No. SC 84011

IN THE
SUPREME COURT OF MISSOURI

STATE ex rel. GERRY TAYLOR,

Relator,

THE HONORABLE BARBARA W. WALLACE,
JUDGE OF THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI,

Respondent.

Action in Prohibition of the Circuit Court of St. Louis County, Missouri
The Honorable Barbara W. Wallace

AMICUS CURIAE

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INTEREST OF *AMICUS CURIAE*

The State of Missouri is one of the largest employers in the State. The State is statutorily required to provide workers' compensation coverage for its employees who are injured in on-the-job accidents. The State is also statutorily required to defend and indemnify its employees for their on-the-job actions. See *Dixon v. Holden*, 923 S.W.2d 370 (Mo.App. W.D. 1996). As a result, the issues addressed in this brief have repeatedly arisen in situations involving Amicus and its employees.

ARGUMENT

Petitioner Gerry Taylor argues that the Circuit Court is without jurisdiction to hear Respondent William Smith's claim for negligent operation of a motor vehicle because Respondent did not allege "something more" than failure to provide a safe work place, and as a result, the Missouri Workers' Compensation Law, § 287.120 RSMo *et seq*. (2000), provides Smith's exclusive remedy for injuries sustained in an on-the-job motor vehicle accident.

The State concurs with Taylor's analysis and conclusion regarding Smith's negligence claim. But instead of resting on that conclusion, this Court should join the overwhelming majority of the states and conclude that co-employees, whether or not they have supervisory responsibilities, are not "third persons" subject to suit for injuries arising from on-the-job accidents that are covered by workers' compensation. That holding would create judicial certainty and would return workers' compensation law to its "no fault" origins.

In the alternative, this Court could conclude that negligent operation of a motor vehicle amounts to nothing more than failure to provide a reasonably safe work place.

A. The History and Purpose of Workers' Compensation Schemes.

Missouri's Workers' Compensation Law was designed to place the burden of workplace accidents on the employer, and ultimately, on the consuming public. *State ex rel. Feldman v. Hon. Herbert Lasky*, 879 S.W.2d 783, 785 (Mo.App. E.D. 1994). This goal, among others, had led to the passage of comprehensive compensation legislation, first in Germany, and then throughout other industrialized nations. 1 A. Larson, The Law of Workmen's Compensation, §§ 2.06-2.08 (2000).

In The United States, Maryland, Montana, and New York were three of the first states to pass "accident funds," or compensation acts. *Id*. at § 2.07. By 1920 all but eight states had adopted compensation laws. *Id*. at § 2.08. Missouri joined them in 1927. In 1963, Hawaii became the last state to adopt a workers' compensation system. *Id*.

Prior to the advent of workers' compensation schemes, an estimated seventy to ninety-four percent of industrial accidents went completely uncompensated under the common law system. W. Page Keeton *et al*., Prosser and Keeton on the Law of Torts 80, at 572-73 (5th ed. 1984). This was due primarily to the "unholy trinity" of defenses relied upon by employers, including assumption of risk, the fellow-servant rule, and contributory negligence, which were onerous for employees to overcome, usually barring recovery. Note, *Ohio's "Employment Intentional Tort": A Worker's Compensation Exception, or the Creation of a Entirely New Cause of Action?*, 44 Clev. St. L. Rev. 381, 384 (1996).

Workers' compensation acts are frequently referred to as a "quid pro quo" between employers and employees. *Id*. at 385. The employer provides the employee with a certain and swift remedy, regardless of fault or the nature of the injury. *Id*. The employee is no longer required to sue his employer at common law to be compensated for his injuries, and thus the "unholy trinity" of defenses are

surrendered by employers. *Id*. The employee, on the other hand, gives up the right to maintain a common law cause of action, including the right to recover for pain and suffering, loss of consortium, and punitive damages. *Id*. at 386.

Both employers and employees make sacrifices in a workers' compensation system. These sacrifices are intended to further the goals associated with compensation schemes, including, as stated above, placing the burden of workplace injuries on employers, who ultimately pass the cost on to the consuming public. Other goals include ensuring that employees and their dependents are compensated for injuries arising from on-the-job accidents and, thus, are not forced to rely on government aid for basic necessities, *id.* at 384, eliminating expensive and time-consuming litigation, and reducing friction and conflicts arising from "employer vs. employee" situations. Note, *The Ohio "Standard" for Workplace Intentional Torts: Fyffe v. Jeno's Inc.*, 61 U. Cin. L. Rev. 331, 337 (1992).

B. This Court Should Abandon the "Something Extra" Standard .

Since *State ex rel. Badami v. Hon. Carl R. Gaertner*, 630 S.W.2d 175 (Mo.App. E.D. 1982), Missouri courts have permitted employees to sue co-employees when they allege something more than their co-employees failure to provide a reasonably safe work place. That "something extra" standard is vague, subjective, and confusing, and does not lead to consistent results. Moreover, the standard conflicts with the purposes of workers' compensation schemes because, in some situations, it allows employees to obtain a double recovery from their employer, may lead to "employee v. employee" or "employee v. employer" friction in the work place, and does not always provide for subrogation by the employer.

1. Court of Appeals Decisions Establish a "Something Extra" Standard .

Missouri's Workers' Compensation Law allows an injured employee to file a civil lawsuit against a "third person" who causes the employee's on-the-job injuries, and further provides employers a right of subrogation against any recovery by the employee. § 287.150 RSMo (2000). Missouri's law does not, however, define which "third persons" are subject to suit. § 287.020 RSMo (2000).

In *Sylcox v. Nat'l Lead Co*., 38 S.W.2d 497 (Mo.App. S.L. 1931), Missouri courts began to grapple with whether the co-employees of an injured worker, in some circumstances, may be considered "third persons" for workers' compensation purposes--a question, the court observed, "not wholly unattended with difficulties." *Id.* at 501. The court recognized that a fellow employee may be viewed as the "agency or instrumentality through which the employer acts." *Id*. That same employee and the employer are "engaged in the accomplishment of a related purpose," namely, carrying out the employer's business. *Id*. For these reasons, among others, a "third person" may be defined as those for whose negligence the employer would not be liable at common law. *Id*. Thus the court explained that "third persons" may be limited to those who are strangers to the employer-employee relationship. *Id*. But the court declined to apply that limit, noting that it is "unsupported by authority from other jurisdictions" excepting one, addressing the issue. *Id*. The court instead held that a negligent co-employee is not required by the workers' compensation act to provide coverage to employees, and thus he must be regarded as a "third person" amenable to common law suits. *Id*.

The same court shifted to a different rule in *State ex rel. Badami v. Hon. Carl R. Gaertner*, 630 S.W.2d 175 (Mo.App. E.D. 1982). In *Badami*, the plaintiff sought to recover for injuries he

received in an on-the-job accident after his hand was drawn into a shredding machine. Three of the plaintiff's fingers had to be surgically amputated. *Id*. at 176. There was no dispute that the plaintiff had applied for, and received, workers' compensation benefits. The corporate president and the plaintiff's supervisor were defendants, and they sought to dismiss the plaintiff's negligence claims against them for lack of subject matter jurisdiction. The defendants argued that the workers' compensation law provided the plaintiff's sole remedy, and that they were not "third persons" amenable to suit under that law. *Id*.

The court began its analysis by repeating the principle that, pursuant to *Sylcox*, co-employees are "third persons" within the meaning of the Missouri Workers' Compensation Law. The court noted that neither party questioned this principle. *Id.* at 177. The court framed the issue in *Badami* as "how far does this principle reach?" *Id*. The court answered this question by adopting an approach that had been applied in Wisconsin and other states.[1] This approach dictates that if the negligence of a corporate officer or supervisory employee is based upon a general non-delegable duty of the employer, the officer or supervisor is not a "third person" subject to suit. *Id*. at 179. "Something extra" is required beyond a breach of the duty of general supervision and safety in the work place, because that duty is owed to the employer, not to other employees. *Id*.

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[1] In adopting this approach in *Badami*, the court primarily relied upon a handful of opinions by Wisconsin courts. Those opinions, however, had essentially been nullified by a 1977 amendment to Wisconsin's workers' compensation law. This amendment specifically states that employees are not subject to suit for injuries sustained by other employees in on-the-job accidents. See Wis. Stat. § 102.02(2).

After *Badami*, other Missouri courts began applying this "something extra" approach and eventually extended it to co-employees who are not corporate officers or supervisors. *See e.g., Shelter Mutual Ins. Co. v. Gebhards*, 947 S.W.2d 132 (Mo.App. W.D. 1997) (workers' compensation is plaintiff's sole remedy because plaintiff's petition alleges nothing more than a co-employee's failure to provide a safe work place); *State ex rel. Feldman v. Hon. Herbert Lasky*, 879 S.W.2d 783 (Mo.App. W.D. 1994) (same); *Gatlin v. Truman Med. Ctr.*, 770 S.W.2d 510 (Mo.App. W.D. 1989) (same).

2. The "Something Extra" Standard is Vague, Subjective, and Confusing, and Does Not Lead to Consistent Results .

The "something extra" standard set forth in *Badami* has proven to be vague, subjective, confusing, and fraught with differences of opinion, because it must be applied on a case-by-case basis. The inconsistencies are evident from a few examples.

In *Workman v. Vader*, 854 S.W.2d 560 (Mo.App. S.D. 1993), the court found that the "something extra" standard was met when a supervisory employee threw a cardboard box and packing materials on the floor and failed to clean them up, resulting in a subordinate employee's slip-and-fall injuries. Throwing debris on the floor and failing to pick it up is arguably a clear-cut example of failing to carry out the employers duty to provide a clean, and hence safe, work place; but the court disagreed, and reversed the lower court's dismissal of the plaintiff's negligence claims against her supervisor. *Id*. at 564.

In contrast, Missouri courts have found that employees who design, engineer, build, and maintain dangerous work-site equipment that subsequently malfunctions and injures other employees are

not subject to suit because the injured employee's sole remedy is workers' compensation. For example, in *Kelley v. DeKalb Energy Co*., 865 S.W.2d 670 (Mo. 1993), this Court found that a supervisory employee who designed and built a corn flamer is not a "third person" subject to suit, after the corn flamer malfunctioned and injured a subordinate employee. *See also Sexton v. Jenkins & Assoc*., 41 S.W.3d 1 (Mo.App. W.D. 2000) (same with regard to co-employees who designed and built an elevator shaft railing); *Gabler v. McColl*, 863 S.W.2d 340 (Mo.App. E.D. 1993) (same with regard to an officer/supervisor who designed, engineered, built, and maintained an elevator/dumbwaiter that dropped, causing severe injuries to a subordinate employee); *Holland v. W.A.S.P. Inc*., 833 S.W.2d 23 (Mo.App. E.D. 1992) (same with regard to supervisor who designed a faulty container trailer that rolled over and struck a subordinate employee).

In yet other cases, Missouri courts have held that to meet the standard adopted in *Badami*, the defendant-employee must have "personally participated in the 'something more'" by directing another employee to engage in "dangerous conditions that a reasonable person would recognize as hazardous and beyond the usual requirements of employment." *Wright v. St. Louis Produce Market, Inc*., 43 S.W.3d 404, 415 (Mo.App. E.D. 2001). *See also Lyon v. McLaughlin*, 960 S.W.2d 522, 526 (Mo.App. W.D. 1998) (same). Cases in which the courts have found such circumstances exist include one involving a supervisor directing a subordinate to suspend himself on a makeshift crane over a vat of scalding water, *Hedglin v. Stahl Specialty Co*., 903 S.W.2d 922 (Mo.App. W.D. 1995), one in which a supervisor ordered, on threat of firing, a subordinate to manually move a 5,000 pound safe from one location to another, *Murry v. Mercantile Bank, N.A.*, 34 S.W.3d 193 (Mo.App. E.D. 2000), and another case involving a supervisor personally arranging a makeshift hoist on an elevator that

failed, causing the elevator to crash while a subordinate employee was working on the elevator. *Tauchert v. Boatmen's Nat'l Bank of St. Louis*, 849 S.W.2d 573 (Mo. banc 1993).

Given this confusion and lack of clarity, it is no surprise that the Court of Appeals, Southern District, referred to the *Badami* approach as "imprecise," further stating that "the order or nature of the breach of duty which renders a supervisory employee liable within the exception . . . remains elusive." *Rhodes v. Rogers*, 675 S.W.2d 107, 108 (Mo.App. S.D. 1984).[2] Judge Smart, of the Western District Court of Appeals, also voiced concern regarding the "vagueness of current Missouri law on the issue of co-employee liability" in the concurring opinion in *Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922, 927 (Mo.App. W.D. 1995).

[2] A recent article in the Journal of the Missouri Bar also discussed Missouri's lack of a "consistent, useful test to determine when" a co-employee is a "third person" under the Workers' Compensation Law. See Passanante and Stock, *Help! We're Lost! Co-Employee Immunity in Missouri*, 57 J. Mo. B. 64 (2001). The same topic was addressed in a prior article, in which the author questions the personal liability of negligent employees whose acts injure others. The author concluded that the answer to the question "is not always a simple one." See Hanna, *Co-Employee Immunity: What Does it Take to Plead "Something More?"*, 53 J. Mo. B. 77 (1997).

3. Allowing an Injured Employee to Sue a Co-Employee for a Work Place Accident Covered by Workers' Compensation May Lead to a Double Recovery For the Employee That is Paid by the Employer.

3. Allowing an Injured Employee to Sue a Co-Employee for a Work Place Accident Covered by Workers' Compensation May Lead to a Double Recovery For the Employee That is Paid by the Employer.

" \l 2 In *Hedglin* the Court of Appeals articulates a concern that Missouri courts have recognized since *Badami*: the anomalous result of applying the "something extra" standard when employers take the laudable step of providing a defense and offering indemnity to employees who are sued for their on-the-job actions. *Id.* at 929. Those employers, after first paying the injured employee's compensation claim, will then also be required to pay the legal expenses associated with defending the negligent employee and any award of damages assessed against him. *Id*. And there is no possibility, under these facts, of the employer recouping any amount of money via subrogation.[3]

Under this scenario, the injured employee obtains the benefits of the workers' compensation system - payment for their injury without regard to fault - but avoids its limitations by recovering from their employer, indirectly, a second time. Such a "double recovery" by an employee is an "evil to be avoided." *Barker v. H & J Transporters, Inc.*, 837 S.W.2d 537 (Mo.App. W.D. 1992).

[3] For example, pursuant to § 105.800 *et seq*. RSMo (2000), the State of Missouri is required to provide workers' compensation coverage to State employees. Pursuant to § 105.711 *et seq*. RSMo (2000), the "State Legal Expense Fund," the State of Missouri is also required to defend and indemnify State employees for claims arising from their on-the-jobs actions. Private employers, by contrast, may voluntarily defend and indemnify employees, or may do so pursuant to employment contracts between employer and employee, or between employer and labor union.

That potential for double recovery explains why Missouri's rule has been rejected elsewhere. Missouri is one of a distinct minority of jurisdictions which allows an injured employee to sue a co-employee for negligence. *Hedglin*, 903 S.W.2d at 928. In fact, the great majority of states now exclude co-employees, either by express statutory language or judicial decision, from the category of "third persons" subject to suit. 6 A. Larson, The Law of Workmen's Compensation, § 111.03(1) (2000). This Court should bring Missouri into that majority and thus eliminate the potential for double recovery.

4. Allowing an Injured Employee to Sue a Co-Employee For an Accident Covered by Workers' Compensation Creates Friction in the Workplace and May Cause the Cost of the Injury to be Passed on to the Co-Employee .

Hedglin also identifies a problem that arises when the employer does not defend and indemnify its employees for their on-the-job actions. That problem is illustrated as follows: Employee "A" is a passenger and is injured in an automobile accident in which employee "B" is driving. "A" receives workers' compensation benefits from their mutual employer. "A" then sues "B" for negligent operation of a motor vehicle and recovers damages. The employer will be required to sue one of its own employees - in this case "B" - to be subrogated. *Hedglin*, 903 S.W.2d at 929. Such a scenario does not further the goals of a workers' compensation scheme, because it involves multiple litigations, will obviously lead to friction in the work place, and will "theoretically cause the cost of the injury to be passed on to the negligent co-employee," and not the employer and subsequently the consuming public, after the employer subrogates. *Id*.

5. This Court Should Adopt a Bright-Line Rule that Removes Employees Committing Negligent Acts From the Group of "Third Persons" Subject to Suit For On-the-Job Accidents Covered by Workers' Compensation .

Employees who commit negligent acts should be removed from the group of "third persons" subject to common law claims under the Workers' Compensation Law. This bright-line, objective rule is precise and may be clearly applied in every situation by employers, supervisors, subordinate employees, and the courts. Negligent acts of any kind would be shielded from liability, because injuries resulting from on-the-job "accidents" are covered by Missouri's Workers' Compensation Law.[4] § 298.020.2 RSMo (2000). Co-employees committing intentional torts, however, would be amenable to suit, because intentional acts are not "accidents" for which an injured employee may receive workers' compensation benefits. *Id.*

Such an approach is consistent with that of the majority of the states. For example, although most states recognize that an employee cannot sue a co-employee for negligence, it appears that the majority of those states allow an employee to be sued for injuries arising from intentional wrongs, based

[4] Missouri's Workers' Compensation Law applies to on-the-job "accidents," which are defined as "unexpected or unforseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."

either upon public policy, or provisions in their states' compensation laws limiting coverage to "accidental" injury. 6 A. Larson, The Law of Workmen's Compensation,

§ 111.03(1) (2000).

Removing negligent co-employees from the group of "third persons" amenable to suit will not prevent injured employees from collecting workers' compensation benefits from their employer, regardless of their own fault, for injuries arising from on-the-job accidents. Injured employees will still be allowed to bring suit against negligent, independent "third persons," who are true strangers to the employer-employee relationship. And their employer will still have a right of subrogation.

Moreover, declaring that co-employees who commit negligent acts are not "third persons" is, for numerous reasons, consistent with the spirit and goals of compensation schemes. Litigation arising from on-the-job accidents will be reduced. The goal of placing the cost of work place accidents on industry and the consuming public will be furthered. The conflict and friction that arises in an adversarial situation, such as one employee suing another or an employer seeking subrogation from its own negligent employee, will be less likely to spill over into the work place.

For the reasons described above, this Court should declare that negligent employees, regardless of whether or not they have supervisory responsibilities, are not "third persons" amenable to suit for injuries arising from on-the-job accidents that are covered by workers' compensation.

C. In the Alternative, This Court Should Find That the "Something Extra" Standard Only Applies to Exceptional Cases, Such as Gross Negligence or Inherently Dangerous

Behavior, and a Claim of Negligent Operation of a Motor Vehicle

is Not "Something Extra."

If this Court declines to exclude negligent co-employees from the "third persons" who can be sued despite the Workers' Compensation Law, then this Court should strictly construe the "something extra" standard to only apply to exceptional cases, such as gross negligence or inherently dangerous behavior.[5] A claim of negligent operation of a motor vehicle by a co-employee is nothing more than alleging simple negligence, i.e., failure to provide a safe work place. Such a failure is never the exceptional case.

That conclusion is evident in decisions of the Western and Eastern Districts of the Missouri Court of Appeals, holding that the Workers' Compensation Law precludes a lawsuit by one employee against another employee for negligently operating a motor vehicle.

In *Shelter Mut. Ins. Co. v. Gebhards*, 947 S.W.2d 132 (Mo.App. W.D. 1997), two employees were riding together in a vehicle conducting work-related business. The driver struck a bridge, injuring the passenger. The parents of the injured passenger, a minor, demanded that two insurance companies compensate them for their child's injuries. Both companies, Shelter and State Farm, denied coverage. *Id*. at 132-33. A third insurance company, Farm Bureau, paid $50,000 to the parents to settle their claim. Farm Bureau then filed a lawsuit in subrogation against Shelter and State Farm to recover the money it paid to the minor's parents. *Id*. at 133. Shelter argued that a "fellow

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[5] As previously stated, the majority of the states do not allow a co-employee to be sued for negligence. 6 A. Larson, The Law of Workmen's Compensation, § 111.03(1) (2000). Some of those states, however, allow a co-employee to be sued for "gross negligence." *Id.*

employee clause" contained in its insurance policy precluded coverage of the accident and, therefore, it was not obligated to subrogate Farm Bureau. But the Circuit Court found that the fellow employee exclusion in the policy conflicts with the requirements of Missouri's Motor Vehicle Financial Responsibility Law, which mandates coverage of $25,000 per person, or $50,000 per accident. *Id*. at 133-34.

The Court of Appeals disagreed with the Circuit Court. The Motor Vehicle Financial Responsibility Law, it maintained, actually provides that a "motor vehicle liability policy need not insure any liability under any workers' compensation law." *Id*. at 134. The Court of Appeals then turned to whether the accident at issue, involving the two co-employees, was one under workers' compensation law, and concluded it in the affirmative. The court also stated that the injured employee could not sue his employer for his injuries, nor could he sue his negligent co-employee. *Id*. Alleging that a co-employee crashes a vehicle into a bridge, the court reasoned, is not "something extra" that goes beyond the "co-employees failure to implement the employer's duty of providing a safe workplace." *Id*.

Likewise, the Eastern District determined in *Collier v. Moore*, 21 S.W.3d 858 (Mo.App. E.D. 2000), that a subordinate employee could not sue his supervisor for negligent operation of a motor vehicle for injuries sustained in an on-the-job accident. The plaintiff in *Collier*, an airline employee, alleged that his supervisor drove a mini-van too fast for the snowy weather conditions and ran into a baggage tug he was driving on the outside concourse at Lambert St. Louis International Airport. The impact of the crash ejected the plaintiff from the baggage tug, causing his injuries. *Id*. at 859. In addition to suing his supervisor, the plaintiff brought a workers' compensation claim against his employer, and there was no dispute that the accident fell under the Workers' Compensation Law. *Id*.

The Court of Appeals began its analysis by noting that an employer's immunity from common law liability under the Workers' Compensation Law applies to employees when they implement the employer's non-delegable duty to provide a reasonably safe work place. *Id*. at 861. The court then reiterated that the injured employee must allege "something extra" against his negligent co-employee, and the "something extra" must be determined on a case-by-case basis. *Id*. The court then concluded that "those circumstances are not present here." *Id*. Instead, the court reasoned, the supervisor was responding to a call requesting his presence at another location on the worksite, a regular part of his job responsibilities. He did not create the hazardous weather conditions that caused the accident, and his actions, including driving too fast for those weather conditions, amounted to a failure to fulfill the duty to provide a reasonably safe work place. *Id*. at 861-62.

A different division of the Eastern District concluded the opposite in *Dierkes v. Banahan*, 1992 Mo. App. Lexis 575, No. 59931 (Mo.App. E.D. 1992). In that case, two police officers were involved in an automobile accident, and the officer riding in the car as a passenger sued the driver. The Court of Appeals affirmed a substantial jury verdict against the defendant, noting that it felt "constrained" to do so. *Id*. at *1. The court recognized that, as of the time of its decision, only seven other states - Alabama, Arkansas, Maryland, Rhode Island, South Dakota, and Vermont[6] - limited immunity from suit, for accidents covered by workers compensation, to employers, thus allowing an employee to sue his negligent co-employee for negligence. *Id*. at *9 n.3. Although it upheld the jury verdict, the court

[6] As of 2000, Missouri is one of only four states that still limit to employers immunity from suit for on-the-job accidents covered by workers' compensation. The other states are Arkansas, Maryland, and Vermont. 6 A. Larson, The Law of Workmen's Compensation, § 111.02(1) n.1 (2000).

articulated numerous reasons for following the majority view, and it determined that "allowing liability to be passed on to co-employees for their negligent acts defeats the basic theory of workers' compensation." *Id*. at *9. The court then transferred the matter to this Court; the case was settled before submission. *See Hedglin*, 903 S.W.2d at 929 n.4.

Arkansas courts have taken this kind of strict application of the "something extra" standard in motor vehicle cases. Arkansas courts, too, had adopted the *Badami* approach in *Simmons First Nat'l Bank v. Thompson*, 686 S.W.2d 415 (Ark. 1985). But Arkansas courts subsequently applied the "something extra" standard to cases involving negligent operation of a motor vehicle, and found that such an allegation is nothing more than failing to provide a safe work place. Initially, these cases involved supervisors as defendants, *Barnes v. Wilkiewicz*, 783 S.W.2d 36 (Ark. 1990), but later cases, such as *Rea v. Fletcher*, 832 S.W.2d 513 (Ark.App. 1992), extended the rule to mere co-employees. Moreover, Arkansas courts also determined that a "work place" is not "static in the sense of being limited to the employer's physical premises or actual place of business." *Brown v. Finney*, 932 S.W.2d 769, 773 (Ark. 1996). Instead, the "work place" is the situs of work at the time of an on-the-job accident, including an accident occurring on a roadway. *See generally, Id*.

Missouri cases in which there was "something extra" are typically distinguishable from motor vehicle negligence cases. Courts have found "something extra" where a negligent supervisor or co-employee participates in an accident by committing an act, or ordering another employee to commit an act, that is reckless or obviously inherently dangerous, and beyond the usual requirements of employment. *Wright v. St. Louis Produce Market, Inc*., 43 S.W.3d 404, 415 (Mo.App. E.D. 2001). *See also Lyon v. McLaughlin*, 960 S.W.2d 522, 526 (Mo.App. W.D. 1998) (same). Those

cases consistently involve outrageous conduct on the part of the culpable co-employee. *See e.g., Murry v. Mercantile Bank, N.A.*, 34 S.W.3d 193 (Mo.App. E.D. 2000) (supervisor ordering, on threat of firing, a subordinate to manually move a 5,000 pound safe from one location to another); *Hedglin v. Stahl Specialty Co*., 903 S.W.2d 922 (Mo.App. W.D. 1995) (supervisor ordering a subordinate to suspend himself on a makeshift crane over a vat of scalding water); *Tauchert v. Boatmen's Nat'l Bank of St. Louis*, 849 S.W.2d 573 (Mo. banc 1993) (supervisor arranging a makeshift hoist on an elevator that fails, causing the elevator to crash while a subordinate employee is working on the elevator). *Contra Workman v. Vader*, 854 S.W.2d 560 (Mo.App. S.D. 1993) (supervisor threw cardboard box and packing paper on floor and did not clean area, subordinate slipped on debris and was injured). That the "something extra" standard might justify co-employee liability in such cases cannot justify its application to the more common set of facts presented here.

CONCLUSION

For the foregoing reasons, the State of Missouri asks that this Court declare that negligent co-employees, regardless of whether or not they have supervisory responsibilities, are not "third persons" subject to suit for injuries arising from on-the-job accidents that are covered by workers' compensation.

In the alternative, the State of Missouri asks that this Court declare that the "something extra" standard is to be strictly construed to only apply to exceptional cases involving gross negligence or conduct that is obviously inherently dangerous. A claim of negligent operation of a motor vehicle does not meet the "something extra" standard because it amounts to nothing more than alleging simple negligence, i.e., failure to provide a reasonably safe work place. Such a failure is never the exceptional case.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE
WITH RULE 84.06(b) and (c)

The undersigned hereby certifies that on this 18th day of January, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed postage prepaid to:

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This undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,470 words. The undersigned further certifies that the labeled disk, simultaneously

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