# In the Missouri Court of Appeals
# Eastern District

**DIVISION ONE**

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| SHERI BIERMAN, | ) | No. ED100946 |
| | ) | |
| Appellant, | ) | Appeal from the Circuit Court |
| | ) | of St. Louis County |
| vs. | ) | 13SL-CC01540 |
| | ) | |
| KIMMIE VIOLETTE, | ) | Honorable Richard C. Bresnahan |
| | ) | |
| Respondent. | ) | Filed: February 14, 2017 |

Sheri Bierman ("Plaintiff") appeals the judgment dismissing her negligence action against her co-employee, Kimmie Violette ("Defendant"), for failure to state a claim upon which relief can be granted. The trial court found Plaintiff's petition should be dismissed because the allegations therein do not establish an independent duty of care owed by Defendant, which is separate and distinct from their employer's non-delegable duty to provide a safe workplace. We reverse and remand.

## I. BACKGROUND

### A. The Relevant Allegations in Plaintiff's Petition

Because this appeal involves a grant of a motion to dismiss for failure to state a claim, it is important to initially set out the relevant allegations in Plaintiff's petition. These allegations are as follows.

Plaintiff and Defendant were co-employees who worked for Espino's Mexican Bar and Grill ("Employer"). On June 19, 2009, Plaintiff entered a lofted space accessible only through

the use of a twelve-foot, A-frame ladder. At that time and place, "Defendant [ ] knew or should have known that Plaintiff [ ] had used the ladder to enter the lofted space." While Plaintiff was in the loft, Defendant unlocked, closed, and moved the ladder, and then Defendant returned the ladder to the place where it was accessible to Plaintiff. However, Defendant failed to fully open the ladder and failed to fully lock and secure the ladder. When Plaintiff returned from the lofted space and stepped on the ladder, it collapsed suddenly and without warning, causing Plaintiff to fall, strike a concrete countertop, and then land on the ground. As a result of Plaintiff's fall, she sustained injuries.

"Defendant [ ] had a duty to Plaintiff to take reasonable and necessary precautions and measures designed to lock and secure the ladder prior to Plaintiff returning from the lofted space." In addition, Plaintiff argued Defendant was negligent in one or more of the following respects:

a. Defendant [ ] negligently failed to exercise reasonable care with respect to the safety and security of Plaintiff;

b. Defendant [ ] failed to lock the ladder;

c. Defendant [ ] failed to properly secure the ladder;

d. Defendant [ ] failed to warn Plaintiff when Defendant knew or should have known the likelihood of a fall; [and]

e. Defendant [ ] otherwise failed to exercise that degree of care that an ordinary careful person would use under the same or similar circumstances.

"Defendant [ ] knew, or by use of ordinary care, should have known of the existence of said conditions and that they were not reasonably safe and that such conditions were likely to cause injury to Plaintiff [ ]." And as a direct and proximate result of the alleged negligence of Defendant, Plaintiff suffered injuries to her left middle finger, right elbow, and right shoulder; Plaintiff suffered lost wages and income; Plaintiff incurred medical expenses; and Plaintiff is

reasonably certain to sustain additional loss in the future for medical treatment, pain and suffering, and lost wages and income.

### B. Procedural Posture

After Plaintiff filed her petition, Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted. Defendant's motion alleges Plaintiff's petition should be dismissed because the allegations therein do not establish an independent duty of care owed by Defendant, which is separate and distinct from their Employer's non-delegable duty to provide a safe workplace. The trial court subsequently entered a judgment dismissing Plaintiff's petition on that basis. Plaintiff then appealed the trial court's decision to this Court, and the case was set for oral argument.

After the parties filed their respective appellant's and respondent's briefs, Plaintiff filed a motion to stay oral argument on the grounds that cases involving the requirements for pleading co-employee liability had been taken by the Missouri Supreme Court and were awaiting rulings, including *Peters v. Wady Industries, Inc.*, No. SC94442 and *Parr v. Breeden*, No. SC94393. Our Court granted Plaintiff's motion to stay and removed the cause from the initially-scheduled oral argument docket. After the Missouri Supreme Court issued rulings in *Peters*, 489 S.W.3d 784 (Mo. banc 2016) and *Parr*, 489 S.W.3d 774 (Mo. banc 2016), this Court ordered the parties to prepare supplemental briefs discussing the potential application of those cases to the facts of the instant case. Both parties filed supplemental briefs, and this case was orally argued and submitted.

## II. DISCUSSION

In Plaintiff's sole point on appeal, she argues the trial court erred in dismissing her negligence action against Defendant. For the reasons set forth below, we agree.

## A. Standard of Review

Our review of a trial court's judgment granting a motion to dismiss is de novo. *Aldridge v. Francis*, 503 S.W.3d 314, 316 (Mo. App. E.D. 2016). A motion to dismiss for failure to state a claim upon which relief can be granted is only a test of the adequacy of the plaintiff's petition. *Id*. When reviewing a motion to dismiss on appeal, we accept as true the allegations in the plaintiff's petition and liberally grant her all reasonable inferences therefrom. *Id*. This Court does not attempt to weigh whether the factual allegations are credible or persuasive. *Id*. Instead, the petition is reviewed "in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Id*. (quoting *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993)). If a plaintiff's petition sets forth any set of facts that, if proven, would entitle her to relief, then the petition states a claim. *Brewer v. Cosgrove*, 498 S.W.3d 837, 843 (Mo. App. E.D. 2016).

## B. Whether the Trial Court Erred in Dismissing Plaintiff's Petition

In this case, Plaintiff asserts the application of *Peters* and *Parr* to the facts of this case requires our Court to reverse the trial court's dismissal of Plaintiff's petition. Plaintiff specifically argues dismissal of her action was improper because her petition alleges sufficient facts that, if proven, establish an independent duty of care owed by Defendant, which is separate and distinct from their Employer's non-delegable duty to provide a safe workplace.

### 1. Relevant Law

Because Plaintiff's alleged injuries occurred in 2009, the 2005 amendments to the Workers' Compensation Law ("the Law"), as reflected in section 287.120 RSMo Supp. 2006,[1] apply to this case. *Abbott v. Bolton*, 500 S.W.3d 288, 292 n.2 (Mo. App. E.D. 2016). In *Peters* and *Parr*, the Missouri Supreme Court recently clarified the correct legal standard to be applied

[1] Unless otherwise indicated, all further statutory references are to RSMo Supp. 2006.

in determining an employee's liability for negligence committed against a co-employee in a case, like this one, that is subject to the 2005 amendments to the Law.[2] *Abbott*, 500 S.W.3d at 292. The plain language of section 287.120 only gives employers immunity against tort claims for work-related injuries and does not afford such immunity to co-employees. *Id*. at 291-92; *Peters*, 489 S.W.3d at 789-93. Consequently, at the time Plaintiff sustained her injuries, she was not precluded from pursuing a common law negligence claim against Defendant, her co-employee, so long as the facts pled in her petition were sufficient to state such a claim. *Peters*, 489 S.W.3d at 790-93.

In any negligence action, including one based upon co-employee liability, "the plaintiff must establish that (1) the defendant had a duty to the plaintiff; (2) the defendant failed to perform that duty; and (3) the defendant's breach was the proximate cause of the plaintiff's injury." *Id*. at 793 and *Parr*, 489 S.W.3d at 778 (quotations omitted). The element at issue in this case is whether Plaintiff's petition sufficiently alleged Defendant, her co-employee, owed Plaintiff a duty. Whether Defendant owed Plaintiff a duty is purely a question of law. *Peters*, 489 S.W.3d at 786, 793-94; *Parr*, 489 S.W.3d at 779.

At common law, an employee is liable to a third person, including a co-employee, for breaching a legal duty owed independently of any master-servant relationship. *Peters*, 489 S.W.3d at 794-95; *Parr*, 489 S.W.3d at 779. An employer owes certain non-delegable duties to all of its employees with respect to safety, and the employer alone is liable for any breach of such duties. *Peters*, 489 S.W.3d at 795. Accordingly, "a co-employee's breach of the employer's non-delegable duty to provide a safe workplace does not constitute a breach of a duty owed independently of the master-servant relationship." *Id*. In other words, a legal duty owed

[2] Section 287.120 was amended in 2012 to provide immunity to co-employees under some circumstances. Section 287.120.1 RSMo Supp. 2013; *Peters*, 489 S.W.3d at 792-93.

by an employee to a third person, including a co-employee, is a duty which is separate and distinct from their employer's non-delegable duties. *Id*.

Thus, in a case such as this where an employee sues a co-employee for negligence, the question to be decided is where the employer's non-delegable duties end and where the co-employee's independent duty begins. *Abbott*, 500 S.W.3d at 292. An employer's non-delegable duties to its employees with respect to safety include, (1) the duty to provide a safe workplace, including a duty to ensure that instrumentalities of the workplace are used safely; (2) the duty to provide safe work appliances, tools, and equipment; (3) the duty to give warning of dangers of which an employee might be reasonably expected to be ignorant of; (4) the duty to provide a sufficient number of fellow employees; and (5) the duty to make and enforce rules for the conduct of employees to ensure the work is safe. *Peters*, 489 S.W.3d at 795; *Parr*, 489 S.W.3d at 779. However, the employer's non-delegable duties are not unlimited. *Peters*, 489 S.W.3d at 795. Except in the cases in which the employer is itself directing the work in hand, its obligation to protect its employees does not extend to protecting them from the transitory risks which are created by the negligence of a co-employee carrying out the details of that work. *Id*. at 795-96.

As noted in *Peters*, the distinction between an employer's non-delegable duty to provide a safe workplace and a co-employee's duty arising from transitory risks in how she carries out the details of her work is exemplified in *Marshall v. Kansas City*, 296 S.W.2d 1 (Mo. 1956). *Peters*, 489 S.W.3d at 796. In *Marshall*, the plaintiff was injured when his co-employee shook and jerked a compressor hose to get the kinks out of it and those actions caused the plaintiff to trip. *Peters*, 489 S.W.3d at 796 (citing *Marshall*, 296 S.W.2d at 2). The Missouri Supreme Court held the plaintiff's injuries resulted from his co-employee's negligence and not the employer's breach of its non-delegable duty to provide a safe workplace, reasoning:

> The plaintiff['s] injury came about by reason of the co-employee's negligent use of the hose and not because it was defective. Likewise the place of work was not

> unsafe and the hazard was not brought about by the manner in which the work was being done; the danger came about by reason of the manner in which the co-employee handled the hose. The co-employee's suddenly and unexpectedly jerking the hose and tripping the plaintiff was not, of course, the exercise of due care on his part, but it does not support the inference or demonstrate negligence on the part of the employer with respect to either the tools furnished, place of work or the manner in which the work was being done.

*Peters*, 489 S.W.3d at 796 (quoting *Marshall*, 296 S.W.2d at 3 and omitting citations from *Marshall*). *Peters* summarized *Marshall* and co-employee liability under common law as follows:

> [W]hen an employee's injuries result from the tools furnished, the place of work, or the manner in which the work was being done, the injuries are attributable to a breach of the employer's non-delegable duty to provide a safe workplace. When, however, the employee's injuries result from a co-employee's negligence in carrying out the details of the work, the injuries are attributable to the co-employee's breach of a duty separate and distinct from the employer's non-delegable duty to provide a safe workplace.
>
> Accordingly, under common law, co-employees are liable to their fellow employees for breaches of a duty owed independently of the master-servant relationship – that is, a duty separate and distinct from the employer's non-delegable duties – including instances in which injury results from transitory risks created by the co-employee's negligence in carrying out the details of his or her work. An injured employee, therefore, cannot maintain a common law negligence action against a co-employee when the duties breached were part of the employer's non-delegable duty to provide a safe workplace.

*Peters*, 489 S.W.3d at 796. Furthermore, whether a co-employee breaches a duty which is separate and distinct from the employer's non-delegable duty to provide a safe workplace "depends on the particular facts and circumstances of each case." *Parr*, 489 S.W.3d at 782.

**2. Analysis**

We find the particular facts and circumstances of this case, which are reflected in the following allegations in Plaintiff's petition, are similar to those in *Marshall*. Plaintiff entered a lofted space accessible only through the use of a twelve-foot, A-frame ladder, and "Defendant [ ] knew or should have known that Plaintiff [ ] had used the ladder to enter the lofted space." Plaintiff further alleged that while she was in the loft, Defendant unlocked, closed, and moved

the ladder, and then Defendant returned the ladder to the place where it was accessible to Plaintiff, but Defendant failed to fully open the ladder and failed to fully lock and secure the ladder. When Plaintiff returned from the lofted space and stepped on the ladder, it collapsed suddenly and without warning, causing Plaintiff to fall and suffer injuries. Plaintiff alleged "Defendant [ ] had a duty to Plaintiff to take reasonable and necessary precautions and measures designed to lock and secure the ladder prior to Plaintiff returning from the lofted space." Plaintiff further alleged that by failing to lock and properly secure the ladder, "Defendant . . . failed to exercise that degree of care that an ordinary careful person would use under the same or similar circumstances."

Like the plaintiff's injury and the defendant's negligent handling of the hose in *Marshall*, Plaintiff's injury in this case was alleged to have occurred because of Defendant's negligent use of the ladder and the manner in which Defendant handled the ladder and not because it was defective, because the place of work was unsafe, or because of the manner in which the work was being done. *See Marshall*, 296 S.W.2d at 3. Similarly, Defendant's alleged failure to lock and properly secure the ladder after moving it while she knew or should have known Plaintiff was in the loft was not the exercise of due care on her part, and it "does not support the inference or demonstrate negligence on the part of the [Employer] with respect to either the tools furnished, place of work or the manner in which the work was being done." *See id*. In other words, Plaintiff sufficiently alleged her injury resulted from transitory risks created by Defendant, her co-employee, in carrying out the details of her work, which is a breach of a duty Defendant owed Plaintiff that is separate and distinct from their Employer's non-delegable duty to provide a safe workplace. *See Peters*, 489 S.W.3d at 796.

Defendant argues that the duties Plaintiff alleges she breached are part of their Employer's non-delegable duty to provide a safe workplace, because the Employer allowed its

employees "to access an open loft with a movable ladder which was an unsafe working environment."[3] Defendant further contends Employer's alleged unsafe working environment was "the root of the harm, not that [Defendant] moved a ladder which the [E]mployer should have made unmovable in the first instance." However, accepting as true the allegations in Plaintiff's petition and liberally granting her all reasonable inferences therefrom, the so-called "root of the harm" for Plaintiff's injuries is only Defendant's failure to lock and properly secure the ladder after moving it while she knew or should have known Plaintiff was in the loft. *See Aldridge*, 503 S.W.3d at 316 (when reviewing a motion to dismiss on appeal, we accept as true the allegations in the plaintiff's petition and liberally grant her all reasonable inferences therefrom).

Furthermore, under the circumstances of this case, we find Defendant's argument that Employer somehow caused Plaintiff's injuries goes to the element of causation and the question of whether there may be multiple causes of Plaintiff's injuries rather than the element of duty. Here, Plaintiff sufficiently alleged Defendant caused her injuries by averring she suffered injuries as a direct and proximate result of the alleged negligence of Defendant. Nevertheless, "[t]he negligence of the defendant need not be the sole cause of the injury, as long as it is one of the efficient causes thereof, without which injury would not have resulted." *United Missouri Bank, N.A. v. City of Grandview*, 105 S.W.3d 890, 896 (Mo. App. W.D. 2003) (quotations

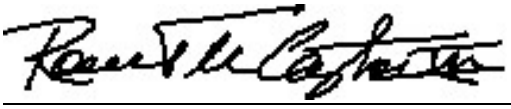
[3] In support of its claim that allowing access to an open loft with a movable ladder was an unsafe working environment, Defendant attempts to cite to The OSHA Handbook for Small Business ("The OSHA Handbook"), which Defendant attached to the appendix of her initial respondent's brief. It is true that "rules and regulations promulgated pursuant to federal statutes may be judicially noticed and considered as *evidence*." *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 821 (Mo. banc 2000) (emphasis added). However, a motion to dismiss for failure to state a claim upon which relief can be granted is only a test of the adequacy of the *plaintiff's petition*. *Aldridge*, 503 S.W.3d at 316. Moreover, because we cannot find any place in the record where Defendant filed or relied on The OSHA Handbook in the trial court proceedings, we will not consider it here. *See Washington v. Gorden*, 286 S.W.3d 824, 826 (Mo. App. E.D. 2009) ("[w]e do not consider documents in an appendix that are not in the record on appeal").

omitted). Missouri Approved Instruction ("MAI") 19.01[4] further indicates there may be more than one cause of an injury. MAI 19.01 provides that in a case involving two or more causes of damage, whether or not another causing damage is a party, an instruction may provide the defendant's negligence "either directly caused damage to plaintiff or combined with the acts of *(here describe another causing damage)* . . . to directly cause damage to plaintiff." MAI 19.01 (emphasis in original) (brackets and non-relevant language omitted); Note on Use No. 2 to MAI 19.01. Whether there may be multiple causes of Plaintiff's injuries is possibly an issue for a trier of fact to determine at a later stage of the proceedings. *See United Missouri Bank, N.A.*, 105 S.W.3d at 896 ("[o]rdinarily, causation is an issue that should be left to the trier of fact"). However, any question as to whether there are multiple causes of Plaintiff's injuries does not support the granting of Defendant's motion to dismiss.

Based on the foregoing, we hold Plaintiff's petition sets forth facts that, if proven, would entitle her to relief against Defendant, her co-employee, for a common law negligence claim. *See Peters*, 489 S.W.3d at 789-96. Therefore, the trial court erred in dismissing Plaintiff's petition. *See Brewer*, 498 S.W.3d at 843. Point one is granted.

## III. CONCLUSION

The trial court's dismissal of Plaintiff's petition is reversed and the cause is remanded for further proceedings in accordance with this opinion.



ROBERT M. CLAYTON III, Presiding Judge

James M. Dowd, J., and
Lisa P. Page, J., concur.

[4] All references to MAI 19.01 and its Notes on Use are to versions found in Missouri Approved Jury Instructions-Civil (7th ed. August 2016 update).