CAUSE NO. 16-0120

IN THE SUPREME COURT OF TEXAS

STEVEN PAINTER; TONYA WRIGHT, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF EARL A. WRIGHT, III, DECEASED; VIRGINIA WEAVER, INDIVIDUALLY AND AS NEXT FRIEND OF A.A.C., A MINOR; AND TABITHA R. ROSELLO, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ALBERT CARILLO, DECEASED,
Petitioners,

V.

AMERIMEX DRILLING I, LTD.,
Respondent.

On Petition for Review from the
Eighth Court of Appeals, El Paso, Texas
Cause No. 08-14-00134-CV

BRIEF OF *AMICUS CURIAE* AMERICAN SUBCONTRACTOR ASSOCIATION IN SUPPORT OF RESPONDENT'S MOTION FOR REHEARING

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STATEMENT OF INTEREST AND FEE DISCLOSURE

TO THE HONORABLE SUPREME COURT OF TEXAS:

The American Subcontractor Association of Texas submits this brief supporting the petition for rehearing made by Amerimex Drilling I, Ltd.

The American Subcontractor Association ("ASA") is a trade association of construction specialty trade contractors, suppliers, and service providers. ASA is committed to improving business conditions for subcontractors and suppliers through legislative influence and providing professional education and collaboration throughout the construction industry. ASA's goal is to ensure members are educated, knowledgeable, and work towards outstanding quality.

The fee for the preparation of this amicus brief is being paid by ASA. ASA has no pecuniary interest in the outcome of this case.

ARGUMENT AND AUTHORITY

I. Amerimex is not vicariously liable for the actions of Burchett because *even if* Burchett was considered to be an employee at the time of the accident, he was outside the course and scope of employment.

An employer will only be held vicariously liable for the actions of its worker if: (1) the worker was an employee; and (2) was acting in the course and scope of employment.[1] Neither requirement is satisfied in this case.

If a worker is determined to be an employee, the question is whether the employee was within the course and scope of his employment. Even if Burchett was an employee at the time of the accident, he was not within the course and scope of his employment when driving crew back to the bunkhouse. This Court has stated "vicarious liability arises only if the tortious act falls 'within the scope of employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired.'"[2] Traveling to and from work, even though arguably for the employer's benefit, has been consistently held to be outside the course and scope of employment.

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[1] *Goodyear Tire & Rubber Co. v. Mayes,* 236 S.W.3d 754, 757 (Tex. 2007).
[2] *Painter v. Amerimex Drilling I, Ltd.,* No. 16-0120, 2018 WL 2749862 at *4 (Tex. Apr. 13, 2018) *(quoting Goodyear Tire & Rubber Co. v. Mayes,* 236 S.W.3d 754, 757 (Tex. 2007)).

A. Travel reimbursement does not create an exception to the coming and going rule.

The contractual $50 per day Driver's Bonus paid to the driller of each crew was a travel reimbursement. Travel reimbursements create no exception to the 'coming and going' rule, which states travel to and from a job location is not within the course and scope of employment.[3] The Driver's Bonus was to reimburse workers for the costs associated with a remote drill site, similar to the $50 per day Subsistence Bonus that compensated crew for daily expenses and the $50 per day Bottom Hole Bonus available to crew who remained employed from the well's spud date through its completion.

The lower courts correctly applied the principle from *Pilgrim* that an employer compensating travel does not create an exception to the coming and going rule. Similar to *Pilgrim*, Amerimex exercised no control and had no right of control over Burchett once he completed his shift. The remote location of the drill site does not affect the coming and going rule,[4] and in fact lends support to the argument that Amerimex is simply trying to reimburse crew members for their added personal costs due to the remote well location.

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[3] *Bell v. VPSI, Inc.*, 205 S.W.3d 706, 718 (Tex. App.—Fort Worth 2006, no pet.); *Longoria v. Texaco, Inc.*, 649 S.W.2d 332, 335 (Tex. App.—Corpus Christi 1983, no writ.).

[4] *Pilgrim v. Fortune Drilling Co., Inc.*, 653 F.2d 982, 987 (5th Cir. 1981); *Am. Nat'l Ins. Co. v. O'Neal,* 107 S.W.2d 927, 928 (Tex. Civ. App.—San Antonio 1937, no writ) (noting there would be no distinction whether the distance traveled was one mile or one hundred miles from the place of employment).

The Court made an unnecessary and incorrect distinction between: (i) a contract requiring Amerimex to hire drivers to provide transportation, and Amerimex deciding to offer that extra work to Burchett; and (ii) the actual contract contemplating that Amerimex would assign the driving task to specific individuals, the drillers.[5] The Court stated that a dual employee-independent contractor relationship might exist in the former case, but not the latter. But in either case, work outside the scope of job duties is assigned to a worker. While the employer in *Pilgrim* allowed the crew to select who received the travel compensation, Amerimex simply making that decision itself does not change what the compensation is for: to reimburse for travel expenses and encourage carpooling. To allow such a minor distinction—assigning the driver or allowing workers to volunteer—to change the result of a well-established rule will create ambiguity and make it unduly difficult for employers to in any way compensate their workers for travel. In sum, there is no way for the Court's opinion and *Pilgrim* to peacefully co-exist.

The Court erroneously relied on workers' compensation law for determining whether Burchett was within course and scope when it cited to *Texas Employers' Insurance Association v. Inge et al*. While it is true that for *workers' compensation purposes*, a drilling contractor's employee did not "step out of his role as an

[5] *Painter v. Amerimex Drilling I, Ltd.*, No. 16-0120, 2018 WL 2749862, at *6 n.13 (Tex. Apr. 13, 2018). Despite the contractual language, non-driller crew members also sometimes drove, and were reimbursed by Burchett.

employee and become an independent contractor" when driving other crew members to and from a remote drilling site, the same is not true for respondeat superior purposes.[6] Workers' compensation is governed by a statutory scheme that is liberally construed towards allowing the employee to receive worker's compensation benefits—and favoring employers who elect to provide coverage—and "the rules applied to determine whether a worker is entitled to statutory workers' compensation benefits are not intended to apply to matters other than cases involving claims for workers' compensation benefits."[7]

Workers' compensation is more liberal in its application and allows an exception for the coming and going rule that respondeat superior does not allow.[8] Under workers' compensation, when an employer pays for an employee's transportation between home and work, the travel is within that employee's course and scope of employment.[9] There is no such exception in respondeat superior.[10] Further, this Court has held that whether an employee received workers'

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[6] *Tex. Emp't Ins. Ass'n v. Inge,* 208 S.W.2d 867, 870 (Tex. 1948).
[7] *OCI Beaumont LLC v. Barajas,* 520 S.W.3d 83, 89 (Tex. App.—Beaumont 2017, no pet.) (*citing Harris v. Mundy Contract Maint.,* No. 09-96-045 CV, 1997 WL 126791 (Tex. App.—Beaumont Mar. 20, 1997, no writ)).
[8] *See Sentry Select Ins. Co. v. Ruiz,* EP-16-CV-00376-DCG, 2018 WL 3046942, at *8 (W.D. Tex. June 20, 2018) (refusing to use workers' compensation caselaw as a way to broaden insurance contract interpretation caselaw and noting that workers' compensation is designed to be broad to assist injured workers).
[9] TEX. LAB. CODE ANN. § 401.011(12)(A)(i) (West 2015); *Shelton v. Standard Ins. Co.,* 389 S.W.2d 290, 293–94 (Tex. 1965).
[10] *Id.*

compensation benefits is not "competent evidence" that the employee was in the scope of employment at the time of the accident for purposes of respondeat superior liability.[11] While workers' compensation and respondeat superior have consistently been treated as two separate concepts with separate purposes, the Court has mixed them for the first time in this case.

Texas appellate courts have (for decades) rejected using workers' compensation law as a mechanism to chip away at longstanding vicarious liability rules.[12] As this Court has noted, "[t]he risks to which employees are exposed while traveling to and from work are shared by society as a whole and do not arise as a result of the work of employers."[13] This Court should not jettison this longstanding policy justification in favor of more permissive workers' compensation standards.

B. Special Mission exception to coming and going rule is not applicable.

There is no special benefit to the employer from Burchett driving crew between the well site and the bunkhouse sufficient to create a "special mission" that would cause an exception to the coming and going rule under the doctrine of respondeat superior.[14] The only benefit to Amerimex was the appearance of Burchett

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[11] *Goodyear Tire & Rubber Co. v. Mayes,* 236 S.W.3d 754, 757 (Tex. 2007).
[12] *OCI Beaumont LLC v. Barajas,* 520 S.W.3d 83, 88 (Tex. App.—Beaumont 2017, no pet.) (declining to use the workers' compensation based "access" rule as a way to expand vicarious liability of principals and citing to a prior unpublished decision from 1997 that held the same way).
[13] *Evans v. Illinois Employers Ins. of Wausau,* 790 S.W.2d 302, 305 (Tex. 1990).
[14] *Pilgrim v. Fortune Drilling Co., Inc.,* 653 F.2d 982, 987–88 (5th Cir. 1981).

and the crew members he drove that day at the well location. This is no different from the benefit an employer receives from every worker traveling to work. The benefit of crew members carpooling does not raise the benefit Amerimex received to make the travel a special mission. In *Pilgrim*, one crew member was reimbursed for driving other crew members, and the court held that under Texas law that fact was insufficient to impose liability on an employer.[15]

II. Burchett was not an employee at the time of the accident.

Regardless of whether Burchett was in the course and scope of employment, that question is not reached because Burchett was not an employee at the time of the accident. Texas follows the Restatement view for whether a worker is an employee. Under either the Second or Third Restatement of Agency, Burchett was not an employee at the time of the accident.[16] Under the Restatement, control is an essential component to whether the worker was an "employee" at the time of the incident for purposes of respondeat superior. As this Court has stated, "the right to control remains the 'supreme test' for whether the master-servant relationship exists."[17] The

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[15] *Pilgrim v. Fortune Drilling Co., Inc.*, 653 F.2d 982, 988 (5th Cir. 1981).

[16] *See* Restatement (Second) of Agency § 220 (1958) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services *is subject to the other's control or right to control.*") (emphasis added); Restatement (Third) of Agency § 7.07 (2006) ("[A]n employee is an agent whose principal co*ntrols or has the right to control the manner and means of the agent's performance of work*.") (emphasis added).

[17] *St. Joseph Hospital v.* Wolff, 94 S.W.3d 513, 542 (Tex. 2002) (*quoting Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins*, 926 S.W.2d 287, 290 (Tex. 1996)).

control requirement is what allows the general rule that a person has no duty to control the actions of another to be altered.[18] This Court recognized the need for an employer to have a right to control a worker as a prerequisite for a court to impose vicarious liability when it stated "[t]he doctrine has been explained as a 'deliberate allocation of risk' in line with 'the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss.'"[19] It is only this right or ability to exercise control over the actions of another that imposes liability on an employer through respondeat superior.

Recognizing the essential nature of control in determining whether a worker is an employee, this Court nevertheless declined to specifically identify the amount and form of control Amerimex had the right to exercise over Burchett at the time of the accident. Instead, because Amerimex exercised control over Burchett's work as a driller sufficient to make him an employee for that task, this Court elected to assume as a matter of law that the same level of control extended to Burchett after his shift ended and he had left the well location. This view contradicts Texas law and creates a shift in respondeat superior by holding an employer potentially liable for actions taken by employees while not under the control of the employer.

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[18] *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007).
[19] *Painter v. Amerimex Drilling I, Ltd.*, No. 16-0120, 2018 WL 2749862, at *3 (Tex. Apr. 13, 2018) (*quoting St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 540 (Tex. 2002)).

A. Respondeat Superior requires an analysis of the employer-employee relationship at the time of the negligent act.

The test for respondeat superior requires the employer to retain the right to control at *the time* of the negligent act. Texas law has consistently held that "a master is liable for the negligent acts of his servant under the doctrine of respondeat superior 'only where the relationship of master and servant exists *at the time and in respect to the very thing causing the injury*."[20] Therefore, the point in time courts must analyze the employer-employee relationship is whether the master had the "right and power to direct and control [the servant] in the performance of the causal act or omission *at the very instance of the act or neglect*."[21]

Despite the language of the test, the Court stated "Amerimex would have us reevaluate the worker's employment status for vicarious-liability purposes by isolating the task the worker was performing at the moment of the accident and conducting an independent evaluation of the employer's control with respect to that

[20] *Pilgrim v. Fortune Drilling Co., Inc.,* 653 F.2d 982, 986 (5th Cir. 1981) (emphasis added) (*quoting Am. Nat'l Ins. Co. v. Denke,* 95 S.W.2d 370, 373 (Tex. 1936)); *Parmlee v. Tex. & N.O.R. Co.,* 381 S.W.2d 90, 94 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.); *Glasgow v. Floors, Inc. of Tex.,* 356 S.W.699, 705 (Tex. Civ. App.—Tyler 1962, no writ); *Daensburg v. Tobey,* 887 S.W.2d 84 (Tex. App.—Dallas 1994, writ denied) (*citing Am. Nat'l Ins. Co. v. Denke,* 95 S.W.2d 370, 373 (Tex. 1936)).

[21] *Daensburg v. Tobey,* 887 S.W.2d 84 (Tex. App.—Dallas 1994, writ denied) (*citing Am. Nat'l Ins. Co. v. Denke,* 95 S.W.2d 370, 373 (Tex. 1936)).

particular task. This position is inconsistent with the framework we have described."[22] However, this position is not inconsistent.

Evaluation of the employer-employee relationship at the time of the act of negligence is required because respondeat superior only applies to make an employer liable for the actions of its *employee*.[23] Therefore, the first step requires an evaluation of the task giving rise to the negligence to determine if for that task the worker was actually an employee whom the employer had the right to control. To bypass this step is to essentially eliminate the first requirement altogether.

The Court also stated that a task-by-task analysis would cause "an individual shifting between employee and independent contractor status countless times in a given work day." The Court references *Mid-Continent Cas. Co. v. Andregg Contracting, Inc.* for the proposition that the employee/independent contractor review is not done on a task by task basis.

In *Mid-Continent*, the court declined to look at each task within the project the worker was performing at the time of the negligence. But there, the worker was hired for two projects, both involving demolition, over a single period of time, and was injured during the overall task of his demolition assignment. Here, Respondent

[22] *Painter v. Amerimex Drilling I, Ltd.*, No. 16-0120, 2018 WL 2749862, at *5 (Tex. Apr. 13, 2018).

[23] *Ogg v. Dillard's, Inc.*, 239 S.W.3d 409, 418 (Tex. App.—Dallas 2007) ("In determining whether a police officer acted as the employee of a private employer or in an official capacity, we 'analyze the capacity in which the officer acted at the time he committed the acts for which the complaint is made.'")

is not asking the Court to look at each task within the job of driving the workers back to the bunkhouse, but that particular job as a whole. Because the job driving workers is so inherently different from the drilling job Burchett was hired for the driving job necessarily must be analyzed separately. Simply put, Burchett was employed by Amerimex as a driller, *not* a driver. The driving may have been something he was doing on this job, it was not the reason for his employment. To lump unrelated job duties together, instead of analyzing the degree of control over each distinct job, will have the overarching effect of increasing employer liability under respondeat superior.

This case is similar to *Ochoa*, where the analysis was not done on a task by task basis within one job. Instead, the court in *Ochoa* analyzed separately because the worker performed two unrelated jobs.[24] While this case did not involve two separate periods of employment, as in *Ochoa*, it involved two separate and unrelated tasks. It is the extent of an employer's control over the details of accomplishing *the task* at issue that primarily distinguishes the status of independent contractor from that of agent.[25]

[24] *Ochoa v. Winerich Motor Sales Co.*, 94 S.W.2d 416, 418 (Tex. Comm'n App. 1926).
[25] § 3:7. Tests determinative of independent contractor status—Right to control details of work, 1 Tex. Prac. Guide Bus. Trans. § 3:7 (*citing Gonzalez v. VATR Constr. LLC,* 418 S.W.3d 777, 784 (Tex. App.—Dallas 2013, no pet.)); *Royal Mortg. Corp. v. Montague,* 41 S.W.3d 721, 732 (Tex. App.—Fort Worth 2001, no pet.).

As this court stated in *McNamara*, the test for determining whether a worker is an independent contractor or an employee "is right ***to*** control, not comparison ***of*** control" with the employer's previous right to control.[26] In this case, Burchett was hired for the work as a driller, and had completed his shift as a driller.

While Amerimex had the right to control Burchett regarding his employment as a driller, once Burchett's shift ended and Burchett left the well location, Amerimex no longer exercised control over him. The driving "job" assigned to Burchett was wholly separate and unrelated to Burchett's employment as a driller. It, therefore, must be analyzed separately to determine whether Amerimex exercised sufficient control over Burchett's actions as a driver to impose vicarious liability on Amerimex.

Even if Burchett was required to drive the crew back to the bunkhouse in the evenings, Amerimex exercised no control over Burchett completing this job. Amerimex had no right of control over the employees after their shift ended. They were not on the payroll and the company did not direct or instruct its employees in any regard as to how they commuted to and from work. Regardless of Plaintiff's contentions, a travel reimbursement is not being "on the payroll".[27] At most, Burchett was an independent contractor, and an independent contractor's negligence

[26] *Limestone Products Distrib., Inc. v. McNamara,* 71 S.W.3d 308, 312 (Tex. 2002)(emphasis added).
[27] *Pilgrim v. Fortune Drilling Co., Inc.,* 653 F.2d 982, 983 (5th Cir. 1981).

does not impose liability on an employer for respondeat superior purposes.[28] As the *Sandridge* court stated, which is still good law as the dissent noted, "[a]t least with respect to the transport of the crew, Burchett has all the markings of an independent contractor."[29]

B. Burchett was at most an independent contractor at the time of the accident.

Determining whether a worker is an employee or an independent contractor is made using the "*Limestone* factors" from *Limestone Products Distribution, Inc. v. McNamara*. Those factors are "(1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform he job; (3) the worker's right to control the progress of the work except about final results; (4) the time for which the worker is employed; and (5) the method of payment, whether by unit of time or by the job."[30]

The *Limestone* factors weigh in favor of Burchett being, at most, an independent contractor, not an employee, with regards to his assigned job of driving to the well location. When driving, Burchett was independent from Amerimex. Burchett drove his own vehicle, Amerimex did not: (1) instruct Burchett on how he

[28] *Fifth Club, Inc. v. Ramirez,* 196 S.W.3d 788, 796 (Tex. 2006).
[29] *Painter v. Sandridge Energy, Inc.*, 511 S.W.3d 713 (Tex. App.—El Paso 2015, pet. denied); *Painter v. Amerimex Drilling I, Ltd.*, No. 16-0120, 2018 WL 2749862, at *10 (Tex. Apr. 13, 2018) (Green, P., dissenting).
[30] *Limestone Products Distrib., Inc. v. McNamara,* 71 S.W.3d 308, 312 (Tex. 2002).

was to drive to the well location; (2) direct or specify for him the route to take; and (3) purport to place any restrictions on Burchett's right or ability to stop anywhere or any time during that drive. In addition, there was no requirement other workers had to ride with Burchett. Instead, they were free to drive themselves.

The only thing Amerimex had any control over, in fact, was the final result that the crew must arrive at the well location to trigger the Driver Bonus. For a worker to be classified as an employee under Texas law, the employer must control "not merely the end sought to be accomplished, but also the means and details of its accomplishment."[31] Therefore, merely naming the driller as the member of the crew who would drive was not sufficient control over the "means and details" absent further instructions. Further, the time Burchett was instructed to drive was before his regular shift began, during the mornings on Burchett's own time. Finally, Burchett was not paid hourly, but was simply paid a flat fee of $50 per day he drove, regardless of the actual cost of travel.

Simply put, before Burchett began his shift and after he ended his shift, Amerimex had no right to control him. Therefore, for any tasks Burchett was performing before or after his day shift as a driller, Burchett was, at most, an independent contractor.

[31] *Limestone Products Distrib., Inc. v. McNamara,* 71 S.W.3d 308, 312 (Tex. 2002).

III. Broadening Respondeat Superior goes against public policy.

Respondeat Superior applies "only where the relationship of master and servant exists *at the time and in respect to the very thing causing the injury* and from which it arises.'"[32] To hold "once an employee always an employee" opens an employer up to vicarious liability for duties their workers complete that are separate from their main employment, and over which the employer has little or no control. The purpose of respondeat superior is to hold an employer liable for the actions of another *when the employer exercises such control over that other person* that the actions being taken are essentially that of the employer. By broadening vicarious liability to hold employers liable for actions taken over which the employer has no control goes against the very purpose of respondeat superior.

Further, to allow an exception to the coming and going rule where the operator or employer designates one worker to drive the carpool instead of allowing the crew to decide creates an arbitrary distinction that injects uncertainty into an employer's ability to reimburse employees for travel and remain within the coming and going rule. Consider the following scenarios:

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[32] *Pilgrim v. Fortune Drilling Co., Inc.*, 653 F.2d 982, 986 (5th Cir. 1981) (emphasis added) (*quoting Am. Nat'l Ins. Co. v. Denke,* 95 S.W.2d 370, 373 (Tex. 1936)); *Parmlee v. Tex. & N.O.R. Co.*, 381 S.W.2d 90, 94 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.); *Glasgow v. Floors, Inc. of Tex.*, 356 S.W.699, 705 (Tex. Civ. App.—Tyler 1962, no writ); *Daensburg v. Tobey*, 887 S.W.2d 84 (Tex. App.—Dallas 1994, writ denied) (*citing Am. Nat'l Ins. Co. v. Denke*, 95 S.W.2d 370, 373 (Tex. 1936)).

> Scenario 1: Employer pays $50 per day to one crew member to drive, crew decides among themselves who that will be. This would be held travel reimbursement and the coming and going rule applies. The driver's insurance company would be liable to third parties injured with a liability cap.
>
> Scenario 2: Employer pays $50 per day to one crew member to drive and specifies it will be the driller who is the most senior/responsible. The driller is as a matter of law an employee while driving and the employer is vicariously liable to any employee passenger or third party with no monetary cap.

Both the above scenarios serve the same purpose and have the same effect. Specifically, that employee carpooling is encouraged, and the driving employee is reimbursed for his or her travel costs. Yet, in scenario one the employer is not vicariously liable for the actions of another, while in scenario two the employer is vicariously liable. The formerly clear rule that reimbursing workers for travel costs will not bring them out of the coming and going rule has been rendered ambiguous. Employers will no longer be able to encourage carpooling without potentially exposing themselves to liability by accident.

Finally, if this result stands it would almost certainly create coverage gaps for contractors and disincentivize contractor-based carpooling programs. Regarding coverage gaps, there are many cases in which courts have declined to use workers' compensation principals to expand coverage obligations.[33] Specifically, courts have

[33] *See, e.g.*, *Nautilus Ins. Co. v. Zamora*, 114 F.3d 536, 538 (5th Cir. 1997); *Sentry Select Ins. Co. v. Ruiz*, EP-16-CV-00376-DCG, 2018 WL 3046942, at *8 (W.D. Tex. June 20, 2018).

held that workers' compensation's "limited exception to the more general rule recognizing that compensation benefits do not extend to injuries incurred by employees going to and from work" could not be used to expand an insurer's general duty to defend an insured.[34] Based on this, it is likely, if an employer's exposure under vicarious liability law is expanded using workers' compensation principles, the employer will have no insurance to cover the exposure. This decision will unnecessarily cause coverage gaps for contractors.

This will leave such companies with a difficult choice: purchase more expensive insurance or abandon carpool incentives. As discussed above, that was a primary benefit of the $50 reimbursement paid by Amerimex. Carpooling provides important benefits to the public at large like cutting down on traffic and pollution. There are good policy reasons to incentivize carpooling, yet the underlying decision will discourage carpooling reimbursement practices. For all of the above reasons, and those set forth in the brief of Amerimex, the Court should reconsider its underlying decision.

CONCLUSION

To create an exception to the general rule that one person is not liable for the actions of another and hold an employer liable for the actions of their employees, the analysis should be job-by-job when the jobs are separate and unrelated from each

[34] *Id.*

other. In many employment contexts, workers are commonly tasked with additional duties that fall outside their main job title. Without the employer having a level of control over the manner the worker completes those additional tasks in such a way as classifies the worker as an employee, then employers will be held liable for the acts of another over which they had little to no control. This goes against the purpose of vicarious liability and against the very requirements of respondeat superior.

Regardless of whether Burchett is classified as an employee, the accident was not in the course and scope of employment because it falls directly into the coming and going rule. Case law is settled that travel reimbursement does not bring travel to and from work into the course and scope of employment. Burchett was not a driver, he was a driller, and the Driver Bonus was reimbursement for Burchett having to drive the carpool to the remote well location.

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4 because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Rule 9.4(i), if applicable, because it contains no more than 4,450 words, excluding any parts exempted by Rule 9.4(i)(1).

/s/ Brian K. Carroll
Brian K. Carroll

CERTIFICATE OF SERVICE

On July 31, 2018, in compliance with Texas Rule of Appellate Procedure 9.5, I served this document on the following counsel of record by e-service, e-mail, and/or first-class United States mail return receipt requested:

/s/ Brian K. Carroll
Brian K. Carroll