

TYPES NOT MAPPED YET November 18, 2021 | TTR not mapped yet | Carl J. Pesce, Benjamin S. Harner

Missouri Supreme Court clarifies meaning and application of co-employee immunity statute

The Missouri Supreme Court recently issued a long-awaited opinion on co-employee immunity and liability under section 287.120.1 of the Missouri's workers' compensation statute. The opinion, *Brock v. Dunne*, — S.W.3d —, 2021 WL 5217031 (Mo. banc Nov. 9, 2021), ¹provides the Supreme Court's first interpretation of the 2012 amendment to the statute, clarifies its application, and provides guidance regarding the type of conduct that opens the door to co-employee liability.

In *Brock*, the plaintiff worked with the defendant (a supervisor) ² on their employer's lamination line—a job that involved feeding sheets of particle board, gypsum, or fiberboard into a laminating machine, which applied glue to the board while a pair of rollers propelled the sheet through the machine. On the day of the incident, the machine was applying too much glue to the sheets, resulting in glue dripping on the rollers. The defendant—despite having knowledge of the employer's safety rules and the machine's warnings—removed a safety guard that shielded a pinch point created by the rollers and instructed the plaintiff to clean the glue off the rollers with a wet rag. The rollers grabbed the rag and pulled the plaintiff's thumb into the pinch point, causing injury. The plaintiff sued, alleging negligence against the defendant for removing the safety guard and ordering the machine to be cleaned while in operation. ³

Following a jury verdict for the plaintiff, the defendant appealed, and the Missouri Supreme Court granted transfer after an opinion by the Court of Appeals. On transfer, the Missouri Supreme Court considered section 287.120.1, as amended in 2012, which provides in relevant part:

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

§ 287.120.1, RSMo. (emphasis added). The Court stated that this amended statute settled confusion regarding co-employee liability—jurisprudence that had “shifted and swung like a pendulum[.]” Opinion, at 6-7. ⁴ *Brock* further resolves uncertainty in this area of law and includes the following takeaways:

1. The statute provides immunity to co-employees; it does not create a new cause of action.

The Court confirmed that the statute “does not preempt the common law claim and create a new statutory cause of action for co-employees to bring against their culpable co-workers[.]” but “[i]nstead, ... provides immunity to co-employees and employers unless the exception applies.” Opinion, at 8.

2. Co-employees are statutorily immune unless they engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.

The Court explained that language of the statute “unambiguously articulates the legislature's intention that co-employees have immunity from civil liability for injuries they cause on the job.” Opinion, at 8-9. This is the general rule. But the statute “provides an exception to this broad immunity ... when ‘the employee engaged in [1] an affirmative negligent act that [2] purposefully and dangerously caused or increased the risk of injury.’” *Id.* at 9 (quoting § 287.120.1).

3. The plaintiff bears the burden of establishing the exception.

The Court detailed that after the defendant meets his or her burden to establish a co-employee relationship, “[t]he burden then shifts to [the plaintiff] to show [the defendant's] actions came within the statutory exception to the general rule of statutory immunity.” Opinion, at 9-10. Specifically, the plaintiff must establish that: (1) “the co-

employee engaged in affirmative conduct that constitutes at least negligence[;]" and (2) the co-employee "purposefully and dangerously cause[d] or increase[d] the risk of injury through that conduct." *Id.* at 10

4. For the exception to immunity to apply, the defendant must act with the "conscious object" of increasing the risk of injury.

The Court interpreted the statute, by its plain text, to provide a "mental element" to the exception—that a co-employee defendant must have "*purposefully* caused or increased the risk of injury." Opinion, at 9 (emphasis in original). Considering the dictionary definition for, and Missouri law regarding, the word "purpose," the Court explained that "[a]n individual acts purposely when it is the person's *conscious object* to engage in that conduct or to cause that result." *Id.* at 11 (citations omitted) (emphasis added).

With respect to the facts in *Brock*, the Court stated that "[a]pplying this definition of purpose, [for the exception to apply] the evidence ... would need to demonstrate that, when [the defendant] removed the safety guard, his purpose - or the conscious object of what he sought to attain - was to increase the risk of injury to [the plaintiff]." *Id.* at 12. The Court held that the plaintiff failed to present sufficient evidence to allow the jury to infer the defendant acted with such conscious object. *Id.* Rather, the evidence merely supported a finding that the defendant "acted negligently, not that he *intended* to cause or increase the risk of any injury to [the plaintiff] or others." *Id.* (emphasis added). As the Court explained, "[t]he injuries [the plaintiff] suffered are tragic, but they resulted from an unfortunate accident in the workplace, not the deliberate and deviant actions of a co-worker who sought and desired to cause or increase the risk of injury to a co-employee." *Id.* at 11. Accordingly, section 287.120.1 entitled the defendant to legal immunity. *Id.* at 13.

5. In addition to establishing that the statutory exception applies, to recover, the plaintiff must also establish a common law claim for co-employee liability.

In *Brock*, the Court's determination that the defendant was statutorily immune was dispositive.⁵ In an effort to avoid confusion and address the dissenting opinion,^[6] however, the Court provided a discussion regarding common law co-employee liability—an additional requirement when the statutory exception applies. Specifically, "[b]ecause no new cause of action was created by section 287.120.1, plaintiffs must establish a common law claim to be entitled to recovery." Opinion, at 13 n.9. In the context of co-employee liability, this means "the plaintiff must show the defendant co-employee breached a duty separate and apart from the employer's foreseeable [and nondelegable] duty to provide a safe workplace[.]" *Id.* at 14. The Court held that the defendant's act of lifting the safety guard from the machine fell within the employer's broad nondelegable duty to provide a safe workplace—therefore, the plaintiff failed to make a submissible case of common law negligence. *Id.* at 16-17.

Ultimately, *Brock* presents Missouri courts with a new analysis for assessing co-employee liability. While determining whether a defendant acted with the "conscious object" to cause or increase the risk of injury depends on the facts of each case, practically speaking, the Missouri Supreme Court's opinion requires plaintiffs to provide more evidence to meet their burden than before. Further, it will likely require plaintiffs to plead additional substantive facts against the co-employee to withstand a motion to dismiss.

Brock may also affect the strategy of product liability defendants. For instance, in cases focused on product liability claims against a product manufacturer, it is not uncommon for a plaintiff to also name a Missouri resident co-employee as a defendant in effort to destroy diversity and avoid removal of the matter to federal court. *Brock* potentially provides additional support for product liability defendants to remove such cases to federal court on the basis of the co-employee defendant's fraudulent joinder (assuming diversity of citizenship between the plaintiff and the product liability defendant and that the amount in controversy exceeds \$75,000). Given the time-sensitive nature of removal, defendants involved in such cases, should continue to monitor how state and federal courts in Missouri apply *Brock* and section 287.120.1 going forward.

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1. As of the date of this post, the opinion remains subject to a motion for rehearing, which must be filed within 15 days of the Court's opinion. See Mo. Sup. Ct. R. 84.17. [↩](#)
2. The supervisor died before trial and a defendant ad litem was substituted as defendant. [↩](#)
3. The plaintiff also applied for and received workers' compensation benefits through his employer and settled claims with the manufacturer of the machine. [↩](#)
4. There is a long history of case law relating to co-employee liability under Missouri law. The Court's opinion details some of the various approaches that have caused confusion [see Opinion, at 6-7 n.5], but for a more complete background of those issues, the reader should separately review and consider the lengthy history of the law on this topic. [↩](#)
5. Earlier in its opinion, the Court stated: "For cases alleging co-employee liability arising after [the 2012 amendment], the analysis must turn its focus from the common law to section 287.120.1 to determine whether the statute bars the suit from proceeding." Opinion, at 7. After that determination, a common law analysis must still take place. [↩](#)

6. The dissent focused on the issue of common law liability and argued there was sufficient evidence for the jury to find that the defendant breached a duty owed independently of the master-servant relationship. The dissent also argued that the majority opinion misinterpreted and misapplied section 287.120.1. [↩](#)

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