COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

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| HUGO A. MARTINEZ, DOLORES RAMIREZ, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF JAVIER GARCIA, JR. DECEASED, JAVIER MAYAGOITIA, SR., INDIVIDUALLY AND AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF JAVIER MAYAGOITIA, JR. DECEASED, JULIETA TAYLOR, OSMAN MARTINEZ AND JEANNE CHAVEZ, INDIVIDUALLY AND AS NEXT FRIEND AND GUARDIAN OF M.C., A MINOR CHILD, | § | No. 08-19-00086-CV |
| | § | Appeal from the |
| Appellants, | § | 143rd District Court |
| | § | of Reeves County, Texas |
| v. | § | (TC# 19-02-22824-CVR) |
| DAVID BOONE, INDIVIDUALLY, DAVID BOONE OILFIELD CONSULTING, INC. AND CAMERON INTERNATIONAL CORPORATION A/K/A CAMERON SYSTEMS CORPORATION, | § | |
| Appellees. | § | |

**O P I N I O N**

Traditional summary judgment motions and no-evidence summary judgment motions were granted against Appellants by the trial court. In four issues, Appellants assert fact issues exist as to whether Appellees ("Boone" and "Cameron") are liable under the doctrine of respondeat

superior, general agency principles, and direct negligence, thereby precluding traditional and no-evidence summary judgment.

## BACKGROUND

### *Factual Background*

John Mueller ("Mueller") was involved in an auto collision resulting in several fatalities. At the time of the collision, Mueller was returning to a remote oil wellsite he was working on named the "Blue Marlin." The details of the collision are not at issue here. We address only the question of whether Boone or Cameron is liable for the conduct of Mueller if he were found negligent in causing the collision.

At the end of his shift on June 8, 2015, Mueller, along with Cameron's lead man, Valadez, traveled to Pecos, Texas for dinner. After dinner, Mueller stopped at a local Wal-Mart to purchase water and other supplies for the wellsite. He then drove back to the wellsite to sleep for the night, and as we describe below, to learn if additional work would be available the next day. En route to the wellsite, he was involved in the collision giving rise to this lawsuit.

The wellsite is located about sixty-five miles from the nearest town, Pecos. There are no nearby facilities for water, food, or fuel. A trip to Pecos is a 130-mile round-trip that takes three hours. ConocoPhillips owns the oil and gas lease of the well. ConocoPhillips contracted with Cameron to conduct "flowback well testing." The process involves analyzing the output of a well to determine the output quantity of water, gas, and oil. The output is sent to a fracking tank where sand and hydraulic fracturing fluids are removed, and the remaining oil, gas, and water levels are measured at various time increments.

To obtain workers for the Blue Marlin, Cameron asked Boone to provide labor for the flowback testing. Boone can best be described as a placement agency that provides laborers to

companies. Cameron contacted Boone and asked for two well test hands. A scheduler for Boone then contacted Mueller, who was available for the Blue Marlin job.

### *Procedural Background*

Appellants, the estate representatives and wrongful death beneficiaries for Javier Mayagoitia and Javier Garcia, along with Hugo and Osman Martinez sued Mueller, Boone, Cameron, and ConocoPhillips.

Appellants alleged Boone and Cameron were both vicariously and directly liable for Mueller's conduct as we describe below. Boone and Cameron filed traditional and no-evidence motions for summary judgment, which the trial court granted. This appeal followed.

## DISCUSSION

Appellants assert four issues on appeal. Issue One claims the trial court erred by granting the summary judgment motions of Boone and Cameron. *See Malooly Bros. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970)(allowing general issue challenging summary judgment). In Issue Two, Appellants contend the summary judgment evidence raises fact issues as to whether Boone and Cameron are vicariously liable under the doctrine of respondeat superior. Issue Three asserts there are fact issues as to whether Boone and Cameron are vicariously liable under general agency principles. Last, Issue Four contends fact issues exist concerning the direct negligence of Boone and Cameron.

### *Standard of Review*

We review a trial court's decision to grant summary judgment *de novo. Travelers Insurance Company v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). A party is permitted to move for a no-evidence summary judgment "without presenting summary judgment evidence," but the moving party must "state the elements as to which there is no evidence." TEX.R.CIV.P. 166a(i);

*Wade Oil & Gas, Inc. v. Telesis Operating Company, Inc.*, 417 S.W.3d 531, 540 (Tex.App.—El Paso 2013, no pet.). A no-evidence motion for summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard of review as we would for a directed verdict. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003).

Under this standard, a no-evidence motion for summary judgment should be granted when: (1) there is an absence of evidence of a vital fact; (2) the court is barred by rules of evidence or law to give weight to the only evidence provided; (3) the evidence offered is no more than a mere scintilla; or (4) the evidence presented conclusively establishes the complete opposite of the vital fact. *Id*. at 751. More than a scintilla of evidence exists when reasonable and fair-minded individuals could differ in their conclusions. *Id*. Stated otherwise, less than a scintilla of evidence is when the evidence is so weak as to do no more than create a mere surmise or suspicion of material fact. *Wade Oil & Gas*, 417 S.W.3d at 540.

The moving party carries the burden of showing there is no genuine issue of material fact and is entitled to judgment as a matter of law. *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). Once the movant establishes its right to summary judgment, the burden then shifts to the non-movant to present evidence raising a genuine issue of material fact, thereby precluding summary judgment. *See City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979). We review the evidence in the light most favorable to the non-movant. *King Ranch*, 118 S.W.3d at 751. The motion must be granted unless the non-movant produces summary judgment evidence raising a genuine issue of material fact. TEX.R.CIV.P. 166a(i). When, as here, the trial court's order "does not specify the grounds for its ruling, summary judgment must be affirmed if any of the grounds on which judgment was sought are meritorious." *Bustamante v. Miranda & Maldonado, P.C.*, 569 S.W.3d 852, 857 (Tex.App.—El Paso 2019, no

pet.).

***Law***

Generally, an employer is insulated from liability for the tortious acts of its independent contractors. *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 131 (Tex. 2018)(*citing Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 796 (Tex. 2006)). However, the common-law doctrine of respondeat superior, or vicarious liability, is an exception to this general rule. *Painter*, 561 S.W.3d at 131. Under the doctrine of respondeat superior, the "liability for one person's fault may be imputed to another who is himself entirely without fault solely because of the relationship between them." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 540 (Tex. 2002)(plurality opinion). The "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.'" *Painter,* 561 S.W.3d at 130-31.

**A. Vicarious Liability for the Acts of "Employees"**

An employer-employee relationship is an agency principle that gives rise to vicarious liability. *Id.*at 131. The first step is determining whether an employer-employee relationship existed. *Id*. Appellants, as the moving parties, have the burden of proving that at the time of the negligent conduct, Mueller was (1) an employee, and (2) acting in the course and scope of his employment. *Id*.

In examining employment status, the principal's right to control over the agent's actions is the "supreme test" for determining the existence of an employee-employer relationship. *Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins,* 926 S.W.2d 287, 290 (Tex. 1996); *Painter*, 561 S.W3d at 132 ("the employer's overall right to control the details of the [agent's] work is what principally distinguishes an employee from an independent contractor."). Employee

in this context is defined in the pattern jury charge as follows:

> [Employee is] a person in the service of another with the understanding, express or implied, that such other person has the right to direct the details of the work and not merely the result to be accomplished.

*Agency and Special Relationships*, ¶ 10.1, Tex. Pattern Jury Charge (2018). The test for determining whether a worker is an employee or an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the employee's work. *Thompson v. Travelers Indem. Co. of Rhode Island*, 789 S.W.2d 277, 278 (Tex. 1990).

The Texas Supreme Court has provided examples of the type of control normally exercised by an employer: "when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of the work, the tools and appliances used to perform the work, and the physical method or manner of accomplishing the end result." *Id*. at 279. We have also described the attributes of an employer as including, "the right to hire and fire, the obligation to pay wages and withhold taxes, the furnishing of tools, and most of all[,] the power to control the details of the worker's performance." *Painter v. Sandridge Energy, Inc.*, 511 S.W.3d 713, 724 (Tex.App.—El Paso 2015, pet. denied); *see also Thompson*, 789 S.W.2d at 278; *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 585–90 (Tex. 1964). An employer essentially must control the ends sought to be accomplished, and the means and details of its accomplishment. *Thompson,* 789 S.W.2d at 278.

The second step requires determining whether an employee was acting in the course and scope of employment. *Painter*, 561 S.W.3d at 131. Course and scope of employment is determined objectively and turns on "whether the employee was performing the tasks generally assigned to him in furtherance of the employer's business. That is, the employee must be acting with the employer's authority and for the employer's benefit." *Id*. at 138-39.

**B. Vicarious Liability for the Acts of Contractors**

Another situation giving rise to vicarious liability is when one contracting party controls the details of another contracting party's work. A principal is generally not liable for the conduct of independent contractors. *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001) ("Ordinarily, a general contractor does not owe a duty to ensure that an independent contractor performs its work in a safe manner."). However, an exception to the independent contractor rule applies when a general contractor retains some control over the manner in which the independent contractor performs, creating a duty of care. *Id*.; *see also Redinger v. Living, Inc*., 689 S.W.2d 415, 418 (Tex. 1985)(adopting Restatement (Second) of Torts § 414 (1977), which imposes a duty on a general contractor who retains control over any part of an independent contractor's work). The general contractor's duty of care is commensurate to the control retained over the independent contractor's work. *Lee Lewis Const.*, 70 S.W.3d at 783. The right to control must also extend to the specific activity from which the injury arose. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 357 (Tex. 1998)(requiring a "*nexus* between an employer's retained supervisory control and the condition or activity that caused the injury")[Emphasis in orig.].

The right to control can arise by way of a contractual agreement, or through the exercise of actual control on the worksite. *Tovar v. Amarillo Oil Co.*, 692 S.W.2d 469, 470 (Tex. 1985)(per curiam)(under drilling contract, oil company controlled part of subcontractor's work and therefore owed a duty of care to oil field worker); *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999)(emphasizing that there must be actual control, and the mere "possibility of control is not evidence of a 'right to control' actually retained or exercised.").

A worksite injury-producing collision can implicate several of the layered contractual relationships that commonly exist in the oil field context. *See Painter*, 561 S.W.3d at 136 (holding

as to employer, summary judgment evidence presented fact question on whether employee, who was transporting work crew to company providing housing, was in the course and scope of employment); *Sandridge Energy, Inc.*, 511 S.W.3d at 716 (holding that out of the very same accident, non-employer contractor was not vicariously liable for tortious conduct because it did not control any aspect of the injury causing event).

Accordingly, in the case at hand, we must determine if issues of material fact exist as to whether Mueller was (1) an employee of either Boone or Cameron, and (2) within the course and scope of his employment at the time of the accident, thereby subjecting the Appellees to vicarious liability for his alleged negligence.

## SUMMARY JUDGMENT AS TO CAMERON

### A. Was Mueller Cameron's Employee?

Appellants first assert Mueller was Cameron's employee by way of contractual agreement, and through evidence of their control over the details of his work at the well. Cameron disagrees, denying Mueller was ever its employee. Cameron further contends, even if Mueller was an employee during his shift on June 8, he was released from employment and was not in the course and scope of employment at the time of the accident. We address each question in turn.

#### *1. Was Mueller an employee of Cameron through the MSA?*

A contractual master service agreement ("MSA") was executed between Cameron and ConocoPhillips. The MSA provides in pertinent part:

> [Cameron] shall be fully responsible for and shall have exclusive direction and control of its agents, employees and subcontractors and shall control the manner and method of carrying out operations. All persons engaged by [Cameron] to perform work under this Agreement (including without limit any contract laborers, leased employees or workers furnished to [Cameron] by a staff leasing agency or company) shall be deemed to be employees, and not subcontractors, of [Cameron] for all purposes.

Cameron does not dispute the applicability of the clause or its clear wording. Rather, Cameron argues this Court cannot consider an upstream contract between two parties to define the downstream relationship of a non-signatory to the agreement. In support of its argument, Cameron cites to *Gonzalez v. VATR Const. LLC*, 418 S.W.3d 777, 786 (Tex.App.—Dallas 2013, no pet.); *Cardona v. Simmons Estate Homes I, LP*, No. 05-14-00575-CV, 2016 WL 3014792, at *5 (Tex.App.—Dallas May 25, 2016, no pet.)(mem. op.); and *Wood v. Phonoscope, Ltd.*, No. 01–00–01054–CV, 2004 WL 1172900, at *10 (Tex.App.—Houston [1st Dist.] May 27, 2004, no pet.)(mem. op.).

These cases are inapplicable. Although all discuss the duties owed between contracting parties at the work site, the aforementioned cases govern whether a contract creates a *duty* from one employer to another, as opposed to the employment status of a wrongdoer for purposes of vicarious liability. The Texas Supreme Court has analyzed the contractual terms that define the relationship between parties in the construction context, even when the person described is a non-signatory to the agreement. *See Exxon Corp. v. Perez*, 842 S.W.2d 629, 630 (Tex. 1992).

Appellants contend the MSA "unequivocally provides that anyone engaged to perform work under the MSA shall be deemed Cameron's employee 'for all purposes[,]'" and thus, "the MSA resolves the issue [of Mueller's employment status] as a matter of law." We recognize the merits of Appellants' argument, but additional considerations must be addressed.

In *Exxon*—before reaching the Texas Supreme Court—the San Antonio Court of Appeals held a contract between Exxon and the plaintiff's employer as determinative of the plaintiff's employment status. *Exxon*, 842 S.W.2d at 630. The Texas Supreme Court reversed finding the record was replete with evidence of Exxon's right to control over the plaintiff—a non-signatory to the agreement—that the court of appeals erred in concluding the contract between the parties alone

was conclusive of the plaintiff's employment status. *Exxon*, 842 S.W.2d at 630 (finding, irrespective of a contractual agreement between the employer and the plaintiff's employer, "[w]here the right of control prescribed or retained over an employee is a controverted issue, it is a proper function for the fact-finder to consider what the contract contemplated or whether it was even enforced."). As in *Exxon*, Mueller is also a non-signatory to the MSA between Cameron and ConocoPhillips. Moreover, as in *Exxon*, the summary judgment record is also replete with conflicting evidence of Cameron's right to control over Mueller. Accordingly, we find the MSA, coupled with the conflicting evidence of Cameron's right to control, contributes to finding a fact issue of Mueller's employment status as to Cameron.

***2. Was Mueller an employee of Cameron based on a right to control analysis?***

Further, Appellants assert they can establish Mueller was an employee through the "right to control" that Cameron exercised over Mueller. The potential for vicarious liability in this context is premised on the relationship between the wrongdoer and the party to whom liability is imputed. *Painter*, 561 S.W.3d at 132. The defining characteristic is the principal's "right to control the agent's actions undertaken to further the principle's objectives." *Id*., (*citing FFP Operating Partners, LP v. Duenez*, 237 S.W.3d 680, 686 (Tex. 2007)).

To differentiate an employee from an independent contractor, the right to control is measured by examining the *Limestone* factors: (1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the 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. *Limestone Products Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002).

*a. Independent nature of the worker's business*

The first *Limestone* factor asks how independently the worker acted in the workplace. An independent contractor generally has the freedom to "work in his own way." *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999). As Mueller describes his role, he was "there to assist [Cameron's] hand that was running this test separator" and Cameron's hand was Juan Valadez. Cameron's "flowback" operations supervisor, Mike Amigh, described Valadez as the lead man and Mueller as a "helper." As such, Amigh agreed Valadez had the right to control all of the details of the work Mueller was performing. However, Amigh stated while Valadez had the authority to instruct Mueller *what* to do, Valadez did not instruct Mueller *how* to do it.

According to Valadez, he was responsible for everyone working at the Blue Marlin. Valadez, however, also testified Mueller was "his own independent contractor. He's his own boss. . . . He's not an actual employee. He's his own employee. He's his own boss." As Valadez described, because Mueller already "[knew] the job tasks," Valadez did not need to give Mueller additional training or detailed instructions. Valadez only provided Mueller with general instructions, such as, "[h]ey, dump the sand traps" and "[c]heck the plug catcher with me."

Mueller's deposition testimony was less clear and conflicting. At one point in his testimony, Mueller stated Valadez was his point of contact and supervisor: Valadez "told me what I was going to do." Mueller stated he was working for Cameron and was under Cameron's control. However, in response to another question, Mueller stated Valadez did not have control over his activities, and that it was ConocoPhillips' "company man" who told him what to do. For instance, if Mueller were to have been injured on the job, Mueller stated he would have reported his injury to ConocoPhillips' company man because that is who he was working for and ConocoPhillips was "controlling" him.

The summary judgment record also contains a written job safety analysis that Cameron

prepared for Mueller. Appellants contend "Mueller learned how to perform his work solely through on-the-job training that Cameron (and Boone) provided." Mueller testified he was required to attend a Cameron specific training about a month before the job that covered issues ranging from aerial forklifts, to rigging and lifting procedures. Cameron required Mueller to complete a form titled, "Employee Info," and Cameron also administered various written tests, assessing Mueller's knowledge of the training provided. One form explicitly refers to Mueller as an "employee."

*b. Tools and equipment*

Cameron provided the specialized equipment needed for well flow testing, while Mueller provided his own hand tools. Cameron supplied the separator, manifold, sand traps, flare stack, and other specialized equipment. Mueller, on the other hand, provided his own sledgehammer, pipe wrench, laptop to report test data, and phone to create an internet hotspot to email test data. It is important to emphasize that without the specialized equipment Cameron provided, Mueller would have been unable to perform the job for which he was hired; the entire operation could not have been performed without the specialized equipment used to separate the sand and fracking fluids from the well output.

*c. Worker's right to control progress*

Mueller worked a specific shift set by Cameron, and Mueller therefore had no control over his own schedule. The progress of the work appears to have been dictated in part by the outflow of the well. Valadez assigned Mueller specific tasks to perform, which appears to have been time sensitive, such as obtaining the scheduled measurements of water, oil, and gas that ConocoPhillips required. Cameron set the time and dates Mueller was to work, provided Mueller with on-site lodging, and provided direct management over the day-to-day operations. Mueller was assigned

to assist Valadez—Cameron's lead on-site operator. Mueller reported to Valadez, who supervised and controlled his work.

*d. Time for which the worker is employed*

According to Mueller's invoicing and Cameron's documentation, Mueller worked four days on the job: June 5 through June 8. Mueller worked a 12-hour shift, starting generally at 6:00 a.m. running to 6:00 p.m. He shared the trailer Cameron provided with another worker who worked the corresponding 12-hour night shift.

The length of well testing varies by job, with some tests lasting forty days, and others as few as three days. This was not Mueller's first job for Cameron. Mueller testified he did not work exclusively for Cameron; Boone provided Mueller work with companies other than Cameron.

*e. Method of payment*

Cameron did not pay Mueller directly. Rather, Boone paid Mueller a flat daily rate. Taxes were not withheld from his pay and he was sent a 1099 IRS form at the end of the year. Mueller and his wife established their own corporation, H&J Oilfield Consulting, Inc., ("H&J"). H&J submitted an invoice for each day's work to Boone. Boone, in turn, billed Cameron, which billed ConocoPhillips.

When the record shows no dispute regarding the controlling facts and only one reasonable conclusion can be inferred, the question of whether one is an "employee" or an "independent contractor" is a question of law. *Durbin v. Culberson County*, 132 S.W.3d 650, 659 (Tex.App.—El Paso 2004, no pet.). We cannot conclude that only one reasonable conclusion can be inferred. Due to the sharply conflicting evidence and balancing of the *Limestone* factors, we conclude Appellants have raised a fact issue as to the right to control Mueller by Cameron.

***3. Does Cameron's control of Mueller establish vicarious liability?***

Appellants also suggest they can establish vicarious liability through the level of control that Cameron exercised over Mueller even as an independent contractor. We take this to mean that even if the level of control is insufficient to make Mueller an employee, it may establish that their level of control of Mueller still exposes Cameron to liability under a *Redinger* type theory for the failure to act reasonably in exercising the control that it did. *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex 1985). The problem with this theory is that if Mueller is viewed only as a contractor—and not an employee—then no liability attaches to Cameron unless it controlled the specific activity from which the injury arose. *Hoechst-Celanese Corp. v. Mendez,* 967 S.W.2d 354, 357 (Tex. 1998)(requiring "*nexus* between an employee's retained supervisory control and the condition or activity that caused the injury")[Emphasis in orig.]; *Sandridge Energy, Inc.*, 511 S.W.3d at 723 (affirming summary judgment because plaintiff presented no evidence that Sandridge actually dictated control any details of the transportation of the workers when the car accident occurred). From this record, there is no evidence Cameron in any way controlled the injury causing conduct at issue here. It provided no rules on driving, it did not regulate when workers should be on the road, nor even which town (and hence the route taken) if a worker went to town. We find Cameron is not liable under a *Redinger* type theory. *Redinger*, 689 S.W.2d at 418-419.

***4. Was Mueller released from employment after his last shift?***

The summary judgment record is also particularly conflicting on this question. Cameron contends Mueller was not an employee at the time of the collision. Cameron argues that certainly by shift's end, Mueller was released, was no longer its employee and was free to return home. Although there was no guarantee of additional work, the evidence is conflicting as to whether Mueller was released from employment or was on standby for additional work at the time of the

collision.

Mueller testified that at around 5:00 p.m. on June 8—the day of the accident—a company representative of ConocoPhillips told Mueller he was “released” from the job. Valadez confirmed this and testified he and Mueller were told they were “released” before the collision occurred. Based on the well test results, ConocoPhillips shut the well in, and consistent with this testimony, the invoiced billed to Cameron shows Mueller worked from June 5 to June 8, but not on June 9.

Mueller, however, contends after he was released for the day on June 8, he was informed of the possibility of ConocoPhillips having additional work for him, but the ConocoPhillips’ foreman would not know for certain until the following day. Mueller testified the ConocoPhillips’ representative told him to stay until morning when he would have confirmation. Appellants support this contention with the following evidence: ConocoPhillips was planning to “drillout” the Blue Marlin. Valadez was called back to the well on June 9 to help with placing coils. Valadez would need one additional well test hand to assist him with that job if the coils had arrived by that time. Cory Johnson, the other Boone worker on site, recalled that after he was informed of his release on June 8, he was asked to remain standby on site:

> Q. Let’s get that clear. Tell-- Tell me about that conversation that you were being requested to stay while they figured out what was going on.
>
> A. I feel like that was with a Cameron hand, maybe Juan Valadez. I feel like he was the one that may have said that, that they wanted to keep the same four guys out there that had been doing the job.
>
> . . .
>
> Q. All right. So going back to the night of June 8th, even when you were told that the task of the well testing-- Let me restate it. On June 8th, after you--you're told that the well is shut in, was it your understanding that you were still going to be kept on-site and continuing to do work out there?
>
> . . .

Q. Okay. So you expected to continue staying in that trailer and continuing to work June 9th and June 10th or whatever other time. Is that correct?

A. Yes.

Q. Okay. Until the collision occurred can you tell us whether or not you expected to continue working at this well site?

A. Yes. Before the-- The whole time, even after the collision, I thought that we would be back on this job. You know, that's twelve hours away from my house, so they asked us to stay. I was told I would get standby and that in a few days that job would start back up. They just needed to make their mind up what they were going to do with that well.

Q. And who told you you would be paid standby?

A. Juan Valadez. [Objections omitted].

Cory Johnson indeed billed Boone for two days of standby—for June 9 and June 10. Cameron, however, later declined to pay those charges.

Juan Valadez's testimony corroborates Cory Johnson's recollection:

Q. ---Mr. Mueller were told by ConocoPhillips y'all were on standby, right?

A. Yes.

Q. And there was an expectation that compensation would be paid?

A. Starting the next day.

Q. For both of you?

A. Yes.

Q. And that you-all would be moving to some other job site?

A. For Conoco.

Q. And—and that was told to you by the lead man-company man out at the job site even before you left the job site on June 8th, correct?

A. Yes.

Q. And the same thing was told to Mr.—

A. No, it was told to me, I told them. [Objections omitted].

Accordingly, Valadez relayed to Mueller and Johnson, "Yeah, they're going to pay standby. We're all staying on location. We're moving to the next well." But according to Valadez, "everything went south" after the collision and the only reason the job did not continue was because of the accident.

Mueller also corroborated Valadez's understanding and in his statement to the police. Mueller said he "went to buy groceries for the rest of the week" because the "company man asked that the Boone hands stay and not be sent home." Mueller testified to telling the ConocoPhillips representative he would stay, but was going to go home if new work did not start quickly, because he was not "going to sit around for five days waiting to get paid." Mueller's view on the matter is best summarized by this statement:

> I wasn't asked to stay. I'm not going to drive all the way back to Burleson, so I wouldn't have—I wasn't planning leaving until that morning anyway, the next morning. So that—I could have left and they would have called somebody else in. The potential was there. I would have found out in the morning either I'm moving locations or I'm driving back to Burleson.

Accordingly, Mueller traveled to town for a meal and watched a soccer game before stopping at a Wal-Mart to re-stock—water, food, and other supplies to bring back to the wellsite—in case he was asked to stay for another job. While awaiting confirmation, Cameron asserts Mueller was not required to remain on wellsite and could have driven home or stayed at a hotel.

Based on the MSA and the right to control balancing under the *Limestone* factors, we recognize the evidence is sharply conflicting.[1] Reviewing the evidence in the light most favorable

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[1] Additionally, the well records confirmed another job was to commence at another nearby well, but Cameron personnel did not arrive at that well until June 18, and those who arrived were all Cameron personnel—not contractors. The only standby fees actually charged to ConocoPhillips were for equipment—not personnel. On Cameron's billing to ConocoPhillips, no employee time is billed for June 9, but it did bill six persons for June 8, which would run from midnight to midnight.

to Appellants, we find more than a scintilla of evidence exists to create a fact issue. We find Appellants have raised a fact issue as to whether Mueller was Cameron's employee at the time of the accident.

**B. If an employee, was Mueller in the Course and Scope?**

Cameron contends Mueller, having chosen to stay the night, driving to Pecos for the evening and buying groceries in case another job became available, constituted a personal errand and was outside the scope of his employment. In other words, Cameron argues, even if we conclude Mueller was in the course and scope of his employment by remaining at the wellsite the evening after his shift, or in cleaning up the trailer the next morning—as some evidence suggests he was obligated to do—or in awaiting confirmation of additional work, the collision occurred while he was driving to Pecos and away from the work premises during the commission of a personal errand, outside the scope of his employment.

For vicarious liability to attach, the subject person must both be an employee and within the course and scope of employment at the time of the underlying event. *Painter*, 561 S.W.3d at 138. Course and scope is determined objectively and turns on "whether the employee was performing the tasks generally assigned to him in furtherance of the employer's business. That is, the employee must be acting with the employer's authority and for the employer's benefit." *Painter*, 561 S.W.3d at 138-39.

The facts of *Painter* are instructive to the analysis at hand. In *Painter*, which also dealt with a remote drilling site, the employer, Amerimex, provided an off-site bunkhouse some thirty miles away from the site. *Id*. at 128. The contract between Amerimex and the leaseholder provided Amerimex would bill $50 per day for the driller to drive the crew from the bunkhouse to the well location. *Id*. While driving the crew from the site to the bunkhouse, a driller was involved in a

collision resulting in multiple fatalities and injuries. *Id*. at 129. It was undisputed that the driller in *Painter* was an employee of Amerimex; the question was whether he was in the course and scope of employment while driving the crew to the bunkhouse *after* his shift ended. *Id*. The Texas Supreme Court confirmed application of the coming-and-going rule for assessing the vicarious liability of Amerimex. *Id*. at 137.

Under the coming-and-going rule, an "employee is generally not acting within the scope of his employment when traveling to and from work." *Id*. at 138-39. However, an exception to that rule applies "when an employee has undertaken a special mission at the direction of his employer or is otherwise performing a service in furtherance of his employer's business with the express or implied approval of his employer." *Id.* at 136 [Internal quotes and brackets omitted].

For example, in *Janak v. Texas Emp. Ins. Ass'n*, the court found injuries arising from a traffic collision were within the course and scope of employment even though the drilling crew, while en route to a well site, took a diversion to obtain water and ice needed for the day's labor. 381 S.W.2d 176, 181-82 (Tex. 1964). Moreover, in *Chevron U.S.A., Inc. v. Lee*, we found the same exception applicable when an employer required its employee to drive to a seminar on what would otherwise have been the employee's day off. 847 S.W.2d 354, 355 (Tex.App.—El Paso 1993, no writ). Conversely, in *Pilgrim v. Fortune Drilling Co., Inc*., the Fifth Circuit, applying Texas law, concluded that a driller driving home after a 12-hour shift was not in the course and scope of employment. 653 F.2d 982, 987 (5th Cir. 1981). "[I]n the absence of some special benefit to the employer other than the mere making of the employee's services available to the employer at his place of business[,] the rule in Texas is that an employee is not acting in the course and scope of his employment while traveling to and from work, and that the employer ordinarily cannot be held vicariously liable to one injured by the employee's negligent operation of an automobile

during these trips to and from work." *Id*.

Here, Appellants do not suggest Mueller's actions of going to town for dinner or watching a soccer game were assigned tasks. In fact, Appellants recognize employees are generally not acting within the scope of employment when traveling to and from work under the coming-and-going rule; *see Painter*, 561 S.W.3d at 138-39. Rather, Appellants rely on an exception to the transportation exclusion. Appellants contend Mueller's actions of securing water and food for the crew constituted a service in furtherance of Cameron's business—triggering the special mission exception. After all, Appellants note, workers need fluids and food during the workday, and we recognize the summary judgment record is conflicting as to whether Cameron provided the crew with either. Appellants further contend Cameron was aware workers drove to town to stock up on supplies.

Although driving to town to restock on water and supplies was not specifically contracted for, as was the case in *Painter*, here, the testimony is nonetheless conflicting as to whether it was implied and whether workers were instructed to travel to obtain necessary water and supplies. The Blue Marlin is located sixty-five miles—a 130-mile round trip—from civilization and contains no facilities for water—other than non-potable water—or food, and there is also no place for fuel. Appellants contend Cameron "paid workers a daily rate to make the three-hour round trip to acquire these necessities" and "were not only well aware that workers traveled to get food and water, [Cameron] also apparently instructed workers to do so." Evidence in the record supports that Cameron advised laborers Pecos was the closest town for employees to obtain necessities and approved them to do so. Michael Amigh, a Cameron employee, testified to the following:

> Q. So Pecos or Carlsbad would be recommended—be the one that Cameron would have workers go to, to get water and food to work out on these remote job sites, correct?

A. Correct.

Q. Okay. And either Pecos or Carlsbad was acceptable to Cameron?

A. Uh-huh. Yes sir. [Objection omitted].

Mueller invoiced Boone at a daily rate of $464, in addition to a vehicle allowance of $50 per day, a phone use fee of $12.50 per day, and $200 for a "travel in and travel out" fee. The vehicle allowance allowed Mueller to have his vehicle on site. Due to the hot conditions, workers ran their vehicles all day to have an air-conditioned place to sit between tasks. Boone, in turn, billed Cameron a flat $750 rate for Mueller's services.[2] As for the remoteness of the wellsite, a "travel in and travel out" allowance was paid to the workers for travel expenses.

Cameron seemingly paid "transportation, time, truck, and travel" expenses to Boone, who in turn, paid Mueller. Although the vehicle Mueller drove at the time of the collision was not a commercial vehicle and Mueller paid for his own gas and vehicle insurance, there is a $200 invoice from Boone to Cameron corroborating travel expenses were compensated—at a fixed rate. Evidence in the record establishes workers ran their trucks all day, and there was no place to refuel anywhere near the Blue Marlin; moreover, workers were compensated for fuel. The *Lopez* court determined the company's business "*called for* employing specialized, non-local work crews in constantly changing, remote locations on temporary assignments," and provided a company vehicle to Lopez, for which the company paid fuel. *Seabright. Ins. Co. v. Lopez*, 465 S.W.3d 637, 644 (Tex. 2015)[Emphasis added]. Here too, Cameron's business called for the frequent replenishment of not only water and food, but fuel too, and workers were compensated for fuel expenses. *Lopez*, 465 S.W.3d at 644.

Thus, due to the fact that workers ran their trucks throughout their 12-hour shifts and were

[2] And as it turns out, Cameron billed ConocoPhillips $1,000 per day for those services.

compensated for fuel, we find fueling the workers' vehicles was a necessity in furtherance of Cameron's business. As such, the summary judgment evidence creates a fact issue as to whether the $50 allowance and/or the travel in and travel out allowance encompassed travel for necessary supplies. Appellants also contend Valadez—Cameron's manager—specifically told Mueller to travel to Pecos for water and food. Cameron counters by arguing there is no evidence that Valadez, or anyone else at Cameron, instructed Mueller to do so.

We find the summary judgment record raises a fact issue as to whether Mueller was acting in the course and scope of his employment at the time of the underlying event. The evidence is specifically conflicting as to whether Cameron provided workers drinking water, whether Cameron instructed workers to travel to obtain said drinking water, or at the very least, whether Cameron was aware workers traveled to obtain drinking water. Mueller testified the reason he traveled to Pecos on the night of the collision was to re-stock his supply of water, food and ice. Surely, having access to drinking water during a 12-hour shift, in hundred-degree weather, at a remote worksite, was necessary and benefited Cameron by ensuring workers were physically able to perform—aside from the obvious fact of it being vital to retaining functioning workers.

The conflicting testimony, coupled with the basic notion that obtaining drinking water and food for the crew could very likely constitute a necessary service in furtherance of Cameron's business, leads us to conclude a fact issue exists as to whether Mueller was within the course and scope of his employment at the time of the accident.

**D. Affirmance of Unaddressed Grounds**

Cameron obtained summary judgment on Appellants' claims for: (1) gross negligence; (2) vicarious liability based on a principal-agent relationship; (3) borrowed servant; and (4) joint enterprise. To the extent we have not addressed Appellants' arguments as noted above, these

grounds were not challenged on appeal and they are accordingly affirmed. *See Rangel v. Progressive County Mut. Ins. Co.*, 333 S.W.3d 265, 270 (Tex.App.—El Paso 2010, pet. denied) (affirming uncontested ground for summary judgment on appeal).

**SUMMARY JUDGMENT AS TO BOONE**

Boone presents similar arguments to those raised by Cameron. It contends the summary judgment on the claims against it can be upheld because Mueller: (1) was released from employment before the collision occurred; (2) was an independent contractor as evidenced by a contractual agreement and conduct of the parties; and (3) was not acting within the course and scope of his employment. We need not reach all these issues because the summary judgment record shows Mueller was not Boone's employee.

**A. Was Mueller Boone's employee?**

We begin with what the parties contractually agreed to. On behalf of H&J, Mueller signed an agreement with Boone titled, "David Boone Oilfield Consulting Independent Contractors Agreement." In this agreement, the parties agreed "each Contractor is Independent, Separate, and apart from [Boone]" for taxes and workers compensation purposes. The parties further agreed, "[t]he contractor is required to furnish his own tools and transportation to the job site." Pursuant to the agreement, Boone did not withhold taxes.

Generally, an agreement providing a person is an independent contractor with no right to control is determinative of the parties' relationship. *Love,* 380 S.W.2d at 582; *Farlow v. Harris Methodist Ft. Worth Hosp.*, 284 S.W.3d 903, 911 (Tex.App.—Fort Worth 2009, pet. denied); *Durbin*, 132 S.W.3d at 659. However, an exception applies when a contract is a "mere sham, subterfuge, or cloak designed to conceal the parties' true relationship" *Id.* Appellants contend they created a fact issue on the sham/subterfuge claim through two arguments: (1) the contract lacks

details about how the relationship would work, and (2) Cameron's discovery responses state that Mueller was Boone's employee.

Appellants posit the agreement "lacks critical details, including any aspects of the work to be performed by Mueller, the terms of the agreement, the location at which work is to be performed, type of work involved, tools or equipment, or the right of control." Irrespective of the agreement, Appellants assert Boone represented Mueller as its employee through its conduct at the well, and via "discovery responses indicating that it was Cameron's belief that Mueller was Boone's employee." According to Appellants, the resulting "discrepancy" between the agreement and Boone's conduct creates a fact issue regarding Mueller's employment status as to Boone. Boone responds the parties understood the agreement created an independent contractor relationship, emphasizing that Mueller himself testified he was an independent contractor. Boone also relies on Valadez's and Cameron's identification of Mueller as an independent contractor.

However, existence of a contractual agreement explicitly providing for an independent contractor relationship does not end the inquiry, as Boone would like us to conclude. If parties have entered into a written contract that expressly provides for an independent contract relationship and it does not vest in the principal or the employer the right to control the details of the work; then evidence must be produced, aside from the contract, to show that the in-fact operating agreement was one which vested the right of control in the alleged master. *Love*, 380 S.W.2d at 592. Under such circumstances, although the right to control remains the ultimate test, the actual exercise of control is evidentiary. *Id*. In *Gulf Refining Co. v. Rogers*, although there was a written contract explicitly providing for an independent contractor relationship, there was evidence the contract was a subterfuge, and the company actually exercised control not only as to the manner in which the work was to be performed, but as to who should be employed to do the work. 57

S.W.2d 183, 185-86 (Tex.Civ.App.—Waco 1933, writ dism'd). The *Rogers* court held a master servant relationship existed. *Id*. ("the mere fact that the contract as written was so drawn for the purpose of creating the relation of independent contractor would not relieve the company of liability for the negligence of such servants" if such contract was a subterfuge, or if actual control over the means and methods by which the work was to be performed was exercised).

The parties' arguments also direct us back to the *Limestone* test to distinguish an employee from an independent contractor. *Limestone*, 71 S.W.3d at 312 (courts look to: "(1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the 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 job."). These elements are also consistent with the contractual designations in the parties' agreement.

1. *Independent nature of the worker's business*

The first *Limestone* factor requires analysis of how independently Mueller acted at the Blue Marlin. Mueller testified he was not Boone's employee, but an independent contractor. He emphatically denied he worked for Boone, stating, "I didn't go to work for David Boone. I go to work for EP, or I go to work for Cameron, or I go to work for XTO. I don't go to work for David Boone." Consistent with that relationship, Boone would ask Mueller *if* he was available for an upcoming project, and Mueller was free to accept or reject the job. Boone required the persons it placed pass a drug test, sign a contract, and carry a $1 million dollar automobile liability policy. Boone also provided worker's compensation coverage in the event one of its placed workers was injured on the job.

Prior to commencing work at the Blue Marlin, Boone did not provide Mueller any type of

training with respect to the work Mueller performed at the wellsite. Appellants contend Boone instructed Mueller when and where to work, designated the hours worked, and could remove Mueller from job sites at its discretion. Although there is conflicting evidence as to whether Mueller followed *Cameron's* orders at the Blue Marlin or maintained broad discretion, Appellants cite no evidence proving **Boone** controlled Mueller. To the contrary, Boone did not have anyone present at the Blue Marlin telling Mueller what to do and had no work rules or regulations that we can discern from this record.

*2. Tools and equipment*

Cameron, not Boone, provided the specialized equipment needed for well flow testing, while Mueller provided his own hand tools on the job. Mueller purchased and provided his own sledgehammer, pipe wrench, laptop to report test data, and phone to create an internet hotspot to email test data.

*3. Worker's right to control progress*

The progress of the work appears to have been dictated in part by the outflow of the well, and Mueller stated he followed specific tasks assigned to him by Cameron personnel. Cameron set the time and dates Mueller was to work, provided Mueller with on-site lodging, and direct management over the day-to-day operations; Boone denies having control over any of these matters and there is no evidence to support that it did. The lead on-site operator who gave orders and maintained overall responsibility at the Blue Marlin was Valadez—a Cameron employee. Although the testimony is conflicting as to whether Valadez controlled Mueller's activities at the Blue Marlin—Mueller denies Valadez had control over him—there is no evidence Boone either had the right of such control or exercised such control. Appellants advance no evidence Boone held or exercised a right to control over the details of Mueller's work.

4. *Time for which the worker is employed*

Mueller worked a total of four days on the Blue Marlin—from June 5 to June 8. Mueller worked for Boone from 2014 to 2016. When Mueller accepted the job, he did not know how long it would last.

5. *Method of payment*

Boone paid Mueller a flat daily rate through Mueller's company, H&J, which submitted an invoice for each day's work by Mueller to Boone. Boone, in turn, billed Cameron, which billed ConocoPhillips. Ultimately, Boone paid Mueller directly, and Mueller was sent a 1099 IRS form at the end of the year. Boone did not withhold taxes on the workers it placed. The testimony shows Boone did no little more than bring willing workers and employers together, and then handled the billing arrangements, taking its cut from the respective rates it negotiated.

Although some of these factors may not, alone, be enough to demonstrate a worker's independent-contractor status, together they provide conclusive summary judgment evidence that Mueller was Boone's independent contractor, and not its employee when the collision occurred. *See Limestone*, 71 S.W.3d at 312. The contractual agreement between Mueller and Boone does not in and of itself absolve the inquiry as to Mueller's employment status. As the Court in *Love* stressed:

> [E]xercise of control must be *so persistent* and the acquiescence therein *so pronounced* as to raise an inference that at the time of the act . . . giving rise to liability, the parties by implied consent and acquiescence had agreed that the principal might have the right to control the details of the work. [Emphasis added].

*Love*, 380 S.W.2d at 592.

Here, we find such evidence of actual exercise of control by Boone lacking and, therefore, cannot overcome the express agreement between Boone and Mueller. We find no case, nor are we directed to any, that supports a finding that Boone is vicariously liable. The summary judgment

evidence, coupled with balancing of the *Limestone* factors, is not so persistent or pronounced as to raise an inference at the time of the collision, the parties had an implied agreement Boone would control the details of Mueller's work, of that in-fact Boone actually exercised such control.

Reviewing the evidence in the light most favorable to the non-movants, Appellants have not raised an issue of fact that leads reasonable and fair-minded individuals to differ in concluding Mueller was Boone's independent contractor. At most, the evidence is weak and does no more than create a mere surmise or suspicion of material fact. *Wade Oil & Gas, Inc.*, 417 S.W.3d at 540. Having concluded Mueller was not Boone's employee, we do not reach whether he acted in the course and scope of his employment.

**B. Affirmance of Unaddressed Grounds**

Boone also moved for summary judgment on Appellants claims of (1) negligent entrustment; (2) negligent hiring, training, supervision, retention; (3) joint enterprise; and (4) negligence by David Boone in his individual capacity. Appellants have not challenged these granted grounds, and for that reason alone, we affirm.

## DIRECT NEGLIGENCE CLAIM

As to both Boone and Cameron, Appellants urge us to create a duty for oil field companies to provide water and food to the workers on remote wellsites. The rationale for the duty would be to obviate the need for workers to be on the highways to replenish their own supplies.[3] The summary judgment record includes evidence Highway 285—where the collision in this case occurred—was a "dangerous" road. Appellants cite to no authority recognizing this duty.

The existence of a duty is a question of law, balancing factors such as "the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the

[3] There was conflicting evidence, however, as to whether ConocoPhillips provided water and Gatorade to contract employees.

magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Adkins*, 926 S.W.2d at 289-90. But particularly relevant here, transportation accidents have been a part of oil field work for decades. *See e.g. Texas Emp. Ins. Ass'n v. Inge*, 208 S.W.2d 867, 867 (Tex. 1948)(transportation collision involving oil field worker). Up until today, no court has recognized the duty Appellants seek to impose, nor has the Legislature felt compelled to intervene. It is not for an intermediate court of appeals to advance the law in such a profound way. *See Durham v. Children's Med. Ctr. of Dallas*, 488 S.W.3d 485, 495 (Tex.App.—Dallas 2016, pet. denied)(declining to create new tolling doctrine for wrongful-death claims involving the death of a minor); *Martin v. Clinical Pathology Labs., Inc.,* 343 S.W.3d 885, 892 (Tex.App.—Dallas 2011, pet. denied)(judicial exceptions to employment-at-will doctrine must be created by the supreme court); *Burroughs v. APS Intern., Ltd.*, 93 S.W.3d 155, 161 (Tex.App.—Houston [14th Dist.] 2002 pet. denied)("It is not for an intermediate appellate court to create new causes of action."); *Landmark Chevrolet Corp. v. Universal Underwriters Ins. Co.*, 121 S.W.3d 886, 890–91 (Tex.App.—Houston [1st Dist.] 2003, no pet.)(declining at court of appeals level to create exception to "eight corners rule"). We decline Appellant's invitation to create this duty today.

**CONCLUSION**

We reverse the summary judgments granted to Cameron, affirm the grants of summary judgment as to Boone, and remand for further proceedings consistent with this opinion.

March 29, 2021          ______________________________
YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.