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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

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 as GUARDIAN OF THE ESTATE of BRIANA BLAKE,
Respondents

On Review from the Fourteenth Court of Appeals, No. 14-18-00967-CV

BRIEF OF AMICI CURIAE THE TEXAS TRUCKING ASSOCIATION AND TRUCKING INDUSTRY DEFENSE ASSOCIATION IN SUPPORT OF PETITIONERS

THE FUENTES FIRM, P.C.

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IDENTITIES OF PARTIES AND COUNSEL

Amici Curiae supplement the identification of parties and counsel with the following:

1. Amicus Curiae is the Texas Trucking Association.
2. Amicus Curiae is the Trucking Industry Defense Association.
3. Counsel for the Texas Trucking Association and Trucking Industry Defense Association are Juan R. Fuentes and Nicholas Van Cleve of THE FUENTES FIRM, P.C., 5507 Louetta Road, Suite A, Spring, Texas 77379.

STATEMENT OF THE CASE AND OF JURISDICTION

Amici Curiae adopt Petitioners' statement of the case and statement of jurisdiction.

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STATEMENT OF AMICI CURIAE'S INTEREST

Texas Trucking Association

Since 1932, the Texas Trucking Association ("TXTA") has served as the unified voice for the trucking industry in Texas. TXTA is dedicated to advocating sound public policies, providing excellence in education, research, training, and information, as well as promoting a safe, dependable, and efficient motor transportation system.

With 1,000 member companies ranging from small businesses to Fortune 500 companies along with the companies that provide them with products and services, TXTA's members play a key role in supporting the trucking industry, which serves a vital role in creating jobs and providing essential services for our communities.

TXTA participates as an amicus curiae in cases that raise issues of concern to its membership, which is the case here. Trucking companies are targeted as deep pockets and faced with a bombardment of unmeritorious claims, settlements, and awards. TXTA's members have a significant interest in this Honorable Court ensuring that trucking companies are not held responsible for damages they did not cause, nor facing disproportionate liability. It is an all-too common occurrence and this case—where the truck driver stayed in his lane, was driving below the speed limit, and never lost control—is a perfect example.

Trucking Industry Defense Association

The Trucking Industry Defense Association ("TIDA") is an international organization that includes over 1,900 members comprised of motor carriers, transportation logistics companies, insurers of motor carriers, third party claims administrators, and legal 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. One of TIDA's missions is to provide training and assistance to the trucking industry on various issues regarding risk management, personal injury, property damage, cargo damage and loss, and insurance coverage.

TIDA participates as an amicus curiae in cases that raise issues of vital concern to its membership, which is the case here. TIDA's members have a significant interest in this Honorable Court ensuring that all litigants are treated fairly.

There is no fee that has been or will be paid for preparing this brief.

Interest in this Case

In this case, it was undisputed that Ali maintained complete control of his vehicle at all times, never left his lane of travel, and acted reasonably in response to the sudden emergency when a vehicle crossed the median and struck his truck head on. In fact, the argument for not submitting Ali's sudden emergency instruction

request was that there was no evidence that Ali failed to act reasonably in response to the sudden emergency. This verdict defies common sense.

Unfortunately, businesses operating in Texas are being subjected to significant liability even when their drivers do not cause an accident and, instead, act reasonably in response to the actual cause of the accident.

The legal, economic, and practical import of the issue presented here are relevant not only to the motor carrier industry but also consumers and the public at large. The problem with the overly expansive liability burden placed on the trucking industry is that it affects everyone from consumers to shippers, to small business, and all employees and suppliers that rely on the trucking industry to support their families.

It is for these reasons that TXTA and TIDA, as amici curiae, submit this brief and ask the Texas Supreme Court to overturn the judgment and render judgment in favor of Petitioners.

SUMMARY OF AMICUS BRIEF

Is a driver liable for an accident when he never loses control of his vehicle at any time, does not actively cause the accident, and there is no contention that he acted unreasonably in response to a sudden emergency created by other motorists over whom the driver had no control? That question may seem unlikely to provoke serious disagreement. But the appellate court below answered "yes" and affirmed a multi-million judgment against the defendant driver, as well as his employer.

How did this come about? In the words of the lead trial attorney for Plaintiffs, "Our case was about *everything but* the three-second crash sequence."[1] Because appropriate boundaries were not in place via the Admission Rule, Plaintiffs' counsel was allowed to argue everything from how Werner should have built a weather command center to how Werner should have given Ali a company email address.

The case against Ali was that he should have been going slower because he *could have* lost control in circumstances prior to the accident. However, the inescapable fact is that *he never did.* Our legal system should not create liability just because someone *could have* lost control when they never did. Nor should our legal system allow arguments to be made about issues that are not relevant, but which may

[1] *Eric Penn – $89M Worth of Experience, Trial Lawyer Nation Podcast* (June 15, 2018), https://triallawyernation.com/12-eric-penn/ (emphasis added) (relevant audio at 16:35).

unfairly prejudice an employee and his or her employer. For the reasons described below, the judgment should be overturned and rendered in favor of Petitioners.

ARGUMENT

I. This case is of critical importance to the trucking industry, which continues to face unsupported verdicts and expanded liability.

This case has become a posterchild for the ever-increasing and over-expansive liability now confronting the trucking industry.

From 2000 to 2020, the rate of fatal crashes per 100 million vehicle miles traveled by motor carriers *decreased* by 34 percent.[2] Per the University of Michigan's Transportation Research Institute, "actions of drivers of passenger vehicles alone contribute to 70 percent of the fatal crashes with trucks."[3] Yet, between 2010 and 2018, there was an 867 percent *increase* in the average size of trucking industry verdicts.[4]

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[2] U.S. DEP'T. OF TRANSP. FED. MOTOR CARRIER SAFETY ADMIN., 2022 POCKET GUIDE TO LARGE TRUCK AND BUS STATISTICS 35 (Dec. 2022), https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2023-02/FMCSA%20Pocket%20Guide%202022-FINAL%20508%20121922.pdf. Vehicle miles traveled (VMT) increased (as measured by million VMT) from 205,520 in 2000 to 302,141 in 2020. *Id.*

[3] U. of Mich. News, *Most Fatal Crashes Involving Heavy Trucks Are Not the Fault of Truckers, U-M Study Says* (Apr. 24, 2007), https://news.umich.edu/most-fatal-crashes-involving-heavy-trucks-are-not-the-fault-of-truckers-u-m-study-says/. The study's author notes that addressing truck safety must focus on more than truck and truck drivers, stating, "[t]he actions of other vehicles on the road contribute substantially to the toll. Even if all trucks were operated perfectly, only a minority of the fatal crashes would be eliminated."

[4] Dan Murray, Nathan Williams, & Erin Speltz, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* 18 (Am. Transp. Res. Inst., Nuclear Verdicts Study Jun. 2020), https://truckingresearch.org/wp-content/uploads/2022/01/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020.pdf (indicating an increase in the average size from $2.3 million to $22.3 million).

Litigation tactics such as those espoused by the "Reptile Theory"[5] and increased advertisements targeting the trucking industry have led to unjust and excessive verdicts, leading to soaring insurance rates,[6] increased shipping costs to the public,[7] and an inability of smaller carriers to stay in business.[8] As a result, trucking companies have found it difficult to manage risk, leading to excessive settlements which are even higher than average verdicts.[9]

II. This case demonstrates how lower courts have transformed trucking companies into insurers of others' safety.

Ali had complete control of his vehicle over the course of hundreds of miles he drove before the accident. (25 RR 11, 76, 96-97) He maintained control of the

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[5] LexisNexis Legal Insights, *The Reptile Theory: A Game-Changing Strategy in Personal Injury Lawsuits*, https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/the-reptile-theory-a-game-changing-strategy-in-personal-injury-lawsuits.

[6] CRC Group, *State of the Market: Excess Trucking*, https://www.crcgroup.com/Tools-Intel/post/state-of-the-market-excess-trucking.

[7] U.S. Dept. of Transp., Fed'l Highways Div., *The Economic Costs of Freight Transportation - FHWA Freight Management and Operations*, https://ops.fhwa.dot.gov/freight/freight_analysis/freight_story/costs.htm (stating "[i]ncreased costs to carriers are reflected eventually in increased prices paid for freight transportation").

[8] Jennifer Smith, *Surging Truck Insurance Rates Hit Freight Operators*, WALL ST. J. (Jan. 13, 2020), https://www.wsj.com/articles/surging-truck-insurance-rates-hit-freight-operators-11578934834.

[9] Claire Evans & Alex Leslie, Ph.D. *The Impact of Small Verdicts and Settlements on the Trucking Industry* 23–25 (Am. Transp. Res. Inst., Small Verdicts Study Nov. 2021), https://truckingresearch.org/wp-content/uploads/2021/11/ATRI-Impact-of-Small-Verdicts-11-2021.pdf (finding that settlements were approximately $135,805 larger than verdicts on average and that about half of all settlements in its database had payments over $500,000 whereas just under a third (31.5 percent) of verdicts had payments over $500,000).

truck even after slamming on his brakes in response to the sudden emergency caused by Salinas. (14 RR 210; 25 RR 67) Ali maintained complete control of his vehicle during and after the impact.

Ali was confronted by a sudden emergency. He did not create the emergency. (11 RR 308; 23 RR 156-57) The emergency was created by Salinas's actions on a disconnected roadway, separated by a grassy median. (17 RR 183; 18 RR 158; 24 RR 219) There was no emergency until Salinas lost control of his vehicle and spun across the median to the other side of the highway and Ali's lane. (18 RR 150) It is undisputed that Ali acted reasonably in response to the sudden emergency. (18 RR 158-59; 25 RR 97)

The Texas Department of Public Safety's Trooper Villareal investigated the accident and determined that Ali "didn't do anything wrong" and that there was nothing Ali "could have done to avoid the collision." (13 RR 139, 143, 154-55) A separate public official, DPS Sergeant Matlock, also reviewed the investigation and determined that there was nothing Ali could have done to avoid the collision and offered no criticisms of Ali's conduct in connection with the accident. (13 RR 172-73, 185-86)

A similar fact scenario was presented in *Labbee v. Roadway Express, Inc.* 469 F.2d 169, 171–72 (8th Cir. 1972). In *Labbee*, the plaintiff was a passenger in a vehicle driving on a snow-covered road. *Id.* at 171. The vehicle skidded across the

center line into the path of a tractor-trailer going in the opposite direction. *Id.* The automobile and the left front bumper of the truck collided. *Id*. Due to the cold weather and hazardous conditions, the plaintiff requested two instructions regarding the effect of 49 C.F.R. § 392.14, which requires reduced speed and extreme caution in the event of hazardous conditions, including snow or ice. *Id*. The trial court refused the instructions because there was no causal connection proved between the alleged violation and the collision. *Id*.

The Eighth Circuit agreed that the instructions were improper because the undisputed evidence showed that, regardless of the speed driven by the truck driver, **the truck driver was in complete control of his truck at the time it was struck by the automobile**. *Id.* "Thus, even if it could be shown that the statute in question was violated, its violation could not be used as evidence of negligence." *Id.* at 172.

Like the truck driver in *Labbee,* Mr. Ali did not create the emergency. Nonetheless, Plaintiffs were allowed to use the broad-form negligence submission to still argue that 49 C.F.R. § 392.14 supported liability. But as *Labbee* teaches, that was improper distortion of the regulation. The emergency was created by Salinas's actions on a disconnected roadway, separated by a grassy median. There was no emergency until Salinas lost control of his vehicle and spun across the median to the other side of the highway and into Ali's lane. It is an uncontroverted fact that Ali

maintained control of his vehicle even while his vehicle was undergoing a litany of forces, from the brakes to the sudden impact from Salinas's truck.

The crux of Plaintiffs' argument is that, instead of driving 10 miles per hour below the speed limit, Ali should have reduced his speed even more. Yet, Ali demonstrated that there was sufficient traction in the roadway to control his vehicle even under the most difficult of circumstances. It is a fact that Ali was driving at a speed whereby he was able to control his vehicle under the extraordinary circumstances present at the time of the accident. Most importantly, the evidence conclusively and indisputably showed that Salinas caused the accident by losing control of his vehicle, not Ali.

III. The outsized verdict resulted from a lack of appropriate boundaries, including an overly broad charge submission.

At trial, course and scope was not at issue. Werner had already stipulated that Ali was within the course and scope of his employment when the accident occurred. But because the plaintiffs had pled direct negligence and gross negligence theories against Werner, they were allowed to 'try the company' and argue a host of issues that the jury should never have considered. According to the lead Plaintiffs' attorney who delivered the closing argument, **"Our case was about everything *but* the three-second crash sequence."**[10]

[10] *Eric Penn – $89M Worth of Experience, Trial Lawyer Nation Podcast* (June 15, 2018), https://triallawyernation.com/12-eric-penn/ (emphasis added) (relevant audio at 16:35).

The court reporter's record of his closing argument is replete with examples just how accurate that statement was. He argued—

- Werner should have built a "command center" for weather monitoring (29 RR 40);
- Werner should have given Ali a company email (29 RR 43);
- Werner's head of safety was unqualified because she had not personally driven an eighteen-wheeler (29 RR 44);
- Werner should have installed a temperature gauge on Ali's truck (29 RR 44);
- Werner should have given Ali access to a CB radio in case he might have heard additional information that may have led him to stop instead of proceeding cautiously under the speed limit (29 RR 38);
- Werner was wrong to hire as safety director someone with a background that included forensic accounting (29 RR 32);
- Ali's team driver, Jeffery Ackerman, should not have been designated a "driver trainer" because he had less than one year's experience (29 RR 44); and
- the jury should "make these people hear your voice" such that "not only will Werner get the message, but when one of the largest trucking companies in the U.S. hears that message, people say, I don't want to be there, what do I have to change, I don't want to be in that situation. This is bigger than us . . . . I hope you feel it now that this is an opportunity because this is bigger than all of us and you have the power to make a change. Not only to deliver justice to this family that desperately needs it but to get the message out and have your voice heard across this country that this is not okay." (29 RR 220–21).

These arguments were irrelevant to the issues in dispute. The plaintiffs were not harmed because a command center had not been built, nor were they harmed because Ali did not have an additional email address. They were harmed when their

vehicle went off the road and directly into oncoming traffic. Plaintiffs' counsel was allowed to make those arguments, in part, because gross negligence had been alleged and because the trial court allowed an overly broad charge submission that authorized the jury to find negligence in virtually any sphere.

Ultimately, no gross negligence finding was made, but the arguments certainly impacted the jury's deliberations, including its apportionment of responsibility. When asked to apportion fault between Ali and Salinas, the jury assigned 45% to Ali and 55% to Salinas. (10 CR 5167) The jury was also asked to apportion fault between Ali, Salinas, and Werner *via its employees other than Ali*. In response, they assigned 14% to Ali, 16% to Salinas, and 70% to Werner. (10 CR 5165)

These questions and the jury's responses were confusing and legally nonsensical. The only way Werner could have indirectly harmed Plaintiffs was via its agent who was present at the scene: Ali, who was driving in his own lane, at a reduced speed, and who never lost control or took faulty evasive action in response to the sudden emergency caused by the plaintiffs' vehicle.

Due to Werner's vicarious liability for Ali's actions, the jury's assessment of 45% responsibility to Ali and 55% to Salinas should have meant the jury was finding Werner less responsible for the accident than Salinas. But via additional questions

that separated out Ali from Werner, the jury was asked to apportion fault to Werner multiple times.

IV. The Admission Rule would help provide appropriate boundaries for argumentation on employer liability and reduce the likelihood of error.

Had Ali been driving *outside* the course and scope of his employment, Plaintiffs may have been able to use derivative liability theories like negligent hiring, training, entrustment, or supervision to find Werner responsible for Ali's actions. But when an employer stipulates to course and scope—as Werner did here—the employer's negligence is no longer in doubt, so long as the employee is found to have been negligent. *See Patterson v. East Tex. Motor Freight Lines*, 349 S.W.2d 634, 636 (Tex. Civ. App.—Texarkana 1961, writ ref'd n.r.e.). El Paso's Court of Appeals explained the issue as follows the context of negligent entrustment claims:

> 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. The proximate cause of the accident or occurrence is the negligence of the driver and not that of the owner.

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

Once course and scope has been established, what matters is not whether the employer will be on the hook for the employee's negligent conduct, but whether the employee was, in fact, negligent. *See, e.g.*, *Wansey v. Hole*, 379 S.W.3d 246, 247–48 (Tex. 2012) (holding that an employer may only be responsible for negligent hiring or supervision if the employee's conduct proximately caused the injuries alleged); *Blaine v. Nat'l-Oilwell, L.P.*, No. 14-09-00711-CV, 2010 WL 4951779, at *8 (Tex. App.—Houston [14th Dist.] Dec. 7, 2010, no pet.). If Werner is responsible for the injuries Plaintiffs suffered on the highway, those injuries must be causally linked to everything Plaintiffs allege Werner did wrong. And everything Werner did wrong had to filter through Ali as he was the instrument by which Werner allegedly caused Plaintiffs harm.

This is why many Texas appellate courts have adopted and applied the Admission Rule, as Justice Wilson noted in dissent below. *Werner Enterprises, Inc. v. Blake*, 672 S.W.3d 554, 632 (Tex. App.—Houston [14th Dist.] 2023, pet. filed) (Wilson, J., dissenting). The Admission Rule clarifies and streamlines the judicial process in cases like this which involve concepts of derivative liability and imputation. If course and scope has been established, the Rule allows the jury to focus on whether the employee was actually negligent as the events giving rise to the suit were unfolding. Without the Rule, claimants are allowed to argue, as in this case, that events in the distant past somehow gave rise to the situation at hand. (*See,*

e.g., 23 RR 84-85, 158; 28 RR 19, 29 RR 44) This can effectively function as a free-for-all to argue anything that theoretically may have contributed to the incident.

Having the Admission Rule in place is important especially in cases like this one where the jury ultimately made no finding of gross negligence. Even though there was ultimately no gross negligence finding, the jurors were allowed to hear evidence and arguments about alleged wrongdoing by Werner which influenced their apportionment of fault and may have contributed to their damages award. If juries are inflamed over an employer's practice that they dislike, that may simultaneously increase the financial award assessed against the employee. But it is not fair or just for an employee to be punished for the employer's alleged wrongdoing.

The solution for these problems lies in application of the Admission Rule and bifurcation of gross negligence allegations into a separate trial or implementation of a clear and convincing evidence standard before such evidence may be presented to the jury, as advocated by Justice Wilson below.[11] *See Werner Enterprises*, 672 S.W.3d at 637 (Wilson, J., dissenting) (discussing the clear and convincing evidence standard). Otherwise, the percentage of fault assessed and damages awarded even

[11] Adopting the Admission Rule would also accord with the Texas Legislature's adoption of Texas Civil Practice and Remedies Code § 72.054. In essence, that statute is a variation on the Admission Rule but allows a form of the gross negligence exception in the context of a bifurcated trial.

for ordinary negligence findings may be inflated. For these reasons, and those described by Justice Wilson, the Court should make clear that the Admission Rule is the law in the State of Texas.

CONCLUSION

For the reasons discussed above, Amicus Curiae the Trucking Industry Defense Association and Texas Trucking Association respectfully request that this Court overturn the judgment, render judgment in favor of Petitioners, and make clear that the Admission Rule is the law in the State of Texas.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief is in compliance with Texas Rule of Appellate Procedure 9.4 and 11 because it contains 4,147 words and has been prepared in a proportionally spaced typeface, using Microsoft Word 365 in 14-point Times New Roman font for text and 12-point Times New Roman font for footnotes. There is no fee that has been or will be paid for the preparation of this brief.

/s/ Juan Roberto Fuentes
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing document has been served on all counsel of record in this case, identified below, on this 16th day of February 2024, electronically through the electronic filing manager in compliance with the Texas Appellate Rules of Civil Procedure:

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