2d Civil No. B280270

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

CRST, INC., CRST EXPEDITED, INC., CRST VAN EXPEDITED, INC. and CRST LINCOLN SALES, INC. Petitioners, v. SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES Respondent.	Los Angeles Superior Court Case No. MC025288 Hon. Brian C. Yep Dept. A14: (661) 483-5774
MATTHEW JOHN LENNIG, MICHAEL LENNIG, ROSA LENNIG, and HECTOR CONTRERAS Real Parties in Interest.	

REPLY TO RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER RELIEF

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INTRODUCTION

The Return is long on hyperbole about driver Contreras being "unfit by any standard" and having "a substantial and lengthy criminal background." (Return 8.) But it is short on what matters for punitive-damages purposes—*clear and convincing* evidence of intentional, despicable conduct based on *advance* notice and *conscious* disregard that this type of accident was inevitable. It is also short on evidence of conduct by managing agents.

The Return instead rests on hindsight-based, second-guessing about what CRST *should have* known about Contreras' unfitness and what it *should have* done in response. As the Supreme Court made plain in *Diaz v. Carcamo* (2011) 51 Cal.4th 1148 (*Diaz*), that is at most a claim for *negligent* hiring or retention: "Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was *negligent* in hiring or retaining that person as a driver." (*Id.* at p. 1157, italics added.)

Where, as here, a trial court has determined as a matter of law that the employee driver was at most negligent, and the plaintiff merely claims the employer should have known such non-punitive-damages-worthy conduct was possible, permitting punitive damages against the employer would gut *Diaz* and fundamentally change California law. It would swallow the *Diaz* rule by letting plaintiffs transform garden-variety negligence claims into punitive-damages claims against employers. It

would expose California businesses to inordinate potential liability based on juries second-guessing hiring and firing decisions. And it would let plaintiffs end-run *Diaz* by presenting to the jury—under the guise of a punitive-damages claim against the employer—evidence of an employee's hiring/retention history that *Diaz* holds is inadmissible and highly inflammatory where an employer accepts vicarious liability as CRST does here/

Stripped of hyperbole, the Return shows that plaintiffs are simply dressing up a garden-variety *Diaz*-type *negligent* hiring/firing claim as a punitive-damages claim:

- In terms of plaintiffs' hindsight-based, second-guessing of CRST's decision *to hire* Contreras, plaintiffs argue that (a) a third-party vendor ran an inadequate background check, and Contreras lied on his employment application; and (b) CRST admitted that it would not have hired Contreras had it known the truth. (Return 9.) But CRST's admission confirms that it was *not* CRST's policy to hire unfit drivers and that it only hired Contreras because it *did not know* the truth. The failure to discover that truth is, at most, negligence. It is not the *advance* notice and *conscious* disregard that California requires to impose punitive-damages liability on an employer.

- In terms of plaintiffs' hindsight-based, second-guessing of CRST's decision to *retain* Contreras and to not fire him until after this accident occurred, there is no evidence that CRST *knew* Contreras had ever

abused drugs or alcohol or even that drugs or alcohol had anything to do with this accident. Nor is there any evidence that CRST actually *knew* this type of accident would occur or even that he had ever previously been in a serious accident. Plaintiffs instead resort to gross exaggerations about Contreras' so-called "accident" and "speeding" record—evidence that is threadbare even in terms of proving *negligent* retention, and that is far from clear and convincing evidence of punitive-damages-worthy conduct.

This is, at most, a negligence case. Under *Diaz*, the claim against CRST is limited to vicarious liability premised on the driver's negligence.[1] CRST is entitled to summary adjudication as to punitive damages.

DISCUSSION

A. The Evidence Touted In The Return Does Not Even Remotely Constitute Clear And Convincing Evidence Of The Actual Knowledge And Despicable Conduct Required To Impose Punitive Damages.

The Return does not and cannot dispute that:

- CRST cannot be liable for punitive damages unless it directly committed oppression, fraud or malice or it had "advance knowledge" that Contreras was unfit and nonetheless employed

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[1] An employer can invoke the *Diaz* rule barring claims for negligent hiring/retention/ entrustment at any time before or at trial. (See *Diaz*, s*upra*, 51 Cal.4th at p. 1148 [noting it made no difference that the employer "offered to admit vicarious liability at trial instead of before"].) CRST has invoked it already, by accepting vicarious liability. (1 PE 57; 5 PE 1079:7-9, 1082:3-4.)

him with a "conscious disregard" of the rights and safety of others." (Civ. Code, § 3294, subd. (b); Return 48.)

- "Conscious disregard" requires more than ordinary negligence, gross negligence or even recklessness. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 (*Weeks*) [noting the Legislature "employ[ed] the phrase 'conscious disregard' to prevent liability from attaching for the reckless or negligent employment of an injuring employee"]; *id.* at p. 1154 ["the conduct described in [Civ. Code, § 3294] subdivision (b) is the equivalent of oppression, fraud, or malice"].)
- Punitive damages cannot be imposed without *clear and convincing* evidence that CRST engaged in the requisite conduct.

The evidence touted in the Return does not come even remotely close to the required showing.

1. The Return's speculative assertions that Contreras was intoxicated at the time of the accident cannot support punitive damages.

a. As the trial court recognized in granting summary adjudication for Contreras, plaintiffs' speculation that Contreras was intoxicated at the time of the accident is insufficient as a matter of law.

Plaintiffs contend that the trial court's summary-adjudication ruling in favor of driver Contreras is not binding as to CRST, and that plaintiffs

remain free to argue to a jury that Contreras was driving under the influence. (Return 52-55.) The argument is a smokescreen.

The issue before this Court is whether the trial court erred in denying summary adjudication on plaintiffs' request for punitive damages against CRST. Plaintiffs' so-called evidence of Contreras being intoxicated at the time of the accident cannot be insufficient to create a triable issue for purposes of Contreras' summary-adjudication motion but at the same time sufficient to create a triable issue as to CRST's concurrent motion. Either the evidentiary record before the trial court sufficiently created a triable intoxication issue or it didn't. It cannot be both ways.

The trial court confirmed this at the hearing on CRST's motion, heard immediately after it heard and resolved Contreras' motion. (See 5 PE 1046-1062.) The court expressly noted that it found no triable issue as to whether Contreras was intoxicated at the time of the accident but that it was concluding plaintiffs could still pursue their claim against CRST because that claim rested on arguments other than Contreras' alleged intoxication: "They [plaintiffs] understand my findings that on that particular occasion he wasn't under the influence, but that's not their argument. Their argument is he has this long history, yet he's hired anyways." (5 PE 1058-1059; see also *id.* at 1050 [court stating that its no-intoxication-evidence finding "in the Contreras MSA gets [CRST] a step closer to the court ruling in [CRST's] favor on [its motion]" but not "over the hump" given plaintiffs' "other argument" that Contreras "displayed conduct that should have warned or alerted CRST that this guy's in trouble, or he is potentially

dangerous"], 1052 [court instructing plaintiffs' counsel to focus "not on the accident itself" because "that's dealt with in the Contreras MSA" but on "other issues" that could support punitive damages].)[2]

In any event, the Return demonstrates why the trial court found insufficient evidence of intoxication. The Return's intoxication assertions rest on speculation, not probative evidence sufficient to reach a jury. Plaintiffs do not and cannot deny that a "drug recognition expert" police officer interviewed Contreras at the accident scene and concluded he was not under the influence and there was no basis for further testing. (2 PE 363-365.) Instead, plaintiffs rely solely on one CRST employee's (Stanek's) testimony that he *did not know* what caused Contreras to go into oncoming traffic and that driving under the influence "*could* be" an explanation. (Return 31, citing 2 PE 434 and 3 PE 723, italics added; see also Return 54.) But not knowing and not being personally able to exclude

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[2] The Return makes noise about the Petition citing a notice of ruling stating the trial court found insufficient intoxication evidence, instead of the underlying order. (Return 18.) But plaintiffs do not and cannot deny what matters—that the notice of ruling (which plaintiffs never objected to and that Contreras' counsel prepared, 5 PE 1066) *was correct*. As noted above, the trial court's comments at the CRST hearing make that clear. Moreover, intoxication is the only punitive-damages issue plaintiffs ever raised as to Contreras. (See 1 PE 40-47; 3 PE 563-574.) In case the court wants to see the transcript and order regarding the Contreras' hearing, CRST has provided them in a concurrently-filed Supplemental Petitioner's Exhibits (SPE). (See SPE 3-17.)

speculative possibilities does not create a triable issue of fact as to the expert police officer's on-the-scene direct assessment.[3]

Plaintiffs also try to sidestep the lack of probative intoxication evidence by criticizing CRST for not requiring Contreras to submit to an alcohol/drug test. (Return 54-55.) But the absence of such testing simply confirms the lack of evidence. It would not permit a jury to speculate. More importantly, whether Contreras needed to be tested at the time of the accident is, and has to be, the judgment call of the police expert at the scene. CRST's ordering of after-the-fact testing a day or so after the accident would not have shown whether Contreras actually was intoxicated at the time of the accident. Nor was there any reason for CRST to test Contreras regarding future safety since it fired him immediately after the accident. (2 PE 455.)

Plaintiffs' reliance on speculative intoxication evidence demonstrates the danger in letting plaintiffs circumvent the *Diaz* rule by claiming punitive damages. Plaintiffs undoubtedly hope to get before the

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[3] Contrary to the Return's speculation that intoxication *must* be the reason, plaintiffs' operative complaint claimed that the activities of a construction crew working on the bridge where the accident occurred were a "substantial factor" in the accident because their negligent construction and supervision made the location of the collision "dangerous and prone to causing injuries" and contributed to southbound traffic crossing into northbound lanes. (1 PE 6-7, 18-22; see also 3 PE 541 ["lanes were very small; [t]here was construction and the Interstate was down to 2 lanes, opposite traffic flow"].)

jury evidence of Contreras' prior alcohol and drug abuse—highly inflammatory "prior bad acts" history that could cause a jury to speculate he was intoxicated, and evidence that would be irrelevant and inadmissible if the *Diaz* rule applied and the negligent hiring/retention claim could not be presented to the jury.

b. Given the insufficient evidence that the accident was intoxication-related, CRST cannot be liable for punitive damages based on any failure to discover Contreras' past intoxication.

The Petition explained that because the trial court correctly found that the evidence did not create a triable issue that Contreras was intoxicated at the time of the accident, CRST cannot be subject to punitive damages based on CRST not knowing about his prior alcohol or drug problems. (Petition, p. 51.) The required causal link is absent. (*Ibid.*) Indeed, the causal link is equally absent for any negligence claim. (See, e.g., *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139-1140 ["Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a *particular* risk or hazard and that *particular harm materializes*"' (italics added)].)

Plaintiffs do not and cannot claim otherwise. Their only response is to speculate that Contreras was intoxicated. (See Return 52-55.)

c. In any event, even assuming Contreras was intoxicated, the absence of evidence CRST *knew* Contreras had any drinking or drug problem would preclude punitive damages.

The intoxication issue is also irrelevant for another reason: Plaintiffs cannot point to any probative evidence that CSRT *actually knew* about any drug or alcohol issues before this accident. There is no evidence any co-drivers reported any alcohol or drug concerns; no evidence anyone ever spotted any concern at a loading facility; no customer complaints. Nothing.

Punitive damages require *advance* notice and *conscious* disregard. Plaintiffs' intoxication-based theory against CSRT rests on its *failure to know*. That is, at most, negligence or recklessness. It is not the stuff of punitive damages.

2. Plaintiffs' hindsight-based, second-guessing that CRST never should have *hired* Contreras at most supports a negligence claim.

The Return argues that CRST's background check of Contreras, conducted through a third-party vendor, was inadequate and that CRST admitted it never would have hired Contreras had it known his full background. (Return 9, 22, 32, 56.) Plaintiffs claim the background check "was inadequate because the background check vendor used the wrong information as to Contreras' residence" and that CRST nonetheless remains responsible for an inaccurate background check. (Return 32, 56.) Plaintiffs concede that Contreras lied on his employment application but argue that

an adequate background check would have uncovered those lies. (Return 27-28.)

But this merely amounts to a claim that, at most, CRST was negligent in hiring Contreras because it (through a third party) conducted an inadequate background check. Far from showing CRST "had *advance* knowledge" of Contreras' unfitness "and employed him with a *conscious* disregard of the rights or safety of others" (Civ. Code, § 3294, subd. (b)), this evidence shows the opposite: CRST *did not know* about his unfitness and would not have hired him had it known.

That is not a basis for punitive damages. Plaintiffs' assertion that "the fact that CRST did not know constitutes evidence of conscious disregard of public safety, i.e., malice" (Return 56) is self-contradictory. Equating "not knowing" with "conscious" is nonsensical. Not knowing is the epitome of what is *not* conscious. The Return's illogic would, if accepted, transform every run-of-the-mill negligent hiring case into a punitive damages case.

3. Plaintiffs' hindsight-based, second-guessing that CRST should have *fired* Contreras *before* the accident at most supports a negligence claim.

Plaintiffs also try to manufacture the requisite "advance notice" and "conscious disregard" by arguing that Contreras' driving transgressions at CRST before the subject accident suffice to impose punitive damages. But the evidence regarding those incidents is not even close. It, at most, shows *negligent* retention or entrustment. The negligence facts here are no worse

than (indeed, less egregious than) those found to be limited to a negligence claim in *Diaz* and its predecessor *Armenta v. Churchill* (1954) 42 Cal.2d 448 (*Armenta*).

Diaz recognizes that "[a]wareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was *negligent* in hiring or retaining that person as a driver." (51 Cal.4th at p. 1157, italics added.) The Court held that the employer's vicarious liability for the employee truck driver's accident required withholding any negligent hiring/retention claim from the jury even though the facts were worse than, or at a minimum analogous to, what plaintiffs allege here:

- The driver had a history of past accidents, including "one in which he was at fault" and another that occurred just 16 days before the subject accident. (*Id.* at p. 1161.)
- The employer failed to discover that the driver was in the country illegally, was using a phony social security number, had lied on his employment application, and "had been fired from (or quit without good reason) three of his last four driving jobs." (*Ibid.*)
- There was evidence the employer had "inadequate hiring practices, thereby making the company appear indifferent to the need to screen or train drivers for safety," including evidence the employer failed to adequately obtain evaluations from past employers and ignored the one lone and "very negative" evaluation it did receive. (*Ibid.*)

As *Diaz* makes plain, the type of allegations that plaintiffs assert in this case are simply standard *negligent* hiring/retention allegations.

Armenta, the case that first adopted California's *Diaz*-type rule, demonstrates the same. The *Armenta* plaintiff's negligent entrustment claim against the truck driver rested on allegations that the employer *actually knew* the driver had previously been found guilty of *thirty-seven* traffic violations, including *a conviction for manslaughter*. (*Id.* at p. 456.) The Court still recognized that the plaintiff was simply claiming negligent entrustment and that such a claim became irrelevant once the employer was vicariously liable. The facts here show no more knowledge or consciousness than in *Diaz* or *Armenta*.

The "advance notice" and "conscious disregard" required for punitive damages is akin to an employer knowingly allowing an employee to shoot into a crowd—the risk is obvious and serious injury is virtually inevitable. Or conduct like a law firm's management knowing that a partner has repeatedly sexually harassed multiple female employees (despicable conduct exposing the partner himself to punitive damage liability) and doing nothing to prevent the partner from sexually harassing the plaintiff. (See *Weeks*, *supra*, 63 Cal.Appp.4th 1128.) By analogy to *Weeks*, punitive damages might theoretically make sense where the managing agents of a truck carrier knew a driver was repeatedly getting behind the wheel of the truck drunk, yet did nothing about it and the driver

later drunkenly crashed into someone.[4] There is nothing even remotely analogous to such conscious, despicable conduct here.

Not only did CRST lack actual knowledge of any despicable, punitive-damages-worthy conduct by Contreras, the very first and only serious accident Contreras ever had at CRST *was the accident that triggered this lawsuit*. CRST did not disregard that accident. It *fired him* because of it. (2 PE 455.)

Plaintiffs' "conscious disregard" argument rests entirely on insufficient hyperbole about Contreras' so-called "accident" and "speeding" record while at CSRT.

The so-called accidents. The Return repeatedly asserts that Contreras "had several accidents" or "collisions" while at CRST. (Return 9, 28, 57.) In actuality, prior to the accident at issue in this lawsuit, Contreras had only three so-called "accidents"—two minor incidents in close proximity where he backed the truck into a cement barrier and a rock in the loading yard and one incident on the road where *someone else hit him*. (4 PE 915 [accident list shows two "backing" incidents, one "hit by other vehicle," and one "struck other vehicle" (the latter was the 7/7/14 accident that triggered this lawsuit and Contreras' termination)]; 2 PE 461,

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[4] Theoretically, an employer might know that a driver is an extreme danger to himself and others but the driver may be so disconnected from reality as to not know that himself. But that also is not this case.

463-464 [reports showing Contreras backed into cement barrier on 1/13/14 and over rock on 1/23/14]; 3 PE 649 [Contreras, noting the non-serious nature of the three prior incidents by testifying "I guess you can call them accidents"].) Minor backing accidents are fairly common with new driver trainees and are not grounds for termination. (4 PE 889.) CRST did not ignore these incidents: It required Contreras to do retraining, including requiring him to take and pass another road test. (2 PE 466-488; 3 PE 551; 4 PE 915.)

The alleged speeding. Given the absence of any serious accidents before the one at issue in this lawsuit, plaintiffs try to suggest in the Return that Contreras was some sort of serial speeder and CRST did not care. For starters, knowledge that a truck driver may have been occasionally speeding can hardly equate to "conscious disregard" that the driver is inevitably going to get into a serious accident, particularly the accident here, which apparently had nothing to do with speeding. Moreover, plaintiffs' "speeding" assertions grossly overstate the record.

- Plaintiffs claim that Davis received a report that Contreras "was tracked going 99 miles per hour" yet "took no follow-up action." (Return 57, citing 4 PE 917.) They fail to mention that there was no basis for follow-up because the 99 mile per hour reading was actually a default code for a late delivery, not an actual register of speed. (2 PE 492, 499.)

- Contreras *never* received a single speeding ticket while driving for CRST. The closest plaintiffs can get is to reference an incident

where Contreras received a ticket for his co-driver not wearing a seat-belt; when the co-driver's supervisor subsequently reprimanded the co-driver, the co-driver claimed Contreras had been speeding and tailgating but the police officer actually chose to give a lesser seatbelt citation instead. (See Return 29, citing 4 PE 871-874.)

- Based upon documents submitted for the first time with the Return (i.e., not before the trial court in determining the motion), plaintiffs claim that recently-produced documents generated by a system named Speed Gauge indicate Contreras was recorded speeding six times. (Return 36-37; see Declaration of Khail A. Parris in Support of Return to Petition ("Parris Dec.")[5] Those documents are irrelevant because the question before this Court is whether the trial court erred in not granting summary adjudication *on the record before it*. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 [appeal from motion to quash service; record could not be augmented with documents not before the court]; *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325 [appellate court ordinarily confines its review to matters that were actually before the trial

[5] Instead of submitting any declaration from a percipient witness authenticating or explaining these documents, plaintiffs submit a declaration from their own attorney stating that he belatedly received the documents from CRST and moved for terminating sanctions. (See Parris Dec., ¶¶ 4-6.) Plaintiffs fail to disclose that the trial court denied the motion and refused to award even monetary sanctions, finding any late production was inadvertent. (See SPE 59-80.)

court]; *Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, 96 [same re writ petition].)

In any event, the documents do not appear to say what plaintiffs claim. The documents track the *truck* number; they reference several drivers other than Contreras; Contreras is mentioned only four times, one of which shows he was *below* the speed limit; and the documents also show Contreras received *a verbal reprimand for speeding*, the exact opposite of CRST not caring. (See Parris Dec., attached documents.)

None of this evidence would even remotely support punitive damages.

4. There is *no* evidence, clear and convincing or otherwise, of punitive-damages-worthy "policies."

Nor can plaintiffs point to any evidence, let alone clear and convincing evidence, that it was CRST's official "policy" to hire and retain unfit drivers. Such a theory is inherently implausible because it assumes the company purposefully acted against its own self-interest. So, it is no surprise that plaintiffs resort to more hyperbole:

- Plaintiffs misleadingly claim that "CRST's Vice President of Safety, Charles Haffenden, testified that *CRST's policy* was that an employee could have caused five accidents without termination, and *only after six accidents* would they 'look at termination.'" (Return 31, citing 4 PE 888-889, italics added; see also Return 55.) That is not what Haffenden said. Haffenden specifically said that there is *no policy* as to any specific

number of "accidents." (4 PE 888.) He drew a distinction between serious accidents, which "could be the cause for *immediate* termination," and minor accidents such as minor backing accidents, which might conceivably reach five but "[t]hat is probably pushing the envelope[.]" (4 PE 888-889; 5 PE 1037.) He explained: "We're a training company, so minor backing accidents happen. . . . . We don't fire them for every minor backing accident." (4 PE 889.) But he confirmed a serious accident warrants immediate termination, which is exactly what happened here after the subject accident. (2 PE 455; 4 PE 915; 5 PE 1037.) Plaintiffs' attempt to manufacture some hard and fast "six accident" policy ignores that Contreras was fired after his *fourth*, which was his *first* serious one. (*Ibid.*)

- The Return claims that "in 2013 CRST had lowered its standards for drivers due to a shortage[.]" (Return 9.) But the sole basis for this vague, sweeping assertion is Haffenden answering "yes" when asked in deposition whether CRST had "lowered [its] standards to get truck drivers, sir, in the last five years?" (Return 31-32, citing 4 PE 894.) Haffenden actually said that the *entire industry* had lowered its standards. (4 PE 894-895.) Plaintiffs never asked Haffenden what he meant by lower standards, such as whether he simply meant drivers with less prior experience. But Haffenden did expressly explain that even with these "lower standards," CRST "wouldn't have hired [Contreras] if we had known about the background." (4 PE 895.) Potential punitive-damage liability cannot be the automatic consequence every time there is a tight labor market and employers have to "lower standards" to hire employees

without a showing that particular employees are hired *knowing* that they will *inevitably* cause serious injury.

Thus, both testimonial snippets are much ado about nothing. They do not show it was CRST's conscious policy to hire people like Contreras or to retain any driver after a serious accident. They confirm the opposite: CRST only hired Contreras because the third-party vendor conducted an inadequate background check based on a mistake, and CRST immediately fired Contreras after his first serious accident. Nor can plaintiffs dispute that CRST had a mechanism on its trucks that prevented drivers from manually accelerating over 65 miles per hour (2 PE 445), or that even the new so-called speeding evidence plaintiffs submitted with their Return shows CRST had a mechanism in place to check driver's speed.

This is hardly some out-of-control company. At most, the evidence shows negligence—the failure to exercise reasonable care. Plaintiffs are simply trying to transform a standard claim for negligent hiring/entrustment, which would be barred under the *Diaz* rule given CRST's acceptance of vicarious liability, into a punitive-damages case. If this is a punitive-damages case, the *Diaz* rule would become meaningless.

B. Plaintiffs' Proposed Sweeping "Punitive-Damages Exception" Would Impermissibly Gut The *Diaz* Rule; The Exceedingly Rare Circumstances That Might Conceivably Support A Legitimate Exception Are Not Even Remotely Present Here.

As discussed in the foregoing section, there is nothing here that remotely would rise to a punitive damages standard. Plaintiffs

acknowledge that the *Diaz* rule—the rule that a plaintiff cannot pursue negligent hiring/retention/entrustment claims against the employer of a truck driver when the employer accepts vicarious liability—is binding on this Court. (Return 44.) But they urge this Court to "adopt a punitive damages exception" to the *Diaz* rule, arguing that "[t]his case is the prototypical example of a case to which the exception should apply." (Return 45.)

The argument is wrong, factually and legally. As discussed above, factually this is not a punitive damages situation. If this were indeed the "prototypical" case to apply a punitive-damages exception, the exception would swallow the *Diaz* rule. It remains to be seen whether the California Supreme Court will ever adopt a punitive-damages exception. But even assuming it might someday, this case does not even remotely present the rare facts that might conceivably support a legitimate exception. This is actually the prototypical case where a request for punitive damages should *be dismissed by summary adjudication*.

1. Plaintiffs' sweeping punitive-damages exception would impermissibly swallow, and thus effectively abrogate, the *Diaz* rule.

Plaintiffs get it exactly backwards in claiming this case is "the prototypical example" of a case where a punitive-damages exception should apply. If plaintiffs' "should have known" theories were enough to preclude a defendant from relying on the *Diaz* rule, *Diaz* would be rendered meaningless.

Far from being a prototype case for a punitive-damages exception, this case is at most a garden-variety claim for negligent hiring/retention dressed up as a punitive-damages case. *Diaz*, itself, proves the point. As discussed above, the negligent hiring/retention facts here are less egregious than in *Diaz* itself, as well as in *Armenta*. If this case were the prototypical case to apply a punitive-damages exception, nothing would be left of *Diaz*. Plaintiffs' requested exception would swallow the *Diaz* rule. (See *James v. Kelly Trucking Co.* (2008) 377 S.C. 628, 633 [661 S.E.2d 329, 332] [South Carolina Supreme Court concluding that a *Diaz*-type rule with a punitive-damages exception would raise procedural problems: "As requests for punitive damages are commonplace in cases of this type, we think traveling the road the Insurer proposes would create an exception which swallows the rule"].)

Intermediate appellate courts cannot and should not adopt "exceptions" that would swallow, and thus effectively abrogate, rules established by binding Supreme Court precedent.

2. A punitive-damages exception is illogical because punitive damages are merely a remedy, not an independent cause of action.

Because there is no evidence here that would begin to rise to the level of clear and convincing evidence necessary to establish the required *conscious*-disregard-of-safety threshold for punitive damages, there is no need to wade into the debate as to whether there is or should be a punitive-

damages exception to *Diaz.* But if that debate were relevant, its outcome is not as the Return supposes.

Just over a month ago, the Colorado Supreme Court adopted a *Diaz*-type "vicarious liability" rule and explicitly found that there is *no exception* for punitive damages. (See *Ferrer v. Okbamicael* (Colo., Feb. 27, 2017, No. 15SA340) __ P.3d __ [2017 WL 778222] (*Ferrer*).) Citing cases the Return emphasizes, the Court dismissed as unpersuasive the few courts that have adopted a punitive-damages exception; it noted most "have done so with little to no analysis" or merely have "suggested in dicta that a theoretical exception to the rule may exist." (*Id.* at *10.)

The Court, applying language that equally applies to California law, held such an exception is illogical because, under Colorado law, punitive damages are merely a remedy, not an independent cause of action: "We reject any exception to the rule where the plaintiff asserts exemplary damages against the employer. Such an exception is not logically consistent with the rule. Exemplary damages do not present a separate, distinct cause of action, but rather, depend on an underlying claim for actual damages . . . . As we explain above, where an employer acknowledges respondeat superior liability for any negligence of its employee, the [*Diaz*-type] rule bars direct negligence claims against the employer. *Because any direct negligence claims against the employer are barred, there can be no freestanding claim against the employer on which to base exemplary damages. A plaintiff cannot simply resurrect direct negligence claims against the employer by asserting a claim for exemplary*

damages against the employer. We therefore decline to recognize any exception . . . for when a plaintiff claims exemplary damages against the employer." (*Id.* at *10.)

The same analysis applies equally in California. As in Colorado, punitive damages are only a statutory *remedy* in California, not an independent cause of action. (See Civ. Code, § 3294; *Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 789 fn.2 ["there is no separate or independent cause of action for punitive damages"]; *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1163 ["[i]n California there is no separate cause of action for punitive damages"].)

3. Plaintiffs grossly exaggerate the purported "need" for a punitive-damages exception.

Quoting an out-of-state law student note, the Return asserts that a punitive-damages exception is "good public policy" because trucking companies might "'skimp on background checks and allow incompetent drivers behind the wheel so long as the companies can be held only vicariously responsible for their employees' negligence.'" (Return 44, quoting J.J. Burns, *Respondeat Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims* (2011) 109 Mich. L. Rev. 657, 676 (hereafter "J.J. Burns"). The Return ignores that the student note was arguing against the vicarious liability rule that *Diaz* adopted; it argued comparative-fault jurisdictions (such as California) should *not* bar negligent hiring/retention claims just because the employer accepts vicarious liability. (See J.J. Burns, *supra*, at 680 ["(t)he respondent

superior admission rule should be abandoned"].) *Diaz* explicitly *rejected* that view and any underlying public-policy predicates. (*Diaz, supra*, 51 Cal.4th at pp. 1158-1160.) As between a California Supreme Court opinion and a student law review note, the former controls.

Plaintiffs also ignore reality in suggesting a punitive-damages exception is needed to prevent trucking companies from putting unfit drivers on the road. It is always *against* a trucking company's *own self-interest* to put an unfit driver on the road. The context dramatically differs from circumstances where an employee's "unfitness" has nothing to do with the quality of their services to the company, such as a law firm that consciously disregards the known, repeated sexual harassment of a partner who brings in substantial business. (See *Weeks, supra*, 63 Cal.4th 1128.)

The risk of a trucking company knowingly and purposefully putting an unfit driver behind the wheel is more theoretical than actual: "Realistically, it appears that it would be *a very rare case* where an employer's misconduct in hiring, training, retaining, or supervising its employees or in entrusting a vehicle to an employee is so egregious that the conduct could support a punitive damages award. [¶] The reason such a situation is unlikely to occur is because it requires, practically speaking, *the employer to show a conscious disregard for its own self interest*. In motor vehicle accident cases, the result of this 'outrageous' conduct is a motor vehicle accident. Obviously, motor vehicle accidents, in addition to potentially harming people, also damage property, often including the expensive tractor-trailer units owned by the motor carrier. Accidents also

often cause damage to the goods being hauled by the motor carrier or cause delays in the delivery of the goods, which can result in a breach of the shipping contract. Loss of a tractor or trailer can also result in lost business income, because the unit is not available to generate income for the motor carrier. Even when there are no personal injuries arising out of an accident, the motor carrier is almost assuredly going to suffer some loss in the form of repairs to the vehicle, damage claims by shippers, and lost income for the time the equipment is out of service. [¶] *It is simply counterintuitive to assert that a motor carrier is going to willfully and wantonly send an untrained driver out on the road in expensive equipment if the motor carrier believes there is a high likelihood that the driver will be involved in an accident.*" (Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior* (2010) 10 Wyo. L. Rev. 229, 261, italics added.)

Plaintiffs also ignore the public-policy benefits of the *Diaz* rule. The *Diaz* rule does not encourage truck carriers to hire unfit drivers. Because the employer must accept vicarious liability for the rule to apply, employers are incentivized to prevent accidents. The rule encourages companies to accept vicarious liability for their drivers, making them liable for the driver's conduct and ensuring a "deep pocket" is available for the plaintiff. It streamlines litigation and prevents unnecessary factual disputes by requiring employers to accept that the driver was an employee (not an independent contractor) and that the conduct occurred in the course and scope of employment. And it prevents plaintiffs from presenting to the jury

highly-inflammatory and otherwise-inadmissible "prior bad acts" evidence about the driver and employer that can prejudice the jury's assessment of the accident and injury.

The Supreme Court has already determined that the *Diaz* rule furthers California public policy. Adding a potential rule-swallowing exception is far from the "good policy" plaintiffs suggest.

4. Even the cases cited in the Return recognize that courts must narrowly construe any punitive-damages exception and summarily dismiss inadequate punitive-damages claims.

And even if a punitive-damages exception to the *Diaz* rule theoretically existed in California, this still would not get plaintiffs where they want to go.

Plaintiffs emphasize that a Missouri intermediate appellate court adopted a punitive-damages exception to that state's *Diaz*-rule equivalent. (Return 42-43.) But they ignore that court's explicit warning that public policy mandates a *heightened* evidentiary showing for a plaintiff to proceed under that exception: "[T]he need for a plaintiff to allege sufficient facts to support a punitive damages claim *is arguably greater* when the reason for doing so is to meet the exception and allow the plaintiff to proceed on claims that would otherwise be barred. 'Just as it is dangerous to have a hard and fast rule that all direct negligence claims should be dismissed in the face of an admission of vicarious liability, it is *equally dangerous* to adhere to an inflexible rule that when a plaintiff asserts a claim for punitive

damages, the *direct negligence claims must necessarily survive summary dismissal*.'" (*Wilson v. Image Flooring, LLC* (Mo.Ct.App. 2013) 400 S.W.3d 386, 393–394, italics added, citation omitted.)

Consequently, as the Colorado Supreme Court recognized in recently rejecting a punitive-damages exception, the few contrary decisions supporting such an exception have mostly "suggested *in dicta* that a *theoretical* exception to the rule may exist." (*Ferrer*, *supra*, __ P.3d __ [2017 WL 778222 at *10, italics added].) That is because those courts, while acknowledging a punitive-damages exception exists or might exist, typically proceed to find *as a matter of law* that the circumstances before them did *not* support punitive damages.

The cases that plaintiffs cite (Return 44) demonstrate the point. (See, e.g., *Clooney v. Geeting* (Fla.Dist.Ct.App. 1977) 352 So.2d 1216, 1219 [upholding striking of punitive-damages claim because allegations that employer "knew that [the truck-driving employee] was neither physically nor mentally able to properly drive the truck, and that its safety manager had pointed this out prior to the accident" merely indicated gross negligence, not "the necessary malice or the wanton, wilful, or outrageous conduct required to support a claim for punitive damages"]; *Durben v. American Materials, Inc.* (Ga.Ct.App. 1998) 232 Ga.App. 750, 753 [503 S.E.2d 618, 620–21] [recognizing exception but granting summary judgment for employer given absence of sufficient evidence supporting punitive damages]; *Scroggins v. Yellow Freight Systems, Inc.* (E.D.Tenn. 2000) 98 F.Supp.2d 928, 932 fn, 4 [noting Georgia law permits punitive-

damages exception but concluding "the evidence fell woefully short of what Georgia courts have considered sufficient to warrant submission of a claim . . . ."].)

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The bottom line: There are ample legal and public-policy based reasons to reject a punitive-damages exception to the *Diaz* rule. But this Court need not decide the issue. Even if some sort of punitive-damages exception were theoretically possible, it could never legitimately apply to the facts of this case. If this case was "the prototypical example of a case to which the [punitive-damages] exception should apply" (Return 45), *Diaz* would become a meaningless shell. The exception would swallow the rule.

As *Diaz* itself demonstrates, plaintiffs are simply recasting a standard negligent hiring/retention claim as a punitive-damages case. Even in jurisdictions suggesting a punitive-damages exception might exist, this type of claim would never get past summary adjudication. As the Petition demonstrated and we further showed above, this is *not* a punitive-damages case. Not even remotely. It is, at most, a negligence case.

C. In Any Event, CRST Cannot Be Liable For Punitive Damages Because No Officer, Director Or Managing Agent Engaged In The Requisite Conduct.

Summary adjudication for CRST as to punitive damages is required for another distinct reason. CRST is not liable for punitive damages unless the conduct required to impose punitive damages was on the part of an officer, director or managing agent. (Civ. Code, § 3294, subd. (b).)

Plaintiffs do not claim that any officer or director engaged in the requisite conduct. (See Return 61-65.) And, they do not and cannot dispute that to be a "managing agent" an employee must have substantial discretionary, policy-making authority, not just the ability to apply policy or to hire and fire individuals. (See *White v. Ultramar, Inc.* (199) 21 Cal.4th 563, 573-574 (*White*); Return 61.) Nor can they contest that to qualify, the person must "be someone who 'exercise[s] substantial discretionary authority'" over *formal company policies* that "affect a substantial portion of the company" and "are the type likely to come to the attention of corporate leadership." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 714-715, quoting *White*, at p. 577, brackets in original.)

Instead, they claim the "managing agent" question is "a question of fact to be decided on a case-by-case basis" and that triable issues of fact exist as to whether the local dispatcher Davis and local safety director Stanek meet that standard. (Return 61-65.)[6] Not so.

None of the evidence discussed in the Return suffices to show Davis and Stanek are managing agents. CRST is entitled to summary

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[6] The Return acknowledges at one point that the only issue is whether Davis and Stanek are managing agents. (See Return 61.) But the Return also includes a stray argument that Charles Haffenden was a managing agent. (Return 64-65.) That argument is irrelevant. Plaintiffs have never claimed, and can never claim, that Haffenden ever knew anything about Contreras before this lawsuit or that he was ever involved in Contreras' hiring, retention, supervision or firing. He therefore never could have had the advance *notice* and *conscious* disregard as to Contreras required to impose punitive damages.

adjudication for this reason as well. (See, e.g., *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 167-168 [reversing judgment awarding punitive damages because "the evidence was insufficient, as a matter of law, to show that (company's loss prevention supervisor) was a managing agent"]; *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421 (*Kelly-Zurian*) [holding record would not allow any reasonable juror to find employer was a managing agent].)

1. Davis was not a managing agent.

Davis's title may have been "fleet manager," but she simply was a dispatcher who oversaw about one hundred drivers nationwide and interfaced and communicated with them on such things as safety matters, vacation time and personal use of their trucks, but primarily in regard to where to pick up or deliver a load. (1 PE 6; 2 PE 413-414, 433; 3 PE 545, 673; 4 PE 902.) Davis had authority to investigate driver incidents, but it varied by the nature of the complaint, and in some cases, it was her "responsibility to report" it "to either HR or to safety." (4 PE 903-905; Return 30.) She testified that she had fired drivers and that no one had more responsibility for her drivers than she did. (4 PE 901, 906-907.)

None of this qualifies Davis as a managing agent, not even her power to terminate a driver. *White* makes this clear, holding as a matter of law that a corporate employee is not a managing agent just because he or she has supervisory power over other employees or possesses the power to hire and fire them. (21 Cal.4th at pp. 566, 574-575, 577.) Multiple cases

have reached the same conclusion. (See *id.* at pp. 573-576; see, e.g, *Kelly-Zurian, supra*, 22 Cal.App.4th at pp. 421-422 [holding no reasonable juror could have found supervisor was a managing agent, even though "there was no one in a superior position to [him] in Southern California" and he "had immediate and direct control over [plaintiff] with the responsibility for supervising her performance"; the fact that the plaintiff reported to the supervisor and he had authority to terminate her "merely reflected that he was her supervisor, not that he was a managing agent"].)

Plaintiffs presented no evidence that Davis made policy, that is, rules to be applied other than on a case-by-case basis, or that the nature of her job involved decisions that could ultimately determine corporate policy. (See 3 PE 704-707; 4 PE 873-874, 881-882; 900-908.) Nor is there an iota of evidence that her individual decisions would come to the attention of corporate leadership. She supervised drivers, and presumably had the discretion to fire them. That's all. Davis was not a managing agent.

That Davis was not a managing agent guts plaintiffs' punitive damages claim. Plaintiffs have offered little evidence to support punitive damages against CRST that does not begin and end with Davis. For example, they do not identify anyone other than Davis as knowing about the speed report stating 99 miles per hour or the co-driver's comments about Contreras allegedly speeding but only getting a citation for the co-driver not wearing a seatbelt. (3 PE 589, 621-622; Return 29, 57-58.)

2. Stanek was not a managing agent.

Stanek had even less involvement with Contreras than Davis. Plaintiffs have not shown that Stanek had any involvement or knowledge as to Contreras prior to the July 7, 2014 collision. The Return's only mention of Stanek is that he never asked Contreras *after* the collision to submit to alcohol/drug testing. (Return 60.)

In any event, Stanek also is not a managing agent. He was only a safety supervisor; he supervised staff on Department of Transportation regulations, did accident reviews, and discussed accidents at safety meetings with people who reported to him. (2 PE 431; 3 PE 614, 713-714, 717-719.) If necessary, he would then discuss particular accidents with his "direct supervisors" and "reach some sort of conclusion on that accident." (3 PE 714.) It was his responsibility "to review the accidents that the drivers or students had" to "[d]etermine preventability and then make a determination what to do with the driver as far as retraining or things of that matter." (2 PE 431.) He could not do random tests on drivers for alcohol or drugs; those were done by a third-party administrator. (2 PE 432-433, 435.) Stanek was a step higher up the corporate ladder than Davis, but below Charles Haffenden, the Vice President for Safety. (4 PE 904-906.)[7]

That is all the record shows. Plaintiffs presented no evidence that Stanek made *policy* or that the nature of his job involved decisions that

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[7] Again, there is no evidence that Haffenden knew anything about Contreras before this litigation. (See fn. 6, *ante*.)

could ultimately determine corporate policy. As per *White*, Stanek is not a managing agent just because he has a supervisory title or possesses the power to fire drivers. As per *Roby*, there is no evidence Stanek is involved in "formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership." (47 Cal.4th at pp. 714-715.)

3. The cases cited in the Return are distinguishable.

None of the cases plaintiffs cite in the Return show Davis or Stanek could properly be considered managing agents.

Plaintiffs point to *Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, for example, as holding that a trier of fact could find at a post-remand trial that the employer's equal employment opportunity officer was a managing agent. (*Id.* at pp. 361, 373; Return 62.) But the job scope of the EEO officer there was entirely distinguishable from the two lower-level supervisors in this case. First, unlike Davis and Stanek, he did not report to anyone else in regard to his EEO responsibilities. More importantly, the company manual defined as his duties, among others, "the initiation, as necessary, of changes to the Affirmative Action Program and/or [the employer's] employment *policies*." (*Davis*, *supra*, 220 Cal.App.4th at p. 373, italics added.) There is no evidence that Stanek or Davis had any such direct policy input.

In *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, the court affirmed a jury verdict that found that a regional

manager/supervisor/claims adjuster was a managing agent who had substantial power to pay or not to pay claims, and who did so without day-to-day oversight. (*Id.* at pp. 1220-1221; Return 62.) Here, both Stanek and Davis reported to higher-ups, and had no authority to make decisions regarding non-employees.

In *Powerhouse Motorsports Group., Inc. v. Yamaha Motor Corporation* (2013) 221 Cal.App. 4th 867, the court affirmed a jury finding that the corporate defendant's "Regional Sales Manager for the Western Region," who managed a group of district managers and was "ultimately responsible for the total well-being of Yamaha Motor Corporation Dealers," with the power to terminate a dealership, was a managing agent. (*Id.* at pp. 885-886; Return 62.) Here, neither Stanek nor Davis had anything like this kind of authority, particularly as to persons or entities outside the corporation.

Lastly, in *Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, a pre-*White* decision, the office manager at the Woodland Hills office of a securities brokerage firm who was responsible for supervision of all 8,000 accounts in the office, and who signed as office manager on the form plaintiff signed, was a managing agent. (*Id.* at p. 193; Return 62-63.) Again, this is nothing like the roles of Davis, as an in-house dispatcher, or Stanek, as an in-house safety supervisor, both answering to higher-ups in the company.

CONCLUSION

This is not a punitive damages case as against CRST. It is not close. There is *no* evidence of a *conscious* disregard of safety. The sum of plaintiffs' over-the-top arguments is at most *unknowing* negligent hiring and retention. *Diaz* makes clear that such claims merge with the admitted vicarious liability for the driver's accident. To the extent that there might be a punitive-damages exception to *Diaz* (and that is not clear), the facts here would not begin to meet the necessary standard. Nor is there evidence of *conscious* misconduct by anyone who is close to being a CRST managing agent, that is, someone whose broad, formal policy-making decisions are likely to come to the attention of corporate leadership.

A peremptory writ should issue.

Dated: April 7, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **REPLY TO RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER RELIEF** contains **8,151 words**, not including the tables of contents and authorities, the caption page, or this certification page, as counted by the word processing program used to generate it.

Dated: April 7, 2017

Edward L. Xanders

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor Los Angeles, California 90036.

On April 7, 2017, I served the foregoing document described as: **SUPPLEMENTAL EXHIBITS IN SUPPORT OF REPLY TO RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER RELIEF VOLUME I OF I [Pages 1 - 80]** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

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I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

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Executed on April 7, 2017, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Anita F. Cole

ANITA F. COLE