No. 126666

IN THE SUPREME COURT OF ILLINOIS

FLETCHER MCQUEEN,

Plaintiff-Petitioner,

v.

PAN-OCEANIC ENGINEERING CO., INC, a corporation,

Defendant-Respondent.

On Appeal from the Appellate Court of Illinois,
First District, No. 1-19-0202.
There Heard on Appeal from the Circuit Court of Cook County,
County Department, Law Division, No. 2014 L 001050,
The Honorable Bridget A. Mitchell, Judge Presiding.

AMICUS CURIAE BRIEF BY ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT

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INTRODUCTION

The Illinois Trial Lawyer's Association (hereinafter "ITLA") is a not-for-profit association whose members specialize in representing injured victims of torts and their families. ITLA has a longstanding tradition of promoting access to the courts and protecting the rights of persons who have been injured. ITLA members prepare *pro bono* briefs *amicus curiae* on issues that are of significant interest to its members' clients. ITLA believes the opinion of this Honorable Court on the issues presented in this case will have a substantial effect upon those persons represented by the ITLA's members, as well as having a substantial effect upon public safety on the roadways. ITLA tenders this brief as Amicus Curiae to provide the court with its views in resolving the questions raised by this case. This brief is submitted in support of the position of Plaintiff-Petitioner.

Mindful that it is a privilege and not a right to appear as an *amicus curiae* before the court, ITLA is grateful to do so in this case. Based on the experience of its members, ITLA respectfully submits that its views may be of some assistance in the further development of the law on the important issues before the Court.

ARGUMENT

This case involves a negligent employer, Pan Oceanic Engineering Co., Inc. ("Pan Oceanic"), which a jury found guilty at trial for failing to train its employee, Davonta Green ("Green"), which proximately caused Fletcher

McQueen's injuries. Jurors found that Pan Oceanic disregarded its duty to train Green on how to ensure that a load is properly attached to a truck, and how to respond when the load becomes unstable when driving on the roadway. After trial, the jury found Pan Oceanic guilty for its negligent training of Green and that its negligence proximately caused Fletcher McQueen's injuries. Trial Court Judge Bridget Mitchell denied Pan Oceanic's post-trial motions and upheld the sanctity of the jury verdict. However, the First District Appellate Court rejected the jury and trial court rulings, stating that failure to train is not a viable cause of action where a defendant admits *respondeat superior*. The First District also ruled that the court should have issued two jury instructions *sua sponte,* in direct contradiction to *Mikolajczyk,* which holds that "a party forfeits the right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court." *See Mikolajczyk v. Ford*, 231 Ill. 2d 516, 557 (2008). With regards to the former, the First District's finding is inconsistent with established Illinois case law in *Longnecker, Neuhengen,* and *Gant.* Moreover, it is clear that Illinois jurisprudence has envisioned that a corporate defendant should be held accountable where it fails to train its employee.

To avoid being duplicative of the arguments raised by Plaintiff-Appellant, this brief will focus on the jurisprudence and policies behind claims regarding failure to train. Specifically, allowing a tort claim independent of

respondeat superior is not just consistent with Illinois law, but enhances major policy goals of tort law and incentivizes responsible corporate behavior, ensuring that unscrupulous employers are accountable when they neglect to train employees, putting the general public at risk of harm. *Fletcher McQueen v. Pan-Oceanic Engineering Co., Inc.,* should be overturned and the jury verdict should be reinstated.

I. Liability Can Arise from Negligence in Training Under a Direct Negligence Theory.

Liability can arise from negligence in training or supervising under both an agency and direct negligence theory. See *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 27, (citing Restatement (Second) of Agency § 213(a) (1958); Restatement (Third) of Agency § 7.05(1) (2006)). Here, the jury and lower court found Pan Oceanic directly liable for negligent training, but the First District reversed and remanded for a new trial.

The Restatement (Third) of Agency section 7.05(1) states that "[a] principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent." Restatement (Third) of Agency § 7.05(1) (2006). Comment b of the same section states, "[t]he rules stated in this section stem from general doctrines of tort law not limited in their applicability to relationships of agency as defined in § 1.01." Restatement (Third) of Agency §

7.05 cmt. b (2006). Also, comment b further provides, "It is not a defense to liability under this rule that the actor whose conduct harms a third party does not have a relationship of agency as defined in § 1.01 with the person who conducted an activity through the actor." Restatement (Third) of Agency § 7.05 cmt. b (2006). The reporter's notes state that this section is the counterpart to Restatement (Second) of Agency section 213. "The formulation in this section, as in § 213, is not limited to situations in which an actor is characterized as the agent or employee of the person who conducts an activity through the actor." Restatement (Third) of Agency § 7.05, Reporter's Notes (2006).

Other States have followed the same line of reasoning and support the proposition that a direct action for failure to train may be alleged regardless of respondeat superior. In *James v. Kelly Trucking Co.*, 661 S.E.2d 329 (S.C. 2008), the South Carolina Supreme Court rejected the proposition set forth by Pan Oceanic. The *James* court ruled:

> In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public. *See* RESTATEMENT (SECOND) OF TORTS § 317 (1965) *(Cited with approval in Degenhart v. Knights of Columbus,* 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992)). As this recitation suggests, the employer's liability under such a theory does not rest on the negligence of another, but on the employer's own negligence. Stated differently, the employer's liability under this theory is not derivative, it is direct.
> ...

> In our view, the argument that the court must entirely preclude a cause of action to protect the jury from considering prejudicial evidence gives impermissibly short-shrift to the trial court's ability to judge the admission of evidence and to protect the integrity of trial...."

We ask that the Illinois Supreme Court find the same here and hold that an employer be held directly liable when it fails to train its employees. Doing so promotes public safety and incentivizes employers to train their employees appropriately. Without the possibility of direct liability, a corporate defendant could simply bury their head in the sand and avoid responsibility, which is precisely what Pan Oceanic did here, as noted below.

II. Allowing an Employer to Evade Liability For Failing to Train Its Employee Weakens Public Safety Incentives That Our Legal System Was Designed to Protect.

According to many legal scholars, "there are two goals of modern tort law...[1] to reduce the accident rate as much as is practicable, and [2] to provide a sensible and coherent system of compensation [ ] for those unfortunate individuals who suffer product or service-related accidents." *See* Priest, Modern Tort Law and Its Reform, 22 VAL. U.L. REV. 1 (1987). Allowing a tortious employer to escape liability where it fails to train its employee is contrary to those goals of tort reform – it would greatly enhance the accident rate and provides for an injudicious system of compensation where employers evade financial responsibility owed to injury victims. Pan Oceanic is directly responsible for the injuries sustained by Fletcher McQueen as it totally ignored

its responsibility to train Green. This directly attacks both of the general goals of tort law; it would greatly enhance the accident rate and provides for an injudicious system of compensation where the employer evades financial responsibility owed to injury victims.

An employer possesses industry and institutional knowledge about its customs, field of practice, and service industry. Employees work for the financial and pecuniary benefit of their employer. As such, employers have an obligation to ensure that their labor force is properly trained on the industry-specific institutional knowledge. Employees must be trained to ensure they can be properly entrusted with equipment, tools, materials, and in this case, a Ford F350 Class 3 truck, to ensure they do not harm the general public. Whereas an employer knows of certain risks of the profession, it must keep its employees apprised of the same to prevent injuries to third parties. Just as an employer possesses institutional knowledge about the custom, trade, and practice of its industry, it must onboard its employees and properly train them to ensure they know how to act under certain circumstances. This is especially true where an employee works for the financial and pecuniary benefit of its employer. Where an employee is not trained on a certain professional risk and a member of the general public is harmed by their lack of training and knowledge, the employer is responsible. If the employer is not held responsible, that negative externality is being offloaded onto the community and general public.

III. Pan Oceanic Should Not Be Permitted to Escape Liability Where Its Failure to Train Green Caused This Collision.

In applying these simple issues of corporate employment incentives to the case at hand, it becomes very clear that the Court should reinstate the verdict and allow an independent tort of failure to train. Pan Oceanic had specific knowledge about this type of incident and wholly failed to train its employee, Green, about how to respond. For example, Pan Oceanic's president, Gulzar Singh, knew the 6000 pound tractor sitting at a 30 degree angle would not be safe. R1572-73, R1586-87. Green did not. Gulzar knew a driver must know how to brake if a load feels unstable. Green never envisioned that would be an issue. Singh agrees that if the load gets loose, Pan Oceanic must teach the driver what to do; otherwise, it was unsafe. R1601. Green had no idea on what to do if a load got loose. Green had no idea on how to handle a stable load as he was never trained in handling a load in distress or if it's unstable. R1890-91.

At bottom, Pan Oceanic and its supervisor knew of and foresaw this specific occurrence and agreed it needed to train its employees on how to respond to prevent this precise situation from occurring. Pan Oceanic did not. Green, on the other hand, had no idea it was a possibility, let alone what could and what would happen. Pan Oceanic's failure to train was the proximate cause of this incident rather than Green, who never considered the magnitude and nature of the risks and dangers presented. Green was entirely unaware of the standard of care and could not have appreciated breaching the standard of care that he was never trained to fully understand and comprehend.

In comparison, the employer fully understood the risks and likelihood of serious injuries and risks on the roadway when a driver does not understand how to assess a properly affixed load, and how to respond in moments the load becomes unstable. The employer knew and had specific training courses on these issues but entirely failed to meet its obligation to ensure its employees complied the company policy to become adequately trained and aware of responding appropriately. Verdict Form B allowed the jury to find Green not guilty and Pan-Oceanic guilty, an outcome wholly disregarded by Pan Oceanic as Plaintiff addressed during rebuttal, specifically noting that Pan Oceanic did not even refute that it failed to train Green. R2396. Of course the jury did not find Green guilty – he had no clue what he was doing because he was never properly trained by Pan Oceanic; they strapped him into a heavy-duty truck with an extremely large load attached to the rear and told him everything was good and sent him on his way. Pan Oceanic's conduct is abhorrent under these circumstances and should be held accountable for the same, just as the jury and the trial court Judge Bridget Mitchell found.

Pan Oceanic made a conscious business decision to offload the risk of collision onto the general public. As noted in Plaintiff-Appellant's Brief, employer liability for failing to train is consistent with 1983 lawsuits where a police department of public entity is held liable for failing to train its officers. Moreover, as noted above, many other states have supported direct claims against the employer where it admits *respondeat superior.* As such, the history

of jurisprudence, goals of tort reform, established Illinois case law in *Longnecker and Neuhengen*, and the public policy incentives all support a ruling in favor of Plaintiff-Appellant, and a reinstatement of the jury's verdict.

CONCLUSION

For the reasons stated, *McQueen v. Pan-Oceanic Engineering, Co., Inc.* should be reversed and the verdict in Plaintiff's favor should be reinstated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The Length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 9 pages.

Date: April 2, 2021 /s/ Dominic C. LoVerde

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PLEASE TAKE NOTICE that on April 2, 2021, the undersigned electronically filed with the Clerk of the Supreme Court of Illinois, the attached Amicus Curiae Brief by Illinois Trial Lawyers Association in Support of Plaintiff-Appellant, a copy of which is hereby served upon you.

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STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned, a non-attorney, certifies that the statements set forth in this instrument are true and correct.

The undersigned, a non-attorney, hereby certifies that a copy of the foregoing Notice of Filing and attached Amicus Curiae Brief by Illinois Trial Lawyers Association in Support of Plaintiff-Appellant were served electronically on April 2, 2021, upon the following:

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