IN THE SUPREME COURT OF MISSISSIPPI

2009-CA-02009

APAC-TENNESSEE, INC. — **DEFENDANT-APPELLANT**

v.

ETHAN BRYANT, ET AL. — **PLAINTIFFS-APPELLEES**

Appeal from Circuit Court of DeSoto County

BRIEF OF APPELLANT APAC-TENNESSEE, INC.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Ethan Bryant, a minor, by his natural father, natural guardian and next friend, Carey Bryant, and Carey and Kateri Bryant, plaintiffs;

2. Robert R. Morris, Paul R. Scott, Smith, Phillips, Mitchell, Scott & Nowak counsel for plaintiffs;

3. Chad McCarty, defendant;

4. Everything Wholesale, LLC, defendant;

5. APAC-Tennessee, Inc., defendant;

6. H. Richmond Culp, III, counsel for Chad McCarty and Everything Wholesale, LLC;

7. Watkins & Eager PLLC, Jackson, MS, counsel for APAC-Tennessee, Inc.;

8. William O. Luckett, Jr., counsel for APAC-Tennessee, Inc.; and

9. Brian L. Yoakum, The Biller Law Firm, counsel for APAC-Tennessee, Inc.

10. National Union Fire Insurance Company of Pittsburgh, PA, insurer for APAC-Tennessee, Inc.

11. United Financial Casualty Company, insurer for Everything Wholesale LLC d/b/a Diesel Construction.

Respectfully submitted,

J. Collins Wohner Jr. (MSB #[redacted])
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A. ISSUES REQUIRING JUDGMENT TO BE REVERSED AND RENDERED.

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2. Whether the judgment against APAC can be affirmed without upending settled law and adopting a seriously erroneous view already specifically rejected by two landmark *en banc* opinions.

3. Whether plaintiffs' alternative "direct" negligence theory, which is based on remote speculative causes, can sustain the judgment, where the only proximate and only legal cause of the crash was the negligence of an independent contractor's driver in running a red light.

B. IN THE ALTERNATIVE, ISSUES REQUIRING A NEW TRIAL.

1. Whether APAC was prejudiced by the refusal to instruct the jury that the scheduling of delivery of freight cannot convert an independent hauler into a respondeat superior servant.

2. Whether APAC was prejudiced by the refusal to instruct the jury that an independent contract is evidence of independent contractor status.

3. Whether the allocation of only 10% fault for the crash to the independent contractor's driver who ran the red light (and who pled guilty to aggravated assault and manslaughter for causing the crash) and a corresponding increase in damages awarded

demonstrate juror confusion, disregard for the instructions, passion and prejudice and are against the overwhelming weight of the evidence, all mandating a new trial.

4. Whether APAC was wrongly prohibited from proving that its independent haulers were required to be insured and that this independent hauler was insured.

5. Whether APAC was prejudiced by improper expert testimony regarding irrelevant purported regulatory violations and a misleading and unfounded conclusion of "control."

STATEMENT REGARDING ORAL ARGUMENT

APAC requests oral argument to explain the injustice of the verdict against it and the violation of the independent contractor rule that the judgment represents.

STATEMENT OF THE CASE

This case arises from a motor vehicle crash at an intersection in DeSoto County. Chad McCarty was driving a dump truck loaded with sand when he failed to heed a traffic signal, entered the intersection against a red light, and struck plaintiff. Plaintiff Ethan Bryant was seriously injured and is now disabled. His passenger was killed.[1] McCarty was indicted for causing the crash and pled guilty to aggravated assault and manslaughter.

APAC is a civil contractor engaged primarily in concrete and asphalt paving. APAC's connection to this crash is through an independent hauling agreement with McCarty's family business Everything Wholesale LLC, of which McCarty was both an

[1] Bryant's passenger was Patrick Taylor. Claims arising from Taylor's death are the subject of a separate action and are not further addressed here.

owner and an employee. McCarty was hauling pursuant to that independent hauling agreement at the time of the crash.

The judgment against APAC must be reversed and rendered. As a matter of law, McCarty's negligent driving cannot be imputed to APAC, and APAC itself was not negligent. Under settled precedent, independent haulers like McCarty are independent contractors. Shippers using independent haulers have no duty to supervise acts as remote and independent as a hauler's driver's control of his vehicle on public roads. The judgment against APAC violates the independent contractor rule and must be reversed.

In the alternative, APAC is entitled to a new trial on multiple grounds. Among other things, the jury's allocation of only 10% fault to McCarty, and corresponding increase in the amount of damages awarded in excess of what plaintiffs asked for, demonstrate passion, prejudice and confusion mandating a new trial.

I. Course of Proceedings and Disposition Below.

APAC moved for summary judgment after discovery, pointing out the lack of legal grounds for a claim against it, including McCarty's status as an independent contractor. CP 354. Summary judgment was denied. CP 1156 (RE tab 5).

APAC reasserted its motion for judgment at every appropriate juncture, seeking both directed verdict and JNOV.[2] Relief was repeatedly denied.[3] Plaintiffs' case against

[2] Motions for directed verdict (T 657 & 907) and JNOV (CP 1688).

[3] T 705-716 (RE tab 8) (denying directed verdict), T 908-909 (RE tab 9) (denying directed verdict on renewed motion), CP 1717 (RE tab 7) (order denying JNOV or New trial).

APAC was presented to the jury together with plaintiffs' case against McCarty and Everything Wholesale.

At trial, plaintiffs argued that McCarty was an "employee" (i.e., a *respondeat superior* servant) of APAC, for whose negligence APAC was liable by operation of law. Plaintiffs also argued that APAC was negligent in allegedly failing to monitor McCarty's hauls in Mississippi for compliance with Mississippi roadway weight limitations for a truck of his truck's size.

Appearing at trial as an individual defendant and as a representative of defendant Everything Wholesale, McCarty admitted his criminal guilty pleas and purported to admit negligence and to take responsibility for his negligence, but he nevertheless joined with plaintiffs in blaming APAC for allegedly causing the crash by failing to monitor his Mississippi loads. T 191-93.

Displaying their confusion and the effects of improper sympathy, the jury returned a verdict assessing McCarty as only 10% at fault for the crash. CP 1577 (RE tab 14). The verdict allocated 70% fault to APAC. *Id.* The remaining 20% fault was allocated to former defendant Memphis Stone & Gravel Company – the company that loaded McCarty's truck on its premises immediately before the crash. *Id.* Memphis Stone & Gravel was named as a defendant but settled before trial and was dismissed. CP 1167.

APAC's post-trial motions (CP 1688) were denied. CP 1717 (RE tab 7).

II. Statement of Facts.

A. APAC Uses Independent Haulers to Meet Seasonal Demands.

APAC is a civil contractor engaged primarily in concrete and asphalt paving of highways and airports. T 843-44. APAC owns trucks and has employee-drivers who haul materials using APAC's own trucks. T 728. APAC's paving work is seasonal due to weather and the bidding process. T 846. To meet seasonal demands, APAC relies on independent contract haulers. *Id.*

As a commercial enterprise, APAC maintains a formal employment payroll. T 865. It is undisputed that, unlike APAC's employee-drivers, McCarty did not apply for formal employment with APAC and was not placed on APAC's employment payroll. T 368. McCarty's relationship with APAC was through a standard form "Renewable Trucking Agreement" between APAC and "Diesel Construction LLC," a business name (or d/b/a) used by McCarty's family business Everything Wholesale for its trucking and hauling business. Ex. 36 (RE tab 12).

B. Everything Wholesale, of which McCarty was Both Owner and Employee, Was a Family Business With Other Ventures.

Before going into business for himself with Everything Wholesale, Chad McCarty had worked as an employee for construction, landscaping and other businesses, where he gained experience operating heavy equipment. T 286-88, 333-36, 346. About a year before the crash, McCarty formed Everything Wholesale LLC with his wife, Brooke, and her father, Daniel Cummings. T 334. Each was a one-third owner. T 371. During its

first year of operation, Everything Wholesale focused on developing a salvage business, for which the owners used the doing-business name McCarty Surplus. T 371.

The Everything Wholesale owners decided to buy a truck and expand into construction work after Cummings identified independent hauling jobs with APAC as a revenue opportunity. T 290-91, 335. They decided to use the doing-business name "Diesel Construction LLC" for the construction venture, to distinguish it from their salvage business. T 294. They bought a truck, and McCarty began using it for landscaping jobs before hauling for APAC. T 291- 92. Everything Wholesale maintained the truck. T 367-68.

Julie Arick was the dispatch supervisor who handled independent contractor relationships for APAC.[4] Chad and Brooke McCarty met with Arick initially to find out what they needed to do to obtain independent hauling work with APAC and later to supply what was needed and sign paperwork, including an independent hauling agreement, entitled "Renewable Trucking Agreement."[5] Brooke McCarty signed the Renewable Trucking Agreement and other paperwork on behalf of Everything Wholesale doing business as Diesel Construction LLC. *Id.*

In accordance with the Renewable Trucking Agreement, Everything Wholesale obtained liability insurance and listed APAC as an insured. T 831-32 (proffer), Ex. 71 ID (RE tab 13).

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[4] T 815, 293, 726, 729-30. APAC's hiring of regular employees was handled by others. *Id.*

[5] T 294-95; Ex. 36 (RE tab 12). *See also* Ex. 37 (safety responsibility sheet), Ex. 66 (checklist). Ex. 67 (payment authorization), Ex. 68 (W-9).

C. McCarty Hauled for APAC for Three Weeks Under APAC's Hauling Agreement With Everything Wholesale.

McCarty hauled his first load for APAC a little more than two weeks before the crash and completed his last haul for APAC the day before the crash.[6] The crash occurred during what would have been his first haul on August 3, 2006, which was not completed. T 299, 326. McCarty made completed hauls for APAC on 14 different days. Ex. 51.

McCarty spent 12 of the 14 days he worked for APAC hauling loads within the state of Tennessee.[7] He spent the other two days on the Mississippi to Tennessee haul that he was on at the time of the crash. T 302. McCarty was beginning what would have been his third day on this haul when the crash occurred. This haul involved loading at former defendant Memphis Stone & Gravel's facility on Pleasant Hill Road in DeSoto County, Mississippi, and hauling to an unmanned drop on Tuggle Road in Tennessee. T 299-300.

As dispatch supervisor, Arick coordinated independent contractor hauling for APAC. Based on anticipated needs, Arick called independent haulers each afternoon and offered them hauls for the next day. T 777. If the haul was a new one, she would explain the rate of pay or "haul rate" offered. T 806. APAC did not specify a number of hauls or an amount of tonnage for the independent haulers to deliver, or designate or monitor routes of delivery. T 801, 805, 326. Haulers chose their own schedules and routes and

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[6] Ex. 51. McCarty's first hauls for APAC were on July 17, 2002, and his last complete haul was on August 2, 2006, the day before the crash.

[7] Ex. 51. McCarty's Tennessee hauls were from an APAC facility in Memphis to a site in midtown Memphis. T 300.

the number and size of their loads. Haulers were paid for completed hauls by the ton according to the haul rate. T 806. The contract required haulers to comply with all laws and regulations, including highway weight limitations. Ex. 36 ¶ 6 (RE tab 12); Ex. 37.

Independent haulers could decline any haul because of dissatisfaction with the haul rate or for any other reason. T 798. McCarty declined the haul he was originally offered for August 3. T 799. Arick wanted McCarty to return to the haul in Tennessee on August 3. *Id.* McCarty declined the offer and asked if he could continue to haul from Memphis Stone & Gravel to Tuggle Road, because he preferred that haul. *Id.* McCarty's counter-offer was accepted. *Id.*

D. McCarty Ran a Red Light.

At the Memphis Stone & Gravel facility, McCarty's truck was loaded by Memphis Stone & Gravel personnel. T 306. McCarty did not know it, but his truck was being loaded in excess of Mississippi highway weight limitations for a truck of his truck's size. T 327-28, 363. McCarty did not know that the Mississippi weight limitation for his truck was lower than the limit in Tennessee. *Id.* McCarty was taking on loads at Memphis Stone & Gravel that were the same size he was used to hauling in Tennessee and that would be legal once he crossed the border into Tennessee.

McCarty departed Memphis Stone & Gravel and headed for Tuggle Road, about 15 miles away in Tennessee. McCarty followed a route over secondary roads that he had selected by following other independent contractor drivers on previous hauls. T 314.

When the crash occurred, McCarty was traveling west on Goodman Road in Southaven, a four-lane road. Ex. 34 (RE tab 10). Plaintiff was traveling north on Malone Road, also four-lane. *Id.* The large intersection formed by these two four-lane roads is controlled by traffic signals. *Id.* Plaintiff entered the intersection on a green light with the intention of continuing north on Malone Road. *Id.* McCarty ran the red light and crashed into plaintiff, pushing plaintiffs' truck across the westbound lanes of Goodman Road, off the north side of the roadway, and into a utility pole. *Id.*

McCarty was indicted and pled guilty to aggravated assault and manslaughter. T 316. He was also fined for his truck being overweight for a truck of its size in Mississippi. Ex. 46. At trial, McCarty joined with plaintiffs in blaming the crash on this excess load. T 192, 1016-17.

Plaintiffs relied upon an accident reconstruction expert at trial to support their (and McCarty's) contention that the excess load, and not McCarty, was to blame for causing the crash. To support this contention, plaintiffs' expert calculated that the excess loading increased the time McCarty needed to bring the truck to a complete stop that morning from about 7 to about 10 seconds.[8] Plaintiffs' expert admitted that the crash would have happened anyway. T 424 ("The wreck still would have occurred"). He speculated that the area of impact would might have been different. *Id.* ("It could have been... a little bit

[8] T 419 (estimating that the extra load increased total stopping time from 6.88 seconds to 9.71 seconds, a difference of 2.83 seconds). The impact occurred before McCarty brought the truck to a complete stop. Ex. 34 (RE tab 10).

more to the front ... and it's possible even that it could have been to the rear" of plaintiff's vehicle).

SUMMARY ARGUMENT

Judgment For APAC. The judgment against APAC violates the independent contractor rule and must be reversed and rendered. Any person who does work for another, but who is not a "servant" for purposes of the *respondeat superior* doctrine, is by definition an independent contractor. The independent contractor "rule" recognizes that vicarious liability is not imputed to a principal where *respondeat superior* servant status cannot be shown. Under settled law, independent haulers like Everything Wholesale and its driver McCarty lack *respondeat superior* servant status as a matter of law and are therefore independent contractors, for whose torts a principal like APAC is not liable.

So far as we can determine, no court in the country has examined the *respondeat-superior*-servant / independent-contractor status of independent haulers like Everything Wholesale and McCarty as intensely as has this Court. The resulting landmark *en banc* decisions, which ought to be considered the leading authority in the country on this subject, preclude the liability imposed on APAC by this judgment.[9]

These decisions establish that "the scheduling of delivery . . . cannot be found to confer sufficient control to convert [an independent hauler] and his employees into employees of the owner of the freight."[10] The decisions also confirm that the right to

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[9] *Richardson v. APAC-Mississippi, Inc.*, 631 So. 2d 143 (Miss. 1994) (Hawkins, C.J., *en banc*); *Webster v. Mississippi Publishers Corp.*, 571 So. 2d 946 (Miss. 1990) (Blass, J., *en banc*).

[10] *Webster*, 571 So. 2d at 951.

form an independent contractor relationship must be respected unless the agreement is no more than a legal fiction or sham to conceal a servant with no real economic or other independence from the master.[11]

Here, there is a total absence of evidence indicative of a legal fiction or sham. To the contrary, for purposes of imposing liability on APAC, this case is indistinguishable from cases denying *respondeat superior* liability as a matter of law. Plaintiffs' assertions to the contrary rest on theories definitively rejected 20 years ago. The judgment cannot be affirmed without upsetting those precedents and the long list of prior precedents on which they were based.

Plaintiffs' alternative negligence theory also cannot sustain the judgment. APAC was not negligent in any way causally, much less proximately, related to the crash. McCarty ran a red light. His grossly negligent driving, for which he pled guilty to a crime, was the only legal cause of the crash. Plaintiffs' purported weight expert admitted that the crash would have occurred regardless of any excess loading. There is no evidence from which a reasonable jury could conclude that the three-second difference in stopping time that plaintiffs' expert speculated about would have made any difference in the crash or in plaintiffs' losses. Furthermore, APAC did not load McCarty's truck; a third-party seller loaded McCarty at its own facility, without any participation by APAC. Even if the loading created a relevant legally cognizable risk (which is denied), APAC was under no duty to supervise such remote independent acts.

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[11] *Richardson*, 631 So. 2d at 150.

Plaintiffs cannot use Tennessee law to sustain the judgment. Tennessee and Mississippi apply the same common-law principles on all material points. Mississippi's case law is more developed, and the resulting definitive interpretations, on indistinguishable facts, of these mutually held common-law principles cannot be avoided here.

New Trial. In the alternative, APAC is entitled to a new trial on multiple grounds. APAC was wrongly refused jury instructions that would have correctly instructed the jury (a) that the scheduling of delivery cannot convert an independent hauler into a *respondeat superior* servant, and (b) that an independent contract is evidence of independent contractor status. The law and evidence unequivocally support both points. The instructions as given did not inform the jury accordingly and in fact implied that the law is exactly the opposite of what the law actually is on both points. Plaintiffs argued accordingly in closing, compounding the error. The prejudice to APAC was substantial.

The jury's allocation of 70% fault to APAC and only 10% fault to McCarty and Everything Wholesale demonstrates juror confusion and passion and prejudice and is against the overwhelming weight of the evidence. The jury's corresponding decision to award 130% of the damages plaintiffs asked for disregards the law and evidence and confirms passion and prejudice. It is apparent that the jury deliberated inflated the damages award and structured the allocation of fault percentages so as to make APAC liable for all the damages plaintiffs had asked for – in defiance of the law, the evidence and their instructions.

APAC was wrongly prohibited from proving that its independent haulers were required to be insured and that Everything Wholesale and McCarty were insured. This evidence was not offered for the improper purpose of showing that McCarty acted negligently – that was not in dispute at trial (McCarty admitted it). To the contrary, the evidence was offered, and was material and probative, to show that Everything Wholesale and McCarty were operationally and financially independent of APAC. Since plaintiffs placed precisely that issue sharply in dispute, APAC had a right to introduce controverting evidence.

Finally, APAC was further prejudiced by improper expert testimony regarding irrelevant purported regulatory violations and a misleading and unfounded conclusion of "control." The purported opinion flatly contradicted this Court's express teachings and gave a specious expert "stamp of approval" to plaintiffs' erroneous contentions regarding on the principal issue in the case.

ARGUMENT

I. APAC Is Entitled to Judgment as a Matter of Law Because McCarty's Negligent Driving Cannot be Imputed to It.

The judgment against APAC must be reversed and rendered because McCarty was an independent contractor and APAC was not negligent.

A. Haulers Like Everything Wholesale and McCarty Are Independent Contractors as a Matter of Settled Law.

The legal status of independent haulers is not an open question. Settled precedent makes clear that independent haulers like Everything Wholesale and its owner/employee Chad McCarty are not *respondeat superior* "servants," but rather "independent contractors" as a matter of law – precluding liability for APAC for McCarty's negligence. The question should never have survived summary judgment or been submitted to a jury, and the jury's adverse determination cannot be permitted to stand.

1. An Independent Contractor Is One Working for Another under Conditions Not Sufficient to Make Him a *Respondeat Superior* Servant.

Independent contractor law recognizes that liability for physical torts initially attaches to the individual or individuals whose wrongful acts or omissions proximately cause injury, and to no others. Imputation of liability to others not at fault is the exception, not the rule.[12] As with all liability issues, the plaintiff bears the burden of proving the legal requisites for imputing liability.[13] It is a fundamental mistake – one that

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[12] *See, e.g., Chisolm v. Miss. Dep't of Transp.*, 942 So. 2d 136, 141 (Miss. 2006) (as a general rule, an independent contractor's principal is not vicariously liable for torts committed by the independent contractor). Even where torts are committed by payroll employees, who are now generally presumed to be "servants" for purposes of the *respondeat superior* doctrine, this Court has not hesitated to render a defense judgment as a matter of law where plaintiff's burden of proof on other requisite elements of the doctrine could not be met. *See, e.g., Commercial Bank v. Hearn*, 923 So. 2d 202, 208 (Miss. 2006) (as a matter of law, bank not vicariously liable for car crash caused by employee while making deliveries for the United Way during normal banking hours); *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 756 (Miss. 2004) (as a matter of law, church not vicariously liable for priest's surreptitious taping of counseling session with parishioner); *Gulledge v. Shaw*, 880 So. 2d 288, 296 (Miss. 2004) (as a matter of law, bank not vicariously liable for employee's knowing notarization of forged signature); *Adams v. Cinemark USA, Inc.*, 831 So. 2d 1156, 1159 (Miss. 2002) (as a matter of law, theater not vicariously liable for employee assault on movie patron).

[13] *Id.*

leads to confusion and irrational results – to assume that independent contractor status must be proved by the defense, or that it is an exception to otherwise presumed liability.[14]

The mere fact that a tortfeasor is doing work or service for another when the tort occurs has never been sufficient to impute liability to the other. This understanding is the essence of what is meant by the term "independent contractor." Thus an "independent contractor" has been most simply defined as "any person who does work for another under conditions which are *not* sufficient to make him a *servant*" for purposes of the *respondeat superior* doctrine. RESTATEMENT (SECOND) OF TORTS § 409 comment a (1979) (emphasis added).[15] *See, e.g., Crawford Logging, Inc. v. Estate of Irving*, 41 So. 3d 687, 691 (¶ 17) (Miss. 2010) (Waller, C.J., concurring) (contrasting "independent-contractor status" with "*respondeat superior* and vicarious liability"). In other words, in essence, an independent contractor is nothing more than one who does not qualify as a *respondeat superior* servant.

A plaintiff must show that a "master-servant" relationship existed in order for the mere fact that a tortfeasor was doing work or service for another when the tort occurs to become sufficient to impute liability to the other. *See id.* A "master-servant" relationship is a prerequisite for *respondeat superior* liability, and "master-servant" is the precise and

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[14] The rejected dissenting views in *Webster* and *Richardson* typify the error of assuming imputed liability is the rule, not the exception. *Richardson*, 631 So. 2d at 155 (McRae, J., dissenting) (defendant "must expressly present and conclusively prove all essential elements of [the independent contractor] defense"); *Webster*, 571 So. 2d at 952 (Robertson, J., dissenting) ("the *quid pro quo* for enjoyment of the independent contract's limitation of liability is respect for its *sine qua nons*") (underline added).

[15] *See also* RESTATEMENT (SECOND) OF AGENCY § 2 comment b ("The word 'servant' is used in contrast with 'independent contractor.' The latter term includes all persons who contract to do something for another but who are not servants in doing the work undertaken").

correct terminology. *See, e.g., Meeks v. Miller*, 956 So. 2d 864, 867-68 (¶ 9) (Miss. 2007) (using master-servant terminology); *Richardson v. APAC-Mississippi, Inc.*, 631 So. 2d 143, 149 n.4 (Miss. 1994) (Hawkins, C.J., *en banc*) (noting that "servant" is the correct term).

The traditional terminology is important because it is indicative of the degree of dependency and subserviency required to justify the imputation of liability to a principal who is not at fault. "The important distinction is between service in which the actor's *physical activities and his time are surrendered to the control of the master*, and service under an agreement to accomplish results or to use care and skill in accomplishing results." RESTATEMENT (SECOND) OF AGENCY § 220 comment e (emphasis added). "Those rendering service but retaining control over the manner of doing it are not servants." *Id.*

The Restatement uses a pair of contrasting definitions to elaborate on the distinction between "service in which the actor's physical activities and his time are surrendered to the control of the master" and other service. These definitions are sometimes referenced as stating a "control" test. But such shorthand references should not be misconstrued – there is much more to the contrasting definitions than just "control."

For one thing, the definitions do not speak of control in the abstract (which could be confused with control over the results or over contractual performance standards), but only of control of "physical conduct." And the definitions rely upon traditional master-

servant terminology, thereby incorporating by reference the traditional understanding of "servant" status. Thus a "servant" is defined as one "employed [1] *by a master* [2] *to perform service in his affairs* [3] whose *physical conduct in the performance of the service is controlled* or is subject to the right to control by the master."[16] An independent contractor, by contrast, is defined as a "*person* who contracts with another *to do something* for him *but who is not controlled . . . with respect to his physical conduct* in the performance of the undertaking."[17]

Servant status for purposes of *respondeat superior* is now commonly equated with regular full- or part-time employment in a commercial enterprise.[18] *See Meeks*, 956 So. 2d 864, 867-68 (¶ 9) (Miss. 2007); *Heirs of Branning*, 743 So. 2d at 316 (¶ 28) (using terms "employee" and "servant" interchangeably). In such employment, it generally can be assumed that the employee's "physical activities and his time are surrendered to the control of the [employer]" completely enough to establish the requisite master-servant relationship. RESTATEMENT (SECOND) OF AGENCY § 220 comment e.

As a result, regular full- or part-time hourly or salaried employment as shown by an employment payroll is now generally assumed to be sufficient to establish a master-

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[16] RESTATEMENT (SECOND) OF AGENCY § 2(2) (emphasis added); *see Heirs of Branning v. Hinds Community College Dist.*, 743 So. 2d 311, 316 (¶ 28) (Miss. 1999) (paraphrasing definition); *Richardson*, 631 So. 2d at 148 (quoting definition).

[17] RESTATEMENT (SECOND) OF AGENCY § 2(3) (emphasis added); *Heirs of Branning*, 743 So. 2d at 316 (¶ 28) (citing RESTATEMENT); *Richardson*, 631 So. 2d at148 (quoting restatement); *Texas Co. v. Mills*, 171 Miss. 231, 156 So. 866, 869 (1934) (same).

[18] Master-servant law and the *respondeat superior* doctrine evolved at common law before employment and payrolls were formalized and regulated in the manner required today by federal labor and tax laws. The regulation of modern employment payrolls makes them strong evidence of employment intent.

servant relationship for purposes of *respondeat superior*. Conversely, where a defendant maintains regular employment payroll, a tortfeasors' *absence* from that payroll is strong evidence that the relationship was not a master-servant relationship for purposes of *respondeat superior*. At a minimum, where an individual does not appear on a defendant's regular employment payroll, any presumption of servant status disappears. In such cases, the plaintiff bears the burden of producing evidence sufficient to show – notwithstanding the tortfeasor's absence from the defendant's employee payroll – that he or she was nevertheless dependent and subservient enough to the defendant to be deemed a *respondeat superior* servant.

Where as here, the tortfeasor is *not* on the defendant's regular employee payroll and is instead acting pursuant to a written contract that expresses the parties' intent *not* to enter into a regular employment relationship, but rather into only an independent contractor relationship, the plaintiff has a high burden to show that – notwithstanding the parties' expressed intentions – the tortfeasor was nevertheless a servant. In the absence of such proof, the parties' constitutional rights to contract must be respected. *Richardson*, 631 So. 2d at 150 (citing U.S. CONST. ART. I, § 10; MISS. CONST. ART. 3, § 16).

2. McCarty Was Hauling Under Conditions that Were, as a Matter of Law, Not Sufficient to Make Him APAC's Servant.

In the preceding section we dealt with master-servant/independent contractor law generally. Now we turn to the application of the law to independent haulers like McCarty. Landmark rulings from this Court leave no doubt how the law applies to independent hauling agreements like APAC's agreement with Everything Wholesale and McCarty. Under well-settled precedent, the facts of this case are insufficient as a matter of law to support an inference that McCarty was a *respondeat superior* servant of APAC. He was therefore an independent contractor as a matter of law.

Proving servant status in the face of an independent hauling agreement like APAC's agreement with Everything Wholesale requires showing the independent hauling agreement was a sham or "legal fiction." *Richardson*, 631 So. 2d at 150 (quoting *Hobbs v. International Paper Co.*, 203 So. 2d 488, 490 (Miss. 1967)). Proof of near-total economic dependence on the principal – such as an inability "to buy gasoline or tags with which to operate the trucks, or even food for themselves, without obtaining advance funds" – is required.[19] There are no such facts here.

On the other hand, the law is also very clear about proof that *cannot* establish that an independent hauling agreement is a sham and that the hauler was a "servant" despite

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[19] *Richardson*, 631 So. 2d at 150 (quoting *Hobbs*, 203 So. 2d at 490). *Hobbs*, it should be noted, found that a jury question existed only as to the pulpwood truck's *owner*, who denied that the driver of his truck was his servant. *Hobbs* affirmed a directed verdict as to the shipping *principal* (International Paper), who was in the position analogous to APAC's position in this case. 203 So. 2d 488. *Hobbs* thus supports judgment as a matter of law of APAC.

the parties' stated intentions to the contrary. This includes proof of "the scheduling of delivery of the freight at fixed times at several destinations and the enforcement of the terms of the contract." *Webster v. Mississippi Publishers Corp.*, 571 So. 2d 946, 951 (Miss. 1990) (Blass, J., *en banc*). As a matter of law, such control of the results contracted for *cannot be used* to convert an independent hauler into a *respondeat superior* servant. *Id.* (control over routes and schedules will not "convert the hauler and his employees into employees of the owner of the freight under the decisions of this Court"). A contractual requirement that "the hauler deliver [materials] before or within a fixed time merely constitutes the ultimate performance sought to be obtained." *Id.* Such control over a contractual "result" does not support a *respondeat superior* liability. *Id.* (citing cases).

Richardson and *Webster* preclude the liability imposed on APAC in this case. *Webster* involved far more exacting control over the timing and routes of delivery than are present in this case. 571 So. 2d at 947-48. It also involved a much longer-term hauling relationship (42 years) and other possibly confounding facts that are not present here. *Id. Richardson* involved similar work being performed on similar terms for a similar (and related) defendant company, and a car crash caused by an independent hauler's driver at an intersection. 631 So. 2d 143. *Richardson* and *Webster* both held that the independent hauler was an independent contractor as a matter of law.

Those holdings are inescapable here. Justice Blass's observation that "[w]e are not confronted here with a void or even an uncertainty in the law" is at least as true today as it

was when he made it. *Webster*, 571 So. 2d at 951. And the law mandates judgment for APAC, just as it did 20 years ago for the defendant in *Webster*.

B. This Court's Landmark Decisions in *Webster* and *Richardson*, Which Fully Control this Case, Require Plaintiffs' Theories to Be Rejected.

Since *Webster* and *Richardson* are also important for the liability-expanding theories that they rejected, we will now review their history in more detail. So far as we can determine, no court in the country has examined these issues as intensely as this Court was required to do from 1990 to 1994. The controversy should not be forgotten – and its lessons should not be discarded, as an affirmance of this judgment would require.

1. *Webster*, 571 So. 2d 946 (Miss. 1990) (Blass, J., *en banc*).

Webster came to the court on plaintiff's appeal from a summary judgment for defendant Mississippi Publishers Corporation. 571 So. 2d 946. Mississippi Publishers relied on independent haulers to distribute its newspapers statewide and was completely dependent on independent contractors for this core function of its business.[20] It owned no trucks and maintained no employee-drivers on its regular employment payroll. Mississippi Publishers maintained exceptionally strict control over distribution routes and schedules and placed high priority on timely delivery. Few requirements were imposed on haulers otherwise, including no requirement to carry insurance.

[20] At the time, Mississippi Publishers owned The Clarion-Ledger, Jackson Daily News and was the distributor of USA Today. 571 So. 2d at 947.

The plaintiff was injured by one of the independent haulers who was en route to distribute papers.[21] On appeal, plaintiff advocated a change in independent-contractor law, asserting that the traditional test "should be broadened" to consider "who, under the particular circumstances of the case, should be required to bear the risks of loss."[22]

As initially issued, with a majority opinion written by Justice Robertson, *Webster* accepted plaintiff's invitation to change the law. Summary judgment for the defendant was reversed on grounds that the "publisher has by contract reserved a right of control over the timely performance of its haulers sufficient that it may not be exonerated via summary judgment." 1989 Miss. Lexis 519, *1. The opinion based this result on what it termed "the legal right of control test." *Id.* at *13. The break from precedent was acknowledged, but ascribed to a new willingness to "take seriously" a rule which had previously been "given lip service" only. *Id.* at *10.

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[21] The independent hauler in *Webster*, Charles Savell, did business as Savell Trucking Company. The driver was Savell's grandson and employee. Savell's grandson was in route to deliver papers one Saturday when he drove his grandfather's truck into the rear of plaintiff's car, causing her extensive personal injuries. 571 So. 2d at 947. (In all these respects, the facts of *Webster* are indistinguishable from the facts of this case.) On the other hand, Savell had been distributing papers for Mississippi Publishers for 42 years. Mississippi Publishers was completely dependent upon haulers like Savell to distribute its papers. Mississippi Publishers employed no drivers and owned no trucks; it delegated *all* distribution to small outside haulers. *Id.* at 947-49. (In all these respects, the facts of *Webster* were more extreme and more susceptible to the argument accepted by the dissenting justices in 1990 and made again by plaintiffs here than are the facts of this case.)

[22] 1989 Miss. Lexis 519, *28 (Blass, J., dissenting, quoting plaintiff's brief).

This initial majority opinion appeared with a detailed dissent by Justice Blass. Justice Blass documented[23] and decried[24] the initial majority's departure from precedent and called for adherence to principle and settled law.[25]

In this initial form, *Webster* caused significant alarm in the business community and in the bar. Nineteen businesses and organizations joined in an *amicus* brief in support of defendant's motion for rehearing.[26] After Presiding Justice Hawkins changed sides, the initial opinion was withdrawn. *Webster* was reissued in its current form with a majority opinion written by Justice Blass. 571 So. 2d 946.

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[23] 1989 Miss. LEXIS 519, *25-*26 text & n.1 (Blass, J., dissenting, reviewing cases).

[24] *Id.* at *24-*25 ("This decision makes a radical change in the law, and the authorities cited by the majority opinion do not support the conclusions"), at *27 ("Deciding cases on an ad hoc basis results in understandable distress; precedent may no longer be relied upon. The old precedent is destroyed, and no new rule is announced. Therefore, the bench and bar of this state are left with no guide whatsoever regarding who is and who is not an independent contractor. How the scheduling of delivery of the freight by the hauler at fixed times at several destinations can be found to confer sufficient control to convert the hauler and his employees into employees of the owner of the freight is certainly not clear"), at *32 ("The law, as we declare it from this appellate bench, should emerge from real facts in real cases. That is not happening here. This decision is being handed down based on facts which exist only in the writer's fantasy").

[25] *Id.* at *30 ("This Court is not confronted with a void or even uncertainty in the law, and therefore, it ought to simply declare the law as it very clearly now stands, leaving major legislative decisions to the legislature"), at *38-*39 ("Furthermore, the majority opinion constitutes the first step in a design to eliminate the use of the independent contractor relationship in most normal business situations. If we had no history in the area and if we were truly 'writing on a clean slate,' this change in the law might be open to us. However, we do have a history that cannot be ignored. We are bound by the law").

[26] The amici included: The Mississippi Press Association, The Mississippi Manufacturers Association, The Mississippi Poultry Association, Inc., The Mississippi Road Builders Association, The Mid-Continent Oil and Gas Association, The Mississippi Associated Builders and Contractors, The National Association Of Independent Insurers, Gannett Satellite Information Network, Inc., The Mississippi Concrete Industries Association, The Memphis Publishing Company, The Mississippi Forestry Association, The Louisiana Press Association, The Arkansas Press Association, The American Pulpwood Association, Inc., The Mississippi Asphalt Pavement Association, The Mobile Press Register, The Mississippi Press Register, The Times-Picayune, and The Mississippi Hotel and Motel Association. *Webster v. Mississippi Publishers Corp.*, Mississippi Supreme Court file No. 07-CA-58372 (MS Archives location B2-R201-B4-S4 Box 22856).

2. The Intervening Decision in *Runyon*.

Despite its rejection in *Webster*, Justice Robertson's "right to control test" appeared again two years later in *W.J. Runyon & Son, Inc. v. Davis*, 605 So. 2d 38 (Miss. 1992) (Robertson, J.), *overruled by Richardson*, 631 So. 2d at 152, *and by J & J Timber Co. v. Broome*, 932 So. 2d 1, 6-7 (¶ 21) (Miss. 2006).[27] This reappearance became the backdrop for *Richardson*.

Runyon arose from a car crash at a highway public works site, where Highway 61 was being expanded near Vicksburg. 605 So. 2d at 39. The plaintiff struck a dump truck that was entering the highway at the work site while hidden in clouds of blowing construction dust. *Id.* at 40. Runyon was the paving subcontractor whose ongoing paving operation at the site was the source of the dust. *Id.* at 39. Runyon was also under a contractual obligation to maintain dust control at the site in the interest of public safety. *Id.* at 44. Plaintiff argued that Runyon was liable in negligence for creating the dust and for failing to maintain dust control. *Id.* at 42. That Runyon was vicariously liable under *respondeat superior* for the dump truck driver's negligent driving was an alternative, additional theory. *Id.*

Runyon was found liable by a jury. *Id.* His appeal primarily sought judgment as a matter of law. *Id.* The first six pages of the opinion detailed the dusty conditions at the site, Runyon's involvement in them, and his duty to maintain dust control. *Id.* at 39-45.

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[27] *J & J Timber* overruled *Runyon* with respect to the effect of settlement with the tortfeasor on imputed liability. 932 So. 2d at 6-7 (¶ 21) ("To the extent that *Runyon* holds that a vicarious liability claim can be maintained against the employer after the employee is released, without an allegation of independent negligence by the employer, that case is overruled").

These issues were sufficient to dispose of Runyon's judgment as matter of law argument without addressing independent contractor law, much less redefining it. But midway through, the opinion nevertheless turns to independent contractor law and, in a page and a half, redefines it in the way that had been advocated by the dissenting opinion in *Webster*. *Id.* at 45-46. The conflict with *Webster*'s holding is not acknowledged or discussed.

There was no dissent in *Runyon*.[28] But it soon became apparent that *Runyon*'s revision of independent contractor law was unintended by the Court.

3. *Richardson*, Overruling *Runyon* and Reaffirming *Webster*.

The decision in *Richardson* appeared about a year and half after *Runyon* was decided. It addressed *Runyon* apparently largely on the Court's own initiative.[29]

The facts of *Richardson* are exceptionally similar to the facts of this case and are indistinguishable for purposes of imputing liability to APAC. 631 So. 2d at 143. *Richardson* involved similar work being performed on similar terms for a similar defendant company (a related APAC company), and a similar car crash caused by an independent hauler. The hauler, a sole proprietor named McCandless doing business as B & P Trucking Co., was also the driver. *Id.* McCandless caused the crash when he ran a red light and struck plaintiff at an intersection. *Id.* at 144. McCandless admitted fault but

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[28] Justice Blass was no longer on the Court when Runyon was decided, having been succeeded Justice McRae.

[29] *Richardson* was briefed before *Runyon* was decided. *Richardson v. APAC-Mississippi, Inc.*, Mississippi Supreme Court file No. 90-CA-1301 (MS Archives location B2-R133-B1-S6 Box 24608). Examination of this Court's *Richardson* file in the archives indicates that the parties never addressed *Runyon* in any briefing, not even by supplementation.

nevertheless claimed that "APAC had overloaded him" and that he was unable to stop "because of the heavy load." *Id.*

Richardson observed that "[u]ntil our recent case of *W.J. Runyon & Son* . . . we [had] consistently held on facts as presented in this case that a relationship, such as that between APAC and McCandless, was that of independent contractor." 631 So. 2d at 152. *Richardson* concluded that the facts "show indisputably that as between themselves [APAC and McCandless] not only intended that their relation be that of principal and independent contractor, not master-servant, but their conduct was that of principal and independent contractor." *Id.* at 151.

Richardson "expressly overruled" the aberrational analysis of *Runyon* and reaffirmed settled precedent, especially *Webster*, which it cited repeatedly. *Id.* at 152. Three justices concurred specially "to applaud the majority's recognition and application of the wisdom found in . . . *Webster*."[30]

Plaintiffs' independent contractor argument in this case, if accepted, would resuscitate the aberrational analysis of *Runyon* and the erroneous, rejected dissenting views of *Webster* and *Richardson*, upsetting sound law in a way that was avoided 20 years ago. Justice Blass's observations about the importance of *stare decisis*, settled rules, and deference to the policymaking role of the legislature are as applicable today as they were 20 years ago.[31] The trial court's erroneous denial of summary judgment (and of

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[30] 631 So. 2d at 154 (Lee, P.J., specially concurring).

[31] *See supra* footnotes 24 & 25.

directed verdict and JNOV) should be reversed and judgment should be rendered for APAC.

C. APAC Was Not Negligent.

In the alternative, plaintiffs contend that APAC was negligent in failing to monitor McCarty in various ways, mainly for compliance with Mississippi highway weight limitations during his Mississippi hauls. This alternative claim fails as a matter of law and fact. Plaintiffs' assertions and evidence fail to establish any actionable legal duty against APAC or that APAC was on notice. Plaintiffs' weight allegations fail to establish an independent cause-in-fact as to anyone, least of all APAC.

"To prevail in any type of negligence action, a plaintiff must first prove the existence of a duty." *Enterprise Leasing Co. v. Bardin*, 8 So. 3d 866, 868 (¶ 7) (Miss. 2009). More specifically, "*The plaintiff must show (1) the existence of a duty 'to conform to a specific standard for the protection of others against the unreasonable risk of injury.*'" *Id.* (quoting with emphasis *Laurel Yamaha, Inc. v. Freeman*, 956 So. 2d 897, 904 (Miss. 2007) (italics supplied by Court). Plaintiff must further show "(2) a breach of that duty, (3) causal relationship between the breach and alleged injury, and (4) injury or damages." *Laurel Yamaha*, 956 So.2d at 904 (quoting *Rein v. Benchmark Constr. Co.*, 865 So. 2d 1134 (Miss. 2004), and numerous other cases).[32] "[W]hether a duty exists in a

[32] An allegedly wrongful act "must be of such character, and done in such a situation, that the person doing it should *reasonably* have anticipated that some injury to another will *probably* result therefrom." *Rolison v. City of Meridian*, 691 So. 2d 440, 444 (Miss. 1997) (quoting *Mauney v. Gulf Refining Co.*, 193 Miss. 421, 427-30, 9 So. 2d 780, 780-81 (1942)) (emphasis added). For duty to exist, some *probable* harm must be a foreseeable *proximate* or direct result, not just a remote possibility – even where a cause-in-fact connection between the conduct and the remote injury is clear in hindsight. *Id.*

negligence case is a question of law to be determined by the court." *Enterprise Leasing*, 8 So. 3d at 868 (¶ 7) (quoting cases).

A principal ordinarily has no duty to monitor the activities of an independent contractor. *See, e.g., Chisolm*, 942 So. 2d at 143 (¶ 16) (noting exceptions for "inherently or intrinsically dangerous" activity and "non-delegable duty"). *See also Warren v. Glascoe*, 852 So. 2d 634 (¶ 17) (Miss. App. 2003) (citation omitted) ("'Common law traditionally has not imposed a broad duty upon individuals to control the conduct of others'").

That an independent contractor's activities are subject to safety laws or regulations is typical and *not* sufficient to cast upon a principal a duty to monitor the independent contractor's activities. *See, e.g., Chisolm*, 942 So. 2d at 143 (¶ 15) ("The [Manual of Uniform Traffic Control Devices] becomes a tool for assessing a breach of duty only after a legal duty has already been established. It cannot be used to create a legal obligation under Mississippi law"). *See also Enterprise Leasing*, 8 So. 3d 866 (insurance statutes did not impose on rental car company a duty to refuse to rent to a driver who failed to produce proof that he was insured); *Laurel Yamaha*, 956 So. 2d 897 (licensing statutes did not impose a duty on motorcycle dealer to determine that buyer was licensed to operate motorcycle); *Heirs of Branning*, 743 So. 2d 311, 315-18 (¶¶ 23-38) (airport owner had no duty to monitor independent contractor's compliance with safety regulations in operation of airport).

For all these reasons, plaintiffs cannot establish any relevant duty against APAC, or any actionable negligence by APAC. Plaintiffs' weight contentions in particular establish no such duty, and in any event, the evidence does support notice or cause-in-fact, much less proximate cause, as to APAC.

McCarty was fined after the crash for being loaded in excess of the weight limit applicable to a truck of his truck's size on a secondary road in Mississippi. Ex. 46. McCarty did not know that his load was in excess of this limit, because he did not realize that the Mississippi limit was lower than in Tennessee. T 327-28, 363. The load would have been legal in Tennessee and was the same size as the dozens of loads McCarty had hauled during the previous weeks in Tennessee, where loads of that size were authorized. McCarty had stopped his truck hundreds of times with loads of that size.[33] McCarty's failure to heed a traffic signal cannot be blamed on his load.

In any event, APAC did not know that McCarty was taking on loads in Mississippi that were in excess of Mississippi weight limits. No one from APAC was involved in loading McCarty's truck in Mississippi or in unloading his Mississippi loads in Tennessee. McCarty's Mississippi loads were dumped at an unmanned site, and his weight tickets, which were used only to calculate accounts payable for independent hauls, were dropped in an unmanned box. T 325-26, 788. The weight tickets were periodically removed from the unmanned box and delivered to the APAC accounting department for that purpose, but the first of McCarty's weight tickets for Mississippi loads did not reach

[33] Ex. 51 (load history showing McCarty had completed up to 10 hauls a day on 14 days).

the APAC accounting department until after the crash. T 788-89. APAC had no notice at all before the crash of McCarty's excess loads or of any other alleged issue with McCarty's truck. And regardless, APAC had no tort-law duty to monitor. *See, e.g.*, *Chisolm*, 942 So. 2d at 143 (¶ 15).

Furthermore, there was no cause-in-fact, much less proximate cause, connecting the excess load to the crash. Plaintiffs' accident reconstruction expert, on whom plaintiffs relied for proof of cause, admitted that the crash would have occurred anyway – even without the excess load.[34] No reasonable jury could conclude as to anyone – least of all APAC – that the less-than-three-second difference in total stopping time and the indeterminate difference in impact area that plaintiffs' expert speculated about would have made any material difference in the crash or in plaintiffs' losses.[35]

Plaintiffs' unstated assumption that truck weight restrictions express a legislative or regulatory conclusion about safe stopping ability is insupportable.[36] That weight (like

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[34] T 424 ("The wreck still would have occurred"). Plaintiffs' expert calculated a less-than-three second difference in total stopping time. T 419. The impact obviously occurred long before McCarty's truck came to a complete stop. Ex. 34 (RE tab 10). Plaintiffs' expert could only speculate that the area of impact to plaintiff's vehicle might have been somehow different with a lesser load – although he could only guess what the difference might have been. T 424 ("It could have been... a little bit more to the front ... and it's possible even that it could have been to the rear").

[35] An allegedly wrongful act must be "both the cause in fact and legal cause of the damage." *Spann v. Shuqualak Lumber Co.*, 990 So. 2d 186, 190 (¶ 12) (Miss. 2008). Cause-in-fact exists only where "but for the defendant's negligence, the injury would not have occurred." *Id.* A cause-in-fact may be "legal cause" if "the damage is the type, or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act." *Id.* Proximate cause is a "cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred." *Entrican v. Ming*, 962 So. 2d 28, 32 (Miss. 2007) (citations omitted).

[36] Plaintiffs' contention assumes that any regulatory violation can be equated with negligence regardless of other considerations, but that is not the law. To the contrary, "a party must prove that he was a member of the class sought to be protected under the statute, that his injuries were of a type sought

many other factors, such as speed, rain and road surface) affects stopping ability is a reality, but it is one that all drivers must account for with all vehicles and all loads. It is no less true for the first 1000 pounds of load than it is for the last, and the effect is highly dependent on speed. It is a driver's duty to be aware of these factors and to maintain reasonable control in light of them.

McCarty ran a red light. His negligent driving, for which he pled guilty to a crime, was the only legal cause of the crash. There was no evidence from which a reasonable jury could conclude that the technically excess load was a separate legal cause of the crash with respect to anyone, least of all APAC. In any event, APAC had no legal duty as a matter of law.

D. Tennessee Law Is in Accord on All Points.

Plaintiffs cannot argue Tennessee law to support the judgment, because Tennessee law is the same on all material points. Tennessee and Mississippi apply the same common law on the tort principles that require judgment for APAC. Tennessee courts regularly find that an independent contractor relationship exists, as a matter of law, on

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to be avoided, and that violation of the statute proximately caused his injuries." *Laurel Yamaha*, 956 So. 2d at 905 (¶ 29) (citations omitted). Plaintiffs cannot show that trucking weight limitations were intended to protect motorists from intersection crashes. These limitations, which vary by road type, truck size and axle array, were meant to protect highways from excessive wear. They cannot be construed to express a legislative judgment about safe stopping distance. *See, e.g.*, MISS. CODE ANN. § 63-5-27(1) ("the gross single or tandem axle weights shall not exceed five hundred fifty (550) pounds *per inch of tire width*"), § 63-5-27 (2) (addressing weight "*imposed on the highway*"), § 63-5-31 (weight "on any group of axles shall not exceed the value given in the following table (Table II) corresponding to the distance in feet between the extreme axles of the group, measured longitudinally to the nearest foot, on those highways or parts of highways found by the Mississippi Transportation Commission *to be suitable to carry such increased load limits from an engineering standpoint*) (emphasis added).

comparable facts.[37] They defer the issue for jury determination only upon evidence that the independent hauling agreement was in effect a sham or legal fiction to conceal a servant with no real economic or other independence from the master.[38] Tennessee courts recognize the same basic elements of common law negligence.[39]

A conflict of law question might arise here only if tort principles were interpreted to void APAC's contractual expectations in the Renewable Trucking Agreement, a contract entered in Tennessee between Tennessee parties and centered in Tennessee. But

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[37] *Bargery v. Obion Grain Co.*, 785 S.W.2d 118, 120 (Tenn. 1990) (truck driver not *respondeat superior* servant of a grain company when the grain company's "only control over [the driver] was the instruction on where to deliver his grain"); *Masiers v. Arrow Transfer & Storage Co.*, 639 S.W.2d 654, 656 (Tenn. 1982) (hauler not servant of shipping company when the hauler owned and maintained his own vehicle, was not covered by the shipping company's insurance, picked up cargo at his discretion, could refuse a job without penalty, and had a contract with the shipping company); *Jackson Sawmill, Inc. v. West*, 619 S.W.2d 105, 106-09 (Tenn. 1981) (logger not servant of logging company even though the logger was told which trees to cut, where to cut, how to cut the logs, and which routes to use to get to the sawmill because "the inescapable conclusion is that the trial court was correct in ruling that the defendant was an independent contractor and not an employee"); *Chapman v. Evans*, 37 Tenn. App. 166, 169 (Tenn. App. 1953) (truck driver not servant of asphalt company when the truck driver's company "had an agreement . . . to do some hauling [at] a fixed price per ton" and owned the vehicle even though the truck driver's company "would communicate with [the asphalt company] from day to day to find out if they wanted his truck to do any hauling the following day").

[38] *Boruff v. CNA Ins. Co.*, 795 S.W. 2d 125, 126 (Tenn. 1990) (driver a servant despite independent contractor designation where company owned truck, paid all costs of operation, maintained truck, and "the practical effect of [the contract's] requirements indicated . . . the relationship . . . is that of employer-employee"); *Nesbit v. Powell*, 558 S.W.2d 436, 437 (Tenn. 1977) (cab drivers servants where fleet owner owned all thirty-seven cabs in the fleet, had his name painted on all the cabs, maintained the cabs, checked for cleanliness, and provided fares and deliveries through a dispatch system and there was "a substantial right of control by [the fleet owner] over the details of performance by each of the drivers"); *Howell v. Chase*, 1999 Tenn. App. LEXIS 148, *4 (Tenn. App. 1999) (plaintiff a servant of an air conditioning installer where he "used the tools, equipment, uniforms, and premises of defendant to carry out the work" and "only contributed labor to the operation").

[39] *See, e.g., Hale v. Ostrow*, 166 S.W.3d 713, 716 (Tenn. 2005) ("A negligence claim requires proof of the following familiar elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. . . . . The existence of a duty is a question of law").

that question should never arise here. The underlying tort principles of neither Mississippi nor Tennessee can be interpreted to void APAC's contractual expectations in the Renewable Trucking Agreement. Basic common law, equally applicable on both sides of the border, requires judgment for APAC.

II. Alternatively, Harmful Error Mandates a New Trial.

In the alternative, APAC is entitled to a new trial. Individually and collectively, multiple harmful errors rendered this trial fundamentally unfair.

A. The Instructions Failed to Inform the Jury that the Scheduling of Delivery Cannot Convert an Independent Hauler into a *Respondeat Superior* Servant.

APAC was wrongly refused an instruction that would have correctly instructed the jury that Arick's calls to McCarty about "where to pick up the load and where to deliver the load" did not alter Everything Wholesale's independent contractor status.[40] CP 1659 (RE tab 15). *See also* T 976-78, 989-90 (APAC arguing for instruction).

A litigant is entitled to have jury instructions that present his theory of the case in a manner that accurately states the law. *Utz v. Running & Rolling Trucking, Inc.*, 32 So. 3d 450, 474 (Miss. 2010).

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[40] Paragraph 2 of proposed instruction DIII-8 (CP 1659 (RE tab 15)) would have informed the jury that:

> The instructions given to Chad McCarty by Julie Arick of AP AC Tennessee, Inc. as to where to pick up the load and where to deliver the load is not control of the conduct of the work. APAC Tennessee, Inc. can exercise discretion and control over the results of the work performed by Everything Wholesale, LLC d/b/a Diesel Construction and Chad McCarty without affecting their independent contractor status.

The refused instruction correctly stated an important point of law directly applicable to the facts in evidence and plaintiffs' contentions. The law is very clear that instructions about where to pick up and deliver loads are *not* evidence that an "actor's *physical activities and his time are surrendered to the control of the master*" in the manner required of a servant. RESTATEMENT (SECOND) OF AGENCY § 220 comment e (emphasis added). To the contrary, such instructions are indicative of nothing more than "service under an agreement to accomplish results or to use care and skill in accomplishing results," which are typical of independent contractor relationships. *Id.*

Applying these principles to the specific subject of independent hauling agreements, *Webster* stressed that requirements that a "hauler deliver [freight] to several destinations before or within a fixed time merely constitutes the ultimate performance sought to be obtained, not control." 571 So. 2d at 951. "Plainly, the scheduling of delivery of the freight at fixed times at several destinations and the enforcement of the terms of the contract cannot be found to confer sufficient control to convert the hauler and his employees into employees of the owner of the freight under the decisions of this Court." *Id.*[41]

The given instructions did not fairly or adequately explain the law on this point. To the contrary, they invited the jury to believe that the law is exactly opposite of what

[41] Tennessee law is the same. *Bargery v. Obion Grain Co.*, 785 S.W.2d 118, 120 (Tenn. 1990) ("An instruction on where to deliver grain is a control over the end result of a job. It is a basic type of control that is consistent with the contractor-contractee relationship").

the law actually is.[42] The inadequate instructions allowed plaintiffs to argue, in defiance of law, that directives about delivery and other aspects of control of the freight and of "ultimate performance" were proof of *respondeat superior* servant status. This improper argumentation pervaded plaintiffs' closing, compounding the error of the improperly refused instruction.[43] APAC was substantially prejudiced, mandating new trial.

B. The Instructions Failed to Inform the Jury that an Independent Contract Is Evidence of Independent Contractor Status.

APAC was also improperly refused an instruction that would have correctly instructed the jury that APAC's and Everything Wholesale's agreement to form an independent contractor relationship and the written contract manifesting that intent are evidence that McCarty was an independent contractor and not an APAC employee. CP 1659 (RE tab 15).[44]

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[42] *See* CP 1589-90 (RE 16) (proposed instructions P-3 and P-2, given as instructions 10 and 11).

[43] *See* T 999 ("Chad McCarty had the authority of APAC to go to Memphis Stone and Gravel, pick up a load, charge it on their account; and when he brought it back to them, they had to pay for it. He was either their employee . . . or . . . a thief"); T 1002 ("He was their employee because they told him everywhere to go"); T 1043 ("[Arick] called [haulers] the day before, told them where to go, what time to be there, what type of commodity to haul and where to haul it"); T 1044-45 ("[APAC] was responsible for that load in his truck, and they were responsible for the actions of Chad McCarty").

[44] Paragraph 1 of proposed instruction DIII-8 (CP 1659 (RE tab 15)) would have instructed the jury to consider the following:

> What the parties agreed to concerning their relationship. If APAC Tennessee, Inc., and Everything Wholesale, LLC d/b/a Diesel Construction agreed to make Everything Wholesale, LLC d/b/a Diesel Construction an independent contractor, this is evidence that Everything Wholesale, LLC d/b/a Diesel Construction was, in fact, an independent contractor of APAC Tennessee, Inc.

The refused instruction correctly stated an important point of law directly applicable to the facts in evidence and plaintiffs' contentions. The law is very clear that an independent contractor agreement is evidence of independent contractor status. *See Richardson*, 631 So. 2d at 150 (noting that "the right of parties to contract as they please is a constitutionally- protected right"); *Hendrix v. City of Maryville*, 431 S.W.2d 292, 296 (Tenn. App.1968) ("In determining whether one is an independent contractor, the language of the contract is always considered").

The instructions that were given did not adequately explain the law on this point. To the contrary, they invited the jury to believe that the law is exactly opposite of what the law actually is.[45] Plaintiffs exploited this error to argue, in defiance of law, that the written contract was completely meaningless. T 998 ("The instructions and the Court tell you that just because there's a piece of paper that says there is a contract doesn't make that a contract").

C. The Allocation of Only 10% Fault to McCarty and Everything Wholesale Demonstrates Juror Confusion and Passion and Prejudice and Is Against the Overwhelming Weight of the Evidence.

The jury's allocation of only 10% fault to McCarty and Everything Wholesale and of 70% fault to APAC is so completely against the overwhelming weight of the evidence as to demonstrate passion and prejudice and require a new trial.

"[A] verdict will be set aside on the grounds that it . . . is against the overwhelming weight of the evidence . . . when it so appears 'in such a convincing way as to be fairly

[45] CP 1589 (RE 16) (proposed instruction P-3, given as instruction 10).

inescapable upon the record as presented.'" *Employers Mut. Cas. Co. v. Ainsworth*, 164 So. 2d 412, 418-19 (Miss. 1964). "The Court has the duty to . . . protect litigants against a jury that is partial, biased or prejudiced." *Id.* at 419.

No reasonable jury could conclude that McCarty, who pled guilty to manslaughter and aggravated assault, and Everything Wholesale, which is liable for McCarty's torts by operation of law, were *less* at fault for causing this crash than APAC, whose connection to the crash was so remote and tenuous as to call the existence of duty into substantial doubt.[46] The jury's allocation of minimal fault to McCarty and Everything Wholesale is irrational, demonstrating the effect of improper appeals to sympathy and prejudice.[47]

The allocation of only 20% fault to the entity that overloaded McCarty's truck (Memphis Stone & Gravel) is also irrational. If overloading is accepted as an independent cause giving rise to separate fault,[48] it is irrational to conclude that the entity that actually overloaded the truck just minutes before the crash is substantially less at fault than APAC, which had no involvement and no knowledge.

The effect of improper sympathy, passion and prejudice is further evident in the substantial excessiveness of verdict. CP 1578 (RE tab 14). The jury assessed damages of

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[46] For reasons shown in argument section I.C., APAC submits that no duty exists as a matter of law and that it is entitled to judgment on that basis.

[47] *See, e.g.*, T 192 (McCarty opening, arguing that McCarty "is the only party that you will hear in this courtroom say we acknowledge fault. In fact, we acknowledged it from the beginning of the complaint. . . . he's serving sentences . . .; and for the rest of his life he will carry the burden . . ."); T 1017 (McCarty closing, blaming APAC).

[48] For reasons shown in argument section I.C., APAC submits that the overloading cannot be accepted as an independent cause giving rise to separate fault and that it is entitled to judgment on that basis.

$30,000,000.00, almost half of which was non-economic. *Id.* This huge award is roughly 130% of the already huge sums plaintiffs argued for in closing.[49] Giving plaintiffs 30% more than they sought had the apparently intended effect of cancelling the 30% fault allocation to parties other than APAC – indicating a calculated attempt to defeat the effect of fault allocation as to APAC.

The jury's bias is further confirmed by a note to the court during deliberations indicating a preoccupation with the effect of any fault allocation to Memphis Stone & Gravel. CP 1573 ("If we, the jury, find Memphis Stone and Gravel part-liable, would the company legally have to pay or would the Bryant family have to sue them and go through another trial?"). The jury was never informed of Memphis Stone & Gravel's status as a settling defendant.[50] It is apparent that, instead of evaluating the evidence in accordance with damages law and allocation of fault law as they were instructed to do, the jury deliberately structured their damages award and fault allocation to assign to APAC the full damages amount plaintiffs had asked for – in defiance of law, the evidence and their instructions.

A jury's failure to comply with the court's instructions "evidence[s] bias, passion and prejudice" mandating new trial. *Dendy v. City of Pascagoula*, 193 So. 2d 559, 564 (Miss. 1967) (jury's failure to reduce damages due in accordance with law and evidence

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[49] *See* T 1013-14 (arguing for $11,376,000 in economic and $11,500,000 in non-economic damages, totaling $22,876,767).

[50] *See* court's response, CP 1574 ("You are not to concern yourself with who will pay. You are to allocate according to the evidence. There will not be another trial").

mandates new trial); *Burrell v. Goss*, 146 So. 2d 78, 80 (Miss. 1962) ("As a general rule a verdict will be set aside as contrary to law where, under the evidence, it is contrary to the instructions given by the court").

The huge verdict and deliberately skewed allocation of fault are against the overwhelming weight of the evidence to an extent that demonstrates disregard for the law, the evidence and the instructions. All these factors confirm substantial passion and prejudice warranting a new trial.

D. APAC Was Wrongly Prohibited from Proving that Its Independent Haulers Were Required to be Insured and that McCarty Was Insured.

Through the Renewable Trucking Agreement, APAC required its independent haulers to be insured and to provide proof of insurance. Ex. 2 ID ¶2 (RE tab 11) (excluded unredacted contract), *cf.* Ex. 36 (RE tab 12) (admitted redacted contract). Everything Wholesale complied with these provision, and McCarty was insured through Everything Wholesale for the crash. Ex. 71 ID (RE tab 13), T 831-32 (proffer). This insurance evidence strongly confirms that the relationship with APAC was intended to be, and was in fact, an independent contractor relationship. But APAC was improperly prevented by motion *in limine* from presenting this evidence the jury. CP 1510 (RE tab 6).

The rules make liability insurance evidence inadmissible only on the issue of "whether [the insured] acted negligently or otherwise wrongfully." MRE 411. The exclusionary rule does not apply when the evidence is offered for other purposes. *See*

Royal Oil Co. v. Wells, 500 So. 2d 439, 448 (Miss. 1986) (where "[a]gency was a hotly contested issue," admission of insurance "would be no error"; "While evidence of the existence of liability insurance is not admissible upon the issue of whether a party acted negligently or otherwise wrongfully, it may well be relevant to other issues such as agency. In this regard, Rule 411 . . . is merely a restatement of our pre-existing law"); *Luke Constr. Co. v. Jernigan*, 252 Miss. 9, 14-15, 172 So. 2d 392, 393 (1965) (insurance admissible where "indicative of a course of conduct which was competent evidence on the issue of whether or not Jones was the agent of Luke or was an independent contractor").

Here, evidence of Everything Wholesale's and McCarty's liability insurance was plainly *not* offered for the improper purpose of showing that McCarty acted negligently. That issue was not in dispute – McCarty and Everything Wholesale *admitted* negligence for purposes of this trial. T 191.

To the contrary, the evidence was offered, and was material and probative, to show that Everything Wholesale and McCarty were operationally and financially independent of APAC. Plaintiffs placed that issue sharply in dispute by contending that McCarty was a *de facto* "employee" of APAC. APAC was entitled to have contrary evidence admitted. The exclusion of substantial probative evidence on a central issue that plaintiffs placed in dispute was prejudicial error.

E. APAC Was Prejudiced by Sweeping Improper Expert Testimony Regarding Irrelevant Purported Regulatory Violations and a Misleading and Unfounded Conclusion of "Control."

Over *in limine* objection, plaintiffs were permitted to offer Dane Maxwell as an expert in commercial motor vehicle regulations for no proper purpose.[51] Maxwell was permitted to make sweeping irrelevant assertions about alleged regulatory violations. T 486 ("No one complied with any of the regulations that I found"). And he purported to have concluded from this "investigation" that APAC was "in the best position to make sure that [McCarty's] truck was being operated safely on the morning of August 3rd, 2006" and was therefore "in control" of the truck. T 491.

Expert testimony must "rest[] on reliable foundation and [be] relevant to a particular case." *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 36 (¶ 11) (Miss. 2003). An opinion that "embraces an ultimate issue" may be admitted, but only where "otherwise admissible." MRE 704. "[A]n absolute requirement . . . [is] that [such] opinions must be helpful to a determination of the case before they are admissible." *Id.* comment. "A question *may not be asked* which is based on inadequately explored legal criteria since the answer would not be helpful." *Id.* (emphasis added).

Maxwell's unfounded, conclusory testimony, which openly embraced legal conclusions, was not relevant to any legitimate issue and was grossly prejudicial to APAC. The testimony cannot be excused by any relevance to McCarty's or Everything Wholesale's negligence, because their fault was admitted and not in dispute. No

[51] CP 1179 (motion in limine); CP 1513 (RE tab 6) (ruling allowing testimony).

relevance to APAC existed except in Maxwell's own *ipse dixit* view of the law. *McLemore*, 863 So. 2d at 37 (¶ 13) (The "*ipse dixit*" or "self-proclaimed accuracy by an expert is an insufficient measure of reliability") (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999)). Maxwell's entire testimony rested on "inadequately explored legal criteria" to an extent that was not just unhelpful, but affirmatively misleading and prejudicial to APAC. MRE 704 comment.

Most egregiously, Maxwell's unfounded testimony about APAC's purported "control" was not a matter of just "inadequately explored legal criteria." This purported expert opinion flatly contradicted this Court's express teachings on the principal issue in this case. *Webster*, 571 So. 2d at 951 ("Plainly, the scheduling of delivery . . . cannot be found to confer . . . control . . . under the decisions of this Court"). This purported expert "stamp of approval"[52] of the blatantly erroneous legal contention that plaintiffs improperly made the central theme of their case[53] is inexcusable, mandating a new trial.

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[52] *Edmonds v. State*, 955 So. 2d 787, 792 (¶ 9) (Miss. 2007) (cautioning that "an expert's 'stamp of approval' . . . may unduly influence the jury," quoting *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991)).

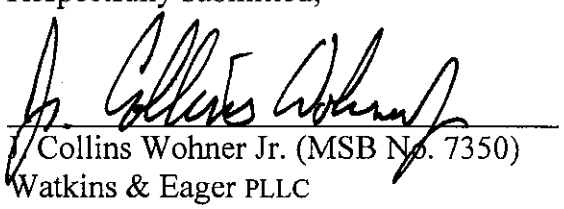
[53] *See* closing argument excerpts *supra*, footnote 43.

CONCLUSION

The judgment should be reversed and rendered. In the alternative, the judgment should be reversed and the case remanded for new trial.

Dated: November 23, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the above and foregoing paper to be delivered by United States mail, postage prepaid, to the following:

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THIS, the 23rd day of November, 2010.

J. Collins Wohner Jr.