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August 22, 2014

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Honorable Tani Cantil-Sakauye, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

CLERK SUPREME COURT

Re: *Kam-Way Transportation, Inc. v. Superior Court of Kern County (Chavez)*
Supreme Court, Case No. S220283

To the Chief Justice and the Associate Justices of the California Supreme Court:

The Trucking Industry Defense Association (“TIDA”) submits this amicus curiae letter in accordance with California Rules of Court, rule 8.500(g), to request that this Court grant petitioner Kam-Way Transportation, Inc.’s petition for review (“Petition”) of the Fifth District Court of Appeal’s July 22, 2014 summary denial of the petition for writ of mandate in *Kam-Way Transportation v. Superior Court of Kern County* (Case No. F069684).

TIDA is an international organization comprised of motor carriers, transportation logistic 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 that haul cargo throughout the United States and internationally. The transportation logistics company members, also known as trucking brokers, arrange for motor carriers to transport goods. The insurance company members provide transportation liability insurance for the trucking industry. TIDA provides training and assistance to the trucking industry on various issues regarding risk management, personal injury, property damage, insurance, and workers’ compensation claims.

TIDA’s members have a substantial interest in having this Court properly determine that trucking brokers are not liable for personal injuries caused by motor carriers under the nondelegable duty doctrine. There are over 21,000 trucking brokers in the United States. TIDA believes that it is important for the Court to review this issue at this juncture, prior to a jury trial, to clarify the proper application of the law as it is applied to trucking brokers.

For all the reasons articulated below, the Court should grant review or remand to the Court of Appeal to consider the merits of the important question of California law raised by the Petition.

REVIEW SHOULD BE GRANTED

This case presents an issue of critical importance to the trucking industry in California. (Cal. Rules of Court, rule 8.500(b)(1).) The trial court's denial of summary judgment in this case is an unprecedented extension of the nondelegable duty doctrine. The trial court imposed a nondelegable duty on a trucking broker for the negligence of a motor carrier, who is an independent contractor. Without clarification of the limits of the nondelegable duty doctrine as applied to the trucking industry, the trial court's decision may cause significant uncertainty regarding the allocation of certain risks in the transportation of goods.

A. The Trial Court's Decision Is An Unwarranted And Unprecedented Expansion Of The Nondelegable Duty Doctrine.

Until this case, the nondelegable duty doctrine has never been applied to trucking brokers, who, unlike motor carriers, do not themselves own any trucks or transport goods. The trial court relied on *Serna v. Petty Leach Trucking* (2003) 110 Cal.App.4th 1475, a case involving a motor carrier, to impose liability on a trucking broker pursuant to the nondelegable duty doctrine.

The trial court's decision improperly blurs the distinction between motor carriers and brokers. A broker has a unique role in the transportation of goods. A broker acts as a middleman between shippers and trucking companies, *i.e.* motor carriers. The relationship between brokers and motor carriers is an independent contractor relationship. Brokers do not transport the goods. Brokers do not own the shipped goods. Brokers do not own the trucks. Brokers are not the employers of the truck drivers.

Under federal law a "motor carrier" is defined as "a person providing motor vehicle transportation for compensation." (49 U.S.C. § 13102(14).) In contrast, under federal law, a "broker" is defined as "a person, other than a motor carrier . . . that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." (49 U.S.C. § 13102(2).) Federal regulations further define a broker as follows:

Broker means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.

(49 C.F.R. § 371.2(a).) Brokers are explicitly excluded in the federal definition of carriers. (49 U.S.C. § 13102(3) ["The term "carrier" means a motor carrier, a water carrier, and a freight

forwarder.”].) The federal definitions of motor carriers and brokers accurately reflect the day-to-day division of labor between the various players involved in the shipment of goods.

Here, the trial court’s ruling fails to account for the different roles of brokers and motor carriers in the shipment of goods. No prior California decision has determined whether a broker (1) has a duty to third parties; and (2) whether such a duty may be delegated. The trial court’s imposition of a nondelegable duty on brokers has no basis in California law and, as discussed below, may cause disruption and uncertainty in the trucking industry (not just in California).

B. This Expansion Of The Nondelegable Duty Doctrine Does Not Further The Public Policy Objectives Of The Doctrine.

There is no sound policy basis to impose liability on trucking brokers and the imposition of such liability may cause unpredictability in the trucking industry. The nondelegable duty doctrine is a form of vicarious liability. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727.) Vicarious liability “is a matter of status or relationship, not fault.” (*Id.* at p. 728.) California law imposes vicarious liability on motor carriers because “were the rule otherwise, a carrier could escape liability for the negligence of its independent contractors, thus reducing the incentive for careful supervision and depriving those who are injured of the financial responsibility of those to whom the privilege was granted.” (*Serna, supra*, 110 Cal.App.4th at p. 1486.)

The public policy behind treating brokers and motor carriers separately for purposes of liability is that their level of involvement with the shipment of goods is vastly different. Motor carriers typically own the trucks, create the routes, hire employees or independent contractor to drive the trucks, and obtain separate motor carrier licenses. In contrast, brokers are simply the middlemen between the motor carrier and the product supplier. Brokers do not transport the goods. Brokers do not own the trucks that are transporting the goods. Brokers simply direct the motor carrier to pick up the goods (owned by a third party) and deliver them. Brokers never have physical control of either the goods that are shipped or the trucks that deliver those goods.

In *Hill Brothers Chemical Co. v. Superior Court* (2004) 123 Cal.App.4th 1001, the Second Appellate District rejected the invitation to expand the application of the nondelegable duty to private carriers. The appellate court refused to impose liability because “[s]uch a rule would impose vicarious liability on the part of a shipper for the negligence of an independent contractor for matters over which it exercises no control.” (*Hill Brothers Chemical Co., supra*, 123 Cal.App.4th at p. 1010.) The court further explained the impact of such an unwarranted expansion of the nondelegable duty doctrine:

It would certainly increase the cost of doing business in California, particularly the cost of insurance, and would effectively spread risk to a party without consideration of fault and without a sound policy basis.

The practical effect of the trial court’s ruling is to extend liability to brokers in situations where they have no control and where the risk would be difficult to anticipate or underwrite by insurers. Any uncertainty in the proper allocation of risk will ultimately result in increased costs that will be passed on to consumers of products that are being moved in interstate commerce. Brokers

are likely to see hefty insurance premium increases. These increases would be paid first by the brokers and would ultimately fall on the consumer.

In sum, the trial court's decision may increase costs and create uncertainty regarding the proper allocation of risk between motor carriers and brokers, while at the same time, the imposition of liability on brokers does nothing to improve public safety because brokers have little or no control to prevent the recurrence of tortious conduct.

CONCLUSION

For all the reasons discussed above, TIDA respectfully requests that the Court grant Kam-Way Transportation, Inc.'s Petition.

Respectfully submitted,



Margaret Carew Toledo
Attorneys for Amicus Curiae
Trucking Industry Defense Association

PCT:sl

PROOF OF SERVICE BY MAIL

Case Name: *Kam-Way Transportation v. S.C. (Chavez)*

Case No.: S220283

I am more than eighteen years old and not a party to this action. My business address is Toledo Don LLP, 3001 Douglas Blvd., Suite 340, Roseville, California 95661. On August 22, 2014, I served the **AMICUS CURIAE LETTER** on the interested parties in this action by placing true and correct copies thereof in sealed envelope(s) addressed as follows:

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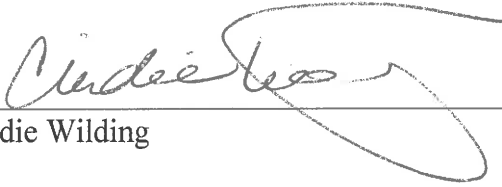
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I am employed in the county from which the mailing occurred. I deposited the sealed envelope(s) with postage thereon fully prepaid in the United States mail at a facility regularly maintained by the United States Postal Service at Roseville, California on the date indicated above.

Executed on August 22, 2014, at Roseville, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


Cindie Wilding