IN THE

INDIANA SUPREME COURT

CAUSE NO. _____

J.B. HUNT TRANSPORT, INC. AND TERRY L. BROWN, JR.,	) ON PETITION TO TRANSFER FROM) THE INDIANA COURT OF APPEALS)
Appellants-Defendants	) CAUSE NO. 45A03-1506-CT-670)
v.	) APPEAL FORM THE LAKE SUPERIOR) COURT NO. 7 CIVIL DIVISION)
THE GUARDIANSHIP OF KRISTEN ZAK,	) LOWER COURT CASE NO.) 45D11-0610-CT-190)
Appellee-Plaintiff	) THE HONORABLE JUDGE) DIANE KAVADIAS SCHNEIDER

BRIEF OF AMICUS CURIAE TRUCKING INDUSTRY DEFENSE ASSOCIATION IN SUPPORT OF APPELLANTS' PETITION TO TRANSFER

Michael B. Langford/#18046-53
R. Jay Taylor, Jr./#19693-53
Janis E. Steck/#28791-49
SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY, P.C.
10 W. Market Street, Ste 1400
Indianapolis, IN 46204

Attorneys for *Amicus Curiae* Trucking Industry Defense Association

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I.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Trucking Industry Defense Association ("TIDA") is an international organization comprised of motor carriers, transportation logistics companies, insurers of motor carriers, third party claims administrators, and defense counsel. The motor carrier members of TIDA include common carriers, private carriers, and private fleets. The insurance company members provide transportation liability insurance for the trucking industry. TIDA provides assistance to the trucking industry on various issues regarding risk management, personal injury, property damage, insurance, and workers' compensation claims.

TIDA has an interest in the outcome of this matter as its members regularly travel through Indiana and are subject to vehicle accident lawsuits filed in Indiana. The issues presented on transfer impact the defense of accident and injury claims asserted against motor carriers and their drivers.

Pursuant to Ind. Appellate Procedure Rule 46(E)(2), TIDA has coordinated with aligned counsel to avoid repetition of legal arguments. While TIDA's interests in this matter include all issues raised in the Petition to Transfer, this brief of *amicus curiae* addresses a single issue: whether the trial court erred in permitting the jury to assess independent fault against the Appellant motor carrier, even though the motor carrier's responsibility for fault of the driver was admitted and there was no claim that the motor carrier was liable for punitive damages by virtue of its own conduct. Punitive damages were not before the jury.

II.

SUMMARY OF ARGUMENT

The underlying facts are well known to the Court, but we offer a brief summary of the particular facts relevant to the propriety of the independent negligence claims. This case arises from a vehicle accident that occurred when Defendant Matthew Robinson ("Robinson") lost control of his vehicle in winter weather and struck a disabled and unoccupied tractor-trailer parked off the roadway and in the median of I-65 in Lake County, Indiana. Approximately one hour before Robinson's collision, J.B. Hunt truck driver Terry L. Brown ("Brown") had jackknifed that same tractor-trailer into the median of I-65. Kristen Zak, Robinson's passenger, was seriously injured in the accident. The Guardianship of Kristen Zak ("Zak") sued, among others, Robinson, Brown, and J.B. Hunt ("Hunt"). Zak alleged Brown negligently operated his vehicle, and that Hunt, as his employer, was vicariously liable for Brown's negligence. Hunt and Brown admitted that Brown was in the scope of his employment with Hunt when Brown jackknifed the tractor-trailer into the interstate median.

At the end of the evidentiary phase of the third jury trial, the trial court allowed Zak, over Hunt's objection, to amend her Complaint to include for the first time an independent negligence claim against Hunt. The pleadings were not amended to include a punitive damages claim against Hunt. Zak argued to the court and then to the jury that Hunt was independently negligent because Hunt's own safety expert testified, on cross examination, that any reasonable trucking company would monitor the weather conditions in the areas where it was

operating and shut down the trucks if necessary. The safety consultant also opined that the motor carriers should communicate with and assist their drivers in making weather-related instructions. The trial court then gave jury instructions about the independent liability of Hunt, and the verdict form allowed for separate fault allocation to Robinson, Brown and Hunt. The jury assessed 30% of the comparative fault for the accident to Hunt, independently. As ordered by the post-trial judgment, Hunt also bears vicarious liability for the 30% of fault allocated to Brown for his negligence. Thus, Hunt, as the motor carrier, is liable for a combined 60% of the $32.5 million judgment.

The Indiana Supreme Court should accept Hunt's Petition to Transfer and reverse the Court of Appeals' affirmation of the trial court's erroneous allowance of the independent negligence claim against Hunt. The Court of Appeals' ruling on this issue was incorrect for at the least the following reasons:

1. Well-established Indiana law bars independent negligence claims against a defendant in this context.
2. The persuasive majority of decisions throughout the country likewise rightly prohibit independent negligence claims when agency is admitted and punitive damages are not at issue because independent actions are superfluous to the vicarious liability negligence actions and confuse the critical issues.
3. Hunt had no legal duty to monitor the weather and ensure Brown operated his truck safely under the conditions existing at the time of the accident.

III.

ARGUMENT

A.
Indiana Law Does Not Recognize a Theory of Independent Liability Against Hunt

The Court of Appeals decision fails to recognize that independent claims of negligent hiring, retention, monitoring and supervision are not recognized if the employer has stipulated that the employee was acting in the course and scope of his employment.[1] *Shipley v. City of South Bend*, 372 N.E.2d 490 (Ind. Ct. App. 1978). *See also Tindall v. Enderle*, 320 N.E.2d 764 (Ind. Ct. App. 1974). The Court of Appeals explained the reason for this rule in *Tindall*:

> Although Indiana law recognizes a separate cause of action for the negligent hiring of an employee, that theory is of no value where an employer has stipulated that his employee was within the scope of his employment. The doctrine of *respondeat superior* provides the proper vehicle for a direct action aimed at recovering the damages resulting from a specific act of negligence committed by an employee within the scope of his employment. Proof of negligence by the employee on the particular occasion at issue is a common element to the theories of *respondeat superior* and negligent hiring. Under the theory of *respondeat superior*, however, when the employer has stipulated that the employee was acting within the scope of his employment in committing the act, upon proof of negligence and damages, plaintiff has successfully carried his burden of proof against the negligent employee's employer. **Proof of the additional elements of negligent hiring under such circumstances is not relevant to the issues in dispute, is wasteful of the court's time and may be unnecessarily confusing to a jury.**

[1] This proposition extends to claims of negligent hiring, retention, training and entrustment. *Id.* Here, Zak's arguments appear to rest only on allegations of negligent monitoring and supervision at the time of the accident. But the larger context of all types of independent negligence theories should be considered too.

Id. at 768. (internal citations omitted) (emphasis added).

This proposition has been adopted by numerous Indiana courts and federal courts applying Indiana law, which have rejected independent claims against employers based upon theories of negligent hiring, retention, training, and entrustment where vicarious liability is already established. *See, e.g., Board of School Com'rs of City of Indianapolis v. Pettigrew,* 851 N.E.2d 326, 332-333 (Ind. Ct. App. 2006) (holding trial court erred in denying summary judgment on negligent supervision claim where employer has admitted the employee was acting within scope of employment); *Simmons v. Pinkerton,* 762 F.2d 591, 602-603 (7th Cir. 1985) (holding admission of evidence of employer's hiring practices at trial was proper only because evidence of negligent training was relevant to separate and distinct breach of contract allegations, otherwise would be duplicative of vicarious liability claim); *Perron v. JP Morgan Chase Bank,* 2014 WL 931897, *5-6 (S.D. Ind. 2014) (dismissing independent claims of negligent supervision, retention and training where there was no allegation the employees were acting outside the scope of employment); *Davis v. Macey,* 901 F.Supp.2d 1107, 1111 (N.D. Ind. 2012) (dismissing claims of negligent entrustment, hiring and retention where employer had stipulated employee was acting within scope of employment); *Kpotufe v. J.B. Hunt Transport, Inc.,* 2011 WL 6092159, *6 (S.D. Ind. 2011) (granting summary judgment in favor of employer on claims for negligent supervision where motor carrier admitted its employee was acting in

the scope of employment, rendering independent claim duplicative of claim for *respondeat superior* liability).[2]

The trial court's allowance of the independent negligence claim against Hunt erroneously ignored this substantial body of settled law. Zak's independent allegations against Hunt sought to hold Hunt liable for the accident based on Hunt's alleged failure to monitor the weather and supervise Brown. But Hunt's responsibility for Brown's driving was already established by virtue of the doctrine of *respondeat superior.* This is the very type of duplicative claim precluded by *Tindall,* and progeny. Hunt admitted Brown was in the scope of employment with Hunt at the time of the accident, and has not disputed its vicarious liability. Therefore, under *Tindall,* any independent claim of negligent monitoring and supervision was unnecessary, redundant, unnecessarily confusing, and should have been precluded. For these same reasons, Final Instructions 15 and 32, and the verdict form, do not accurately reflect Indiana law and should not have been issued to the jury, thereby mandating a reversal of the judgment entered here.

[2] Certain limited exceptions apply this rule, including where breach of contract claims have been pled, where there is an allegation that the employee was acting outside the scope of their employment or where there is a claim for punitive damages. *Tindall*, 320 N.E.2d at 768. For example, if there is an allegation of an intentional tort, then evidence of negligent hiring may have significance. *Davis*, 901 F.Supp.2d at 1111-1112. None of these exception apply to this matter.

B.
***Indian Trucking* Does Not Support the Court of Appeals' Decision**

The Court of Appeals ignored the cases cited above and instead relied on a single case, *Indian Trucking v. Harber*, 752 N.E.2d 168 (Ind. Ct. App. 2001). However, the independent negligence holding in *Indian Trucking* is an aberration of Indiana law that should be disapproved by the Indiana Supreme Court.

In *Indian Trucking,* evidence indicated that a commercial truck's braking mechanism was in disrepair and had not been separately inspected by the company and driver, as required by the Federal Motor Carrier Safety Regulations that govern commercial motor vehicles. The failure of the braking mechanism was a cause of the accident. Even though punitive damages against the motor carrier were not sought in the case, the Court of Appeals in *Indian Trucking* reasoned that an independent negligence claim (and associated comparative fault line on a verdict form) against the motor carrier was appropriate as it was established that "each of the [defendants] violated at least one Federal Motor Carrier Safety Regulation ("FMCSR") that applied specifically to that [defendant]." *Id*. at 177.

The *Indian Trucking* decision did not address the hefty weight of Indiana caselaw precedent that has long prohibited an independent negligence action against a vicariously liable defendant. To make Indiana law even more confusing on this topic, the Court of Appeals in the instant case cites only *Indian Trucking* for the proposition that independent negligence actions and corresponding verdict forms are permitted here. Thus, the Court of Appeals here compounds

the error of *Indian Trucking* by relying on *Indian Trucking's* faulty holding without acknowledging the substantial body of conflicting holdings on this very issue.

Perhaps the result in *Indian Trucking* was different from *Tindall* and its progeny because *Indian Trucking* involved specific independent regulations that directly go to a motor carrier's regulatory responsibility. But in light of the Court of Appeals' ruling here, there are now three very different (and conflicting) potential answers to this question: are independent negligence actions against a motor carrier allowed even when agency between the motor carrier and its driver is admitted and there are no punitive damages? Those potential answers include the following:

1. No such action is allowed whatsoever, per the 1974 case of *Tindall* and its progeny; or
2. Such an action is allowed under *Indian Trucking*, but only if the direct negligence action is premised on the violation of a regulation that is specific to the motor carrier; or
3. Such an action is allowed under the instant Court of Appeals' decision so long as a question of fact exists about whether the motor carrier violated an independent duty, whether that duty arises from statute, regulation or a common law duty of care.

While this *Amicus* Petitioner contends that the first listed possible answer to the question is the correct answer, there is no doubt that Indiana case law on this point has been further confused by the Indiana Court of Appeals decision here and the independent negligence issue now needs to be fully addressed by

the Indiana Supreme Court. Accordingly, Appellants' Petition to Transfer should be granted on at least this important issue.

C.
The Court of Appeals Opinion Deviates from the Majority Position Throughout the Country

The decision of the Court of Appeals is not only at odds with the weight of Indiana precedent, it also conflicts with the majority of states that have addressed the issue and have held that a plaintiff cannot pursue a claim against an employer for negligent entrustment, hiring, supervision, or training resulting in an accident when the employer liability for the accident has already been established by virtue of an admission that its employee was acting within the scope of employment. *See, e.g., Peterson v. Johnson*, No., 2013 WL 5408532, at *1 (D.Utah Sept. 25, 2013) (*citing Coville v. Ryder Truck Rental, Inc.*, 30 A.D.3d 744, 817 N.Y.S.2d 179 (N.Y.App.Div.2006)); *Zibolis–Sekella v. Ruehrwein*, 2013 WL 3208573, at *2 (D.N.H. June 24, 2013) (citations, internal citations, and internal quotations omitted); *Sterner v. Titus Transp., LP*, 2013 WL 6506591 at *3 (M.D.Pa. Dec. 12, 2013) (recognizing exception where valid claim for punitive damages exists); *Perry v. Stevens Transp., Inc.*, 2012 WL 2805026 at *6 (E.D.Ark. July 12, 2012) (recognizing exception where valid claim for punitive damages exists); *Brown v. Tethys Bioscience, Inc.*, 2012 WL 4606386, at *6 (S.D.W.Va. Oct. 1, 2012) (*citing Niece v. Elmview Grp. Home*, 131 Wash.2d 39, 929 P.2d 420 (1997)); *Brown v. Larabee*, 2005 WL 1719908, at *1 (W.D.Mo. July 25, 2005) (*citing McHaffie v. Bunch*, 891 S.W.2d 822 (Mo.1995) (en banc)); *Gant v. L.U.*

Transport, Inc., 331 Ill.App.3d 924, 927, 264 Ill.Dec. 459, 770 N.E.2d 1155 (Ill.App.Ct.2002); *Wise v. Fiberglass Systems*, Inc., 110 Idaho 740, 718 P.2d 1178 (1986); *see also Adele v. Dunn*, No., 2013 WL 1314944, at *1–*2 (D.Nev. Mar. 27, 2013) (predicting Nevada courts would follow majority rule); *see generally*, Richard Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of Admission of Respondeat Superior*, 10 Wyo. L.Rev. 229 (2010).

Like the Indiana state and federal cases discussed above, in arriving at these findings, these courts have held an independent cause of action against an employer under these circumstances is unnecessary, redundant, prejudicial and a wasteful of the court's resources. For example, in *Bartja v.Nat'l Union Fire Ins.co.*, 463 S.E.2d 358, 361 (Ga.Ct.App. 1995), the Georgia Court of Appeals found that in cases where claims for *respondeat superior* and direct negligence against the employer are alleged, a defendant's admission of liability under *respondeat superior* establishes "the liability link" from the negligence of the driver to the employer, rendering evidence of direct negligence claims "unnecessary and irrelevant," because vicarious liability under the theory of *respondeat superior* makes the employer strictly liable for all fault attributed to the negligence employee. *Bartja*, 463 S.E.2d at 361. This is the point made by the Indiana decisions discussed above, adding a direct negligence claim is superfluous to a *respondeat superior* case because the claim does not alter the link to nor the amount of compensatory damages. Courts adopting this majority view are also rightly concerned that allowing independent negligence claims in compensatory damage cases will confuse the issues. The primary issues for a

court to consider in a motor vehicle accident case are whether drivers were negligent in the operation of their vehicles and whether that negligence was the proximate cause of the plaintiff's injuries. However, with the introduction of evidence to support an independent negligence claim, the jury will hear evidence, for example, about a driver's driving record or the employer's hiring practices, evidence that is routinely excluded in a motor vehicle case. This then could lead to a situation where a driver was fault free for an accident, but the driver's employer is found liable for the unrelated acts an employer hiring, retaining or monitoring a driver with a poor record. Yet, the collateral misconduct confuses the real issue, the driver's negligence. As one court has accurately held:

> [T]o hold that the rights and liabilities of the parties should be determined, not solely by what they did, but by their conduct on other occasions and in different situations would put us on a tortious trial – tedious, difficult and expensive to follow and leading in the end only to an intolerable result.

Deatherage v. Dyer, 530 P.2d 150, 152 (Okla. Civ.App. 1974).

Furthermore, an additional independent negligence claim invites the jury to assess the negligence of the employer twice. That is what occurred in the present case. Because of vicarious liability, Hunt bears liability for the 30% fault the jury assessed to its employee Brown, plus an additional 30% of fault for the independent negligence finding. Yet, Brown's conduct in relation to the Plaintiff remains the same, which is what the liability assessment in a vehicle accident case is about: Who caused the accident and what was the extent of the party's fault? Zak contended that Hunt was independently liable for failing to monitor the weather in Northwest Indiana and communicating with Brown about that weather. Even so, Brown's driving actions and how they compared to the other

driver in the second accident, Robinson, are neither enhanced nor diminished by Hunt's alleged direct negligence or lack thereof. Thus, the majority view has it right when concluding that giving plaintiffs a second shot at a liability assessment is not consistent with the goal of fairly determining which parties to a vehicle accident caused the accident.

Finally, direct negligence claims create more issues to be litigated in discovery, motions and at trial. Yet, the direct negligence claims in the context here provide no additional compensatory damages for the plaintiff and, as previously pointed out, confuse the real issues. Therefore, the direct negligence actions waste the parties and the courts' time and resources.

This Supreme Court should therefore adopt the majority view, enunciated long ago by the Indiana Court of Appeals in *Tindall,* and in so doing, reverse the findings of the trial court and the Court of Appeals on the direct negligence issue.

D.
Hunt Had No Duty to Monitor the Weather and Determine if Brown Could Safely Operate His Vehicle

Plaintiff's direct negligence theory against Hunt was premised upon the concept that a national motor carrier, based in Arkansas with thousands of trucks traveling throughout the country nationwide at any given moment, should monitor all weather and road conditions all the time and then decide for the drivers when they should alter their driving based upon those conditions. This theory arose when Hunt's safety expert testified on cross examination that any reasonable trucking company should monitor the weather conditions, in the areas where its was operating, communicate with its drivers about the weather

conditions and shut down the trucks if necessary. However, that position actually goes to the question of reasonable care, skipping past the first prerequisite question: What duty, if any, does a motor carrier have to monitor the weather conditions for its drivers and trucks traveling roads throughout the country? It is of course for the Court, not an expert, to determine the duty question. *See, e.g., Northern Indiana Public Service Co. v. Sharp*, 790 N.E.2d 462, 466 (Ind. 2003) ("Whether a defendant owes a duty of care to a plaintiff is a question of law for the court to decide."). Contrary to the Court of Appeals' decision here, motor carriers have no such duty.

The Federal Motor Carrier Safety Regulations indicate that this duty is to be born by drivers, not motor carriers:

> **Hazardous conditions; extreme caution**
>
> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated. Whenever compliance with the foregoing provisions of this rule increases hazard to passengers, the commercial motor vehicle may be operated to the nearest point at which the safety of passengers is assured.

49 C.F.R. § 392.14

The Regulatory Guidance that accompanies 49 C.F.R. § 392.14 expressly confirms that it is the driver, not the motor carrier, who decides whether and how operation should continue in adverse weather conditions. The Guidance states as follows:

> Question 1: Who makes the determination, the driver or the carrier, that conditions are sufficiently dangerous to warrant discontinuing the operation of a Commercial Motor Vehicle (CMV)?
>
> Guidance: Under this section, the driver is clearly responsible for the safe operation of the vehicle and the decision to cease operation because of hazardous conditions.

This Guidance comports with the language and logic of the regulation and reflects the reality that only the driver is in a position to assess whether "hazardous conditions … adversely affect visibility or traction," not someone working in a corporate office that could be more than 1,000 miles away from where a truck is traveling. Given that drivers encounter differing weather and road conditions within a few minutes' time, it would have been absurd to require motor carrier's corporate headquarters to monitor, 24/7, thousands of different weather conditions throughout the country that are constantly changing. The decision of the Court of Appeals imposes precisely this duty, which adds an unprecedented and oppressive legal burden on the motor carrier industry, a crucial component of this state's and the nation's commerce.

One safety expert's opinion cannot create a legal duty that otherwise does not exist and runs counter to the clear language of the guiding federal regulation for motor carriers operating in inclement weather. Left undisturbed, the Court of Appeals' decision here will be read to impose a duty on motor carriers to be all-knowing about weather and road conditions throughout the country at any given moment. Future lawsuits involving motor carrier accidents in inclement weather will constantly be complicated by superfluous direct negligence actions against the motor carriers, alleging that a driver's operation in adverse weather

conditions is an independent tort against a motor carrier. This untenable result will have deep and long-lasting ramifications against one of our country's most vital industries.

IV.

CONCLUSION

For these reasons, *amicus curiae* Trucking Industry Defense Association respectfully requests this Court accept transfer.

Respectfully submitted,

/s/ Michael B. Langford
Michael B. Langford/#18046-53
R. Jay Taylor, Jr./#19693-53
Janis E. Steck/#28791-49

Attorneys for Trucking Industry Defense Association

CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 44(E)

I verify that this Brief of Amicus Curiae complies with the type volume limitation of Appellate Rule 44(E). The Brief of Amicus Curiae does not exceed 7,000 words. The Brief of Amicus Curiae contains _____ words (including those used in footnotes) based upon the count of the word processing system employed to prepare the brief, Microsoft Word 2016.

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY, P.C.

/s/ Michael B. Langford
Michael B. Langford/#18046-53
R. Jay Taylor, Jr./#19693-53
Janis E. Steck/#28791-49

Attorneys for Trucking Industry Defense Association

CERTIFICATE OF FILING AND SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record by E-service on September 19, 2016:

Timothy S. Schafer
Timothy S. Schafer II
Todd S. Schafer
SCHAFER & SCHAFER, LLP
3820 E. US 30
Merrillville, IN 46410

Gregory W. Brown
BROWN & BROWN, PC
7448 Broadway
Merrillville, IN 46410

John B. Drummy
Mark D. Gerth
KIGHTLINGER & GRAY, LLP
One Indiana Square, Ste 300
211 N. Pennsylvania Street
Indianapolis, IN 46204

Keith A. Gaston
Bruce D. Jones
CRUSER, MITCHELL, NOVITZ, SANCHEZ, GASTON & ZIMET, LLC
3077 East 98th Street, Ste 280
Indianapolis, IN 46280

Crystal G. Rowe
Whitney E. Wood
Alyssa Cochran
KIGHTLINGER & GRAY, LLP
3620 Blackiston Boulevard
Bonterra Building, Ste 200
New Albany, IN 47150

Julie R. Murzyn
O'NEILL, MCFADDEN & WILLETT, LLP
833 W. Lincoln Highway, Ste 410W
Schererville, IN 46375

/s/ Michael B. Langford
Michael B. Langford

SCOPELITIS, GARVIN, LIGHT HANSON & FEARY, P.C.
10 West Market Street, Suite 1400
Indianapolis, IN 46204
(317) 637-1777

4811-8245-4328, v. 1