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July 1, 2014

VIA OVERNIGHT DELIVERY
Chief Justice and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Letter in Support of Petition for Review
Global Hawk Insurance Company v. Jerry Le, et al
Supreme Court Case No. : S218772
Our File No. : 9999-0008

Dear Honorable Justices:

Amicus TRUCKING INDUSTRY DEFENSE ASSOCIATION ("TIDA") hereby submits this Amicus Letter in Support of Petition for Review in Global Hawk Insurance Company v. Jerry Le, et. al., Supreme Court Case No. S218772. For the reasons stated herein, TIDA submits that review is necessary to secure uniformity of **application of the term "Employee" in the Federal Motor Carrier Safety Regulations** and to settle **an** important question of law. (California Rules of Court, Rule 29, Subdivision (a).)

REVIEW IS NECESSARY TO SECURE UNIFORMITY OF APPLICATION OF THE TERM "EMPLOYEE" IN THE FEDERAL MOTOR CARRIER SAFETY REGUATIONS AND TO SETTLE THE IMPORTANT QUESTION OF LAW PRESENTED HEREIN

I. The Federal Motor Carrier Safety Regulations, Including the Definition Of "Employee" in 49 CFR 390.5, Clearly Apply To This Accident

There is much debate in the parties' briefs regarding the presence or absence of a federally mandated (See 49 CFR 387.15) MCS 90 endorsement to the policy. The reason for the heated debate is obvious - the definition of "Employee" in 49 CFR 390.5, which is clearly part of the MCS 90 endorsement, would dictate that the drivers engaged in the subject interstate trip

were employees of the federal motor carrier at issue (V&H Trucking, Inc.). In particular, the definition of "Employee" in 49 CFR 390.5 provides as follows (in pertinent part):

> Employee means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler.

As there is no suggestion that V&H Transportation, Inc. was not a federally authorized motor carrier at the time of the accident, there should be no dispute that an MCS 90 endorsement was applicable to this accident. Specifically, V&H Transportation could not have been a federally authorized motor carrier without a filing with the Federal Motor Carrier Safety Administration by Global Hawk signifying the attachment of an MCS 90 endorsement to the Global Hawk policy. See, 49 CFR 387.7 et seq. Thus, there really is no debate regarding the application of the MCS 90 endorsement to this incident. Indeed, if a third party vehicle was hit by the V&H Transportation tractor-trailer causing injury to the third-party, there is no doubt that an MCS 90 endorsement would be found to exist to protect the third-party in the event the policy did not otherwise provide coverage.

In any event, all parties to this dispute must agree with the premise that the Federal Motor Carrier Safety Regulations ("FMCSRs") governed the interstate shipment at issue. If this point is accepted, then it is clear that 49 CFR 390.5 should be applicable here. Specifically, V&H Transportation had an obligation to control and require its drivers to comply with the FMCSRs pursuant to 49 CFR 390.11 which provides as follows:

> § 390.11 Motor carrier to require observance of driver regulations.
>
> Whenever in part 325 of subchapter A or in this subchapter a duty is prescribed for a driver or a prohibition is imposed upon the driver, it shall be the duty of the motor carrier to require observance of such duty or prohibition. If the motor carrier is a driver, the driver shall likewise be bound.

Of course, 49 CFR 390.5 is a part of the same regulation and, as cited above, specifically indicates that a driver is an employee. Thus, there is no doubt that the drivers at issue in this accident were considered to be the employees of V&H Transportation for purposes of compliance with the FMCSRs.

II. Inconsistent Application Of The Definition Of "Employee" To Interstate Accidents Hurts California Truckers

There is no doubt that V&H Transportation would have been legally responsible for either driver's violation of the hours of service regulations in 49 CFR 395 which specifically required that the injured person here, Jerry Le, be resting at the time of the accident. The drivers would not only be considered to be an employees of VH Transportation for the purposes of compliance with the FMCSRs, but such drivers would unquestionably be considered to be employee of V&H Transportation in the event of an accident involving a third-party vehicle on the roadway. See, e.g., Zamalloa v. Hart, 31 F.3d 911 (9th Cir. 1994); Planet Ins. Co. v. Transport Indem. Co., 823 F.2d 285 (1987).

As the Global Hawk policy would unquestionably be required to cover V&H Transportation's legal liability for the negligence of its "employee" drivers as defined in 49 CFR 390.5 to the extent a third-party was injured, the proposition that drivers would not be considered to be V&H Transportation's "employees" as defined in 49 CFR 390.5 for the same accident that injures one of the drivers instead of a third-party is simple untenable. There is no logical basis for the policy to change meaning or scope depending upon who is hurt in an accident. This is exactly the result that Defendant/Appellant Jerry Le asks this Court to accept in violation of all or most uniform case law throughout the country concluding that co-drivers on interstate trips are "employees" under 49 CFR 390.5. See e.g., Consumer County Mut. Ins. Co. v. P.W. & Sons Trucking, Inc., 307 F.3d 362 (5th Cir. 2002); OOIDA Risk Retention Group, Inc. v. Williams, 579 F.3d 469, 475 (5th Cir. 2009); United Financial Casualty Co. v. Abe Hershberger & Sons Trucking Ltd., 2012 Ohio App. LEXIS 489 (Ohio App. 2012); Basha v. Ghalib, 2008 Ohio App. LEXIS 3364 (Ohio App. 2008); Perry v. Harco National Ins. Co., 129 F.3d 1072 (9th Cir. 1997); Gramercy Ins. Co. v. Expeditor's Express, Inc., 2013 U.S. Dist. LEXIS 99976 (M.D. Tenn. July 16, 2013); Lancer Ins. Co. v. Newman Specialized Carriers, Inc., 2012 U.S. Dist. LEXIS 143652 (N.D. Ala. Oct. 4, 2012); White v. Excalibur Insurance Company, 599 F.2d 50 (5th Cir. 1979); Amerisure Mutual Ins. Co. v. Carey Transportation, et al., 2007 Mich. App. Lexis 9 (Mich. Ct. App. 2007); Miller v. Northland Ins. Co., 2014 Tenn. App. LEXIS 248 (Tenn. Ct. App. Apr. 29, 2014).

The Court of Appeals in this case departed from the clear trend in the case law and refused to apply the federal statutory definition of "employee" in interpreting the policy, even though the policy was issued to a federally authorized motor carrier in order to comply with the FMCSRs. Instead, the Court held that whether the co-driver was an employee of V&H Transportation on this interstate trip (that all parties must agree was subject to the FMCSRs) had to be determined based solely upon California law. This will inevitably raise premiums for

California truckers whose third-party liability policies will now be viewed as sources of recovery for injuries to drivers.

The FMCSRs do not require motor carriers to maintain liability insurance for injuries to their employees/drivers. Accordingly, insurers issuing such policies clearly do not intend for their coverage to extend to injured drivers. Insurers, no doubt, set premiums with this expectation in mind. The effect of the Court of Appeals' decision will be a substantial increase in the number of lawsuits brought by injured drivers against their motor carriers in California, and a corresponding increase in claims for coverage for such claims against the motor carriers' insurers. Insurers will be forced to provide such coverage, even though they never intended it, and they did not set their premiums with the expectation of this type of exposure. The insurers will undoubtedly adapt quickly and raise premiums to compensate for this added exposure forcing more costs upon the motor carrier industry, particularly those motor carriers with a home base in California as well as their insurers.

III. Conclusion

The Court of Appeals' decision yields untenable results and creates uncertainty in industry that is already burdened with significant costs and puts California truckers at a competitive disadvantage. On behalf of TIDA, I respectfully request your review of this case in light of the immediate and profound impact the Court of Appeals' erroneous decision will have on California truckers and their insurers.

Respectfully Submitted,

TRUCKING INDUSTRY DEFENSE ASSOCIATION (TIDA)

SCOTT W. MCMICKLE
Attorney for TIDA

cc: Service List on All Counsel
First Appellate District, Div. 2 (Case No.: A137976)
Alameda County Superior Court (Case No.: VG11598026)

PROOF OF SERVICE

I am a resident of the State of Georgia, over the age of 18 years, and not a party to the within action. My business address is McMickle, Kurey & Branch, LLP, 200 South Main Street, Alpharetta, Georgia 30009.

On July 1, 2014, I served the foregoing documents described as **Amicus Letter in Support of Petition for Review** on the interested p arties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

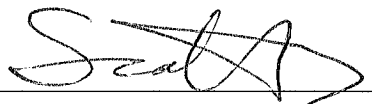
[XX] **BY MAIL**: I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX**: I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[ ] **BY UNITED PARCEL SERVICE**: I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed July 1, 2014 at Alpharetta, Georgia.



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SERVICE LIST
Global Hawk Insurance Company v. Jerry Le, et al
Case No.: S218772

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CALIFORNIA COURT OF APPEALS:

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