

*OLSON v. SHUMAKER TRUCKING & EXCAVATING CONTRACTORS, INC.*<sup>1</sup>

The Montana Supreme Court recently held that defendants who owe a nondelegable duty in personal injury claims may raise the defense of comparative negligence when either element of a two-pronged test is satisfied.<sup>2</sup>

The majority opinion in *Olson* was written by Justice Morris. Justices Leaphart and Warner concurred, as did Chief Justice Gray. Justice Nelson dissented with the majority's view on the role of contributory negligence as a defense in claims arising under nondelegable duties.

Balfour Beatty Rail, Inc. employed the plaintiff, Corey Olson, as a jobsite laborer in Great Falls, Montana.<sup>3</sup> Balfour was a subcontractor for Shumaker Trucking & Excavating Contractors, Inc. ("Shumaker"), which contracted with the Great Falls Development Authority ("GFDA") to build a rail line.<sup>4</sup> Balfour's jobsite was located "some distance" from its employee parking lot.<sup>5</sup> Since neither company provided transportation between the two areas, workers frequently rode back and forth on whatever means were available—including the bucket of a front-end loader.<sup>6</sup>

Olson was injured at the end of his workday while riding from the jobsite to the employee parking area in a loader bucket.<sup>7</sup> Another laborer, who was in the loader's cab, mistakenly actuated one of the bucket's hydraulic controls.<sup>8</sup> The bucket fell on Olson's right leg, immediately causing serious physical injuries and, later, post-traumatic stress disorder ("PTSD").<sup>9</sup> Olson elected to ride in the front-end loader even though his supervisor had

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<sup>1</sup> *Olson v. Shumaker Trucking & Excavating Contractors, Inc.*, 196 P.3d 1265 (Mont. 2008).

<sup>2</sup> *Id.* at 1277–1278.

<sup>3</sup> *Id.* at 1268.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Olson*, 196 P.3d at 1268.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

informed him he would return to the jobsite shortly with a pickup truck to give Olson a ride to the parking lot.<sup>10</sup> Prior to the accident, “Olson had been aware of Shumaker’s safety policy barring employees . . . from riding on construction equipment.”<sup>11</sup>

Olson sued Shumaker, alleging the company was negligent for failing to provide Balfour’s workers with safe jobsite transportation.<sup>12</sup> Before trial, the court granted Olson summary judgment on the issues of duty and breach.<sup>13</sup> The district court also found that the nondelegable duty that Shumaker owed to Olson stemmed from both Shumaker’s contract with the GFDA and the Montana Safety Act.<sup>14</sup>

Subsequently, Olson moved for summary judgment on the issue of contributory negligence, arguing that Shumaker could not introduce evidence of contributory negligence by an injured employee when the employer had breached a nondelegable duty.<sup>15</sup> The district court denied Olson’s motion, determining that:

contributory negligence does not constitute delegation or transfer of a nondelegable duty [and that] negligence per se under the Montana Safety Act, arising from a breach of a nondelegable contract duty, does not preclude comparison and apportionment of contributory negligence as a matter of law in all cases.<sup>16</sup>

The case proceeded to trial.

At the close of trial, a jury awarded Olson \$1,044,773.<sup>17</sup> However, the jury also found that Olson was ten-percent negligent.<sup>18</sup> Thus, his award was reduced to \$940,296. Olson appealed the district court’s decision to allow the defense of contributory negligence.<sup>19</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1277–1278.

<sup>12</sup> *Id.* at 1268.

<sup>13</sup> *Olson*, 196 P.3d at 1268–1269.

<sup>14</sup> *Id.* at 1269.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1270.

<sup>18</sup> *Id.* at 1270.

On appeal, Olson argued that the district court improperly delegated Shumaker's nondelegable duty when it denied his motion for summary judgment on the defense of contributory negligence.<sup>20</sup>

Prior to *Olson v. Schumaker*, Montana's longstanding nondelegable duty rule prevented any duty-shifting in circumstances where the defendant owed the plaintiff a nondelegable duty.<sup>21</sup> In particular, "where a nondelegable duty to provide a safe work environment exists, the general contractor 'cannot evade liability by employing another to do that which he has agreed to perform.'"<sup>22</sup>

Before undertaking an analysis of Olson's argument, the Supreme Court observed that the "statutory nondelegable duty arising from the Montana Safety Act stands in tension with the general duty to avoid harm to oneself under [Montana's] Contributory Negligence Statute."<sup>23</sup> The Court also noted that it had yet to be faced with a case directly addressing this relationship.<sup>24</sup>

In determining that contributory negligence remained available as a defense to Shumaker, the district court relied on *Shannon v. Howard S. Wight Construction Co.*<sup>25</sup> and *Stepanek v. Kober Construction*.<sup>26</sup> The district court found that, taken together, these two cases implied the following rule:

[C]ontributory or comparative negligence remains available to the defendant if evidence exists demonstrating that: (1) the worker has a reasonable means or opportunity to avoid the hazard without endangering his or her employment; or (2) the subject harm was not a reasonably foreseeable consequence of the contractor's breach of a nondelegable safety duty.<sup>27</sup>

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<sup>19</sup> *Olson*, 196 P.3d at 1270–1272.

<sup>20</sup> *Id.* at 1275.

<sup>21</sup> *Ulmen v. Schweiger*, 12 P.2d 856, 860 (Mont. 1932).

<sup>22</sup> *Olson*, 196 P.3d at 1275 (citing *Ulmen*, 12 P.2d at 860).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1275–1276 (citing *Shannon v. Howard S. Wight Constr. Co.*, 593 P.2d 438, 445–446 (Mont. 1979)).

<sup>26</sup> *Id.* (citing *Stepanek v. Kober Constr.*, 625 P.2d 51, 56 (Mont. 1981)).

<sup>27</sup> *Id.* at 1276.

Since the district court had determined that Shumaker was negligent per se under the Montana Safety Act, the Court focused its primary analysis on the role of comparative negligence in negligence per se claims.<sup>28</sup> The Court noted that, in a negligence per se claim, “[the] plaintiff must still prove causation before she may recover,”<sup>29</sup> and that the existence of contributory negligence in a negligence per se claim is usually a factual question.<sup>30</sup>

Approving the district court’s handling of the case, the Montana Supreme Court adopted the two-part, *Shannon-Stepanek* test that the district court had developed, which provided that comparative negligence remained available as a defense in negligence claims involving a nondelegable duty when either of the two prongs is satisfied.<sup>31</sup>

Justice Nelson viewed the majority’s interpretation as a “sea change in the law governing a contractor’s breach of its contractually-assumed, nondelegable duty of safety to employees.”<sup>32</sup> His dissent expressed a distinct concern that allowing contributory negligence as a defense in workplace claims will serve as an incentive for contractors to pass undue responsibility for workplace safety onto their laborers, “the very persons that the nondelegable-duty doctrine was designed to protect.”<sup>33</sup>

In agreeing with Olson’s apportionment argument,<sup>34</sup> Nelson also took into account several facts that the majority did not mention. At the time of the injury, Olson was 18-years-old and a new employee.<sup>35</sup> He had previously been instructed to follow the lead of a co-worker, and

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<sup>28</sup> *Olson*, 196 P.3d at 1277.

<sup>29</sup> *Id.* (citing *Est. of Schwabe v. Custer’s Inn*, 15 P.3d 903, 909 (Mont. 2000) (overruled on other grounds); *Giambra v. Kelsey*, 162 P.3d 134, 147 (Mont. 2007)).

<sup>30</sup> *Id.* (citing *Pierce v. ALSC Architects, P.S.*, 890 P.2d 1254, 1260 (Mont. 1995)).

<sup>31</sup> *Id.* at 1278.

<sup>32</sup> *Id.* at 1278 (Nelson, J., dissenting).

<sup>33</sup> *Id.*

<sup>34</sup> *Olson*, 196 P.3d at 1278 (Nelson, J., dissenting).

<sup>35</sup> *Id.* at 1279.

the co-worker climbed aboard the loader before Olson.<sup>36</sup> Finally, the dissent emphasized that the injury occurred at the end of a long and exhausting workday—a time when an employee is likely to ride (instead of walk) to a distant parking area if given the choice.<sup>37</sup>

The dissent summarized its opinion, and stated that, “the only reason Olson was put into the position of being transported in the front-end loader was because Shumaker undisputedly abdicated and breached its nondelegable duty to supervise safety and provide safe transportation.”<sup>38</sup>

While only the passage of time will show if Justice Nelson’s concerns prove prescient, for now, the Court’s holding on the role of comparative negligence in nondelegable duty claims is likely a cost-saving victory for the State’s contracting businesses and their insurers.

Regardless of one’s opinion of the majority ruling, *Olson* brings clarity to an area of Montana law.

One subtle portion of this case that may prove important is the Court’s broad interpretation of Montana’s comparative negligence scheme<sup>39</sup> as creating a “duty to avoid.”<sup>40</sup> The “duty to avoid” will certainly be cited by defendants in other types of claims, such as premises liability and vehicular negligence. In turn, plaintiffs will likely argue that this portion of the *Olson* opinion is dicta, or that the “duty to avoid” is limited to workplace negligence actions.

— *Joseph M. Ransmeier*

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1280.

<sup>39</sup> Mont. Code Ann. § 27–1–702 (2007).

<sup>40</sup> *Olson*, 196 P.3d 1275 (majority).