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CLERK SUPREME COURT

August 19, 2014

Clerk, California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Kam-Way Transportation v. Superior Court (Chavez)*, No. S220283

To the Chief Justice and Associate Justices of the California Supreme Court:

The International Association of Defense Counsel (IADC) urges the Court to grant the petition for review in *Kam-Way Transportation v. Superior Court (Chavez),* No. S220283. The Court should either grant review on the merits, or grant review and transfer the petition to the Court of Appeal for decision.

The IADC's Interest. The IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. Members of the IADC's Transportation Committee represent numerous clients in the transportation industry, including motor carriers and trucking insurance companies. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

Facts. Defendant Kam-Way Transportation, Inc. ("Kam-Way") is a trucking broker: companies that need transportation hire Kam-Way to arrange for independent truckers to haul their loads. (Exh.[1] 1 p. 65) At the

[1] "Exh. _ p. _ " refers to the volume and page of the exhibits in support of petition for writ of mandate filed in the Court of Appeal.

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time of the events in issue it held both a motor carrier license and a broker license (Exh. 1 p. 64), but in this case was operating exclusively as a broker. (Exh. 1 pp. 64-65)

Sun-Fresh International hired Kam-Way as a broker to arrange for an independent trucker to haul a load of pears from Washington State to Arizona. (Exh. 1 pp. 66, 75, 97-101) Kam-Way agreed to arrange for an independent carrier to haul the load. (Exh. 1 pp. 66, 76) Kam-Way did not agree to haul the load itself. (Exh. 1 pp. 66, 76)

Kam-Way had previously entered into a transportation brokerage agreement with co-defendant Harbhajan Singh and his company, HSD Trucking, to haul loads upon request. (Exh. 1 p. 65, 97-101) Kam-Way engaged Singh as an independent contractor to haul Sun-Fresh's load. (Exh. 1 pp. 65, 103) Singh drove his own truck and set his own hours and route. (Exh. 1 p. 65) Singh picked up the goods directly from the shipper; Kam-Way never had possession of them. (Exh. 1 p. 54)

Plaintiffs' complaint alleges that near Goldendale, Washington, Singh negligently rolled the semi truck (big rig), injuring his passenger, plaintiff David Chavez. (Exh. 1 p. 3) Chavez and his wife sued, among others, Singh and Kam-Way. (Exh. 1 p. 1) They sued in California even though, as stated, the load originated in Washington, the truck was in Washington when the accident occurred, and the destination was Arizona.

Kam-Way moved for summary judgment on the ground that, as a broker, it was not liable for the alleged negligent driving of Singh because he was an independent contractor. (Exh. 1 p. 24) The trial court found that Kam-Way did not own the truck, so plaintiffs could not prove that Kam-Way negligently entrusted the truck to Singh; and that Kam-Way did not employ Singh, so plaintiffs could not prove that it negligently hired Singh. (Exh. 2 pp. 396-97)

The court nevertheless denied summary judgment, relying on a line of cases holding that if a person "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." (Exh. 2 p. 399 [quoting *Taylor v. Oakland*

Scavenger Co. (1941) 17 Cal.2d 694, 604] [emphasis added]) The trial court quoted *Serna v. Pettey Leach Trucking, Inc.* (2003) 110 Cal.App.4th 1475 as holding that a carrier who undertakes an activity that can lawfully be carried on only under a "public franchise or authority," which involves possible danger to the public, the carrier is liable to a third person for harm caused by the independent contractor's negligence. (Exh. 2 pp. 399-400) The court held that Kam-Way was not entitled to summary judgment because it "undertook the activity of contracting for the carriage of goods," which assertedly "cannot be carried on without a public franchise or authority" because it is "regulated and requires a license under both federal law and state law" and "involves a danger to the public." (Exh. 2 p. 400) Consequently, the court held, Kam-Way "had a non-delegable duty to verify Singh was a safe driver, and carried the proper insurance." (Exh. 2 p. 401)

The Court of Appeal summarily denied Kam-Way's writ petition challenging denial of summary judgment. Kam-Way petitioned this Court for review, requesting the Court to grant review and either decide the issue on the merits or transfer the cause to the Court of Appeal for decision on the merits.

The Trial Court's Decision Is Incorrect. The trial court's decision is incorrect. We agree with the points raised in Kam-Way's petition for review, and do not repeat them. We add the following.

First, the duties imposed on Kam-Way by the trial court have no basis in the federal or California licensing laws. Those laws do not require transportation brokers like Kam-Way to verify that the truck driver is a safe driver or carries the proper insurance, nor do they make brokers liable for the driver's negligence. The statutes and regulations impose these duties solely on the motor carrier and the driver's employer.

Specifically, federal law requires both motor carriers and brokers to register with the Secretary of Transportation. 49 U.S.C. §§ 13901, 13902, 13904. However, the requirements governing brokers differ from those governing carriers. The licensing statutes and regulations impose safety- and insurance-related duties on the motor carriers, drivers' employers, and drivers themselves, not brokers. Thus, the commercial-driver's license requirements apply to persons who "operate" commercial motor vehicles

and their "employers." 49 C.F.R. § 383.3; *see* 49 C.F.R. §§ 383.1-383.155 (commercial driver's license standards). No "employer" may knowingly allow a driver without a license or whose license has been suspended to drive a commercial motor vehicle. 49 C.F.R. § 383.37. A driver must notify his or her "employer" of any convictions for driving violations and any suspension or revocation of his or her license. 49 C.F.R. § 383.31(b), 383.33.

A motor carrier is an employer for this purpose, but a broker is not. An employer is a person who "owns or leases a commercial motor vehicle or assigns employees to operate such a vehicle," and an "employee" is an operator of a commercial motor vehicle who is "either directly employed by or under lease to an employer." 49 C.F.R. § 383.5. A motor carrier is typically an "employer" under this definition because it owns the vehicle, directly employs a driver, or leases a vehicle and driver. A broker, like Kam-Way, is not an employer because it does not own or lease the vehicle and the driver is neither directly employed by the broker nor under lease to the broker. The regulations governing *brokers* do not impose any duty to verify the truck driver's driving record or license. *See* 49 C.F.R. §§ 371.1-371.121 (regulations governing brokers).

The situation is similar for insurance. The licensing statute requires *motor carriers* to carry liability insurance for injuries or deaths caused by negligent driving, such as Chavez alleges Singh committed. 49 U.S.C. § 13906(a)(1) (requiring carriers to carry liability insurance for "bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles"); 49 C.F.R. § 387.301(a)(1). In contrast, brokers are not required to carry or provide insurance against negligent driving. Instead, the statute and regulations require brokers to post financial security to ensure the *transportation contract* is carried out and the *carriers and shippers* are not left with a loss. 49 U.S.C. § 13906(b) (Secretary must require broker to post bond, insurance or other security "to ensure that the transportation for which a broker arranges is provided"); 49 U.S.C. § 13904(e) (regulations "applicable to brokers registered under this section shall provide for the protection of motor carriers and shippers by motor vehicle"); 49 C.F.R. § 387.307 (broker's security must "provid[e] for payments to shippers or motor carriers if the broker fails to carry out its contracts … for the supplying of transportation by authorized motor carriers"); *see* 49 C.F.R. §§ 371.1-371.121 (regulations governing brokers).

More broadly, the registration statute requires the *motor carrie*r to "comply with … any safety regulations imposed by the Secretary" and "safety fitness requirements established by the Secretary." 49 U.S.C. § 13902(a)(1)(A)(ii), (iv). The safety standards apply to persons and vehicles that "transport property or passengers." 49 C.F.R. §§ 390.3; *see* 49 C.F.R. §§ 390.1-390.39 (safety regulations); 49 C.F.R. §§ 385.1-385.717 (safety fitness procedures). Brokers do not fall within these safety regulations, precisely because they do not themselves transport the property. The registration statute does not require *brokers* to comply with safety regulations, or make safety regulations applicable to brokers. *See* 49 U.S.C. § 13904.

Moreover, Congress could not have intended to hold brokers responsible for carriers' driving records, insurance, or safety. A *former* version of the federal broker-licensing statute required brokers to use only motor carriers with federal licenses. Former 49 U.S.C. § 10924(c)(1) (requiring brokers to use only carriers "holding a certificate or permit issued under this subchapter"). Congress removed this requirement when it overhauled the interstate-commerce statutes and abolished the Interstate Commerce Commission. The current broker-registration statute, section 13904, resembles the old statute but does not require brokers to contract only with federally-licensed carriers. *See* Pub. L. 104-88 § 102(a) (abolishing I.C.C. and revising related provisions of Title 49, U.S. Code); 49 U.S.C. § 13904. Having eliminated the requirement that brokers even verify that a carrier is licensed, Congress could not have intended to require brokers to undertake the far more onerous and intrusive duties of verifying driving records of the carrier's drivers or confirming that the carrier has adequate insurance, let alone supervising the carrier's safety generally.

In sum: Nothing in the federal statutes and regulations governing brokers' licenses imposes the duties the trial court imposed here.

California statutes and regulations also impose driver-safety and liability-insurance requirements on the motor carrier and employer of the driver, not the broker. California law requires *motor carriers* to obtain a license and comply with extensive safety regulations. Vehicle Code § 34620(a); 13 C.C.R. 1200 *et seq.* (Motor Carrier Safety regulations); *see* 13 C.C.R. § 1200(a) (safety regulations apply to commercial trucks "and their operation"). *Employers* of big-rig drivers must check their drivers' driving records. Vehicle Code § 1808.1(b), (f) (employers must use a statutorily-

prescribed system to learn and monitor their drivers' DMV records; it is a crime for an employer to continue allowing a driver to drive after receiving notice of a disqualifying action). In the case of an owner-operator like Singh, if the owner's driver's license is suspended, ordinarily the motor carrier's permit is automatically suspended. Vehicle Code § 34624(d). *Motor carriers* must carry liability insurance covering "bodily injuries to, or death of, one or more persons" or damage to property other than property being transported. Vehicle Code §§ 34630, 34631.5.

As with federal law, California's licensing scheme does not impose these driver-safety and insurance duties on brokers. Indeed, California law does not require a transportation broker to obtain a license, as the trial court appeared to acknowledge. Exh. 2 p. 398 ("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."). Rather, California law bars anyone -- including brokers -- from contracting with a motor carrier unless the *motor carrier* has a valid permit. Vehicle Code § 34620(b).

Thus, like the federal licensing laws, California licensing laws do not impose on brokers a duty to monitor the safety or insurance of motor carriers they hire. Rather, California law imposes detailed duties on the motor carrier/employer -- either directly or as a condition of obtaining a permit -- and bars anyone else from contracting with a motor carrier who does not have a valid permit.

In sum, the licensing scheme relied on by the trial court does *not* impose on Kam-Way the duties that the trial court identified. Under both federal and California law, duties regarding the driver's driving record, insurance against liability for negligent driving, and safe driving are imposed only on the motor carrier, employer, and in some instances the driver. The broker's duties under the licensing statutes and regulations relate to ensuring that the transportation contract is carried out and providing financial security to ensure that the shipper and carrier will be made whole if the contract is not carried out. Further, the trial court identified no source *other than* the licensing scheme for the duties it imposed.

Because Kam-Way did not otherwise owe *any* duty to check the driver's driving record or insurance, the non-delegable duty doctrine did not *create*

any duty to do so. *Seabright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 601 (non-delegable duty doctrine "applies when the duty preexists and does not arise from the contract with the independent contractor"); *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1375.

Second, a transportation broker's license does not trigger the non-delegable duty doctrine for another, separate reason. The non-delegable duty doctrine applies when the defendant operates under a franchise or authority granted by the public agency. *Eli v. Murphy* (1952) 39 Cal.2d 598, 600. It does not apply when the defendant has a permit granted as a matter of right upon compliance with the statute. This Court in *Eli* held that a common carrier regulated by the Public Utilities Commission was subject to the non-delegable duty doctrine. *Id.* at 599-600. The Court expressly distinguished carriers that "are not required to secure certificates of public convenience and necessity," "are not subject to the safety regulations the commission may establish for highway common carriers," and are "entitled to permits as a matter of right on complying with the statutory provisions," stating that such carriers are engaged in "business open to all" and the non-delegable duty doctrine, Restatement of Torts section 428, is "inapplicable" to such carriers. *Ibid.* (distinguishing *Gaskill v. Calaveras Cement Co.* (1951) 102 Cal.App.2d 120).

Court of Appeal decisions are split as to whether the non-delegable duty doctrine applies to carriers that have permits granted as a matter of right rather than discretionary franchises granted to carriers as public utilities. *Compare Klein v. Leatherman* (1969) 270 Cal.App.2d 792, 795-96 (criticizing distinction between franchised and permitted carriers and applying non-delegable duty doctrine to non-franchised carrier), *and Serna v. Pettey Leach Trucking, Inc.* (2003) 110 Cal.App.4th 1475, 1480-86 (interpreting cases as expanding non-delegable duty doctrine to non-franchised defendants), *with Gilbert v. Rogers* (1953) 117 Cal.App.2d 712, 716-17 (holding that *Eli* dictates that non-delegable duty doctrine does not apply to carriers who operate pursuant to permits rather than franchises), *and Hill Brothers Chemical Co. v. Super. Ct.* (2004) 123 Cal.App.4th 1001, 1008-10 (holding that non-delegable duty doctrine did not apply to private carrier, mainly because it operated under permit rather than franchise) (citing *Eli, Gilbert*, and additional cases). *Klein* and *Serna* interpret *Snyder v. Southern California Edison Co.* (1955) 44 Cal.2d 793 as expanding the nondelegable duty doctrine. But *Snyder* did not do away with *Eli's*

distinction between franchised and permitted carriers. To the contrary, the defendant in *Snyder* was an electrical utility, a "public utility" regulated by the Public Utilities Commission. 44 Cal.2d at 795-96.

The broker's license held by Kam-Way is the kind of permit that, under *Eli,* does not trigger the non-delegable duty doctrine. A broker is "not required to secure [a] certificate[] of public convenience and necessity," is "not subject to the safety regulations the commission may establish for highway common carriers," and is "entitled to [a] permit[] as a matter of right on complying with the statutory provisions." *Eli, supra*, 39 Cal.2d at 600. As mentioned above, only federal law, not California law, requires brokers to obtain a license. The federal statute provides that the Secretary of Transportation "shall register" a broker -- *i.e.* shall issue the license -- if the Secretary determines that the person has sufficient experience and is "fit, willing, and able to be a broker for transportation and to comply" with the governing statutes and rules. 49 U.S.C. § 13904(a). Further, the experience requirements are defined by statute. 49 U.S.C. § 13904(c). The regulations confirm that the Secretary must issue the license if the statutory requirements are satisfied; fitness applications for brokers (and most motor carriers) "require *only* the finding that the applicant is fit, willing and able to perform the involved operations and to comply with all applicable statutory and regulatory provisions. These applications can be opposed only on the grounds that the applicant is not fit (*e.g.*, is not in compliance with applicable financial responsibility and safety fitness requirements)." 49 C.F.R. § 365.107(a) (emphasis added).

Third, the fact that Kam-Way also had a motor carrier's license is beside the point. Application of the non-delegable duty rule depends on the function the defendant actually played in the particular transaction; having a motor carrier's license does not trigger the non-delegable duty doctrine unless the defendant's activities in the transaction required that license. *Castro v. Budget Rent-A-Car System, Inc.* (2007) 154 Cal.App.4th 1162, 1176 (even though defendant held a motor carrier's license, it was not a motor carrier for purposes of non-delegable duty doctrine because it was not transporting property in the particular transaction at issue). In the transaction at issue, Kam-Way merely arranged transportation by another carrier (HSD/Singh). Kam-Way did not itself undertake to transport any goods. Thus the fact that Kam-Way had a motor carrier's license does not trigger the non-delegable duty doctrine.

In short, the trial court erred in denying summary judgment to Kam-Way.

The Decision Warrants Immediate Appellate Review. The trial court's decision warrants appellate review, either by this Court or by a grant of review and transfer to the Court of Appeal. The IADC agrees with Kam-Way's argument that immediate review is needed given the decision's impact on a large, economically important industry.

In addition, the decision will have interstate impact. The trial court's decision imposes duties on Kam-Way under California law even though Kam-Way arranged transportation from Washington to Arizona (not California), and even though the accident happened in Washington. If California law holds a broker liable for arranging transportation *between other states* where the accident *did not even occur in California,* brokers and their insurers must factor the potential liability into their rates for any trip that *might* go through California regardless of its starting and ending points, and must assume that an accident anywhere along that route might trigger liability in California. The assertion of liability under California law will have broad impact on brokers throughout the West.

Additionally, the legal landscape governing trucking licensing has changed dramatically since this Court last examined the non-delegable duty doctrine with regard to trucking in *Eli,* in 1952. In 1980, Congress deregulated trucking, and in 1994 it broadly pre-empted state trucking regulation. *See Rowe v. N.H. Motor Transport Assn.* (2008) 552 U.S. 364, 367 (discussing deregulation); 49 U.S.C. § 14501(c)(1) (with specified exceptions, "a State ... may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property"). California overhauled its trucking regulation with the Motor Carriers of Property Permit Act in 1996. *See* Vehicle Code §§ 34600 *et seq.* As a result, California law no longer requires certificates of public convenience and necessity -- one of the foundations of *Eli* -- for interstate trucking like that at issue in this case. *See* Stats.1996, c. 1042 (A.B.1683) (repealing Public Utility Code § 1063, which previously required highway common carriers to obtain certificates of public convenience and necessity from the Public Utilities Commission; enacting the Motor Carriers of Property Permit Act). The Court should use this opportunity to define whether or in what circumstances the non-delegable duty doctrine applies to an entity that

operates under a permit that is issued as a matter of right -- and does not impose any duty relevant to plaintiffs' claim.

Sincerely yours,

Robert A. Brundage

Robert A. Brundage

PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in the County of San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence is deposited with the United States Postal Service that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on August 19, 2014.

Jennifer Gray

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