SUPREME COURT OF MISSOURI
en banc

FELECIA Y. McCOMB,	)	*Opinion issued March 6, 2018*
	)	
Appellant,	)	
	)	
v.	)	No. SC96042
	)	
GREGORY NORFUS and DAVID CHEESE,	)	
	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
The Honorable Jon E. Beetem, Judge

Edward R. McComb died while driving a delivery vehicle for his employer. His widow brought a wrongful death action against her husband's supervisory co-employees, Gregory Norfus and David Cheese (collectively, "Co-employees"). The trial court agreed with Co-employees that the suit was barred by the exclusivity provision in Missouri's workers' compensation statutes, section 287.120,[1] and granted summary judgment. Felecia Y. McComb ("Appellant")[2] appeals the trial court's judgment.

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[1] All statutory citations are to RSMo Supp. 2005 unless otherwise indicated.

[2] The original plaintiff in this case was McComb's widow, Nadine McComb. She died March 30, 2016. The McCombs' daughter, Felecia Y. McComb, filed a motion with this Court to be substituted in place of her mother as the appellant in this case, which this Court now sustains. Nadine McComb and Felecia Y. McComb are referred to as "Appellant."

At issue in this case is the application of two recent opinions from this Court concerning common law liability for co-employees: *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784 (Mo. banc 2016), and *Parr v. Breeden*, 489 S.W.3d 774 (Mo. banc 2016). Because Appellant failed to establish Co-employees owed McComb a duty separate and distinct from his employer's nondelegable duty to provide a safe workplace, this Court affirms the trial court's judgment.

Background

Edward R. McComb worked as a courier for a hospital and was tasked with delivering medical supplies and other materials to clinics. He was scheduled to work on a day when a severe winter storm moved through Missouri, causing the governor to declare a state of emergency.

Before McComb's shift began, his immediate supervisor, Gregory Norfus, was informed by other employees that a severe winter storm was approaching the area. Norfus called David Cheese, who supervised both Norfus and McComb, and asked if Cheese wanted McComb to drive his route. Cheese instructed Norfus to tell McComb to go on his route, but to drive slowly and carefully. Cheese did not consult with anyone or check the weather forecast before making the decision.

During McComb's shift, Norfus called him to check on his status. McComb told Norfus the windshield of his vehicle was freezing. Norfus again contacted Cheese to ask if they should pull McComb from his route, but Cheese instructed Norfus that McComb, who was not delivering any vital organs or "STAT" items that needed immediate delivery, should continue as scheduled. Before the end of his shift, McComb's vehicle

slid off the road, flipping several times down an embankment. He died as a result of the accident.

Appellant sued Co-employees for wrongful death, arguing they were negligent in sending McComb on his route and declining to pull him off his route despite the weather conditions. Co-employees moved for summary judgment and claimed the suit was barred by the exclusivity provision in Missouri's workers' compensation statutes. *See* sec. 287.120. The trial court granted summary judgment. Appellant appeals.[3]

Standard of Review

This Court reviews a trial court's grant of summary judgment *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is appropriate when the moving party has demonstrated there is no genuine dispute about material facts and the moving party is entitled to judgment as a matter of law. Rule 74.04(c)(6); *ITT Commercial*, 854 S.W.2d at 380.

Analysis

Appellant argues the trial court erred in granting summary judgment because there is a genuine issue of material fact. According to Appellant, whether McComb's death was attributable to his employer's nondelegable duty to provide a safe workplace is a question of fact for a jury to decide.

[3] This Court previously transferred the case after the court of appeals initially reversed the trial court's grant of summary judgment, but retransferred the case back to the court of appeals for reconsideration in light of *Peters* and *Parr*. On retransfer, the court of appeals again reversed the trial court's judgment. This Court has jurisdiction pursuant to article V, section 10 of the Missouri Constitution.

The workers' compensation statute applicable at the time of McComb's death provided the following exclusivity provision:

> 1. 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 arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person. . . .
>
> 2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee . . . at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.

Sec. 287.120.

Pursuant to section 287.120.1, an employer was subject to liability under workers' compensation law for accidents arising out of and in the course of an employment, but employers were released from all other liability for the accident. As explained in *Peters*, the definition of "employer" in the statute does not include a co-employee. 489 S.W.3d at 790. Because a co-employee is not an employer under the workers' compensation law, a co-employee is not covered in the exclusivity provision. *Id.* As a result, section 287.120.1 does not release a co-employee from any common law liability resulting from the work-related accident. *Id.* Appellant is permitted to pursue common law remedies against Co-employees because the version of section 287.120.1 in effect at the time of McComb's death did not release Co-employees from common law liability.[4] *See Peters*, 489 S.W.3d at 790.

[4] As explained in *Peters*, in 2012 the General Assembly amended section 287.120. 489 S.W.3d at 792-93. The amended statute provides immunity to co-employees except when "the employee

To establish a cause of action for common law negligence, "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 (quoting *Martin v. City of Washington*, 848 S.W.2d 487, 493 (Mo. banc 1993)). As this Court has repeatedly affirmed, the question of whether a duty existed between the plaintiff and defendant is purely a question of law. *Peters*, 489 S.W.3d at 793-94; *Parr*, 489 S.W.3d at 782.

The legal duty owed by a co-employee to a third person is separate and distinct from an employer's nondelegable duties. *Peters*, 489 S.W.3d at 795. If an employer's nondelegable duties owed to its employees with respect to safety are breached, an employer remains liable *even though an employer assigns the performance of those duties to an employee*. *Id.* Those nondelegable duties include the following:

> 1. The duty to provide a safe place to work.
> 2. The duty to provide safe appliances, tools, and equipment for work.
> 3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
> 4. The duty to provide a sufficient number of suitable fellow servants.
> 5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

W. Keeton, *Prosser and Keeton on the Law of Torts*, sec. 80 at 569 (5th ed. 1984) (footnotes omitted); *Peters*, 489 S.W.3d at 784; *Parr*, 489 S.W.3d at 779.

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engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." Sec. 287.120.1, RSMo Supp. 2012. Because of this change, this Court's holding, as in *Peters*, is limited to injuries occurring before the 2012 amendments went into effect. *See* 489 S.W.3d at 793.

If a co-employee has been assigned to perform nondelegable duties of the employer, such assignment exists because of the master-servant relationship and, absent the master-servant relationship, the co-employee would have no independent duty. *Peters*, 489 S.W.3d at 795; *Hansen v. Ritter*, 375 S.W.3d 201, 213 (Mo. App. 2012). Accordingly, an injured employee is barred from bringing common law negligence actions against a co-employee when the co-employee was performing a nondelegable duty owed by the employer. *Peters*, 489 S.W.3d at 796; *Parr*, 489 S.W.3d at 778. An injured employee, however, may bring a common law action for negligence against a co-employee if the injured employee can establish the co-employee owed a duty separate and distinct from the employer's nondelegable duties. *Peters*, 489 S.W.3d at 796; *Parr*, 489 S.W.3d at 778.

Appellant contends the trial court erred by granting summary judgment in favor of Co-employees because there are facts in controversy as to whether McComb's death was attributable to his employer's nondelegable duties. She argues this issue is a question of fact for a jury to decide. According to Appellant, Co-employees negligently performed their work and breached a separate and distinct duty from the employer's nondelegable duty if a factfinder determines they acted in contravention of the employer's inclement weather policy.[5] This misplaced argument, however, it contrary to this Court's holdings.[6]

[5] Co-employees claim the employer did not have a separate inclement weather policy, but rather McComb's job description mentions what to do in bad weather. This disagreement is immaterial to this Court's analysis.

[6] Appellant's argument is essentially the rationale adopted by *Leeper v. Asmus*, 440 S.W.3d 478 (Mo. App. 2014), which was explicitly rejected in *Peters* and *Parr*. *Leeper* stated, "[B]efore a court can determine whether a co-employee owes a duty in negligence at common law (a

The determination of the scope of an employer's duty is indistinguishable from the determination of the existence of a duty, which is clearly a question of law. *See Peters*, 489 S.W.3d at 793-94; *Parr*, 489 S.W.3d at 782; *Hoffman*, 176 S.W.3d at 708; *Kibbons*, 823 S.W.2d at 489; *Aaron*, 758 S.W.2d at 447. "The scope of the employer's duty to provide a safe workplace . . . is dependent on several factors, including the nature of the employer's work and the risks associated with the work." *Peters*, 489 S.W.3d at 795.

The duty allegedly breached in this case is similar to the one allegedly breached in *Parr*. In *Parr*, a truck driver was involved in a fatal single-vehicle accident. 489 S.W.3d at 777. His family claimed his medical condition – including his smoking habits, obesity, severe coronary artery disease, diabetes, and probable sleep apnea – made it unsafe for him to operate as a truck driver. *Id.* at 777. They brought a wrongful death action against three of the driver's supervisory co-employees, claiming they had a duty to provide a safe working environment by monitoring the driver's physical condition to determine whether he was fit to drive. *Id.* This Court concluded as a matter of law the duties allegedly breached by the supervisory co-employees "[fell] squarely within the [employer's] duty to provide a safe workplace." *Id.* at 779. The trial court's grant of summary judgment in favor of the supervisory co-employees was affirmed because the

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question of law), it must first be determined whether the workplace injury is attributable to the employer's breach of a nondelegable duty, a question of fact unique to the workplace." *Id.* at 488. This Court noted *Leeper* reached the wrong conclusion and overruled it "to the extent that it holds that the existence of a duty is not purely a question of law." *Peters*, 489 S.W.3d at 794 n.8; *see Parr*, 489 S.W.3d at 781.

driver's family failed to show the supervisory co-employees owed a duty separate and distinct from the employer's nondelegable duty to provide a safe workplace. *Id.* at 782.

Analogous to Appellant's argument that Co-employees owed a duty to McComb to pull him from his route when inclement weather created a danger, the plaintiffs in *Parr* claimed the supervisory co-employees owed a duty to the driver to not allow him to drive because of his particular health problems. As a matter of law, both duties clearly fall within an employer's nondelegable duty to provide a safe workplace. It would be illogical to say a court may determine the employer had a nondelegable duty, but then allow the jury to decide whether the co-employee's conduct fell within that duty. Both determinations are questions of law for the court.

It was an employer's nondelegable duty at common law to provide a safe workplace, "and it breaches that duty where it charged an employee with the responsibility to provide a reasonably safe work environment but the employee did not so provide." *Peters*, 489 S.W.3d at 800. An employer's nondelegable duty to provide a safe workplace is not unlimited, and liability will not extend to the employer for "the transitory risks which are created by the negligence of the servants themselves in carrying out the details of that work." *Peters*, 489 S.W.3d at 795-96 (quoting *Kelso v. W. A. Ross Const. Co.*, 85 S.W.2d 527, 535-36 (Mo. 1935)).

> [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 nondelegable 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 nondelegable duty to provide a safe workplace.

Id. at 796.

A transitory risk created by negligent co-employees is a risk that can be considered so unforeseeable to an employer as to remove it from the employer's nondelegable duty to provide a safe workplace. *See Redmond v. Quincy, O. & K.C.R. Co.*, 126 S.W. 159, 165 (Mo. 1909) ("[W]hen the master furnishes a reasonably safe place for the servant to work in, he is not liable for a transitory danger arising out of a single occurrence in which he is not at fault, and of which he has no notice or opportunity to correct."); *Beasley v. Linehan Transfer Co.*, 50 S.W. 87, 89 (Mo. 1899) (an employer will be liable for risks "so liable to occur that a reasonably prudent and experienced [employer], in the business in which the defendant was engaged, would have anticipated and could have guarded against it, but failed to do so"). As a result, an employer at common law would be liable for injuries caused by a co-employee if it was reasonably foreseeable that a co-employee would create such a risk. This principle is further examined in the companion case of *Conner v. Ogletree*, ___ S.W.3d ___ (Mo. banc 2018) (No. SC95995, decided Mar. 6, 2018), handed down this same day, and the reasoning in *Conner* also controls the disposition of this case.[7]

To explain the distinction between an employer's nondelegable duty to provide a safe workplace and a co-employee's separate and distinct duty arising from unforeseeable transitory risks created by how the co-employee carries out the details of his or her work,

[7] *Conner* provides additional explanation of the historical background concerning liability between employees and employers.

Peters relied on *Marshall v. Kansas City*, 296 S.W.2d 1 (Mo. 1956). The plaintiff in *Marshall* was injured when his co-employee "suddenly and unexpectedly" shook a compressor hose to remove kinks, causing the plaintiff to trip. *Id.* at 3. This Court concluded the co-employee was liable under common law negligence because "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." *Id.*

Unlike the dangerous condition at issue in *Marshall*, the dangerous condition in this case – the slippery road conditions – was not created by Co-employees. Rather, the severe winter weather made McComb's workplace unsafe and Co-employees' decision to keep him on his route related to the employer's nondelegable duty to provide a safe workplace. Additionally, the risks associated with driving a delivery vehicle in a region that experiences dangerous weather conditions are reasonably foreseeable to employers. McComb's employer had a procedure of what drivers should do in bad weather, and it relied on supervisors to ensure drivers followed the procedures to provide a safe workplace. In addition, it was reasonably foreseeable that a supervisor, such as Cheese, would be negligent in directing a delivery driver, such as McComb, to remain on the road in dangerous weather conditions.[8] *See Peters*, 489 S.W.3d (stating "this is a classic case

[8] The dissenting opinion asserts the following cases would have reached opposite results had those courts applied the reasoning outlined in this case and *Conner*, ___ S.W.3d ___ (Mo. banc 2018) (No. SC95995, decided Mar. 6, 2018): *Burns v. Smith*, 214 S.W.3d 335 (Mo. banc 2007); *Tauchert v. Boatmen's National Bank of St. Louis*, 849 S.W.2d 573 (Mo. banc 1993); and *Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922 (Mo. App. 1995). Applying the reasoning in this case to *Burns*, *Tauchert*, and *Hedglin* would yield the same results because the injuries in those

of a supervisory employee breaching the employer's nondelegable duty to provide a safe workplace").

Appellant has failed to demonstrate Co-employees owed McComb a duty separate and distinct from the employer's nondelegable duties. The trial court did not err by granting summary judgment.

Conclusion

The trial court's judgment in favor of Co-employees is affirmed.

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Mary R. Russell, Judge

Fischer, C.J., Wilson and Stith, JJ., concur;
Draper, J., dissents in separate opinion filed;
Breckenridge, J., concurs in opinion of Draper, J.
Powell, J., not participating.

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cases resulted from unforeseeable risks created by co-employees. *Burns*, 214 S.W.3d at 336 (holding a supervisor liable for injuries resulting from a water pressure tank explosion after he directed an employee to "[r]un it till it blows"); *Tauchert*, 849 S.W.2d at 574 (holding a supervisor liable for injuries resulting from his personal rigging of a makeshift hoist system to raise the elevator); *Hedglin*, 903 S.W.2d at 927 (holding a supervisor liable for injuries resulting from his directing an employee to climb to the top of a vat of scalding water and remove a grate by hanging from a forklift). *Burns* itself even notes the supervisor was liable because he "creat[ed] an additional danger beyond that normally faced in his job-specific environment." 214 S.W.3d at 340. Nothing in this opinion is inconsistent with the outcomes in these previous cases.

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DISSENTING OPINION

I respectfully dissent from the principal opinion's holding Appellant failed to establish Co-employees owed McComb a duty separate and distinct from his employer's nondelegable duty to provide a safe workplace when Co-employees ordered McComb to perform his courier duties in a severe winter storm, which ultimately resulted in his death. Although Appellant inartfully argues there are material facts in dispute regarding the duty owed to McComb that defeat summary judgment, I believe the pleadings established Co-employees' directive that McComb continue his route in increasingly dangerous weather conditions created a transitory risk in negligently carrying out the details of the work, resulting in a breach of duty beyond the employer's nondelegable duty to provide a safe

workplace. I would reverse the circuit court's judgment and remand for further proceedings.

"[T]he employer's nondelegable duty to provide a safe workplace does not include transitory risks arising from an employee's negligence in carrying out his or her work." *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784, 799 (Mo. banc 2016). The determination as to whether a co-employee's "personal duty exists depends on the particular facts and circumstances of each case." *Parr v. Breeden*, 489 S.W.3d 774, 782 (Mo. banc 2016). Accordingly, it is necessary to ascertain where the employer's non-delegable duty ends and a co-employee's independent duty begins. *Abbott v. Bolton*, 500 S.W.3d 288, 292 (Mo. App. E.D. 2016).

The principal opinion fails to distinguish several cases Appellant relies on to analogize Co-employees' actions to those finding co-employees and supervisors owed the injured employee a personal duty of care. In each of those cases, the co-employee or supervisor engaged in conduct that created a hazardous condition, or transitory risk, beyond the employer's nondelegable duty to provide a safe workplace, resulting in injury or death. Although these cases set forth affirmative acts and purposeful conduct consistent with the "something more" doctrine, in *Peters* this Court stated cases applying the "something more" test "can still prove instructive in a common law analysis" when determining a co-employee's duty, even though an injured employee is not required to allege affirmative, purposeful, or inherently dangerous conduct or conduct directed at the injured employee to establish co-employee liability in cases in which the common law applies. *Peters*, 489

S.W.3d at 797-98. *Conner v. Ogletree*, ___ S.W.3d ___ (Mo. banc 2018) (No. SC95955, decided Mar. 6, 2018), continues to recognize the usefulness of these cases.

In *Tauchert v. Boatmen's National Bank of St. Louis*, 849 S.W.2d 573, 574 (Mo. banc 1993), the supervisor personally created a makeshift hoist system to raise an elevator he and the employee were inspecting. The hoist failed, causing the employee to fall and sustain injuries. *Id.* This Court reversed the grant of summary judgment in employer's favor, holding there was a recognized cause of action against a co-employee for negligence when the co-employee created a hazardous condition that was "not merely a breach of an employer's duty to provide a safe place to work." *Id.*

In *Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922 (Mo. App. W.D. 1995), a supervisor directed an employee to climb to the top of a vat of scalding water and hang from a forklift to remove a grate inside the vat. *Id.* at 927. While the supervisor operated the forklift, the employee fell into the vat of scalding water and died. *Id.* Finding this case akin to *Tauchert*, the court agreed with the plaintiff's assertion that the supervisor, "contrary to his obligation to assure [the employee] a safe workplace, personally arranged an extremely dangerous scheme to remove a screen or grate from the vat by hanging [the employee] from a forklift." *Id.*

In *Pavia v. Childs*, 951 S.W.2d 700 (Mo. App. S.D. 1997), a supervisor directed a grocery store employee to stand on a wooden pallet, which the supervisor then lifted approximately fifteen feet into the air so the employee could retrieve store items stacked in the store's warehouse area. *Id.* at 701. The employee fell and sustained serious injuries. *Id.* The court, citing *Tauchert* and *Hedglin*, held the employee could maintain a cause of

action against his supervisor because the employee demonstrated the supervisor's negligent act created a hazardous condition beyond the employer's responsibility to provide a safe workplace. *Id*. at 702.

Finally, in *Burns v. Smith*, 214 S.W.3d 335 (Mo. banc 2007), this Court affirmed a trial court's judgment holding a supervisor personally liable for injuries an employee sustained when a water pressure tank on the side of a concrete truck exploded after the supervisor directed the employee to "[r]un it till it blows." *Id.* at 336. *Burns* explained an affirmatively negligent act "can best be described as an affirmative act that creates additional danger beyond that normally faced in the job-specific work environment." *Id*. at 338.

McComb's job as a courier inherently carried a general risk of accident or injury, no matter the weather conditions. Moreover, when McComb delivered or picked up life-saving medical supplies, organs, or other "STAT" items, driving in inclement weather was required as a part of his job description. McComb's job description required him to deliver "STAT" items immediately and to remove "snow/frost from both [courier] vehicles for STAT runs in winter months." In those instances, Co-employees' directive to navigate the winter storm would not have breached a duty owed by Co-employees separate and distinct from the employer's duty to provide a safe workplace. Yet these are not the facts presented here.

When viewing the facts in the light most favorable to Appellant, it is clear McComb was *not* delivering a "STAT" item when Norfus asked Cheese if he could pull McComb off his route after McComb reported his visibility was impaired. I would find Cheese's act

of sending McComb out to drive his route and failure to pull McComb from the route was a transitory risk created by Co-employees' negligence in carrying out the details of the work beyond the employer's nondelegable duty to provide a safe workplace as found in *Tauchert* and its progeny. The winter weather conditions were so severe that not only did the governor issue a state of emergency, but Norfus also called Cheese prior to McComb's shift to discuss whether McComb should be sent out on his route at all. Cheese did not check the weather forecast, failed to consult with anyone, and did not even deign to look out his office window before directing McComb to drive his route. Cheese knew it would take several hours to complete his route and McComb would be driving the route by himself in the dark.

When Norfus spoke with McComb later that evening, McComb told Norfus his windshield was freezing. A reasonable inference from McComb's disclosure strongly suggested the freezing windshield impacted his visibility while driving through the winter storm in the dark. Norfus again called Cheese and requested permission to pull McComb from his route. Cheese declined, although he could have pulled McComb from his route, and he knew McComb's job duties did not require him to perform deliveries of nonlife-saving or non-STAT items in severe winter weather when a state of emergency had been issued. Tragically, Cheese's directive to Norfus to instruct McComb to continue driving during a severe winter storm, knowing McComb's visibility was impaired due to the storm, a freezing windshield, and darkness, was a transitory risk, which, resulted in McComb's death, just as occurred in *Tauchert* and the other cases.

I also disagree with the principal opinion's proposition the duty allegedly breached in this case is similar to the one allegedly breached in *Parr*. In *Parr*, the employee, who had a myriad of medical conditions, was involved in a fatal single-vehicle accident in the course of his employment. *Parr*, 489 S.W.3d at 777. The employee's family filed a wrongful death action against three co-employees, alleging they had a duty to provide a safe working environment, to monitor the employee's health to determine if he was fit to drive, and to determine whether the employee was in compliance with federal regulations. *Id*. This Court held these allegations failed to establish the co-employees owed the employee a duty separate and distinct from the employer's nondelegable duty to provide a safe workplace. *Id*. at 782. *Parr* is distinguishable and the principle opinion's reliance on it is misplaced because *Parr* did not reach the issue of transitory risk, which squarely is at issue here.

Appellant established Co-employees' directive that McComb continue his route in the face of severe inclement weather and reduced visibility due to the darkness and an icy windshield created a transitory risk in negligently carrying out the details of the work, resulting in a breach of duty beyond the employer's nondelegable duty to provide a safe workplace. I would reverse the circuit court's grant of summary judgment in Co-employees' favor and remand for further proceedings.

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GEORGE W. DRAPER III, JUDGE