Established in 1945, Evans & Dixon, L.L.C. is one of the most experienced and respected insurance defense firms in the Midwest. Steeped in tradition and committed to service, we remain dedicated to representing employers, the insurance industry and the self-insured. We offer comprehensive legal coverage in the areas of labor and employment law, workers' compensation defense and civil liability defense.

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Prior to 2005…

In 2005, Missouri's Workers' Compensation Statute was amended. Prior to 2005, Section 287.800 mandated that “[a]ll provisions of [the Workers’ Compensation Act] shall be liberally construed with a view to the public welfare.”

Under this standard, courts *broadly* interpreted the Act to extend benefits to the largest possible class and resolved any doubts as to the right to compensation *in favor* of the employee.

Prior to 2005 …

Section 287.120 of the Act provides:
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 therefore 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 accidental injury or death, except such rights and remedies as are not provided for by this chapter.

*Note: The statute does not mention “co-employee”.

Prior to 2005 …

Section 287.030.1 “Employer Defined”:
1) Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;

2) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter …
Prior to 2005...

“Something more” v. Negligence

Badami v. Gaertner

➢ Leading up to the 2005 amendments, Badami allowed immunity for co-workers unless there was proof of “something more” beyond a simple act of negligence.

➢ This “something more” test required an injured employee show his co-employee purposefully and dangerously caused or increased a risk of injury. Or stated another way, the co-employee performed an affirmative act which caused or increased the risk of injury.

➢ Simple negligence was not enough under this test.

After 2005...

In 2005, the Act was amended to eliminate the requirement of liberal construction. Section 287.800 now provides:

▪ Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the Division of Workers’ Compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

Robinson v. Hooker
Robinson v. Hooker

- Employee sustained an injury to his eye resulting in blindness when his co-employee lost her grip on a high pressure hose. After settling his workers’ compensation claim, the employee brought a civil negligence claim against the co-employee.

- The court reasoned that a strict reading of the workers’ compensation statute, resulted in the exclusivity provision of RSMo § 287.120 only applying to employers, and not co-employees. Thus the Badami “something more” test was no longer applicable.

- Accordingly, the employee was free to proceed in tort against the allegedly negligent co-employee without a showing of “something more” than ordinary negligence.

Robinson v. Hooker

The court in Robinson highlighted the terms “person” and “using service of another for pay” when discussing the definition of employer under the Act:

- Section 287.030.1
  1) Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;
  2) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter. . . .

The Robinson Court further held:

- “The employee retains a common law right of action against co-employees who do not fall squarely within the definition of employer.”

- “Hooker cannot qualify as an ‘employer’ based on the mere statement in the petition that she is a co-employee of Robinson. Accordingly, she is not entitled to immunity under Section 287.120…”

QUESTIONPOSED:
In light of the language used by the court, should we argue a negligent co-employee is an “employer”?
Is an Act of Simple Negligence Enough?

<table>
<thead>
<tr>
<th>Before Robinson and the 2005 Amendment</th>
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<td>Then, liberal interpretation of the work comp statute.</td>
<td>Strict interpretation of the work comp statute.</td>
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<td>Badami: More than a simple act of negligence to sue a co-employee in tort.</td>
<td>“Something more” is no longer the test.</td>
</tr>
<tr>
<td>Negligence + an affirmative act causing or increasing the risk of injury = “something more”.</td>
<td>Injured employee does not need to show “something more” than simple negligence to bring a civil claim against a co-employee.</td>
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<tr>
<td>What is the new test? See Hansen v. Ritter.</td>
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Hansen v. Ritter

- Employee died when a safety guard gave way causing him to become entangled in the moving parts of a wire-stranding machine.

- In their petition, the deceased employee’s family argued the plant safety supervisor and corporate safety manager were negligent co-employees. The family alleged these employees owed the deceased a duty to provide a safe workplace, and this duty was delegated by the employer.

Hansen v. Ritter and HB1540

Co-employee liability evolves...
Hansen v. Ritter

- The court concluded co-employees cannot be held liable for failing to provide a safe workplace because, under common law, a duty to provide a safe workplace is assigned to the employer and cannot be delegated to employees.
- Injured workers must demonstrate circumstances showing a legally recognizable personal duty of care owed by defendant (co-employee) to the injured worker, separate and apart from the employer's non-delegable duties.

What is the standard after Hansen?
- Unfortunately, the injured employee does not need to show “something more” than simple negligence; BUT,
- The injured employee must show the allegedly negligent co-employee had a recognized personal duty of care, and a breach of this duty resulted in the injuries alleged.

House Bill 1540

- In response to the Robinson case, HB1540 was enacted July 10, 2012, and took effect August 28, 2012. This legislation amended §287.120 of the Workers’ Compensation Act, and changed the standard for co-employee liability to require an “affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.”
- The intent of the new language is to make employees liable only for intentional or obviously dangerous acts, rather than acts of simple negligence.
## What is the Standard?

<table>
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<tr>
<th>After the 2005 Amendment, Robinson and Hansen</th>
<th>After HB1540</th>
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<tr>
<td>- Strict interpretation of the work comp statute.</td>
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What is the new test? Co-employee breached personal duty of care.

- Back to "Badami".
- Affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.

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### What is the standard for pending cases?

**BEFORE 8/28/05**

- Badami v. Gaertner = "something more"
- Liberal Construction

**8/28/05 TO 8/28/12**

- Robinson and Hansen = simple negligence is enough.
- Strict Construction

**8/28/12 FORWARD**

- Robinson = Affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.
- Strict Construction

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### What is the standard for pending cases?

- Unfortunately, HB1540 is not retroactive, and it will only apply to injuries from 8/28/2012 forward.

- If the alleged date of injury occurred between 8/28/05 and 8/28/12, and the claim was “pending” during that period, *Robinson* will apply.
How do we handle cases that apply the “Robinson standard”? 
Defenses and Proactive Management

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Coverage and Employer’s Duty to Defend

- The Robinson decision is limited to the liability of the negligent co-employee. The case law indicates that generally, the employer remains immune from civil liability for personal injury claims that arise out of and in the course of employment as these claims remain within the exclusive jurisdiction of the Division of Workers’ Compensation.

- Many commercial liability policies exclude coverage for claims to injured employees that arise out of the employment environment. Employer liability (Part B) policies typically name only the employer as an insured, and in most cases, narrowly define coverage to include the “corporate employer”.

- Accordingly, Missouri employees who commit torts against their co-workers may be subject to civil liability and personal financial responsibility.

In light of the potential liability for co-employee’s and supervisors, what duty does an employer have to defend these claims?

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Defending Negligent Co-Employees

After the Robinson decision, some injured employees have sued allegedly negligent co-employees in circuit court. This raises some important questions:

- Should an employer pay for the defense of the negligent co-employee?

- If the employer elects not to defend, what are the risks and possible exposure?
Defending Negligent Co-Employees

If a potential insurer chooses not to defend under a reservation of rights, the insurer runs the risk of waiving its defenses (e.g., liability and damages).

- The injured employee could settle with or obtain a judgment against the negligent co-employee and attempt to collect from the insurer by way of a garnishment action.
- Because the potential insurer initially refused to defend under a reservation of rights, it also waived its right to dispute liability or damages and is now limited to disputing coverage under the insurance policy.

Defending Negligent Co-Employees

Since the Robinson decision, employers and insurers in workers’ compensation cases are advised to allege in their Answer that the negligent employee is an “employer” rather than a “co-employee”.

- Recently, injured employees have argued the definition of “employer” allows the negligent employee to fall under the umbrella of the general liability or Part B policy.
- Because this issue has not been resolved by Missouri Courts, it may be in the insurer’s best interest to provide representation to a negligent co-employee to avoid waiving their rights and defenses to coverage under the policy.

Defending Negligent Co-Employees

The following actions are recommended to properly defend and limit the insurer’s exposure under the policy:

1. Insurer retains counsel to defend the allegedly negligent co-employee under a reservation of rights;
2. Insurance company retains separate counsel to file a declaratory judgment action in circuit court.

Although the interests of the allegedly negligent co-employee and the insurer are aligned, there may be allegations in the insurer’s declaratory judgment that are inconsistent with the co-employee’s defense. Because this represents a possible conflict, the co-employee and insurer must be represented by separate counsel.