25. However, the guard could still be removed from its position over the "pinch point" while the machine was running to provide access to the bottom rollers. *Id.*

[22] Appellant's Substitute Brief at *6–7, Brock v. Dunne, 637 S.W.3d 22 (Mo. 2021) (en banc) No. SC97542, 2019 WL 1576416.

[23] *Brock*, 637 S.W.3d at 25.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 26.

Upon Edwards' dismissal of this concern, Brock followed Edwards' instructions and cleaned the rollers.[28] Using a wet towel, Brock squeezed water onto the rollers and cleaned them as they turned.[29] As the rollers turned, the towel got caught and pulled Brock's hand into the pinch point, crushing it.[30] After three surgeries, a doctor informed Brock that he had sustained irreparable damage to his hand and that he would be subject to chronic pain.[31] Because of the injury, Brock is permanently precluded from doing the type of work he performed at JMC.[32]

Following the injury, Brock applied for and received workers' compensation benefits.[33] Brock also filed a negligence suit against Edwards, pursuant to Missouri Revised Statute section 287.120.1.[34] Edwards died before trial and Peter Dunne was substituted as a defendant ad litem.[35] Brock claimed that Edwards negligently caused Brock's injuries when Edwards: (1) removed the safety guard from the machine; (2) ordered the machine to be cleaned while the machine was in operation and the guard was removed; (3) failed to warn Brock of the machine's dangers when the guard was removed, despite being aware of such; and (4) disregarded complaints as to the unsafe condition of the machine and instructed Brock to clean it without the safety guard.[36]

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[28] *Id.* at 25–26.

[29] *Id.* at 25.

[30] *Id.*

[31] *Id.* at 25–26.

[32] *Id.*

[33] *Id.* at 26.

[34] *Id.* Section 287.120.1 of the Revised Missouri Statutes provides that "[a]ny employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter…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." MO. REV. STAT. § 287.120.1 (2017). Thus, section 287.120.1 allows for an injured co-employee to collect from both worker's compensation and a liable co-employee. *Id.* Brock also brough a products liability suit against Black Bros. Co., which was eventually settled. Brock v. Dunne, No. ED 105739, 2018 WL 4309412, at *2 (Mo. Ct. App. 2018).

[35] *Brock*, 637 S.W.3d at 26. "A personal representative of the estate of a wrongdoer upon the death of such wrongdoer . . . [shall] be known as a defendant ad litem. The defendant ad litem when so appointed shall serve and act as the named party defendant in such actions in the capacity of legal representative of the deceased wrongdoer and such appointment and any proceedings had or judgment rendered in such cause after such appointment shall be binding on the insurer of such deceased wrongdoer to the same extent as if a personal representative had acted as the legal representative of such deceased wrongdoer in such cause of action." MO. REV. STAT. § 537.021 (2022).

[36] *Brock*, 637 S.W.3d at 26.

At trial, Dunne filed a motion for a directed verdict.[37] The court overruled the motion.[38] Subsequently, the jury returned a $1.06 million verdict in Brock's favor.[39] Dunne then filed a motion for judgment notwithstanding the verdict, which was similarly overruled.[40] Dunne appealed, and the Missouri Court of Appeals for the Eastern District affirmed.[41] The Supreme Court of Missouri granted transfer.[42] As a matter of first impression, the court held that section 287.120.1 requires a defendant to (1) engage in "affirmative conduct that constitutes at least negligence," and (2) "act with the conscious object of increasing the risk of injury to a plaintiff or someone else."[43] Applying this interpretation to the facts presented by Brock, the court concluded that while Brock made a submissible case of common law negligence, he did not present sufficient evidence that Edwards acted with the conscious object to increase the risk of injury toward Brock.[44] Thus, the court held that Brock failed to prove his claim of negligence under section 287.120.1 and reversed the lower court's judgment.[45]

III. LEGAL BACKGROUND

This Section begins with a brief discussion of the guiding principles, theories, and tools of statutory interpretation commonly employed by the judiciary. It then gives an overview of the history and enactment of the Missouri Workers' Compensation Act, the rationale behind the Act's adoption, the theory of the Act as an exclusive remedy, and the statutory interpretation requirements under the Act. The Section concludes with a discussion of the history of co-employee liability for workplace injuries at common law and under the Act.

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[37] *Id.* On his motion for directed verdict, Dunne argued that "(1) Brock failed to make a submissible case of negligence under the common law; (2) section 287.120 released Edwards from liability because Edwards' conduct did not constitute an 'affirmative negligent act that purposefully and dangerously caused or increased the risk of injury'; [and] (3) Edwards' acts were within the scope of JMC's nondelegable duties." *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* The court reduced the jury's verdict to $873,000 after accounting for the Black Bros. Co. settlement and the 10 percent fault attributed to Brock. *Id.*

[41] Brock v. Dunne, No. ED 105739, 2018 WL 4309412, at *20 (Mo. Ct. App. 2018).

[42] *Brock*, 637 S.W.3d at 26.

[43] *Id.* at 30.

[44] *Id* at 30, 33. Because the purpose of this Note does not hinge on the rationale supplied by the court in coming to this determination, further discussion of the majority's holding, as applied to the specific facts of the case, have been omitted.

[45] *Id*.

A. Guiding Principles of Statutory Interpretation and Strict Construction

In the 1803 case of *Marbury v. Madison*, Chief Justice John Marshall stated that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[46] When it comes to statutory interpretation, however, the court's role in "saying what the law is" often plays second fiddle to the General Assembly's intent as drafters of the law.[47] For decades, judges have disagreed on how to best carry out legislative intent.[48] Today, there are two predominant theories of statutory interpretation: purposivism and textualism.[49]

Purposivists believe that judges should construe statutes in accordance with the legislature's intended purpose.[50] As such, purposivists first ask: what problem did the legislature intend to solve by enacting this statute?[51] The second question then contemplates whether the court's proposed interpretation fits that purpose.[52] In contrast, textualists commonly focus exclusively on the text.[53] Textualists believe that legislative purpose can, and should be, evident in the text itself.[54] Textualism relies on the assumption that a court should look for statutory meaning as an "objectively reasonable user of the words" would.[55] Most judges, however, do not identify as pure purposivists or textualists.[56] Rather, judges often employ elements from both theories.[57] In doing so, courts have adopted a number of interpretive tools that reflect this mixed-bag approach to statutory interpretation.[58] The "plain meaning" rule, a canon of textualism and strict construction, is often a court's first stop on its duty for statutory interpretation, regardless of ideological orientation.[59]

The plain, or ordinary, meaning rule assumes that a word used in a statute reflects its "popular meaning," as commonly understood by a

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[46] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[47] CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 4 (2022).

[48] *Id.* at 2.

[49] *Id.*

[50] ROBERT A. KATZMANN, JUDICIAL INTERPRETATION OF STATUTES, CONG. RSCH. SERV. 31 (Oxford Univ. Press ed., 2014).

[51] CONG. RSCH. SERV. *supra* note 47, at 13.

[52] *Id.*

[53] *Id.* at 14.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 17.

[57] *Id.*

[58] *Id.* at 21.

[59] *Id.* at 22.

reasonable person.[60] This is true unless there is evidence that the term has "specialized meaning in the law."[61] When applying the plain meaning rule, judges commonly turn to dictionaries to help inform their understanding of a word's normal usage.[62] While courts must give words their plain and ordinary meaning when possible and refrain from statutory construction when the meaning is clear,[63] courts may look outside the plain meaning when that meaning would lead to an "absurd result defeating the purpose of the legislature."[64] However, when searching beyond the plain meaning, courts are often limited in their pursuit by the imputation rule.

Missouri courts have stated that a court's interpretation cannot impute additional words into a statute, omit words, or render words meaningless.[65] Rather, the court must give each word separate and individual meaning.[66] This is particularly true under principles of strict construction.[67] In *Vocational Services, Inc. v. Developmental Disabilities Resource Board*, the Missouri Court of Appeals interpreted section 205.968 of the Missouri Revised Statutes,[68] which addressed the establishment and operation of county sheltered workshops.[69] Specifically, section 205.968 permitted the establishment and operation of "sheltered workshop[s] . . . residence facilities, or related services, for the care or employment, or both, of persons with a disability."[70] In *Vocational Services*, the parties disagreed on the meaning of the term "related service" as used in the statute,[71] and the statute did not define the term.[72] The Development Disabilities Board contended that "related services" referred to services related to the care and employment of the "handicapped."[73] Meanwhile, Vocational Services contended that "related services" included only services directly related to the operation of sheltered workshops and residential facilities.[74] The court rejected the Development

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[60] *Id.*

[61] *Id.*

[62] *See* Craig A. Sullivan, *Statutory Construction in Missouri*, 59 J. MO. B. 120 (2003).

[63] *Id.* at 120.

[64] Roland v. St. Louis City Bd. of Election Comm'rs, No. ED 106192, 2019 WL 927466, at *2 (Mo. Ct. App. 2019).

[65] Sullivan, *supra* note 62, at 122.

[66] *Id.*

[67] *Id.* at 123.

[68] MO. REV. STAT. § 205.968 (1969).

[69] Vocational Servs., Inc. v. Dev. Disabilities Res. Bd., 5 S.W.3d 625 (Mo. Ct. App. 1999).

[70] MO. REV. STAT. § 205.968 (1969).

[71] *Vocational Servs.*, 5 S.W.3d at 628.

[72] *Id.* at 630.

[73] *Id.* at 629.

[74] *Id.* at 630.

Disabilities Board's interpretation because such an interpretation would have rendered the term "related" meaningless.[75] The court stated that if the General Assembly intended to allow funding for all services for the care and employment of the "handicapped," "then it could have said 'sheltered workshops, residence facilities, or services for the care or employment, or both, of the handicapped.'"[76] Because the General Assembly chose not to do that, the court would not go so far as to render a statutory term superfluous.[77] The plain and ordinary meaning rule and imputation rule play a critical role in how the court is required to interpret the Missouri Workers' Compensation Act.

B. Missouri Workers' Compensation: Missouri's Grand Bargain

In 1926, Missouri enacted workers' compensation laws as the "grand bargain" between employers and workers.[78] Under this supposed bargain, employers agreed to compensate employees for work-related injuries in exchange for the employer's immunity for civil liability relating to the injury.[79] Thus, regardless of fault, liability, or defense, employers must compensate employees for workplace injuries, and in turn, employees must refrain from suing their employer.[80]

The origins of this legislation stem back to the early twentieth century.[81] Workers' compensation laws developed "in response to dissatisfaction with the tort system as a method of compensating workers for occupational injuries, illnesses, and deaths,"[82] which allowed the court to order an employer to compensate an injured employee only if the employee met her burden of proving the employer's negligence.[83] Agreeing that this system was burdensome and unpredictable, both workers and employers concluded that each party stood to gain from the Act's adoption.[84] The workers' compensation system was intended to

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] CONG. RSCH. SERV., R44580, WORKERS' COMPENSATION: OVERVIEW AND ISSUES 24 (2022) (Missouri's General Assembly passed a workers' compensation law in 1919, but it failed to gain enough votes in a statewide referendum to be enacted. Missouri's workers' compensation law was enacted through a statewide referendum in 1926.).

[79] *Id.* at 2.

[80] *Id.*

[81] *Id.*

[82] *Id.* at Summary.

[83] *Id.* at 2.

[84] *Id.* at 3.

totally supplant the tort system, not to merely supplement it.[85] Thus, the provisions of the workers' compensation statutes act as an exclusive remedy for an employee's workplace injury and prohibit civil causes of action against employers.[86] Academics argue that exceptions to the Act's provisions will erode the integrity of the system.[87]

Workers' compensation laws initially adopted in Missouri instructed that all provisions of the Act were to be "liberally construed with a view to the public welfare."[88] Applying this standard, courts broadly interpreted workers' compensation laws and extended benefits to the "largest possible class," resolving any doubts as to the right of compensation in favor of employees.[89] To rebuff this more liberalized construction, the Missouri General Assembly amended the Act in 2005 to provide that all provisions be strictly construed.[90] Under this standard, a provision may be given "no broader application than is warranted by its plain and unambiguous terms" and nothing is to be presumed that is not expressed.[91] The rule of strict construction does not require that a statute be construed in a "narrow or stingy manner," but rather that everything not clearly within the scope of the language shall be excluded from its operation.[92] Missouri's adoption of workers' compensation laws, common law interpretations of the Act's provisions, and subsequent amendments to the Act have resulted in significant changes in the viability of claims against co-employees for workplace injuries.[93]

C. History of Co-Employee Immunity: Before and After the Missouri Workers' Compensation Act

Before the Act's adoption, an employer was not liable for injuries caused to an employee by a co-employee's negligent acts.[94] This was true despite the employer's nondelegable duty to provide a reasonably safe

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[85] 1 MODERN WORKERS COMPENSATION § 102:1, Westlaw (database updated November 2022).

[86] *Id.* (The workers' compensation remedy is exclusive, absent a statutory or judicial exception, for all work-related claims).

[87] Stephen A. Markey III, *Exclusive Remedy Under Workers' Compensation: An Update on Exceptions to the General Rule*, 17 UNIV. BALT. L. F. 4, 4 (1987).

[88] Bass v. Nat'l Super Mkts., Inc., 911 S.W.2d 617, 619 (Mo. 1995) (en banc).

[89] Robinson v. Hooker, 323 S.W.3d 418, 423 (Mo. Ct. App. 2010).

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Robert T. Plunkert, *A Practitioner's Guide to the "Something More" Doctrine*, 70 J. MO. B. 92, 92 (2014).

[94] State *ex re.* Badami v. Gaertner, 630 S.W.2d 175, 177 (Mo. Ct. App. 1982).

workplace.[95] Many courts saw this rule as unduly harsh and, as a result, created the dual capacity doctrine.[96]

Under the dual capacity doctrine, a co-employee may act as either a "vice-principal" or as a "fellow servant" for the employer.[97] A co-employee functions as a vice-principal when the co-employee is assigned and performs the employer's nondelegable duties.[98] By contrast, a co-employee functions as a fellow servant when the co-employee is not acting in pursuit of the employer's nondelegable duties.[99] When acting as a fellow servant, a co-employee remained independently liable for her negligent acts.[100] If the co-employee was acting as a vice-principal, however, the employer faced liability for the co-employee's negligent acts.[101] Notwithstanding the 1926 adoption of the Missouri Workers' Compensation Act, the nondelegable duty and dual capacity doctrines remain viable doctrines for establishing employer liability for workplace injuries.[102]

Initial adoption of the Act was silent as to co-employee liability.[103] As a result, in *State ex rel. Badami v. Gaertner*, the Missouri Court of Appeals for the Eastern District judicially extended immunity to co-employees under the Act.[104] In *Badami*, the court held that a co-employee could not be sued unless the plaintiff showed that the co-employee had done "something more" than breach the employer's duty to provide a safe workplace.[105] This became known as the "something more" test.[106] While the court did not expressly lay out a test for what would constitute "something more," the court suggested that it required at least an

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[95] *Id.* A nondelegable duty is a legal duty which cannot legally be delegated. If delegated, the principal remains liable for and breach of the duty. Nondelegable duties are also known as non-assignable duties or obligations.

[96] Boston v. Kroger Grocery & Baking Co., 320 Mo. 408, 415–16, 7 S.W.2d 1006, 1009 (1928); Radtke v. St. Louis Basket & Box Co., 229 Mo. 1, 129 S.W. 508, 514 (1910).

[97] Wall v. Philip A. Rohan Boat, Boiler & Tank Co., 62 S.W.2d 764, 767 (Mo. 1933) (en banc); Logsdon v. Duncan, 293 S.W.2d 944, 949 (Mo. 1956).

[98] *Wall*, 62 S.W.2d at 767; *Logsdon*, 293 S.W.2d at 949.

[99] *Wall*, 62 S.W.2d at 767; *Logsdon*, 293 S.W.2d at 949. An employee is engaging in nondelegable duties when they are merely doing productive work of the business. *Id.*

[100] Peters v. Wady Industries, Inc., 489 S.W.3d 784, 791 (Mo. 2016).

[101] *Id.* at 796.

[102] *Id.* at 800.

[103] Brock v. Dunne, 637 S.W.3d 22, 27 (Mo. 2021) (en banc) (quoting Peters v. Wady Indus., Inc., 489 S.W.3d 784, 790 (Mo. 2016) (en banc)).

[104] *Badami*, 630 S.W.2d at 180–81.

[105] *Id.* at 180.

[106] *See* Robinson v. Hooker, 323 S.W.3d 418, 423 (Mo. Ct. App. 2010).

"affirmative act that caused or increased the risk of injury" and explicitly stated that liability could be determined only on a case-by-case basis.[107]

In 2012, twenty-eight years after *Badami*, the Missouri Court of Appeals for the Western District invalidated the something more test.[108] In *Robinson v. Hooker*, the court looked to the General Assembly's 2005 amendments requiring strict construction of the Act's provisions and stated that the test needed to be reevaluated in accordance with strict construction principles.[109] Upon reevaluation, the court held that co-employees were not entitled to immunity under the Act, reasoning that the Act defined an "employer," and because a co-employee did not qualify as an employer, it could not be interpreted to extend immunity where the legislature did not provide.[110]

The General Assembly abrogated *Robinson* by subsequently amending section 287.120.1 of the Act to expressly extend immunity to co-employees.[111] But the legislature included an exception.[112] Section 287.120.1 provides that:

> Any employee of such employer shall not be liable for any injury . . . and . . . shall be released from all other liability. . . *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.[113]

Currently, co-employees are presumed immune from liability unless the plaintiff proves this exception under section 287.120.1.[114] *Brock v. Dunne* was the first case to interpret the statutory language of section 287.120.1.[115]

IV. INSTANT DECISION

In *Brock*, the Supreme Court of Missouri interpreted section 287.120.1's immunity exception for the first time.[116] Specifically, the court determined whether Brock presented sufficient evidence to prove that Edwards "engaged in an affirmative negligent act that purposefully

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[107] *Badami*, 630 S.W.2d at 180–81.
[108] *Id.*
[109] *Robinson*, 323 S.W.3d at 424.
[110] *Id.*
[111] MO. REV. STAT. § 287.120.1 (2017).
[112] *Id.*
[113] *Id.* (emphasis added).
[114] *Id.*
[115] Brock v. Dunne, 637 S.W.3d 22, 28 (Mo. 2021) (en banc).
[116] *Brock*, 637 S.W.3d at 28.

and dangerously caused or increased the risk of injury."[117] Claiming to adhere to common tools of statutory interpretation, the majority determined that section 287.120.1 required Brock to prove that Edwards (1) engaged in affirmative conduct that constituted at least negligence, and (2) acted with the conscious object of increasing the risk of injury to Brock or someone else.[118] Applying this standard, Brock clearly presented a submittable claim of negligence, fulfilling the first requirement.[119] However, the majority concluded that there was not sufficient evidence that Edwards acted with the conscious object.[120] The dissent questioned the majority's insertion of a "conscious object" standard, absent the requirement's existence in the statute's plain text.[121] In contrast, the dissent would have applied a different test that gave full effect to the plain language of section 287.120.1, which used the words "purposefully and dangerously" and not "conscious object."[122] Applying its own standard, the dissent would have held that there was sufficient evidence to meet the second requirement.[123]

A. Majority Opinion

The majority began its analysis by detailing the claims and procedural requirements arising under the statute.[124] In doing so, the majority determined that the amended statute did not preempt common law co-employee liability by statutorily extending liability to employees.[125] Rather, the court held that co-employees enjoy immunity under section 287.120.1, subject to the statute's exception.[126] If the exception does not apply, then common law co-employee liability doctrine governs.[127] It is the plaintiff's burden to prove that the exception applies.[128] However, because the statutory immunity provided by section 287.120.1 operates as an affirmative defense, Dunne held the initial burden of proving that Edwards was entitled to immunity as a co-employee of Brock.[129] After the court concluded that Dunne sufficiently met his burden, the court

[117] *Id.*; MO. REV. STAT. § 287.120.1 (2017).
[118] *Brock*, 637 S.W.3d at 30.
[119] *Id*.
[120] *Id.* at 29.
[121] *Id.* at 44–45. (Breckenridge, J., dissenting).
[122] *Id.*
[123] *Id.* at 43.
[124] *Id.* at 27.
[125] *Id*.
[126] *Id.* at 28.
[127] *See id.*
[128] *Id.* at 29.
[129] *Id.*

determined the burden shifted to Brock to prove that Edwards' actions came within the statutory exception.[130]

To evaluate whether Brock met his burden, the majority then interpreted section 287.120.1 and determined its statutory requirements.[131] To reach its conclusion, the majority relied almost exclusively on the plain meaning rule,[132] applying it to the following section 287.120.1 language. "[A]ffirmative negligent act that purposefully and dangerously caused or increased the risk of injury."[133] The majority focused on the General Assembly's inclusion of the word "purposefully."[134] The majority noted that, as defined by Webster's Third New International Dictionary, "purpose" is "something that one sets before himself as an object to be attained," a definition closely adopted in Missouri case law.[135] Based on this analysis alone, the majority concluded that section 287.120.1's exception applies when a co-employee plaintiff proves that a co-employee defendant (1) engaged in affirmative conduct that constituted at least negligence and (2) acted with the "conscious object of increasing the risk of injury" to the plaintiff or someone else.[136] Applying this standard, the court determined that Brock made a submissible case of common law negligence but concluded that there was not sufficient evidence that Edwards acted with the conscious object.[137] As such, the court held that the circuit court erred in overruling Dunne's motion for judgement notwithstanding the verdict.[138] Determining that Edwards was immune pursuant to section 287.120.1, the court reversed the circuit court's judgment and ordered judgment in favor of Dunne.[139] By contrast, the dissent argued that Brock made a submissible case warranting the application of section 287.120.1's exception.[140]

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[130] *Id.* at 28, 42.

[131] *Id.* at 28.

[132] *Id.* at 29–30.

[133] MO. REV. STAT. § 287.120.1 (2017).

[134] *Id.* at 28.

[135] An individual acts purposely "when it is the person's 'conscious object to engage in that conduct or to cause that result.'" *Id*. at 30 (citing Webster's New Int'l Dictionary 1847 (3d ed. 2002)) (quoting State v. Michaud, 600 S.W.3d 757, 760 (Mo. 2019) (en banc)).

[136] *Id.*

[137] *Id.* at 29.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 42. (Breckenridge, J., dissenting).

B. Dissenting Opinion

The dissent agreed with the majority that Brock made a submissible case of common law negligence.[141] However, the dissent argued that the intent requirement—i.e., that the act was done "purposefully and dangerously"—was shown through the surrounding facts and circumstances.[142] The dissent noted that, generally, an individual is found to intend "the natural and probable consequences" of their voluntary acts.[143] Under this standard, the dissent concluded that there was sufficient evidence that Edwards acted with the intent to increase the risk of injury.[144]

The dissent further critiqued the majority's departure from the court's primary duty—to interpret the statute in accordance with its plain and ordinary language.[145] The dissent highlighted the majority's failure to adhere to the strict construction requirement as mandated by section 287.800, and it disagreed with the majority's interpretation of the word "purposefully."[146] The dissent noted that "the words 'conscious object . . .' are not to be found anywhere in section 287.120.1" and concluded that any interpretation which includes those words must be well beyond the "plain and ordinary meaning" claimed by the majority.[147]

V. COMMENT

When the Missouri General Assembly amended the Act to require strict construction, it effectively instructed the judiciary to interpret the Act under a textualist approach. This requirement not only runs counter to the preferred mixed-method approach commonly used by judges,[148] but it also requires courts to use a highly criticized approach as an exclusive means of interpretation.[149] Textualist approaches, including the plain and ordinary meaning rule, are said to produce a "meaning plain only to the

[141] *Id.* at 42–43. (Breckenridge, J., dissenting). (Because the purpose of this Note does not hinge on the rationale supplied by the court in coming to this determination, further discussion of the majority's holding, as applied to the specific facts of the case, have been omitted.).

[142] *Id.* at 43.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 44.

[146] *Id.*

[147] *Id.*

[148] CONG. RSCH. SERV. *supra* note 47, at 25.

[149] *Id.* at 15.

eye of the beholder."[150] Scholars also argue that judges might invoke "ordinary meaning" merely to mask their own policy preferences.[151]

While the *Brock* majority attempted to shoehorn its rationale into the framework of the plain meaning rule,[152] the court's holding, on its face, violates conventional rules of strict construction. First, when taken in its entirety, the court's interpretation rendered meaningless entire portions of the statute.[153] Second, the court unilaterally added a mental element by requiring a co-employee to act "with the conscious object"—words that are plainly not in the statute.[154] If the court is required, by demand of the General Assembly, to *strictly* interpret section 287.120.1, what happened in *Brock*?

The irony of *Brock*'s holding makes clear that strict construction was not the only basis for the court's decision. Underlying policy concerns and preferences, including the protection of the Workers' Compensation Act as an exclusive remedy, shaped the court's decision. This is evidenced by the contradictory-nature of the court's holding, which stated that section 287.120.1 requires a co-employee to (1) engage in affirmative conduct that constitutes at least negligence and (2) act with the conscious object of increasing the risk of injury to a coworker or someone else. The latter requirement renders the former superfluous in violation of strict construction principles and makes the viability of future claims nearly impossible. As a result, the integrity of the Workers' Compensation Act as an exclusive remedy and the policy preferences of the *Brock* court are upheld.[155] While the policy concerns underlying *Brock* are valid, the court's corrective approach overestimates the statute's potential effect, as the issue the court sought to protect was never at risk.

A. The Inherent Legal Conflict: The Negligence and Conscious Object Requirement

The plain language of section 287.120.1 provides that a co-employee is immune from liability unless she "engaged in an *affirmative negligent act* that *purposefully and dangerously* caused or increased the risk of

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[150] *See* MO. REV. STAT. § 456.4–415 (2022); 4A Mo. Prac., Probate & Surrogate Laws Manual § 456.4–415 (2d ed.).

[151] *See* Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 738 (1992) ("It is true that judges have historically tended to mask contested social and political choices of interpretation of indeterminate texts in the language of linguistic inexorability.").

[152] Brock v. Dunne, 637 S.W.3d 22, 29 (Mo. 2021) (en banc).

[153] Sullivan, *supra* note 62, at 122 (Stating that a court's interpretation cannot impute additional words into a statute, omit words, or render words meaningless).

[154] *Brock*, 637 S.W.3d at 30.

[155] Sullivan, *supra* note 62, at 122 (Stating that a court's interpretation cannot impute additional words into a statute, omit words, or render words meaningless).

injury."[156] Yet, the *Brock* court held that section 287.120.1 immunizes a co-employee from liability for workplace injuries unless she (1) engaged in affirmative conduct that constitutes at least *negligence* and (2) acted with the *conscious object* to increase the risk of injury to a coworker or someone else.[157] This holding clearly violates the court's duty to strictly construe the Act.

It is well-established that strict construction principles require a court to presume that every word, sentence, or clause in a statute has effect.[158] For this reason, a court must assume that the General Assembly did not insert superfluous language.[159] The *Brock* court's interpretation of section 287.120.1, however, plainly and objectively renders portions of the statute meaningless.[160] The *Brock* interpretation, by mandating a subsequent finding that the co-employee defendant acted with the conscious object, requires a co-employee plaintiff to prove that the co-employee defendant acted *both* negligently and intentionally.[161] The negligence standard is a basis for *unintended* torts and is the dominant cause of action for accidental injury.[162] In contrast, to act with the conscious object is the *determination* to do an act.[163] By holding that the section 287.120.1 exception applies only if a co-employee both engaged in affirmative negligent conduct and acted with the conscious object to increase the risk of injury, the *Brock* court rendered meaningless the "affirmative negligent act" portion of the statute—a clear violation of strict construction.[164] Requiring a secondary finding of *intent* renders superfluous the threshold finding of *negligence* and erroneously raises section 287.120.1 to an intentional tort standard.[165]

Further, the Supreme Court of Missouri itself established that principles of strict construction prevent the court from adding or

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[156] MO. REV. STAT. § 287.120.1 (2017) (emphasis added).

[157] *Brock*, 637 S.W.3d at 29.

[158] Bateman v. Rinehart, 391 S.W.3d 441, 446 (Mo. 2013) (en banc).

[159] *Id.*

[160] Sullivan, *supra* note 62, at 122 (stating that a court's interpretation cannot impute additional words into a statute, omit words, or render words meaningless).

[161] *See Brock*, 637 S.W.3d at 30.

[162] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 28, at 161 (5th ed. 1984). In most cases, these injuries are caused by "heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act." *Id.* at 169.

[163] *Determination*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[164] *See* Sullivan, *supra* note 62, at 122 (stating that a court's interpretation cannot impute additional words into a statute).

[165] *See id.* at 122 (stating that a court's interpretation cannot impute additional words into a statute).

subtracting words from a statute.[166] Throughout *Brock*, the court interchangeably and confusingly substituted the words "intent" and "conscious object" for the plain language of "purposefully and dangerously."[167] While, under some circumstances, "intent" and "conscious object" may operate synonymously for the term "purposefully," the *Brock* court had a duty to construe the statute strictly by not adding or subtracting any words. Neither "intent" nor "conscious object" appears in the plain language of section 287.120.1.[168] Therefore, when the court held that section 287.120.1 requires the co-employee defendant to act with the conscious object to increase the risk of injury, it violated its duty to construe the Act strictly.[169]

Citing the plain meaning rule, the *Brock* court argued the soundness of its holding.[170] However, the court's attempt to use the rule as its trojan horse ultimately fails. Not only is the *Brock* opinion riddled with inconsistent language, none of which is found in the statute's text, but the court's holding also rendered meaningless entire portions of the statute.[171] Both are clear violations of strict construction.[172] As the *Vocational Services* court acknowledged, the General Assembly can and often will clearly state its intent.[173] Here, the *Brock* court ignored that the General Assembly easily could have omitted the term "negligence" from section 287.120.1,[174] stating instead that a co-employee defendant is entitled to immunity unless she engages in an "affirmative act that purposefully and dangerously caused or increased the risk of injury." But it did not.[175] Rather, the General Assembly expressly mandated that a co-employee defendant is entitled to immunity unless she engages in an "affirmative *negligent* act that purposefully and dangerously caused or increased the risk of injury."[176] The General Assembly's use of the word "negligent" as a modifier for "affirmative act" demonstrates its refusal to require intent for co-employee liability.[177] The *Brock* holding unnecessarily violates the

[166] Dickemann v. Costco Wholesale Corp., 550 S.W.3d 65, 68 n.5 (Mo. 2018) (en banc).

[167] Brock v. Dunne, 637 S.W.3d 22, 29–30 (Mo. 2021) (en banc).

[168] MO. REV. STAT. § 287.120.1 (2017).

[169] *See* Bateman v. Rinehart, 391 S.W.3d 441, 446 (Mo. 2013) (en banc).

[170] *Brock*, 637 S.W.3d at 29.

[171] *See* Sullivan, *supra* note 62, at 122 (stating that a court's interpretation cannot impute additional words into a statute).

[172] *See* Bateman, 391 S.W.3d at 446.

[173] Vocational Servs., Inc. v. Dev. Disabilities Res. Bd., 5 S.W.3d 625, 630 (Mo. Ct. App. 1999).

[174] MO. REV. STAT. § 287.120.1 (2017) (emphasis added).

[175] *Id.*

[176] MO. REV. STAT. § 287.120.1 (2017) (emphasis added).

[177] *See id.*

principles of strict construction and heightens section 287.120.1's intended standard.

Relying on the statute's plain language, the *Brock* court could have interpreted section 287.120.1 to foreclose immunity upon a showing that the co-employee had (1) the *purpose* to engage in some affirmative negligent act, which (2) *dangerously* caused or increased the risk of injury. Here, the word "purposefully" modifies "affirmative negligent act," and the word "dangerously" modifies the effect of such an act. This interpretation fulfills the court's duty to strictly construe the statute, giving full meaning to both the "affirmative negligent act" and "purposefully" language. Common law on the subject of affirmative negligence further supports such an interpretation.

While negligence does not require a co-employee plaintiff to prove intent, negligence can be either active or passive.[178] Active, or affirmative, negligence refers to the creation of a condition that causes injury.[179] Passive negligence, on the other hand, refers to the failure to discover and correct conditions.[180] As suggested above, had the court held that section 287.102.1 required a co-employee to engage in affirmative negligence, rather than passive negligence, it would have rendered section 287.120.1 meaningful in its entirety and honored the guiding principles of strict construction. Applying this interpretation to *Brock*'s facts, it is clear that Edwards engaged in a purposeful affirmative negligent act when he purposefully removed the safety guard and instructed Brock to clean the machine.[181] Given that faithful adherence to strict construction principles favors this approach, as raised in the dissent,[182] the majority's opposition leaves many wondering if greater policy concerns were at play.[183]

Under the plain meaning rule, section 287.120.1 does not plainly and expressly require a plaintiff to prove intent to injure. However, if one were

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[178] Cunningham v. Hayes, 463 S.W.2d 555, 559–60 (Mo. Ct. App. 1971); State *ex rel* Laclede Gas Co., 468 S.W.2d 693, 698.

[179] *Cunningham*, 463 S.W.2d at 559–60 (Mo. Ct. App. 1971); *Laclede Gas Co*., 468 S.W.2d at 698.

[180] *Cunningham*, 463 S.W.2d at 559–60 (Mo. Ct. App. 1971); *Laclede Gas Co*., 468 S.W.2d at 698.

[181] Brief of Amicus Curiae Missouri Association of Trial Attorneys in Support of Respondent at 21–22, Brock v. Dunne 637 S.W.3d 22 (Mo. 2021) (en banc).

[182] Brock v. Dunne, 637 S.W.3d 22, 44 (Mo. 2021) (en banc) (Breckenridge, J., dissenting).

[183] Instead, the court expressly declined to adopt such an interpretation, reasoning that affirmative negligence is not the "'kind of purposeful, affirmatively dangerous conduct'" recognized by Missouri courts. *Id*. at 30 (citing State *ex rel*. Taylor v. Wallace, 73 S.W.3d 620, 622 (Mo. 2002) (en banc), *overruled on other grounds by* McCraken v. Wal-Mart Stores East, LP, 298 S.W.3d 473, 478–79 (Mo. 2009) (en banc)). The court stated further that the "fact that an intentional act may increase the risk of injury to others does not unequivocally lead to the conclusion that the actor intended to increase the risk of injury." *Id*. at 30.

to assume the statute does require proof of intent, guidance from Missouri courts still leads away from the *Brock* court's interpretation of section 287.120.1. Where strict construction of a statute creates an "absurd result defeating the purpose of the legislature,"[184] the court may look to the legislature's intent in adopting the statute. Here, the *Brock* interpretation is clearly absurd, as it is near-impossible to act both negligently and intentionally. Further, the General Assembly's response to the evolution of co-employee liability in Missouri demonstrates its willingness to hold co-employees liable for workplace injuries under some circumstances—including those involving affirmative negligence.[185] In *Badami*, the Missouri Court of Appeals for the Eastern District established the something more test, which granted co-employee immunity unless the plaintiff showed that a co-employee engaged in an "affirmative act that caused or increased the risk of injury."[186] In light of the General Assembly's amendments requiring strict construction, the *Robinson* court held that co-employees did not enjoy a right to immunity under the Act.[187] From there, the General Assembly was left with a choice to either affirm *Robinson*—through inaction or codification of *Robinson*'s holding—or override *Robinson* through the codification of a statute permitting co-employee immunity under the Act.[188] The General Assembly opted for the latter.[189] Immunity granted under the Act, however, was not unlimited.[190] Rather, the General Assembly expressly carved out an exception for when a co-employee "engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury."[191]

Coincidentally, or perhaps not, the exception adopted by the General Assembly looks especially similar to the one used in the something more test.[192] Clearly, when enacting section 287.120.1, the Missouri legislature considered the language of the something more test and opted to use portions of the test's language, adding in the terms "negligent" and "purposefully and dangerously."[193] While it may be argued that the court's inclusion of the terms purposefully and dangerously reflects the

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[184] Roland v. St. Louis City Bd. of Election Comm'rs, No. ED 106192, 2019 WL 927466, at *2 (Mo. Ct. App. 2019).

[185] *See* State *ex rel*. Badami v. Gaertner, 630 S.W.2d 175, 180 (Mo. Ct. App. 1982); Robinson v. Hooker, 323 S.W.3d 418, 424 (Mo. Ct. App. 2010); MO. REV. STAT. §287.120.1 (2017).

[186] *Badami*, 630 S.W.2d at 180.

[187] *Robinson*, 323 S.W.3d at 424.

[188] *See* MO. REV. STAT. § 287.120.1 (2017).

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] State *ex rel*. Badami v. Gaertner, 630 S.W.2d 175, 180 (Mo. Ct. App. 1982).

[193] *See id.*; *See also* MO. REV. STAT. 287.120.1 (2017).

legislature's desire to heighten the something more standard, it may also be argued that the term "negligent" sought to lower and better define the standard's scope.[194] The something more test was a factor-less standard that often led to inconsistent results.[195] Thus, it is plausible that the General Assembly's inclusion was an inadequate attempt to better define the standard to provide for more predictability, consistency, and stability in the rule's application.[196]

Regardless, the mere inclusion of the term "negligent" demonstrates the legislature's intent to establish an exception to co-employee liability when a co-employee engages in an affirmative negligent act.[197] Yet, the *Brock* court expressly declined to adopt an interpretation that is easily reconcilable with a finding of affirmative negligence and purposeful intent to act, in clear violation of its duty to strictly construe section 287.120.1.[198] Such a holding would have compensated Brock for costs typically not fully covered by workers' compensation, including lost wages, lost earning capacity, and pain and suffering.[199] By holding that a plaintiff must prove the co-employee's intent to injure, the *Brock* court effectively foreclosed the opportunity for victims, like Brock, to recover for long-term damages stemming from the affirmative negligence of co-employees.[200]

B. Policy Rationale and the Nondelegable Duty Doctrine

After the Supreme Court of Missouri released its opinion in *Brock*, legal scholars across Missouri questioned the court's decision, focusing on the court's faulty application of strict construction principles and breach of legal common sense.[201] Notwithstanding *Brock*'s suspect legal analysis, it is plausible that the opinion stands for the proposition that the workers' compensation system and its function as an exclusive remedy

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[194] *See Badami*, 630 S.W.2d at 180–81 (Stating that the test should be applied on a case-by-case basis).

[195] *Id.* at 179.

[196] *Id.* at 180–81.

[197] MO. REV. STAT. § 287.120.1 (2017).

[198] *Id.* § 287.800 (2005).

[199] Smith Law Offices, *How Bad is the Brock Decision for Hurt Workers?*, SMITH LAW OFFICES L.L.C (Dec. 15, 2021), https://www.smithlawco.com/blog/2021/december/how-bad-is-the-brock-decision-for-hurt-workers-/ [https://perma.cc/Z8UQ-5M9W].

[200] Generally, recipients of workers' compensation are only entitled to medical care expenses and a portion of their weekly wages. *Id.*

[201] *See generally*, Smith Law Offices, *How Bad is the Brock Decision for Hurt Workers?*, SMITH LAW OFFICES L.L.C (Dec. 15, 2021), https://www.smithlawco.com/blog/2021/december/how-bad-is-the-brock-decision-for-hurt-workers-/ [https://perma.cc/Z8UQ-5M9W] (stating that "*Brock* provides legal protection to managers who shrug at the dangers that come with increasing output by one percent. Not only is this disturbing and immoral, it also leaves the victims behind.").

should be protected at all costs. Under this policy rationale, the growing number of exceptions, like the one in section 287.120.1, exposes an employer to liabilities beyond its obligations under the Act, in violation of the exclusivity principle.[202] While meritorious in other contexts, this argument fails with regard to the co-employee liability exception under section 287.120.1.

First, liability for claims arising under section 287.120.1 is limited to co-employees.[203] Silent as to employer liability, the plain language of section 287.120.1 makes clear that an employer is not liable for workplace injuries arising under this section.[204] Section 287.120.1 applies only in narrow circumstances, when an employee, not an employer, engages in an affirmative negligent act that purposefully and dangerously increases the risk of injury to a fellow employee.[205] Through narrow drafting, the General Assembly preemptively protected the integrity of the workers' compensation system by guaranteeing that the section's exception did not apply to employers.[206] Therefore, the argument that the *Brock* court's opinion serves as a valid protection to employer liability is flawed and does not excuse the court's departure from honored principles of strict construction.

Second, the nondelegable duty doctrine limits employee liability where an employer is successfully impleaded under a theory of respondeat superior or where a plaintiff attempts to hold the co-employee and employer jointly liable.[207] The most common nondelegable duty invoked in a co-employee liability case is the employer's duty to provide a

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[202] Pierce, Pierce & Napolitano, *Workers' Compensation No Longer the Exclusive Remedy*, PIERCE, PIERCE & NAPOLITANO, https://www.ppnlaw.com/workers-compensation-no-longer-the-exclusive-remedy/#:~:text=The%20'exclusive%20remedy%20doctrine'%20by,above%20its%20workers'%20compensation%20obligation [https://perma.cc/73KU-H32B] (last visited Mar. 24, 2023) (Against employers, the exclusivity principle provides that the Workers' Compensation Act serves as the exclusive remedy for an employee's workplace injury.); MO. REV. STAT. § 287.120.2 (2017).

[203] *See* MO. REV. STAT. § 287.120.1 (2017).

[204] *Id.*

[205] *Id.*

[206] *See id.*

[207] Impleader is a procedural device through which third parties can be brought into litigation. Typically, the device is used by defendants who bring in another party and try to show that this "third party defendant" is liable instead of the original defendant. *See, e.g.*, Caterpillar Inc. v. Lewis, 519 US 61, 61 n.1 (1996). Respondeat superior is a legal doctrine that holds an employer or principal legally responsible for the wrongful acts of an employee or agent, if such acts occur within the scope of the employment or agency. *See* Gibson v. Brewer, 952 S.W.2d 239, 245–46 (Mo. 1997).

reasonably safe workplace.[208] Generally, this duty cannot be delegated.[209] Even when delegated, however, any liability resulting from the employer's failure to provide a reasonably safe workplace will result in employer liability.[210] An employer found jointly liable or liable via respondeat superior, therefore, may claim immunity under the Act and force the employee to recover from workers' compensation.[211] Cases following the holding in *Brock* demonstrate how the nondelegable duty doctrine acts as a protection to the exclusivity principle,[212] stating that even if section 287.120.1's exception is met, the claim must be independent from the employer's nondelegable duty.[213]

As applied to section 287.120.1, the argument that the *Brock* court's opinion serves as a valid protection to the workers' compensation system, and thus, employer liability, cannot serve as an excuse for the court's departure from canons of strict construction. The section limits liability to co-employees, to the exclusion of employers and the nondelegable duty doctrine preempts any valid claims against employers, requiring such claims to be submitted pursuant to the Act. In light of these legal protections, this policy concern is moot and would not be disturbed if the *Brock* court held that section 287.120.1 created an exception for acts that were purposefully and dangerously engaged in and rose to the level of at least negligence. Such a holding does not curtail the credibility of the workers' compensation system.

VI. CONCLUSION

Section 287.800 requires Missouri courts to strictly construe the Missouri Workers' Compensation Act. In *Brock*, however, the Supreme Court of Missouri violated this duty and exasperated the discordant language of the statute. While Missourians may not expect the General Assembly to fully appreciate the inherent legal conflict created in requiring an action be both negligent and purposeful, Missourians do

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[208] *See, e.g.*, Brock v. Dunne, 637 S.W.3d 22, 31 (Mo. 2021) (en banc); Halsey v. Townsend Corp. of Indiana, 20 F.4th 1222, 1227 (8th Cir. 2021); Miller v. Bucy, 641 S.W.3d 725, 730 (Mo. Ct. App. 1982); Bestgen v. Haile, 643 S.W.3d 647, 654 (Mo. Ct. App. 2022).

[209] *See* Peters v. Wady Industries., Inc., 489 S.W.3d 784, 795 (Mo. 2016).

[210] *See id*.

[211] *See* MO. REV. STAT. § 287.120.2 (2017).

[212] *See, e.g.*, *Halsey*, 20 F.4th at 1226.

[213] *See, e.g.*, *id*. (stating that *Brock* created a two-part test requiring the court to consider whether (1) the co-employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury to the injured employee so as to deny that co-employee immunity and (2) *if so, has the injured employee made allegations that otherwise establish a claim of common law negligence for a breach of a duty independent of the employer's nondelegable duty?*).

expect the state's highest court to appreciate such an irony. By opting against an interpretation that countered this conflict, the *Brock* court rendered portions of the statute meaningless and created a de facto requirement raising the mandatory mental state to that of an intentional tort. These actions clearly violate basic principles of strict construction. So, was it bad drafting turned bad construction? Were policy considerations guiding the court? Was the court letting the General Assembly have its cake and eat it too? Maybe, maybe not. One will never know. But Danny Brock, and others, will continue to pay the price for that slice.