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August 28, 2024

Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: No. 23-0493; *Werner Enterprises, Inc. and Shiraz A. Ali 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 Brianna Blake*

To the Honorable Members of the Supreme Court of Texas:

Pursuant to Rule 11, Texas Rules of Appellate Procedure, *amicus curiae* Texas Civil Justice League files this letter in the above-referenced cause in support of the Motion for Rehearing.

Statement of Interest

The Texas Civil Justice League ("TCJL") is a non-profit association of Texas businesses, health care providers, professional and trade associations, and individuals dedicated to maintaining a fair, stable, and predictable civil justice system based on the impartial administration of justice. TCJL has long participated

as *amicus curiae* in matters that have a significant and pervasive impact on our membership and the Texas business climate. TCJL members have become alarmed at the increase of "nuclear verdicts" in commercial motor vehicle cases in which the bulk of the damages are non-economic in nature and the employer's liability stems from derivative negligence theories with no firm basis in Texas jurisprudence.

This brief has been prepared in the ordinary course of TCJL's operations. No one has paid for the preparation of this brief.

Argument

TCJL strongly endorses the sound legal arguments arguments presented by *amicus curiae* Texans for Lawsuit Reform. We particularly endorse TLR's assertion that this Court should limit derivative negligence claims against the employer to negligent entrustment. We further urge this Court to be as clear as possible as to the types of evidence that may be admitted to establish a claim of negligent entrustment. Trial courts, we believe, would benefit from as many bright-line boundaries as we can draw around negligent entrustment so that it doesn't, as TLR argues, become merely another general negligence theory with elements of other derivative claims that have not been explicitly recognized by this Court.

What this Court decides about this case has immense real-world consequences. At some time or another, virtually *every* Texas business operates a

commercial motor vehicle. The spectacle offered by some attorney television advertising would have us believe that huge profit-over-people entities are unleashing on helpless Texans fleets of poorly maintained tractor-trailers operated by untrained, unsupervised, and dangerous drivers hired off the street. The reality could not be more different. Texas businesses of all shapes and sizes take vehicle safety extremely seriously, not only because it is the right thing to do, but because they know that they, too, could become the target of plaintiff's attorney well-schooled in reptile theory, whether they could have done anything to prevent an accident or not. This is not idle speculation on our part, and the problem doesn't affect shippers alone.

In 2021 the Legislature enacted § 38.05, Insurance Code, as part of a larger bill addressing commercial motor vehicle liability, H.B. 19.[1] This section directs the Texas Department of Insurance to conduct a biennial study of H.B. 19's effects on commercial automobile premiums, deductibles, coverage, and availability. TDI published the first of these reports in 2022, just after the new law went into effect. Because it was conducted so soon after the effective date of the new law, in TDI's terms, the initial report "mainly provides baseline information about the commercial auto market . . . but it is too early to pinpoint trends, effects, or marketplace changes

[1] Acts 2021, 87th Leg., R.S., Ch. 785 (H.B. 19), Sec. 5, eff. September 1, 2021.

possibly due to the law." But the "baseline information" is sobering, as shown by the following findings:

- "The truckers' liability submarket is highly concentrated and becoming less competitive. A few insurers write the bulk of this business."
- "Surplus lines market share in Texas nearly doubled from about 5% in 2019 to 10% in 2021."
- "Ten-year return on net worth for liability coverage was about -2% in 2021, its lowest point in at least 18 years."
- "Rates have increased by almost 45% since 2017, averaging about 6% a year."
- "Average liability premium for all vehicle types increased by 50% from 2017 to 2021, averaging about 11% a year."[2]

There is little data to suggest that these trends have gone into reverse, and a lot to suggest otherwise. The problem is not limited to commercial vehicles, either, but it is in cases like this one that we can most clearly discern the influence that the civil justice system can exert on the difficult task of predicting risk in an uncertain environment.

[2] https://www.tdi.texas.gov/reports/documents/commercial-auto-biennial-report.pdf. Last accessed 7 August 2024.

Perhaps Justice Blacklock said it best in his concurring opinion in *American Honda Motor Co., Inc. v. Sarah Milburn* (No. 21-1097; June 28, 2024). Though he wrote in the products liability context, his point about the way jurors of divergent values might evaluate the adequacy of federal safety regulations is equally true here. H.B. 19 lists a whole panoply of federal safety regulations that are available to plaintiffs in commercial trucking cases to make a negligent entrustment claim. But when legislators did that, they duplicated the problem Justice Blacklock identified when he observed that "policy and politics" and the "political value judgments" that underlie them *cannot but* get into the jury room, no matter how stringently (or not) the Legislature may try to limit them. Just as § 82.008 does, H.B. 19 assigns the jury the task of evaluating federal safety regulations *in relation to* the facts of a specific accident, presumably in an effort to decide whether an employer's compliance or non-compliance *independently* caused the accident. Even under the best of circumstances—which in our view can only exist if a hard-nosed trial court keeps the lawyers between the ditches—juries are still left with the unenviable task of, in Justice Blacklock's terms, "balanc[ing] competing values" as those values are expressed, at best opaquely, in the jargon of the regulations themselves.

The *Milburn* majority, as interpreted by Justice Blacklock, came to the sensible conclusion that "[a] fact finder cannot validly judge a federal agency's balancing of [safety, cost, feasibility, etc.] unless he knows something about how the

regulatory process works and has a sense of the many conflicting considerations and competing values—safety just one among them—that contributed to the promulgated regulation." Juries can make a determination of inadequacy, but to do so "a qualified regulatory expert would need to explain why, in the context of the entire regulatory history and the delicate balance between absolute safety and commercial feasibility, the agency's determination was . . . 'inadequate.'" Op. at 5. In *Milburn* the plaintiff offered no such expert but rather asked the jury "to condemn the regulation based on the singular consideration of passenger safety."

At the end of its brief, TLR poses a series of questions that go to the heart of the issue: what precisely constitutes the employer's legal duty when it comes to "entrusting" a vehicle to an employee? It seems to us that a logical extension of the Court's thinking in *Milburn* can be helpfully applied to this question. If the plaintiff introduces evidence of the employer's alleged violation of one or more of the safety regulations specified in H.B. 19, for example, it stands to reason that the plaintiff should bear the burden, by testimony of a qualified regulatory expert, to "explain why, in the context of the entire regulatory history and the delicate balance between absolute safety and commercial feasibility," the pertinent regulation exists in its current form and the "commercial feasibility" of imposing the duty plaintiff *really* seeks the court to impose. In other words, evidence of a mere violation is not enough to establish a breach of duty. We urge this Court to ask—and answer—the question

that Justice Blacklock posed (in the context of manufacturing a motor vehicle) in *Milburn*: "[w]hat economic cost is this Court willing to impose on the commercial vehicle industry in Texas to comply with the duty of supervision/manage?"

How would this Court accomplish this admittedly difficult task? After all, it seems easy enough just to leave it up to the jury's good sense in hopes that everything will come out even in the end. But making things "easy" is no substitute for a full and fair consideration of a regulatory scheme that may have a very questionable and frequently remote relationship to the *employee-driver's* negligence under particular and unique circumstances. In addition to clarifying that Texas law does not recognize independent causes of action for negligent training/supervision/management, we urge the Court to require a plaintiff alleging that, based on a regulatory violation, a defendant employer violated a legal duty by entrusting a vehicle to the driver, to offer the testimony of a qualified regulatory expert who can address the regulatory history and the precise way in which the alleged violation breached the duty "not to entrust" the vehicle, if such a duty indeed exists in this specific context. The expert (or another one) must then explain precisely how the supposed breach proximately caused the accident. No expert, no negligent entrustment theory. If the plaintiff does, however, put on a qualified expert, the defendant employer must then be entitled to query that regulatory history and engage the jury in an examination of the reasonableness and commercial feasibility of adopting the plaintiff's *proposed duty*

standard, as well as whether the alleged regulatory violation had logical or factual connection to the "entrustment." If the case gets to the jury, the jury should be charged with making specific findings on duty and causation as to the employer so that there won't be any doubt on appellate review upon what basis the jury found the employer negligent.

The return of nuclear verdicts to Texas courts has placed some very difficult decisions in the hands of this Court. This case is one of them. *Gregory*, *Milburn*, and now *Werner*. These, and others that this Court will likely hear in the near future, are simply crucial in terms of maintaining a sufficient level of reasonable predictability in the civil justice system so that businesses can assess their risk exposure and, ultimately, decide how much business they can afford to conduct in Texas. We realize that reasonable minds will differ with us on this point, but the problem our members see with verdicts of this magnitude is that there doesn't seem to be anything that the so-called "deep pocket" defendant could have done to prevent something terrible from happening short of simply not doing business at all. While this Court has consistently and rightfully abstained from intervention on the policy level, that does not mean that, as Justice Blacklock observed in *Milburn*, its decisions take place in a vacuum devoid of policy considerations in the minds of jurors and the lawyers who are trying to make their case. In the past this Court has risen to the challenge of

mitigating the real or potential distortions that those considerations have on the fair and impartial administration of justice. We are asking that it do so again in this case.

Conclusion and Prayer

TCJL respectfully requests that this Court grant the petition for review and address the issues identified by *amici* TCJL and Texans for Lawsuit Reform.

Respectfully submitted,

/s/ George S. Christian

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,751 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ George S. Christian

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *amicus* letter was served on counsel of record by using the Court's CM/ECF system on the day of August 28, 2024.

/s/ George S. Christian