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SUPREME COURT OF TEXAS
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No. 23-0493

IN THE SUPREME COURT OF TEXAS

Werner Enterprises, Inc. and Shiraz A. Ali,

Petitioners,

v.

Jennifer Blake, Individually and as Next Friend for Nathan Blake, and as Heir of the Estate of Zachery Blake, deceased; and Eldridge Moak, in his capacity as Guardian of the Estate of Briana Blake,

Respondents.

On Petition for Review from the
14th Court of Appeals at Houston, Texas
No. 14-18-00967-CV

Brief of Amicus Curiae Texans for Lawsuit Reform

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Statement of Interest

Texans for Lawsuit Reform (TLR) is a volunteer-led organization founded in 1994 to help foster and maintain a system that achieves a fair, merits-based resolution of civil disputes, in a quick and efficient manner, to encourage economic development and job creation in Texas for the benefit of all Texans. Thousands of individuals—living in towns and cities across Texas and representing virtually all of Texas's trades, businesses, and professions—support TLR's mission.

TLR has a demonstrated interest in the issues before the Court. Before and during the 2021 Regular Session of the Texas Legislature, TLR engaged with legislators, trade associations, owners and operators of commercial motor vehicles (CMVs), members of the public, and others for the purpose of identifying and, hopefully, solving a litigation crisis that has developed in Texas in commercial transportation. In association with the Texas Trucking Association, TLR created and developed the Keep Texas Trucking Coalition (KTTC) to organize support for a legislative effort to address inequities in CMV lawsuits. The coalition has more than 800 members. Then, during the Legislature's 87th Regular Session, TLR itself and through KTTC engaged with legislators to pass House Bill 19—a bill intended to address the CMV litigation crisis in Texas. This case—*Blake v. Werner Enterprises*—was often discussed in the halls of the Texas Capitol during the legislative session because it is an example of erroneous trial court decision-making in a tragic case that

resulted in a multi-million-dollar judgment. TLR has no direct or indirect financial interest in this matter, but its interest in the substantive law related to CMV litigation continues. TLR paid all fees incurred in preparing and filing this brief.

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TO THE SUPREME COURT OF TEXAS:

The view of tort law embodied in the lower court's opinion is prevailing in Texas's trial and appellate courts and will continue to prevail unless this Court grants the petition for review in this case and provides much-needed guidance to the lower courts.

The unjustified and expansive tort liability approved by the court of appeals in this case threatens all commercial enterprises operating in Texas. For several reasons, commercial trucking is particularly vulnerable to the outsized liability being created by Texas's lower courts. This vulnerability prompted the Texas Legislature to act in 2021, passing House Bill 19[1] to impose some rules of the road for CMV litigation. At the center of this case are the dependent direct-liability torts being pursued in CMV lawsuits in Texas—negligent entrustment, hiring, training, management, supervision, and retention. These torts were discussed at length in the legislative process surrounding H.B. 19 and are addressed in the bill. Consequently, to the extent the Court's decision in this case touches on these torts, the outcome here will affect how CMV cases are litigated for years to come under H.B. 19. Because of the relationship between this case and H.B. 19, this brief focuses on the dependent direct-liability torts.

But our focus on these specific issues does not mean we agree with the remainder of the court of appeals' opinion. This Court has avoided creating new duties and closely policed the requirements of foreseeability and proximate cause. But the court of appeals was not so careful. Based on a flawed analysis, it imposed multiple duties on trucking entities that are vastly unwise. In its brief, Werner has thoroughly addressed the foreseeability and duty issues related to the collision itself. We agree

[1] House Bill 19 is codified at Texas Civil Practice and Remedies Code sections 77.052 to 77.055.

with Werner's arguments on those topics and encourage the Court to write on them, too.

For the reasons provided below and those presented by Werner in its brief, TLR respectfully urges this Court to grant the petition for review and, after briefing and argument, reverse the lower court's judgment.

Introduction and Summary of the Argument

House Bill 19, enacted by the Texas Legislature in 2021, seeks to address the widespread use of a litigation strategy based on a theory that humans and reptiles share a core component of their minds that motivates them to fight when threatened. The strategy requires the plaintiff attorney in an injury or death case to paint the defendant as a threat to the safety of the jurors themselves and the public at large, and then to guide the jurors to fight by punishing the defendant. It is employed in virtually all CMV cases tried in Texas courts today.

In CMV lawsuits, this "reptile strategy" relies on the dependent direct-liability torts, with particular emphasis on negligent training and supervision/management. As currently recognized by Texas's trial and appellate courts, the duty imposed by these two claims is virtually boundless. When viewed with 20/20 hindsight, it is impossible for any employer to have adequately trained, supervised, or managed an employee—there is always something more a skilled attorney will say a reasonable employer would have done.

Other than negligent entrustment, these claims should not exist in vehicle collision cases. Claims for negligent hiring and retention should be jettisoned altogether, and evidence of inadequate training and supervision/management of an employee driver should be presented only as proof of an element of negligent entrustment and only in unusual circumstances.

Additionally, the Court should explicitly adopt the Admission Rule. If a defendant employer stipulates liability under respondeat superior, evidence about ordinary negligence in entrusting the CMV to the employee driver—and evidence about negligence in training and supervising/managing that driver related to the negligent entrustment claim—should not be admitted. Such evidence should be admitted only if pretrial rulings have determined there is a *credible* claim that the employer was grossly negligent in entrusting the CMV to the driver. And, under the gross negligence standards provided by Texas law, claims of grossly negligent entrustment of a vehicle should survive summary judgment only in rare cases.

Background of the Case

The motor vehicle accident giving rise to this case occurred on I-20, a divided interstate highway, near Odessa, Texas. Respondents, the Blakes (plaintiffs below), were traveling east in a pickup truck driven by their friend Zaragoza "Trey" Salinas. While going 55-60 mph, the speed of surrounding traffic, Salinas lost control on black ice. His vehicle crossed the east-bound shoulder, a 42-foot median, and the opposite

shoulder. It careened directly into the path of a west-bound Werner 18-wheeler driven by its employee, Shiraz Ali. Ali was driving at approximately 50 mph—well below the speed limit. He immediately applied the brakes, began to slow, and did not slide on the ice or otherwise lose control. He did not violate any traffic law. But unfortunately, he was unable to avoid the collision, which caused both fatal and life-altering injuries to the occupants of Salinas's vehicle.

No one disputes the appropriateness of Ali's response once he saw the Blakes' vehicle. In fact, the Texas State Trooper who investigated the collision concluded that it was "truly an accident," that Ali "didn't do anything wrong," and there was nothing he could have done to avoid the collision.

Although Werner admitted respondeat superior liability, the trial court submitted two direct-liability questions to the jury. One asked if Werner was negligent acting through employees other than Ali, with no guidance provided to jurors other than giving definitions of negligence (failure to use ordinary care) and ordinary care (ordinary prudence under the same or similar circumstances).[2] The second asked if Werner was negligent acting through employees other than Ali in how it trained or supervised Ali.[3] The jury answered "yes" to both, but not unanimously. It also found that Ali was negligent in operating the CMV, but less so

[2] CR 4887.
[3] CR 4888.

than Salinas.[4] And the jury determined that the Blakes should recover substantial economic and noneconomic damages.[5]

The trial court signed a $92 million judgment against Werner that now exceeds $100 million with interest. The court of appeals affirmed.

Argument

A. The Court Should Explicitly Adopt the Admission Rule

1. Using the reptile strategy in CMV cases.

Recognizing the importance of commercial transportation to Texas's economy and the plague of abusive lawsuits against commercial trucking, the Texas Legislature passed House Bill 19 in May of 2021, to become effective September 1, 2021.[6] TLR was a leading outside-the-Capitol advocate for the passage of H.B. 19.[7]

H.B. 19 was intended to deal with a trial strategy that is based on the "reptile theory"—a physiologist-invented theory that humans, like reptiles, have a part of their brain that will lead them to fight when exposed to a threat.[8] Using this strategy,

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[4] CR 4890-94.

[5] CR 4895-4900.

[6] Act of May 28, 2021, 87th Leg., R.S., ch. 785, 2021 TEX. GEN. LAWS 1855 (codified at TEX. CIV. PRAC. & REM. CODE §§ 72.051–.055).

[7] *See* H. Comm. on Judiciary & Civil Jurisprudence, Witness List, Tex. H.B. 19, 87th Leg., R.S. (Mar. 9, 2021), https://capitol.texas.gov/tlodocs/87R/witlistmtg/pdf/C3302021030910001.PDF (Lee Parsley testifying for the bill on behalf of TLR); S. Comm. on Transp., Witness List, Tex. H.B. 19, 87th Leg., R.S. (May 12, 2021), https://capitol.texas.gov/tlodocs/87R/witlistmtg/pdf/C6402021051207001.PDF (Lee Parsley testifying for the bill on behalf of TLR).

[8] *See* Nicholas P. Hurzeler, *The Reptile Theory in Practice*, LEWIS BRISBOIS (Aug. 19, 2021), https://lewisbrisbois.com/newsroom/legal-alerts/the-reptile-theory-in-practice ("The term

a plaintiff lawyer in an injury or death case seeks to make jurors feel threatened by a defendant and to respond to this threat by awarding substantial damages to protect themselves and society. The strategy is to focus trial on the corporate defendant's alleged safety-threatening conduct at times and places separate from the accident rather than on the evidence surrounding the event giving rise to the lawsuit.

Thus, in a lawsuit based on a collision involving a CMV, use of the reptile strategy requires the plaintiff to paint the CMV owner as a threat to the jurors themselves and the motoring public, which is typically done by presenting evidence of a problematic safety record or questionable employment practices. The plaintiff pleads: (1) the CMV driver was negligent in operating the vehicle; (2) the driver's employer is liable for the employee's negligence through respondeat superior; (3) the employer was directly negligent in hiring, supervising, training, managing, or retaining the driver, or in entrusting the vehicle to him[9]; (4) the employer was directly negligent in maintaining the vehicle (although this claim is less popular in these lawsuits); and (5) the driver and employer were both grossly negligent.

Before trial, the plaintiff uses the gross negligence claim as the hook to conduct expansive discovery into the defendant's employment practices and safety record in

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'Reptile Theory' originated in the writings of nuero-physiologist [sic] Paul D. MacLean in the 1950s, who suggested that one major part of the brain consisted of a 'reptilian complex' that controlled instinctive behaviors involved in aggression, dominance, and territoriality. Then in the 2009 publication 'Manual of the Plaintiff's Revolution' by David Ball and Don Keenan, the authors first described the 'Reptile Theory' in the context of litigation.").

[9] We will use "him" to refer to defendants and "her" to refer to plaintiffs, rather than "him or her."

hopes of unearthing damaging information—often unrelated to the specific collision in issue—that can be used at trial to paint the defendant as a threat to the traveling public. At trial, the plaintiff uses the gross negligence claim as justification for introducing this otherwise extraneous evidence, then focuses the trial on this evidence and the defendant's alleged threatening conduct. Often, the plaintiff elects to forego the gross negligence claim when submitting a proposed jury charge. In this way, damaging evidence having nothing to do with the collision is put before the jury for the purpose of prejudicing the jury against the defendant in the hope that the jury will punish the defendant through an increased award of noneconomic damages.

Sadly, this strategy is allowed to play out in courtrooms throughout Texas. And it works. Texas now leads the nation in "nuclear verdicts" of $10 million or more.[10]

2. Dealing with the reptile strategy—H.B. 19's elements.

H.B. 19 does four things:

First, it allows any defendant in a CMV collision case to demand a bifurcated trial.[11]

Second, it regulates evidence of breaches of governmental standards.[12]

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[10] Cassandra R. Cole & Chad Marzen, *Nuclear Verdicts, Tort Liability, and Legislative Responses*, J. INS. REG. (Jan. 2023), https://content.naic.org/sites/default/files/cipr-jir-2023-3.pdf.

[11] TEX. CIV. PRAC. & REM. CODE § 72.052(a).

[12] *Id.* § 72.053.

Third, it codifies the Admission Rule.[13]

Fourth, it requires the admission of contemporaneously-made photographs and videos of the collision and the vehicles involved in the collision.[14]

This brief focuses on the first and third of these elements.

3. H.B. 19 adopts the Admission Rule.

Under H.B. 19, if an employer defendant stipulates that its employee was driving the CMV in the course and scope of employment at the time of the collision, dependent direct-liability claims against the employer cannot be pursued as ordinary negligence claims (with exceptions discussed in note 23) but may be pursued as gross negligence claims[15]—which amounts to codification of the Admission Rule. If trial is bifurcated, H.B. 19 provides that admissible evidence in the first phase is limited to that which tends to prove responsibility for the collision and the plaintiff's compensatory damages, while evidence related to liability for and the amount of exemplary damages is relegated to the second phase.[16] Thus, if trial is bifurcated, evidence to support claims that the employer defendant was grossly negligent in entrusting the CMV to the employee is presented only in the second phase of trial.[17]

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[13] *Id.* § 72.054(a), (b).

[14] *Id.* § 72.055.

[15] *Id.* § 72.054(b).

[16] *Id.* § 72.052(c), (d). *But see id.* § 41.009 (allowing bifurcated trial, with second phase deciding only the amount of exemplary damages).

[17] *Id.* § 72.054(a), (b).

A defendant may demand a bifurcated trial, regardless of whether he stipulates to respondeat superior.[18] Thus, if the employer defendant does not stipulate to respondeat superior but does require bifurcation, ordinary direct-liability claims may be pursued by the plaintiff in the first phase of trial, while gross negligence claims are considered in phase two.

In codifying the Admission Rule, the Legislature recognized negligent entrustment as a dependent direct-liability claim, but it did not mention negligent hiring, supervision, training, management, or retention.[19] The Legislature's refusal to list these other claims alongside negligent entrustment should be regarded as both purposeful and meaningful. It should be presumed that the Legislature intentionally chose not to comment on their existence.[20] *Thus, it will not conflict with H.B. 19 for this Court to declare that dependent direct-liability claims other than negligent entrustment do not exist in CMV collision cases, as we advocate below.*

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[18] *See id.* § 72.052(a), (b).

[19] *See id.* §§ 72.052(e), 72.054(b) (both recognizing only negligent entrustment); § 72.054(d) (making evidence admissible only to prove negligent entrustment).

[20] *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001) (quoting *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942) ("All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it.")); *Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995) ("It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose." (citations omitted)); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) ("The legislature is never presumed to have done a useless act.") (citations omitted)); *see also* TEX. GOV'T CODE § 312.005 ("In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.").

Of course, a plaintiff typically cannot recover damages for gross negligence unless she first has proven the defendant's liability and been awarded damages for ordinary negligence based on the same claim.[21] If a plaintiff is prohibited from pursuing negligent entrustment in the first phase of trial as may happen under H.B. 19, then, obviously, the plaintiff will not recover damages on that claim. Consequently, the plaintiff would be precluded from pursuing damages for grossly negligent entrustment in the second phase. H.B. 19 reflects the Legislature's awareness that, absent a curative provision, H.B. 19's bifurcation provision would make it impossible for a plaintiff to pursue a grossly negligent entrustment claim. It cured the impossibility by providing:

> For purposes of this section [72.052], a finding by the trier of fact in the first phase of a bifurcated trial that an employee defendant was negligent in operating an employer defendant's commercial motor vehicle may serve as a basis for the claimant to proceed in the second phase of the trial on a claim against the employer defendant, such as negligent entrustment, that requires a finding by the trier of fact that the employee was negligent in operating the vehicle as a prerequisite to the

[21] *See Ford Motor Co. v. Miles*, 967 S.W.2d 377, 390 (Tex. 1998) (Gonzalez, J., concurring) ("[N]egligence and gross negligence are not separable causes of action but are inextricably intertwined. Negligence is a liability finding, involving duty, breach, and causation. Gross negligence presumes a negligent act or omission and includes two further elements . . . ." (citation omitted)); *Pecan Valley Mental Health Mental Retardation Region Operating as Pecan Valley Ctrs. for Behavioral & Developmental Healthcare v. Doe*, 678 S.W.3d 577, 594 (Tex. App.—Eastland 2023, pet. filed) ("Gross negligence is not an independent cause of action; rather, ordinary negligence and gross negligence are 'inextricably intertwined'—gross negligence is contingent upon an affirmative finding of ordinary negligence." (citations omitted)); *Douglas v. Hardy*, 600 S.W.3d 358, 372 (Tex. App.—Tyler 2019, no pet.) ("[W]ithout evidence of negligence, there can be no gross negligence to support exemplary damages." (citation omitted)); *Nowzaradan v. Ryans*, 347 S.W.3d 734, 739 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("[I]t is well established that a finding of ordinary negligence is a prerequisite to a finding of gross negligence." (citation omitted)).

> employer defendant being found negligent in relation to the employee defendant's operation of the vehicle. This subsection does not apply to a claimant who has pursued a claim described by this subsection in the first phase of a trial that is bifurcated under this section.[22]

And so, the Legislature's intent is clear from the face of H.B. 19—Texas courts should use the Admission Rule. In a CMV collision case, when an employer defendant stipulates liability for its employee's negligence and demands a bifurcated trial, the dependent direct-liability claims (except as indicated in note 23) disappear except in the form of gross negligence claims, which may be pursued in the second phase of trial.[23]

4. Texas courts have employed the Admission Rule for decades.

In 1961, in *Patterson v. East Texas Motor Freight Lines*, plaintiffs who were injured in a motor vehicle collision pleaded negligent entrustment against the trucking company defendant.[24] They also alleged the defendant driver was an employee of the trucking company acting within the scope and course of

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[22] TEX. CIV. PRAC. & REM. CODE § 72.052(e).

[23] This statement requires qualification. H.B. 19 was amended on the House floor to create what are supposed to be narrow exceptions to the Admission Rule through references to sections of the federal regulations governing CMV drivers and owners and limiting the exceptions to owners of large CMVs. The general idea was that owners of large CMVs should be especially diligent, and, therefore, the jury in a collision case involving a large CMV should be told in the first phase of trial that the employer defendant entrusted the truck to a driver who was high, intoxicated, unlicensed, operating the truck beyond the allowed driving time, not background-checked when he was hired, and a few other similar things.

[24] *Patterson v. E. Tex. Motor Freight Lines*, 349 S.W.2d 634, 636 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.).

employment at the time of the collision.[25] The defendants stipulated that respondeat superior would apply.[26] The Beaumont Court of Appeals held the plaintiffs' negligent entrustment claim was properly disallowed by the trial court because it "became immaterial as soon as the stipulation as to course of employment was made."[27]

Four years later, in *Frasier v. Pierce*, the Amarillo Court of Appeals followed *Patterson* in a case in which a pedestrian was killed in a traffic collision, stating that "[t]he theory of negligent entrustment in order to bind the truck company became immaterial as soon as the stipulation as to course of employment was made. There was no issue left to submit to the jury . . . ."[28] The following year, in *Rodgers v. McFarland*, the El Paso Court of Appeals agreed with these prior decisions, stating that evidence of the defendant driver's driving record "would have been admissible on the issue of negligent entrustment, to establish the liability of the owner for the acts of the driver, but it became immaterial on that issue when the owner admitted liability. Public policy would not permit forcing the parties to try an issue where none existed."[29]

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[25] *Id.*

[26] *Id.*

[27] *Id.*; *see also Luvual v. Henke & Pillot*, 366 S.W.2d 831, 833 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.) (plaintiff pleaded negligent entrustment, but it was not submitted to the jury because the employer admitted that the employee at the time of the collision was its employee acting in the course and scope of employment).

[28] *Frasier v. Pierce*, 398 S.W.2d 955, 957–58 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.).

[29] *Rodgers v. McFarland*, 402 S.W.2d 208, 210 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.).

In the 1977 case *Hines v. Nelson*, the plaintiff was injured when the defendant's employee caused the truck he was driving to crash into the rear of the plaintiff's vehicle.[30] The plaintiff alleged negligence and gross negligence of the defendant driver while he was acting in the scope of his employment with the defendant employer.[31] The plaintiff also alleged the employer was negligent and grossly negligent in hiring and entrusting the truck to the employee, who was allegedly dangerous, reckless, and incompetent based on his driving record and reputation.[32] The defendant admitted respondeat superior. The court of appeals in *Hines* held:

> In cases involving ordinary negligence of both the driver and owner, the owner's stipulation or admittance that respondeat superior applied would render moot any issue of negligent entrustment since the owner's liability would only extend to liability for damages caused by the negligence of his driver. There would be no separate ground for damages against the owner.
>
> In cases involving allegations of ordinary negligence against the driver and gross negligence against the owner for entrusting his vehicle to a reckless or incompetent driver, we feel there would be a separate ground for damages against the owner in the form of exemplary damages.[33]

Patterson and *Hines* have never been overruled, and more recent decisions have continued to follow them, including:

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[30] *Hines v. Nelson*, 547 S.W.2d 378, 380 (Tex. Civ. App.—Tyler 1977, no writ).

[31] *Id.*

[32] *Id.*

[33] *Id.* at 385.

Estate of Arrington v. Fields: "Where only ordinary negligence is alleged, the case law supports appellants' contention that *negligent hiring and respondeat superior are mutually exclusive modes of recovery*. In cases where the plaintiff was relying upon the theory of negligent entrustment of a motor vehicle, the courts have refused to permit the plaintiff to proceed with this separate ground of recovery against the owner where the derivative liability of the owner has already been established by an admission or stipulation of agency or course and scope of employment."[34]

Parker v. Fox Vacuum, Inc.: "In *Hines v. Nelson*, . . . the [c]ourt held the owner's stipulation or admittance that respondeat superior applied 'would render moot any issue of negligent entrustment' except where gross negligence was contended. While we have some reservations about this pronouncement, it does not affect the case we now review because, of course, gross negligence was contended."[35]

Loom Craft Carpet Mills, Inc. v. Gorrell: "Negligent entrustment liability is derivative in nature. While entrusting is a separate act of negligence, and in that sense not imputed, it is still derivative in that one may be extremely negligent in entrusting and yet have no liability until the driver causes an injury. If the owner is negligent, his liability for the acts of the driver is established, and the degree of negligence of the owner would be of no consequence. When the driver's wrong is established, then by negligent entrustment, liability for such wrong is passed on to the owner. We believe the better rule is to apportion fault only among those directly involved in the accident, and to hold the entrustor liable for the percentage of fault apportioned to the driver."[36]

Rosell v. Central West Motor Stages, Inc.: "Where only ordinary negligence is alleged, the case law supports appellees' contention that

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[34] *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (emphasis added) (citations omitted).

[35] *Parker v. Fox Vacuum, Inc.*, 732 S.W.2d 722, 723 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.).

[36] *Loom Craft Carpet Mills, Inc. v. Gorrell*, 823 S.W.2d 431, 432 (Tex. App.—Texarkana 1992, no writ) (citations omitted).

> negligent hiring or negligent entrustment and respondeat superior are mutually exclusive modes of recovery. Where the plaintiff has alleged ordinary negligence against the driver and gross negligence against the owner for entrusting his vehicle to a reckless or incompetent driver, *the negligent entrustment cause of action would be an independent and separate ground of recovery against the owner for exemplary damages*."[37]
>
> *Simmons v. Bisland*: "As a general rule, evidence supporting alternative liability theories such as negligent hiring or negligent entrustment is inadmissible when the defendant has stipulated to vicarious liability."[38]

In sum, at least eight Texas courts of appeals have held that ordinary negligent entrustment is not available to a plaintiff when the employer stipulates that the employee–driver was acting in the course and scope of employment, with the most recent opinion being handed down in 2009. Texas federal court opinions align with state court decisions on this issue, with the most recent example being a 2021 opinion reaffirming the Admission Rule.[39]

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[37] *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 654 (Tex. App.—Dallas 2002, pet. denied) (emphasis added) (citations omitted).

[38] *Simmons v. Bisland,* No. 03-08-00141-CV, 2009 WL 961522, at *4 (Tex. App.—Austin Apr. 9, 2009, pet. denied) (mem. op.).

[39] *See Williams v. McCollister*, 671 F. Supp. 2d 884, 888–89 (S.D. Tex. 2009); *see also Kuss v. Ulmer*, No. SA-19-CV-629-JKP, 2021 WL 1433062, at *5 (W.D. Tex. Mar. 17, 2021); *Plascencia v. Hillman*, No. EP-19-CV-40-PRM, 2019 WL 4087439, at *3 (W.D. Tex. July 3, 2019); *Alpizar v. John Christner Trucking, LLC*, No. SA-17-CV-00712-FB, 2019 WL 1643743, at *7 (W.D. Tex. Apr. 16, 2019); *Sanchez v. Transportes Internacionales Tamaulipecos S.A de C.V.*, No. 7:16-CV-354, 2017 WL 3671089, at *2–3 (S.D. Tex. July 20, 2017); *Sanchez v. Swift Transp. Co. of Ariz., LLC*, No. PE:15-CV-00015-RAJ, 2016 WL 10587127, at *4 (W.D. Tex. Oct. 4, 2016) (order granting Swift LLC's partial motion for summary judgment on plaintiff's direct liability claims and joint enterprise theory).

Doubtless, there are more state and federal court opinions that have not been captured here.

5. Other states recognize the Admission Rule.

The following states—either in the highest court, appellate courts, or related federal jurisdictions applying state law—have embraced the view that an employer cannot be held directly liable for negligent entrustment and other such claims when he is vicariously liable under respondeat superior: Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Maryland, Mississippi, Missouri, New York, North Carolina, Tennessee, and Wyoming.[40]

In 1995, the Missouri Supreme Court provided the rationale for holding that it is improper for a plaintiff to proceed against an owner of a vehicle on a direct-liability tort where respondeat superior is admitted, as follows:

> The reason given for holding that it is improper for a plaintiff to proceed against an owner of a vehicle on the independent theory of imputed

[40] *See Elrod v. G & R Constr. Co.*, 628 S.W.2d 17, 19 (Ark. 1982); *Diaz v. Carcamo*, 253 P.3d 535, 543–44 (Cal. 2011); *Ferrer v. Okbamicael*, 2017 CO 14M, ¶ 25, 390 P.3d 836, 844 (Colo. 2017); *Prosser v. Richman*, 50 A.2d 85, 87 (Conn. 1946); *Greene v. Grams*, 384 F. Supp. 3d 100, 102 (D.D.C. 2019); *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977); *Bartja v. Nat'l Union Fire Ins. Co.*, 463 S.E.2d 358, 361 (Ga. Ct. App. 1995); *Wise v. Fiberglass Sys., Inc.*, 718 P.2d 1178, 1181 (Idaho 1986); *Gant v. L.U. Transp., Inc.*, 770 N.E.2d 1155, 1160 (Ill. App. Ct. 2002); *Sedam v. 2JR Pizza Enters., LLC*, 84 N.E.3d 1174, 1178 (Ind. 2017); *Houlihan v. McCall*, 78 A.2d 661, 665 (Md. 1951); *Dinger v. Am. Zurich Ins. Co.*, No. 3:13-CV-46-MPM-SAA, 2014 WL 580889, at *2–3 (N.D. Miss. Feb. 13, 2014); *McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995) (en banc); *Lee v. J.B. Hunt Transp., Inc.*, 308 F. Supp. 2d 310, 315 (S.D.N.Y. 2004); *Velez v. City of New York*, 730 F.3d 128, 137 (2d Cir. 2013) (applying New York law); *Heath v. Kirkman*, 82 S.E.2d 104, 107–08 (N.C. 1954); *Ryans v. Koch Foods, LLC*, No. 1:13-cv-234-SKL, 2015 WL 12942221, at *9 (E.D. Tenn. July 8, 2015); *Bogdanski v. Budzik*, 2018 WY 7, ¶ 20, 408 P.3d 1156, 1162 (Wyo. 2018).

> negligence where *respondeat superior* is admitted has to do with the nature of the claim. Vicarious liability or imputed negligence has been recognized under varying theories, including agency, negligent entrustment of a chattel to an incompetent, conspiracy, the family purpose doctrine, joint enterprise, and ownership liability statutes. If all of the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where the imputation of negligence is admitted, the evidence laboriously submitted to establish other theories serves no real purpose. The energy and time of courts and litigants is unnecessarily expended. In addition, potentially inflammatory evidence comes into the record which is irrelevant to any contested issue in the case. Once vicarious liability for negligence is admitted under *respondeat superior*, the person to whom negligence is imputed becomes strictly liable to the third party for damages attributable to the conduct of the person from whom negligence is imputed. The liability of the employer is fixed by the amount of liability of the employee. This is true regardless of the "percentage of fault" as between the party whose negligence directly caused the injury and the one whose liability for negligence is derivative.[41]

More recently, the Wyoming Supreme Court, quoting the Colorado Supreme Court, stated:

> But where the employer has already conceded it is subject to respondeat superior liability for any negligence of its employee, direct negligence claims become superfluous. Importantly, to prevail on direct negligence claims against the employer, a plaintiff still must prove that the employee engaged in tortious conduct. That is, tortious conduct by an employee is a predicate in direct negligence claims against the employer. Direct negligence claims effectively impute the employee's liability for his negligent conduct to the employer, similar to vicarious liability.
>
> An employer's negligent act in hiring, supervision and retention, or entrustment is not a wholly independent cause of the plaintiff's injuries, unconnected to the employee's negligence. A plaintiff has no cause of action against the employer for negligent hiring, for example, unless and

[41] *McHaffie*, 891 S.W.2d at 826 (citations omitted).

> until the employee's own negligence causes an accident.
>
> Stated differently, both vicarious liability and direct negligence claims are tethered to the employee's tortious acts. "Derivative or dependent liability means that one element of imposing liability on the employer is a finding of some level of culpability by the employee in causing injury to a third party."[42]

And, as summarized by the Illinois Appellate Court:

> Under either theory, the liability of the principal is dependent on the negligence of the agent. If it is not disputed that the employee's negligence is to be imputed to the employer, there is no need to prove that the employer is liable. Once the principal has admitted its liability under a *respondeat superior* theory . . . the cause of action for negligent entrustment is duplicative and unnecessary. To allow both causes of action to stand would allow a jury to assess or apportion a principal's liability twice.[43]

6. Only positive consequences flow from adopting the Admission Rule.

Obviously, this Court is independent of the Texas Legislature and may fashion common law as it deems right. But we encourage the Court to follow the Legislature's lead and adopt the Admission Rule because it makes sense—especially when coupled with bifurcation of trial in the manner it is done in Texas Civil Practice and Remedies Code sections 72.052 to 72.054.

[42] *Bogdanski*, ¶ 22, 408 P.3d at 1162–63 (citations omitted) (quoting *McHaffie*, 891 S.W.2d at 825).

[43] *Gant*, 770 N.E.2d at 1160.

The purpose of compensatory damages is to make the plaintiff whole.[44] These damages are plaintiff-centered. A person injured in a collision misses however much work she misses, incurs however much in medical expenses she incurs, and feels however much pain and anguish she feels. Whether the CMV driver had a spotless driving record or 50 moving violations, was sober or intoxicated, was adequately trained and supervised or untrained and unsupervised, the plaintiff's compensatory damages do not change. Whether the plaintiff sues one defendant or ten defendants, the plaintiff's compensatory damages do not change. These damages are plaintiff-centered, not defendant-dependent. Evidence regarding a driver's record, sobriety, or other such things can affect the factfinder's determination as to who caused a collision and may affect the determination about whether to award exemplary damages. But the number of defendants, the culpability of defendants, and the relationship among the defendants to each other and the plaintiff make no difference to the compensatory damages required to fairly and reasonably compensate the plaintiff for her injuries.

The negligence claims lodged directly against the employer/vehicle owner—such as negligent entrustment, hiring, training, supervision, and retention—are dependent causes of action. The CMV owner can be held liable only if the plaintiff establishes that the CMV driver was negligent in operating the vehicle on the

[44] *Haygood v. De Escabedo*, 356 S.W.3d 390, 394 (Tex. 2011) (quoting *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994)).

occasion in question.[45] Consequently, to prevail on a negligent entrustment, hiring, training, supervision, management, or retention claim, the plaintiff must prove two torts: (1) the driver was negligent in operating the vehicle; and (2) the owner was negligent in entrusting the vehicle to him, in hiring, training, managing, or supervising him, or in failing to discharge him from employment. When an employer defendant stipulates liability under respondeat superior, as happened in this case, the Admission Rule simplifies trial for the jurors, parties, and court because, if the plaintiff can prove the CMV driver was negligent, proving that the employer was separately

[45] *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 240–41 (Tex. 2010) (concluding that negligent hiring should have a similar requirement to negligent entrustment cases, which requires that the employee's negligent conduct harm the plaintiff); *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 800 (Tex. 2010) (noting with approval that the court of appeals had held that an element of a claim for negligent supervision and retention is that "the employee committed an actionable tort"); *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987) ("[T]here must be a showing . . . that the [employee] driver's negligence proximately caused the accident."); *Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 384 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("To prevail on a claim for negligent hiring or supervision, the plaintiff is required to establish not only that the employer was negligent in hiring or supervising the employee, but also that the employee committed an actionable tort against the plaintiff."); *Gonzales v. Willis*, 995 S.W.2d 729, 739 & n.2 (Tex. App.—San Antonio 1999, no pet.) (employer cannot be held liable for negligent hiring, retention, training, or supervision of employee unless employee committed an actionable tort), *overruled in part on other grounds by Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447-48 (Tex. 2004); *Loom Craft Carpet Mills, Inc. v. Gorrell*, 823 S.W.2d 431, 432 (Tex. App.—Texarkana 1992, no writ) ("While entrusting is a separate act of negligence, and in that sense not imputed, it is still derivative in that one may be extremely negligent in entrusting and yet have no liability until the driver causes an injury."); *Rodgers v. McFarland,* 402 S.W.2d 208, 210 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.) ("Obviously, an owner who is negligent in entrusting his vehicle is not liable for such negligence until some wrong is committed by the one to whom it is entrusted. Even if the owner's negligence in permitting the driving were gross, it would not be actionable if the driver was guilty of no negligence. The driver's wrong, in the form of legal liability to the plaintiff, first must be established, then by negligent entrustment liability for such wrong is passed on to the owner.").

negligent does not increase or decrease her compensatory damages or change who will pay them—and so it is unnecessary.

Application of the Admission Rule, of course, heightens the need for trial courts to make correct rulings on motions for summary judgment that seek to resolve gross negligence claims.[46] But this should not be considered an impediment to confirming the application of the Admission Rule in Texas. Erroneously denying such a motion means the jury will improperly hear evidence related to dependent direct-negligence claims, both wasting the jury's time and increasing the likelihood of a verdict based on passion. In light of this prejudicial effect, asking trial courts to carefully consider and correctly rule on pretrial summary judgment motions should not be regarded as unusually taxing.

The only "negative" consequence of adopting the Admission Rule is that it will reduce use of the abusive reptile trial strategy, thus compelling the parties to focus instead on the cause of the event and the plaintiff's injuries—and that, too, is positive.

This Court should confirm what multiple courts in Texas and many other states have already decided—that the Admission Rule should apply when the employer defendant stipulates to liability under respondeat superior. If an employer defendant so stipulates, dependent direct-liability claims should exist only as gross negligence claims.

[46] Werner asked for a summary judgment in this case (8CR281-82; 9CR227), but the motion was overruled.

B. *In Vehicle Collision Cases, the Only Dependent Direct-Liability Claim Should Be Negligent Entrustment*

1. Negligent entrustment subsumes the other dependent direct-liability claims.

This Court has expressly recognized the tort of negligent entrustment.[47] Its jurisprudence regarding other dependent direct-liability employment torts, such as negligent hiring, training, supervision, management, and retention, is less than crystal clear. This lack of clarity should be resolved. The Court should state that the other dependent direct-liability claims are wholly subsumed under negligent entrustment and, therefore, do not exist as stand-alone torts in vehicle collision cases.

If an employer hires an unlicensed person, or someone who would be an incompetent or reckless driver if allowed to operate the employer's vehicle, this negligence is irrelevant unless the employer entrusts a vehicle to that employee. This is so because an employee who is behind a desk at an office—not behind the wheel of a vehicle—cannot have been a negligent driver, and the employee's negligence in operating the vehicle is a prerequisite to imposing liability on the employer. It is the *entrustment* of the vehicle to an unlicensed, incompetent, or reckless driver that matters, *not the hiring* of that driver.

The same may be said about negligent retention. Unless the employee is entrusted with the employer's vehicle, the fact that the employee continues to work

[47] *See, e.g.*, *Schneider*, 744 S.W.2d at 595.

at the employer's business beyond the point at which he should be fired is of no consequence to the injured plaintiff. And the same analysis applies with equal force to a negligent training claim. If a poorly trained employee is never given the keys to the employer's vehicle, then that employee will never be driving the employer's vehicle when a collision occurs. *It is the entrustment of the vehicle to the employee that matters, not the hiring, training, or retention of the employee.*

Negligence in training or supervising/managing a driver may play a role in proving negligent entrustment, but these claims should not stand alone. To establish negligent entrustment, a plaintiff has the burden to prove:

(1) entrustment of a vehicle by an owner;

(2) to an unlicensed, incompetent, or reckless driver;

(3) that the owner knew or should have known the driver to be unlicensed, incompetent, or reckless;

(4) that the driver was negligent on the occasion in question; and

(5) that the driver's negligence proximately caused the collision.[48]

If an employee is poorly trained, then the lack of training may make the employee an incompetent driver. If an employee is unsupervised, the lack of supervision/management may make him a reckless driver. The failure to properly train or supervise/manage an employee may provide evidence to support a negligent entrustment claim, but these claims should not also stand alone as separate torts.

[48] *See id.* at 596.

Maybe these four causes of action—or other negligent fill-in-the-blank claims—should exist in other employment relationships. But in the context of a motor vehicle collision, the only claim that should exist is negligent entrustment. Allowing a plaintiff to pursue the other claims along with negligent entrustment unfairly and inappropriately allows plaintiffs two or more bites at the apple.

2. Negligent entrustment is not a boundless cause of action, but negligent training and supervision/management are.

Courts have begun lumping negligent hiring, training, supervision/management, and retention with negligent entrustment, all being treated as essentially equivalent direct-liability claims against employers.[49] At least according to one court of appeals, these theories are "cognizable causes of action, and the Texas Supreme Court recognizes that Texas courts have broad consensus in applying these direct negligence claims as viable theories of liability."[50]

As noted, this Court has established five elements a plaintiff must fulfill to prove negligent entrustment.[51] In addition to these elements, the Court has stated that

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[49] *See, e.g.*, *Williams*, 671 F. Supp. at 888 ("Texas courts have underscored that, in matters involving only ordinary negligence, a direct liability claim (such as negligent hiring or entrustment) and a claim resulting in vicarious liability under *respondeat superior* could be mutually exclusive modes of recovery." (citations omitted)); *Hughes*, 306 S.W.3d at 240–41 (discussing negligent hiring and negligent entrustment almost interchangeably, or at least with no distinction between the two); *Rosell*, 89 S.W.3d at 657 (stating that "negligent entrustment and hiring are a means to make a defendant liable for the negligence of another").

[50] *FTS Int'l Servs., LLC v. Patterson*, No. 12-19-00040-CV, 2020 WL 5047913, at *4 (Tex. App.—Tyler Aug. 26, 2020, pet. granted, judgm't vacated w.r.m.) (mem. op.) (also setting out the "elements" of each of these claims).

[51] *See Schneider*, 744 S.W.2d at 596.

negligent entrustment "requires a showing of more than just general negligence," and thus it is not sufficient to show, for example, that a driver might have a momentary lapse in judgment or otherwise act negligently.[52] Furthermore, the basis for imposing liability on an owner of a vehicle entrusted to another is that ownership of the vehicle bespeaks the right of control over its use.[53] Without control, there is no liability.[54] Thus, negligent entrustment is not a boundless cause of action. These proof requirements make negligent entrustment a fair cause of action and a manageable tort for defendants. This is not true for negligent hiring or supervision/management.

Admittedly, this Court has discussed negligent hiring as if it is a recognized tort action in Texas.[55] In *Wansey v. Hole*, the Court held a negligent hiring claim requires that some harmful or negligent conduct of an employee—one hired pursuant to the defendant's negligent hiring or supervision practices—proximately caused the injury complained of, stating:

> Though we have never expressly set out what duty an employer has in hiring employees, or said that a negligent hiring claim requires more than just negligent hiring practices, there is a broad consensus among Texas courts that such a claim requires that the plaintiff suffer some damages from the foreseeable misconduct of an employee hired pursuant to the defendant's negligent practices. *See Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 384 (Tex. App.—Houston [1st Dist.]

[52] *4Front Engineered Sols., Inc. v. Rosales*, 505 S.W.3d 905, 910–11 (Tex. 2016).

[53] *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 686 (Tex. 2007).

[54] *See Fiallos v. Pagan-Lewis Motors, Inc.*, 147 S.W.3d 578, 587 (Tex. App.—Corpus Christi 2004, pet. denied); *see also McCarty v. Purser*, 379 S.W.2d 291, 294 (Tex. 1964) ("[I]t is . . . essential that the party sought to be held legally responsible have the right of control over the vehicle.").

[55] *See, e.g.*, *Wansey v. Hole*, 379 S.W.3d 246 (Tex. 2012) (per curiam).

> 2005, no pet.) ("To prevail on a claim for negligent hiring or supervision, the plaintiff is required to establish not only that the employer was negligent in hiring or supervising the employee, but also that the employee committed an actionable tort against the plaintiff."). . . . We have explicitly established this requirement in negligent entrustment cases, which are factually similar to negligent hiring claims. *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987) ("[T]here must be a showing . . . that the [employee] driver's negligence proximately caused the accident."); *see also TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 240 (Tex. 2010) (concluding that negligent hiring should have a similar requirement to negligent entrustment cases, which requires that the employee's negligent conduct harm the plaintiff).[56]

In *Wansey*, the plaintiff's minor daughter was enrolled in a driving school class operated by the defendant. Upon suspicion that one of the defendant's driving school instructors was engaging in inappropriate behavior with the minor, the plaintiff removed her daughter from the class and demanded a refund. The defendant refused to explain his employee's behavior and disclaimed any responsibility for it after school hours. The plaintiff sued the defendant for breach of contract and *grossly negligent or malicious* hiring, training, supervision, or retention.[57] In other words, the plaintiff pursued direct-liability claims against the employer as gross negligence, not ordinary negligence, claims.

Lower courts, however, have not typically focused on the fact that the claims were raised only as gross negligence claims. Without recognition of this important

[56] *Id.* at 247–48 (citations without parentheticals omitted).

[57] *Id.*

fact, *Wansey* suggests that negligent hiring and supervision claims are a spinoff of negligent entrustment and basic negligence.[58] But, unlike negligent entrustment, the Court announced no elements other than the elements of negligence—foreseeability and damages. It makes little sense, of course, to say that negligent entrustment must be something "more than just general negligence,"[59] but allow negligent hiring claims to be based on a showing of "some damages from the foreseeable misconduct of an employee hired pursuant to the defendant's negligent practices."[60] And so, if nothing else, the Court should take this opportunity to state that in vehicle collision litigation, negligent training and supervision/management claims require proof of *something* beyond the elements of ordinary negligence.

a. Negligent training.

Because the lower courts think that negligent training has no elements beyond those required to prove ordinary negligence, they have effectively allowed plaintiffs to claim that *any* conceivable failure to train is enough to hold the driver's employer liable. If *any* alleged failure to train an employee–driver may be used to establish his employer's liability for negligent training, then courts have effectively imposed an unbounded duty to train on vehicle owners. Quite literally, there are an unlimited number of acts or omissions that *could* constitute insufficient training, especially when

[58] *See id.*

[59] *Rosales*, 505 S.W.3d at 910–11.

[60] *Wansey*, 379 S.W.3d at 247.

viewed with 20/20 hindsight. A critical eye will always see a deficiency in an employer's training regime. The duty to train would be extremely burdensome and potentially impossible to satisfy—which counsels against its recognition.[61]

Obtaining a commercial driver's license requires training, as noted by the Federal Motor Carrier Safety Administration (FMCSA) on its website:

> Driving a Commercial Motor Vehicle (CMV) requires a higher level of knowledge, experience, skills, and physical abilities than that required to drive a non-commercial vehicle. In order to obtain a Commercial Driver's License (CDL), an applicant must pass both skills and knowledge testing geared to these higher standards.[62]

According to the FMCSA, one step required to obtain a CDL is to "complete entry-level driver training with a registered training provider."[63]

Licensing by a governmental entity charged with protecting the public is an appropriate mechanism for the common law to use in differentiating between a person who is regarded as appropriately trained and a person who is not. This concept has been recognized for decades by Texas courts, which have consistently held that the possession of a valid driver's license is prima facie evidence of a driver's

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[61] *See Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 503-04 (Tex. 2017) (consequences of placing a burden on the defendant must be considered in determining whether to impose a duty); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 182 (Tex. 2004) (same).

[62] *Commercial Driver's License Program*, FED. MOTOR CARRIER SAFETY ADMIN., https://www.fmcsa.dot.gov/registration/commercial-drivers-license (last updated Nov. 28, 2022).

[63] *How Do I Get a Commercial Driver's License?*, FED. MOTOR CARRIER SAFETY ADMIN., https://www.fmcsa.dot.gov/registration/commercial-drivers-license/how-do-i-get-commercial-drivers-license (last updated Feb. 10, 2022).

competency.[64] Absent unusual circumstances, the training required to obtain a license to operate the vehicle being driven at the time of the event should be presumed to be sufficient.

This Court should hold that if the CMV driver was duly licensed at the time of the collision, evidence of alleged training failures generally should not be admissible at trial—*even to show the incompetence element of negligent entrustment*—except in unusual circumstances that arise because the type of vehicle or type of load being carried by the vehicle requires a specific kind of additional training that is standard for the industry.

b. Negligent supervision/management.

As with negligent training, lower courts believe that negligent supervision/management has no elements beyond those required to prove ordinary negligence. Again, they have effectively allowed plaintiffs to claim that *any* conceivable failure to supervise or manage is enough to hold the driver's employer liable. As with negligent training, there are an unlimited number of acts or omissions that *could* constitute insufficient supervision or management when viewed with 20/20 hindsight. This, too, amounts to an unbounded duty to train/manage that is being placed on CMV owners by Texas's courts. Recognition of negligent

[64] *See Mundy v. Pirie-Slaughter Motor Co.*, 206 S.W.2d 587, 590–91 (Tex. 1947); *Batte v. Hendricks*, 137 S.W.3d 790, 791 (Tex. App.—Dallas 2004, pet. denied); *Avalos v. Brown Auto. Ctr., Inc.*, 63 S.W.3d 42, 48 (Tex. App.—San Antonio 2001, pet. denied); *Bartley v. Budget Rent-A-Car Corp.*, 919 S.W.2d 747, 752 (Tex. App.—Amarillo 1996, writ denied).

supervision/management as a basis for liability in the context of vehicular collisions is not good or wise policy, even as an element of negligent entrustment.

Alleged negligent supervision/management in the context of vehicular collisions occurs in two situations.

First, it may be alleged that the lack of supervision allowed a licensed and otherwise careful and competent employee driver to be in a position or location to cause the collision to occur. The allegation, for example, might be that if the employer had been supervising the employee, the employee would not have gone on a junket and, therefore, would not have been at the place where the collision occurred at the time it occurred. This claim is not cognizable because the causal link between the alleged negligence and injury cannot be established.

The two elements of proximate cause are cause-in-fact and foreseeability.[65] Cause-in-fact is established when the act or omission was a substantial factor in bringing about the injury and that, without it, the injury would not have occurred.[66] Accordingly, cause-in-fact is not established where the defendant's act or omission does no more than furnish a condition that makes the injury possible.[67] If an employer fails to supervise an employee who then uses the company vehicle for personal

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[65] *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004); *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992).

[66] *Mason*, 143 S.W.3d at 799; *Doe v. Boys Clubs of Greater Dall., Inc.*, 907 S.W.2d 472, 477 (Tex. 1995).

[67] *Mason*, 143 S.W.3d at 799; *Doe*, 907 S.W.2d at 477.

purposes, the failure to supervise has done no more than furnish a condition that makes the injury-causing event possible. Thus, if negligent entrustment were to be recognized in this context, it would be contrary to well-established Texas law on causation.

Second, it may be alleged that the failure to supervise enabled an employee driver who was in the course and scope of employment to be reckless driver at a particular moment in time. The facts supporting such a claim might be that if an employee had been properly supervised, he would not, for example, have been distracted watching a video while driving. But the Court should not impose a duty to supervise or manage on Texas's CMV operators.

If the Court is considering imposing such duties on CMV owners—even as an element of negligent entrustment—it must answer the following questions and others:

- Does every commercial vehicle owner have a duty to supervise its drivers while on the roads, or would the duty apply only to owners of large vehicles or large fleets who can afford to do it? What would be the philosophical underpinning for imposing a duty on owners of 18-wheelers but not owners of minivans used to deliver flowers, or on owners of large fleets but not small businesses?

- What level of supervision should courts require—constant (24 hours a day, seven days a week), regular, intermittent, occasional, or random? If constant supervision is the standard, does the owner have to provide a number of supervisors equal to the number of drivers?

- How much management is enough management? What is the appropriate ratio of managers to drivers?

- Is a supervisor who has a momentary lapse in attention liable for a collision that occurs during that episode? Will Texas companies be required to hire supervisors to oversee the supervisors?[68] Will it hereafter be appropriate for lawsuits to name the truck owner, driver, and supervisor(s)?

- Will fulfilling the duty require commercial vehicle owners to use technology? If so, will vehicle owners be required to purchase hardware and software they do not currently own? Will they have to purchase the most advanced technology? Will they have to purchase new technology every time a better product comes onto the market?

- If the duty does not require technology purchases, then will truck owners have a disincentive to use technology that could save lives?

What economic cost is this Court willing to impose on the commercial vehicle industry in Texas to comply with the duty of supervision/manage? Lower courts in Texas have effectively imposed these duties on CMV owners in this state with very little analysis of the consequences. Until this Court provides otherwise, these obligations will exist as boundless duties that truck owners can never fulfill.

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[68] Dr. Seuss expresses the scope of the potential problem:

> Oh, the jobs people work at! Out west near Hawtch-Hawtch there's a Hawtch-Hawtcher bee watcher, his job is to watch. Is to keep both his eyes on the lazy town bee, a bee that is watched will work harder you see. So he watched and he watched, but in spite of his watch that bee didn't work any harder not mawtch. So then somebody said "Our old bee-watching man just isn't bee watching as hard as he can, he ought to be watched by another Hawtch-Hawtcher! The thing that we need is a bee-watcher-watcher!". Well, the bee-watcher-watcher watched the bee-watcher. He didn't watch well so another Hawtch-Hawtcher had to come in as a watch-watcher-watcher! And now all the Hawtchers who live in Hawtch-Hawtch are watching on watch watcher watchering watch, watch watching the watcher who's watching that bee. You're not a Hawtch-Watcher you're lucky you see!

DR. SEUSS, DID I EVER TELL YOU HOW LUCKY YOU ARE? (1973).

Conclusion

Whether the Admission Rule applies in Texas is an issue presented in this case and should be resolved. Whether a plaintiff suing a CMV owner following a vehicle collision can pursue negligent training, supervision, and other such torts in addition to negligent entrustment also is an issue raised in this case. For the reasons stated herein, TLR encourages this Court to grant Werner's petition for review and resolve both issues.

Respectfully submitted,

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