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August 16, 2014

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

Re: *KAM-WAY Transportation, Inc. v. Superior Court (Chavez),* Case No. S220283

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Atlantic Legal Foundation ("ALF") urges the Court to grant the petition for review in *KAM-WAY Transportation v. Superior Court (Chavez),* Case No. S220283.

This issue in this case is important, but straightforward: Did the trial court err in expanding "as a matter of public policy" the "nondelegable duty doctrine" to freight brokers who arrange for the transportation of third parties' goods by independent contractor truck operators over whom the broker has no legal or operational control.

Interest of Amicus

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses and trade associations. The Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes current and retired general counsels of some of the nation's largest and most respected corporations, partners in prominent law firms and distinguished legal scholars.

The issue in this case – the expansion of vicarious liability – is of particular interest because it threatens the viability of small and medium size firms that act as intermediaries who promote efficiency in a vital industry, the transportation of goods by truck and could diminish competition.[1]

Facts

KAM-WAY is a motor, freight or trucking broker. "'Broker' means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation." 49 U.S.C. 13102(2).[2] A freight broker is an individual or company that serves as a liaison between another individual or company that needs shipping services and an authorized motor carrier. A broker does not control or own the large commercial vehicles used to transport goods. To operate as a freight broker, a business or individual must obtain a license from the Federal Motor Carrier Safety Administration ("FMCSA"). Freight brokers are required to carry surety bonds. 49 U.S.C. § 13906.

Defendant HSD Trucking ("HSD") is a motor carrier, a "person providing commercial motor vehicle transportation for compensation." 49 U.S.C. § 13102, subd. (14). Harbhajan Singh ("Singh") is the owner of HSD and was the driver of HSD's vehicle at the time of the accident giving rise to this litigation. HSD was an independent contractor who could transport goods in his vehicles for other shippers or through other brokers.

KAM-WAY was retained by a grower of fruits and vegetables to find a trucker to carry a cargo to Arizona. KAM-WAY suggested HSD for the job. HSD provided all equipment and personnel, and chose the route and other means to move the cargo from its point of dispatch to its intended point of delivery. HSD picked up goods directly from the shipper. KAM-WAY had no possession of or control over the cargo or the truck.

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[1] No counsel for any party authored this *amicus* letter in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this letter. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Although the trial court went to some pains to find that federal law did not control, it found that KAM-WAY was a broker, and did not quibble with the definition of broker under the federal regulatory regime. We note that this transaction involved the *interstate* movement of goods and was thus subject to federal law and regulations.

David Chavez, the plaintiff in this case, is an acquaintance of defendant Singh and was being trained by Singh to become a truck driver. Singh paid Chavez $300 per trip to help him drive the truck, and Chavez had assisted Singh on other trips before the trip during which the accident occurred. Chavez was sitting in the passenger seat of Singh's truck when Singh allegedly caused it to roll.

The Superior Court Action and KAM-WAY's Motion for Summary Judgment

Chavez and his wife, Marisol, filed a complaint against Singh, HSD Trucking, and KAM-WAY, alleging (1) general negligence; (2) personal injury; and (3) loss of consortium. The Chavezes sought relief against KAM-WAY based on the theory that Singh was acting within his scope of employment for HSD and KAM-WAY at the time of the accident.

KAM-WAY moved for summary judgment on the ground that KAM-WAY was acting as a broker for the load that was being hauled by HSD and Singh at the time of the accident, that Singh was an independent contractor and that KAM-WAY could not be held liable for Singh's negligence. KAM-WAY argued that while a "nondelegable duty of care" may be imposed on motor carriers, it cannot be imposed on brokers such as KAM-WAY.

Plaintiffs opposed summary judgment, arguing that they had pleaded claims for negligent hiring and negligent entrustment. The Chavezes did not dispute that HSD and Singh were independent contractors or that KAM-WAY had acted as a broker and did not dispute that under California law only a carrier would have nondelegable duties to Chavez.

HSD and Singh opposed KAM-WAY's motion for summary judgment, contending that there was a triable issue of fact as to whether KAM-WAY was Singh's employer and that there was a triable issue of material fact as to whether KAM-WAY was a carrier rather than a broker.

The Superior Court Decision

The trial court held that there was no triable issue of material fact on the claims for negligent entrustment or negligent hiring: the claim for negligent entrustment failed because Singh owned the truck, and KAM-WAY, as a broker rather than a carrier, did not exercise ownership or control over the truck and shipment involved in the incident or over Singh himself as the driver; the claim for negligent hiring failed because Singh was not KAM-WAY's employee.[3]

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[3] "In this case, Plaintiff cannot prove vicarious liability because Movant was a logistics 'broker,' not a 'carrier' of goods. Plaintiff cannot show Movant exercised ownership or

(continued...)

The trial court denied KAM-WAY's motion for summary judgment solely because it found a triable issue of fact as to whether KAM-WAY had breached a "nondelegable duty of care" to David Chavez. (Ruling at 8).

The trial court acknowledged that the "nondelegable duty doctrine had only been applied to carriers, but determined for the first time that "The articulated [nondelegable duty] rule that applies to carriers, should apply to brokers . . . as a matter of public policy." The court reasoned that expansion of the doctrine upheld the policy articulated by this Court in its carrier cases because finding there to be a nondelegable duty was necessary to ensure "the incentive for careful supervision of its business" and "members of the public who are injured would be deprived of the financial responsibility of those who had been granted the privilege of conducting their business over the public highways." (Citing to *Serna v. Pettey Leach Trucking, Inc.* (2003) 110 Cal.App.4th 1475, 1481, which in turn had cited *Eli v. Murphy* (1952) 39 Cal.2d 598, 600-601.) (Ruling at 6).

The Superior Court then held that because none of the cases following *Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594 (which it viewed as the seminal case involving nondelegable duty) dealt with an entity that was a *broker*, there was no precedent to support KAM-WAY's legal position that it is not vicariously liable for Singh's negligence and that KAM-WAY owed a duty to carefully supervise those it contracts to carry goods, so that those who are injured by the contractors it hires are not deprived of the financial responsibility of the contractors to pay for their injuries. *Serna, supra,* 110 Cal.App.4th at 1486 and that "By holding brokers like Movant liable in cases like this, the POLICY articulated by our Supreme Court [in *Serna*] is upheld." (Emphasis in original.) (Ruling at 6).

The Superior Court concluded that since KAM-WAY's activities as a trucking broker cannot be carried on without a public franchise or without public authority, and since these activities involve a danger to the public, [KAM-WAY] had a non-delegable duty to verify that Singh was a safe driver, and carried the proper insurance, and denied KAM-WAY's motion for summary judgment. (Ruling at 7).

The trial court put the burden on KAM-WAY to show why the nondelegable duty *Serna* imposed on carrier should not be extended to brokers. We submit that the onus for

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[3](...continued)
control over the truck and shipment involved in the subject incident, or Mr. Singh himself." Ruling on Defendant, KAM-WAY Transportation, Inc.'s Motion for Summary Judgment on Plaintiffs' Complaint (hereafter "Ruling"), Exhibit B to KAM-WAY's Petition for Review, at 3.

establishing a new or expanded rule of liability should be on the party advocating for the new rule. (Ruling at 7).[4]

Issue Presented for Review

The issue presented is purely one of law: Whether a freight broker, which has no preexisting duty to third parties for the conduct of an independent contractor motor carrier, can be held vicariously liable for the motor carrier's allegedly negligent driving under the "nondelegable duty" doctrine.

Reasons for Granting Review

The Legal Issue Is One of First Impression in this Court, But of Great Legal Significance

This Court has shown a continuing interest in the law of vicarious liability. The Court is currently examining vicarious liability in other contexts in *Patterson v. Domino's Pizza* (Case No. 5204543, argued June 4, 2014) and *Auto Club v. Monarraz* (Case No. 5207726, granted and held pending decision in *Domino's)*. This case provides the Court with an opportunity to delineate the contours of vicarious liability in the context of broker-principal relationships.

Heretofore, this Court has carefully limited the liability of a party who hires an independent contractor, *see, e.g., Privette v. Superior Court* (1993) 5 Cal.4th 689, *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, and *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, and has never held that a freight or truck broker can be held vicariously liable for the acts of its independent contractor motor carrier under the nondelegable duty doctrine, nor has any Court of Appeal. *Serna*, the case principally relied on by the trial court, held only that carriers have a nondelegable duty:

> Hence, the rule is that a carrier who undertakes an activity (1) which can be lawfully carried on only under a public franchise or authority and (2) which involves possible danger to the public, is liable to a third person for harm caused by the negligence of the carrier's independent contractor. Were the rule otherwise, a carrier could escape liability for the negligence of its independent contractors, thus reducing the incentive for careful supervision and depriving those who are injured of the financial responsibility of those to whom the privilege was granted. For these reasons, the carrier's duties are nondelegable,

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[4] The Court of Appeal for the Fifth Appellate District, Division Five summarily denied KAM-WAY's Petition for Writ of Mandate and/or Prohibition.

> and it is only when the carrier is "not regulated" at all that the rule is otherwise.

Serna at 1486 (internal citations omitted, emphasis added); *see also Hill Brothers Chemical Co. v. Superior Court* (2004) 123 Cal.App.4th 1001, 1005 ("*Hill Brothers*").

The Superior Court's Reasoning is Faulty

Vicarious liability is the exception, not the rule. The general rule is that one is not liable for the negligent acts of an independent contractor. *Hill Brothers* 123 Cal.App.4th 1001, 1008. An exception is the "nondelegable duty" doctrine, *(id.; Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 604). The trial court seems to have started with the view that vicarious liability is the rule, and that classical agency principles are the exception.[5] We believe the trial court misread this Court's precedents, and also misread *Serna.*

Heretofore, the doctrine of nondelegable duty has been applied only to limited classes of persons: landowners who undertake inherently dangerous activities on their land, vehicle owners, general contractors, and motor carriers. *Privette v. Superior Court* (1993) 5 Cal.4th 689, 694; *Hill Brothers,* 123 Cal.App.4th at 1008). Those classes of persons have direct or substantial control over the persons or instrumentalities which create the risk of injury to the public. Until the trial court's decision in this case, the doctrine had never been applied to trucking or freight (or any other) brokers.

Further, the nondelegable duty doctrine has been applied only where there was an underlying duty of the party to be held vicariously liable and the original contractor cannot transfer liability by hiring another to perform a task. As this court expressed it,

> If, however, an individual or corporation undertakes to carry on an activity involving possible danger to the public under a license or franchise granted by public authority subject to certain obligations or liabilities imposed by the public authority, these liabilities may not be evaded by delegating performance to an independent contractor. The original contractor remains subject to liability for harm caused by the negligence of the independent contractor employed to do the work.

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[5] "The application of the general law of agency to the type of claim at issue in this case, never really happened [and]. . . .the general rule that vicarious liability does not exist in an independent contractor relationship was systematically dismantled through the creation of a series of exceptions," citing *Serna* (2003) 110 Cal.App.4th at 1484. (Ruling at 5)

Taylor v. Oakland Scavenger Co., supra, 17 Cal.2d at 604. The trial court seems to have overlooked the fact that KAM-WAY did not itself undertake to carry on an activity that involves danger to the public.

The reasoning of *Taylor* and *Serna* has not been applied to freight brokers, and for good reason: brokers would not perform the task for which a motor carrier is hired. The freight broker is merely an intermediary between the shipper and the carrier. The broker does not transport any goods itself, does not have title to, nor custody of, the cargo, does not own or operate the motor vehicle, does not hire the vehicle's driver, and does not have the expertise to assess the possible hazards of the cargo, the safety of the vehicle or the capability of the driver. Thus it had no underlying duty to third parties to protect them from the independent truckers or drivers.[6]

Vicarious liability has thus been limited to motor carriers. *Hill Brothers,* (2004) 123 Cal.App.4th 1001, 1005; *see also Castro v. Budget Rent-A-Car System, Inc.* (2007) 154 Cal.App.4th 1162, 1177-1178. The trial court relied almost exclusively on *Serna* as the rationale for finding that a nondelegable duty should be imposed on freight or trucking broker, but overlooked the fundamental point that all of the cases on which *Serna* relies, and *Serna* itself, are limited to carriers.

The trial court's imposition of vicarious liability is based on a fundamental misunderstanding of the role of a freight broker. Unlike a carrier, who owns or has control over the commercial vehicles it operates, a broker is merely an intermediary which connects motor carriers with companies seeking transportation of goods. KAM-WAY does not itself engage in such dangerous activity.

Expanding the application of the nondelegable duty doctrine to brokers would fundamentally change the broker's role in the trucking industry by requiring brokers to exercise control over the independent drivers and the vehicles those drivers own and operate. Moreover, imposing this new duty on brokers would effectively extend risk to a party without consideration of

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[6] The distinction between motor carriers and brokers is delineated in the relevant federal statute and regulations. The Superior Court acknowledged that there is no California statute, regulation or precedent that provides a contrary description of the distinct roles of motor carrier and broker: "The problem with Movant's 'broker' claim is that nowhere in the voluminous Codes of this State, or in the history of published judicial decisions of this State's tribunals, is Movant's position defined or regulated. This is probably due to the fact that the [Interstate Commerce Act] does that job well enough." Ruling at 4. Absent a contrary California definition or rule, there is no rationale, we submit, for abandoning the pertinent federal law definition in a statute that regulates the very activity here involved.

fault of that party (*see Hill Brothers, supra,* 123 Cal.App.4th at 1010) or the potential benefit to that party of the activity at issue (*see Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1013).

The trial court in this case simply made its own policy determination that the nondelegable duty doctrine should apply to trucking brokers as well as to motor carriers. We submit that it is not the proper role of a trial court to extend doctrines which impair common law rules, in this case long-standing and bedrock rules regarding liability for acts or omissions of independent contractors.

The Issue Has a Potentially Enormous Impact on Commerce and the Economy

The Superior Court's policy determination is likely to have an enormous impact on the economy: According to the U. S. Department of Transportation, of all the goods shipped in the United States in calendar year 2012, 70% of total tons was shipped by truck, 15.8% of total tons was shopped by rail, 4.4% of total tons was shipped by ship or barge; and only a negligible percent was shipped by air (including "multimodal" transportations in which goods were transported by truck and plane). *See* U. S. Department of Transportation, Bureau of Transportation, Commodity Flow Survey, at http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/commodity_flow_survey/index.html (last visited August 14, 2014); see also FMCSA, 2014 Pocket Guide to Large Truck and Bus Statistics at 13, available at http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/ files/docs/FMCSA%20Pocket%20Guide% 20to%20Large%20Truck%20and%20Bus%20Statistics%20-%202014%20-%20508C.pdf ("FMCSA Pocket Guide")(last visited August 15, 2014).[7]

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[7] These data are based on preliminary results for 2012 (final results will not be published until the end of 2014), but they are quite similar to the final results for 2007, in which 68.8% of total tons were shipped by truck, 14.8% were shipped by rail, 3.3% were shipped by ship or barge, and a neglibile percentage was shipped by air (*see* U.S. Census Bureau, 2007 Commodity Flow Survey, at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=CFS_2007_00P1&prodType=table (last visited August 14, 2014) and for 2002 in which 67.2% of total tons were shipped by truck, 16.1% were shipped by rail, 5.8% were shipped by ship or barge, and a neglibile percentage was shipped by air (see U.S. Census Bureau, 2002 Commodity Flow Survey, at http://factfinder2.census.gov/faces/tableservices/jsf/pages/ productview.xhtml?pid=CFS_2002_00A01&prodType=table. If there is any trend, it is that the percentage of goods shipped by truck is increasing over time.

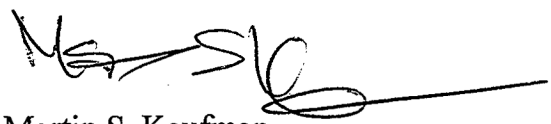
In 2013 over 500,000 interstate freight carriers, 3,500,000 interstate freight truck drivers, and 2,200,000 intrastate freight truck drivers were active in the United States. *See* FMCSA Pocket Guide, at 11, available at http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/FMCSA%20Pocket%20Guide%20to%20Large%20Truck%20and%20Bus%20Statistics%20-%202014%20-%20508C.pdf (last visited August 15, 2014) and FMCSA, Commercial Motor Vehicle Facts – March 2013, available at http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Commercial_Motor_Vehicle_Facts_March_2013.pdf (last visited August 15, 2014). There were 13,710 freight brokers operating in the United States in 2013, but that number was almost 50% lower than the number of brokers in 2009. FMCSA Pocket Guide. *Id.*, at 14.

Extending the nondelegable duty doctrine to brokers will increase the costs of truck transportation, because at the very least brokers will have to insure against vicarious liability (assuming such insurance is available) and that cost will be passed on to shippers and consumers. If such insurance is not available, or available only at prohibitive cost, many small and medium-sized brokers will likely be driven out of business, reducing competition and diminishing the availability of a useful, and in many cases, vital, service.

Further, extending vicarious liability to brokers will not significantly increase protection for the public, because motor carriers are already required to have substantial insurance or bonding (California Vehicle Code §§ 34630(a) and 34631.5(a)(1); 49 C.F.R. §§ 387.301, 387.303(b)(2)).

For the foregoing reasons this Court should grant the petition for review and reverse the courts below.

Respectfully submitted,



Martin S. Kaufman

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PROOF OF SERVICE

I am counsel for *amicus curiae* Atlantic Legal Foundation in this matter. I am over the age of 18 and not a party to the within action. My business address is 2039 Palmer Avenue, Suite 104, Larchmont, New York 10538.

On August 16, 2014, I served the foregoing document described as AMICUS LETTER BRIEF on the parties indicated on the attached Mailing List by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

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by United States Postal Service. I personally deposited envelopes containing copies of the attached *amicus* letter brief with the United States Postal Service that same day, with the postage thereon fully prepaid, in a postal depository box under the exclusive care of the United States Postal Service in Larchmont, New York.

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

Executed this 16th day of August, 2014.

Martin S. Kaufman

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