2d Civil No. _____

REQUEST FOR IMMEDIATE STAY—TRIAL DATE FEBRUARY 10, 2017

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION _____

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.	

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER RELIEF

BASSI, EDLIN, HUIE & BLUM LLP
Fred M. Blum, Esq., SBN 101586
fblum@behblaw.com
Michael E. Gallagher, Esq., SBN 195592
mgallagher@behblaw.com
Lisa M. Stevenson, Esq., SBN 228338
lstevenson@behblaw.com
515 S. Flower Street, Suite 1020
Los Angeles, California 90071
(213) 412-2661 / Fax (213) 652-1992

GREINES, MARTIN, STEIN & RICHLAND LLP
*Robert A. Olson, SBN 109374
rolson@gmsr.com
Cynthia E. Tobisman, SBN 197983
ctobisman@gmsr.com
Alan Diamond, SBN 60967
adiamond@gmsr.com
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 / Fax (310) 276-5261

Counsel Continued On Next Page

YOKA & SMITH, LLP
Christopher E. Faenza, Esq. (SBN 205680)
cfaenza@yokasmith
Benjamin A. Davis, Esq. (SBN 255375)
bdavis@yokasmith.com
445 South Figueroa Street, 38th Floor
Los Angeles, California 90071
(213) 427-2300 / Fax (213) 427-2330

Attorneys for Petitioners
CRST, INC., CRST EXPEDITED, INC., CRST VAN EXPEDITED, INC. and CRST LINCOLN SALES, INC.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INTRODUCTION

This petition challenges an order denying summary adjudication of a punitive damages claim against an employer after the trial court granted summary adjudication of a punitive damages claim against the employee driver who caused the plaintiff's injury. Trial is set for February 10, 2017.

A. Important Issue Presented: Can An Employer Be Held Liable For Punitive Damages For An Accident Caused By, At Most, The Negligent Conduct Of An Employee?

Punitive damages are reserved for *conscious* disregard of others' rights or safety. They are not available for negligent disregard or even grossly negligent disregard. There is no evidence here reaching this standard.

A truck driver was involved in a head-on collision with plaintiffs' vehicle. Plaintiffs sought punitive damages from the driver on the ground he was under the influence of alcohol or drugs at the time of the collision. They sought punitive damages from his employer for its alleged negligent hiring, supervision, retention and entrustment.

The trial court granted the driver summary adjudication on the punitive damages claims on the ground that the undisputed evidence showed he was not driving while under the influence of alcohol or drugs. But the court *denied* summary adjudication of the punitive damages claim against the employer. The result: Plaintiffs can seek punitive damages

against an employer for an employee's *non-punitive damages-worthy* conduct. How so? Because, the trial court reasoned, the employer *should have known* what the driver did not know: that the driver was a potential danger on the road.

This is not a punitive damages case. Plaintiffs have not shown either despicable conduct or conscious disregard for public safety, let alone under a clear and convincing evidence standard. In fact, most of the basis for plaintiffs' punitive damages claim is factually insupportable. Many of plaintiffs' scattershot assertions against the employer do not appear in their complaint, some are no longer actionable given the award of summary adjudication to the driver, and others they've effectively conceded to have been false. What remains plainly cannot sustain an award for punitive damages:

1. The employer knew that the driver had two minor accidents backing up his truck; plaintiffs claim it was four, but the evidence does not support that assertion. The employer required the driver to attend a remedial driving course, and the driver completed it. Plaintiffs assert that the driver should have been fired or given greater discipline. Even crediting plaintiffs' unsupported allegations, those allegations show at most negligence, not despicable conduct or a conscious disregard for public safety.

2. Certain mid-level employees, who plaintiffs assert were the employer's managing agents, were allegedly notified by an electronic control module in the driver's vehicle that it had once been traveling at 99 miles per hour, and yet he was not terminated or required to complete a defensive driving course. But the undisputed evidence is that no such event ever happened. The undisputed evidence is that the 99 mile per hour vehicle is a default code showing that a load will not arrive on time. The driver's vehicle had equipment that prevented the driver from manually accelerating over 65 miles per hour. But, even were that not so, failing to fire a driver for speeding once is not despicable conduct or a conscious disregard for public safety.

3. A co-driver on one occasion complained to his dispatcher that he thought the driver had been speeding in a construction zone—again failing to take action or file a report is neither despicable conduct, nor illustrative of *conscious* disregard.

4. Plaintiffs claim that the driver's dispatcher was a managing agent of the employer, but there is no evidence, clear and convincing or otherwise, that the employee was anything more than a dispatcher, working with the truck drivers to manage delivery and pickup, or that she had any power to make policy.

Neither the allegations, nor the record, supports a finding that the employer acting in "conscious" disregard of public safety, that is *knowingly*

engaging in conduct that it understood to probably/likely lead to harm or that it was *actually aware* of the *probable* dangerous consequences of its decisions, not just negligently unaware of the danger, and willfully and deliberately failed to avoid those consequences. (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61.) Nothing like that is part of this record. It is illegal and wrong to subject the employer, one step removed from causing the harm, to punitive damages when the driver is not subject to punitive damages.

The bottom line: Plaintiffs' evidence, at most, shows the employer "should have known" that its driver was a "potential" danger. That is not the standard for punitive damages, but for negligence. Because the trial court denied summary adjudication, the employer must now go to trial on a punitive damages claim, with all that entails, where the evidence is simply not there to sustain a finding of despicable conduct and conscious disregard against it.

And there's another problem: Every allegation against the employer rises or falls on whether one of its managing agents was aware of the driver's conduct. The two identified persons here are ordinary mid-level employees. At the furthest reach of their discretion, they can hire and fire drivers, but that's about it. They do not set corporate policy, let alone the requisite formal corporate policy. They report to multiple superiors. In

holding that punitive damages claims can proceed to trial against the employer (but not the employee), the court committed clear error.

Writ relief is imperative.

B. Why Writ Review Is Necessary.

That petitioners have no plain, speedy, or adequate remedy at law for the court's denial of summary adjudication of plaintiff's punitive damages claim is evident. There is no right of immediate appeal from such an order (Code Civ. Proc., § 904.1), and an appeal from a final judgment could not repair the harm in allowing the punitive damages claim to go to the jury.

Writ relief for erroneous punitive damages claims is anticipated by law. Code of Civil Procedure 437c, subdivisions (f) and (t), expressly envision summary adjudication of punitive damage claims. And, the summary adjudication statute sets out a petition for a peremptory writ as the appropriate remedy for denial of a motion for summary adjudication. (Code Civ. Proc., § 437c, subd. (m)(1) [after any outcome other than a grant of summary judgment, a party may "petition an appropriate reviewing court for a peremptory writ"].) This is a *legislative recognition* of the importance of proper summary adjudication rulings on punitive damages issues.

Case law recognizes an improper punitive damage claim as a quintessential case for writ relief. (E.g., *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704.) The reason: Punitive damages are a

game-changer. They greatly affect the evidence to be presented at, and the scope of, trial. They necessarily multiply the time and expense that it takes to try what otherwise is a simple negligence case. They are a sword of Damocles hanging over any defendant exposed to them, and therefore alter the whole tenor and focus of a trial.

Given the high cost of litigation and limited judicial resources resulting from the economic crisis facing the courts, this case should not have to proceed to trial on an issue where it is clear that the court has misapplied basic principles of the law and, thus, unduly expanded the issues subject to discovery and trial and thereby interfered with settlement possibilities. It would result in wasted time and effort for the parties and the courts, and inevitably should result in a retrial if there is a defense verdict.

Where, as here, a trial court's erroneous ruling on summary adjudication will result in a trial on a nonactionable claim, a writ of mandate is called for. (*West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 946; *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033 [writ issued where invalid pleading of tort claim would extend discovery and trial, and could require a bifurcated proceeding on punitive damage claim and an obtrusive inquiry into the defendant's financial condition].) Again, the goal is to avoid needless trials and burdens to the bench and bar alike.

The trial court's error in denying summary adjudication also is plainly evident, another factor that alone requires writ relief. (E.g., *Babb v. Superior Court* (1971) 3 Cal.3d 841, 850.) Without writ relief, petitioners will be exposed to a much longer, much more complicated trial and, perhaps, a greatly multiplied judgment to be bonded on appeal. Punitive damages are for exceptional cases of despicable conduct, not this case.

Finally, one of the key aspects here is novel, warranting immediate consideration by this Court. To our knowledge, no court has ever ruled that an employer can be liable for punitive damages on the basis of its driver's *non-punitive-worthy* driving. This issue is narrow but important to employers across the State. The potential impact of the trial court's ruling is great: It affects the extent to which trucking companies or other driving businesses can be liable for punitive damages based on their employees' driving, when that driving is no more than negligent.

Under the rule announced by the trial court, employers cannot hire—and may have to terminate—anyone with any sort of driving record, or else risk potential punitive damages. Such a novel application of the extraordinary windfall of punitive damages is ground breaking. It should compel immediate appellate review. (E.g., *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816 [writ relief appropriate to address issue of "widespread interest"]; *Interinsurance Exchange of Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1225 [writ relief appropriate where

"'necessary to resolve an issue of first impression promptly and to set guidelines for bench and bar'"]; *Rodrigues v. Superior Court* (2005) 127 Cal.App.4th 1027, 1032 [same]; *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1315 [writ relief appropriate to address "novel and important question"].)

C. An Immediate Stay Is Necessary.

Trial is currently set for February 10, 2017. Yet, the trial court just signed the summary judgment denial order on January 9, 2017. A stay is necessary to allow this Court sufficient time to consider this petition.

An application for this case to be assigned to a long-cause courtroom is being filed.

PETITION

By this verified petition, petitioners CRST, Inc., CRST Expedited, Inc., CRST Van Expedited, Inc. And Lincoln Sales, Inc. (collectively "CRST") allege and show as follows:

A. The Parties And Underlying Lawsuit.

1. Petitioners are defendants in a personal injury action now pending in respondent Los Angeles Superior Court, styled *Lennig, et al. v. CRST, Inc., et al.*, Case No. MC025288 (the "personal injury action"). The operative complaint is the Third Amended Complaint. (1 PE 3.)[1]

2. Real parties in interest Matthew John Lennig, Michael Lennig and Rosa Lennig are the plaintiffs in the personal injury action. (1 PE 4.)

3. Real party in interest Hector Contreras is the remaining defendant. (1 PE 4.)[2]

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[1] Exhibits are contained in the accompanying Petitioners Exhibits and are true and correct copies of documents filed in this action or reporter transcripts of proceedings therein. Citations are to the volume and page, as follows: "[volume] PE [page]."

[2] Plaintiffs settled with and dismissed the defendants named in the second, third and sixth causes of action who were alleged to have negligently designed, owned, constructed, controlled, maintained or supervised the construction site where the incident occurred, including failing properly to erect a physical barrier between northbound and southbound lanes at the site, which "was the substantial factor in the collision which then caused

4. The complaint alleges that Matthew Lennig was driving north approaching a construction zone when Contreras' Freightliner Semi-Truck crossed over the double yellow line and entered the northbound traffic lane, hitting Matthew's vehicle head-on, injuring Matthew and his passenger Michael Lennig. (1 PE 7, 15-16.)

5. The complaint further alleges that at the time of the accident, Contreras was employed by CRST as a truck driver to deliver goods on its behalf and his vehicle was owned, maintained, entrusted and controlled by CRST. (1 PE 7, 9.)

6. The currently pending claims are: (1) the first cause of action for negligence against Contreras and CRST; (2) the fourth cause of action against CRST for negligent hiring, supervision and retention of Contreras; (3) the fifth cause of action against Contreras and CRST for negligent infliction of emotional distress; (4) the sixth cause of action against Contreras and CRST for loss of consortium; and (5) the seventh cause of action against CRST for negligent entrustment to Contreras. (1 PE 15-18, 23-28.)

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serious injuries to plaintiffs" and "the proximate cause of harm to plaintiffs." (1 PE 5-7, 18-23, 26-27.)

B. The Allegations Seeking Punitive Damages.

7. Plaintiffs sought punitive damages against CRST and Contreras in the first, fourth and seventh causes of action. (1 PE 16-17, 24, 27-28.)

8. The first cause of action against Contreras and CRST alleges as the basis for punitive damages:

a. Contreras was under the influence of alcohol or drugs at the time of the collision, and knew at the time he consumed such alcohol or drugs that he was going to be operating a Freightliner Semi-Truck, which he carelessly, negligently, wantonly, or unlawfully operated in that intoxicated condition. (1 PE 16.)

b. Contreras had a history of driving under the influence, including a DUI conviction, and CRST knew *or should have known* of that history, such that in allowing him to operate the Freightliner Semi-Truck, they acted intentionally, maliciously and in conscious disregard for the safety of the public. (1 PE 9-11, 16-17.)

c. CRST failed to perform required drug testing of its employees or a thorough background check of Contreras that would have disclosed multiple convictions regarding illicit substances, as well as other criminal history, or to implement company policies to protect the public safety. (1 PE 10-11, 17.)

9. The fourth cause of action against CRST alleges as the basis for punitive damages:

a. CRST knew *or should have known* that Contreras was unfit or incompetent to perform the work for which he was hired, including operation of a truck, and that created a risk that harmed plaintiffs. (1 PE 23-24.) CRST refused to properly hire, screen, train, or supervise their employees who operate its vehicles, by virtue of which failure plaintiffs suffered injury and damages. (1 PE 24.)

b. By hiring Contreras and allowing him to operate the Freightliner Semi-Truck on the date of the collision, CRST's conduct was despicable, malicious and done in willful and knowing disregard of the public safety. (1 PE 24.)

10. The seventh cause of action for negligent entrustment against CRST alleges as the basis for punitive damages:

a. CRST knew *or should have known* of that Contreras was incompetent and unfit to drive the Freightliner Semi-Truck on the day of the incident and that his unfitness or incompetence created a particular risk to the general public. (1 PE 27.)

b. By hiring Contreras and allowing him to operate the Freightliner Semi-Truck on the date of the collision, CRST's conduct was despicable, malicious and done in willful and knowing disregard of the public safety. (1 PE 27-28.)

11. The complaint alleges as the basis for punitive damages that CRST's employees Marge Davis and Dale Stanek were managing agents, so that their knowledge and actions can be attributed to CRST:

a. Davis was a "fleet manager" and Stanek was "a Supervisor of Safety Compliance." Both allegedly "exercised direct managing control over defendant Contreras," as well as other CRST drivers. (1 PE 6.)

b. Davis allegedly knew that the Qualcomm system in Contreras' vehicle was not functioning and continued to permit him to operate it and knew it was contrary to company policy, but permitted him to drive without a co-driver. (1 PE 11.)

c. Davis and Stanek supposedly knew *or should have known* that Contreras was involved in four preventable collisions, but only required him to attend one defensive driving course. (1 PE 12.)

d. Davis allegedly was told by a co-driver that Contreras had been ticketed for speeding in a construction zone, but neither Davis nor Stanek either terminated Contreras or demanded that he complete a defensive driving course. (1 PE 12-13.)

e. Davis and Stanek were allegedly notified by Contreras' vehicle's electronic control module that it was traveling at 99 miles per hour, but they did not terminate him or demand he complete a defensive driving course. (1 PE 13.)

C. Truck Driver And Co-Defendant Hector Contreras Successfully Moves For Summary Adjudication On Plaintiffs' Punitive Damages Claims With The Court Finding No Evidence That He Was Intoxicated.

12. Contreras moved for summary adjudication of the punitive damages claim against him on the ground that the claim's only basis was that he was under the influence of alcohol or drugs at the time of the accident when, in fact, the undisputed facts show he did not consume alcohol or drugs at any time from July 3, 2014 through the July 7, 2014 date of the accident. (1 PE 42-43, 45; 4 PE 933-934, 938-945.)

13. The trial court granted Contreras' motion, holding that no evidence suggested that Contreras was under the influence of drugs or alcohol at the time of the accident. (5 PE 1066-1067.)

D. CRST Moves For Summary Adjudication Of The Punitive Damages Claims Arising Out Of Contreras' Accident.

14. CRST moved for summary adjudication of plaintiffs' claims for punitive damages, arguing that there was no evidence (1) that CRST employed or retained an employee, in *conscious* disregard of the rights or safety of others, or (2) that any managing agent of CRST engaged in or ratified any despicable conduct by an employee. (1 PE 48, 59-67; 4 PE 953, 958-964.)

15. No evidence supported an inference that CRST had any intention of harming plaintiffs or any member of the public— i.e., there was no evidence CRST knew that Contreras was such a dangerous driver that he was almost certainly going to get into a serious accident, such that CRST could be said to have knowingly and consciously disregarded a danger to the public. (1 PE 53-56, 62-66.)

16. ***Burden-Shifting Showing***. To establish the absence of punitive damage-worthy conduct, CRST presented evidence (echoed by evidence proffered by plaintiffs, see pp. 28-29, *post*) that:

- Pursuant to governing regulations, "CRST conducted the required pre-employment screening of Hector Contreras. Based upon the MVR (Moving Violations Record) obtained, CRST was informed and believed that Contreras had no reportable moving violations within the past three years prior to his hire." (3 PE 558; see also 2 PE 382-390, 392-406; 3 PE 552.)
- CRST properly relied on both its own employment application and driving records obtained from a third party. (2 PE 369-406.)
- Prior to his collision with plaintiffs, CRST was aware Contreras had two minor accidents backing up his truck, and shortly after those accidents, CRST addressed those incidents

by requiring Contreras to attend a defensive driving course, which he completed. (2 PE 460-488; 3 PE 551.)

- The two backing accidents were minor and Contreras' discipline was proportionate to the nature of those accidents—under company policy, very serious accidents could be a cause for immediate termination, and so could six accidents within an eight month period, but there are generally many minor backing accidents among drivers, and the company doesn't fire for those. (4 PE 885-889.)
- Between June 25 and July 7, 2014, the Qualcomm unit on Contreras' Freightliner was functioning and never registered a speed of 99 miles per hour, nor could it have done so because CRST freightliners have equipment that prevents the driver from manually accelerating over 65 miles per hour. (1 PE 90 - 2 PE 357; 2 PE 422, 445, 492, 499; 3 PE 550, 558.)
- The 99 mile per hour reading that had been recorded on Contreras' Freightliner was *not* a register of speed but rather was a default code showing that a load would not arrive on time. (2 PE 492, 499.)

17. ***CRST's Showing That Neither Marge Davis Nor Dale Stanek Was CRST's Managing Agent.*** CRST showed that, contrary to the allegations in the complaint, neither Marge Davis nor Dale Stanek was a managing agent. (1 PE 64; 4 PE 960-963.)

18. CRST presented evidence (echoed by evidence plaintiffs proffered, see p. 29, *post*) that:

- Davis, as a "fleet manager," was essentially a dispatcher, who had multiple supervisors and made no policy decisions herself. (2 PE 414, 433; 3 PE 545-546, 673.)
- Davis's role with respect to drivers involved lower-level tasks such as supervising them in picking up and delivering freight, and doing those things on time, and making reports about drivers to persons higher up, in HR or in safety. (4 PE 902-904.)
- Despite his title of "safety supervisor," Dale Stanek was not a policy maker and answered to persons higher up on the CRST corporate ladder. (2 PE 414-415, 431, 433-435, 447; 4 PE 904-905.)[3]

19. ***Plaintiffs' Proffered Opposing "Evidence."*** In opposing summary adjudication, plaintiffs focused on the complaint's allegation that Contreras was driving while under the influence on the day of the collision,

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[3] CRST also disproved plaintiffs' allegations in the Third Amended Complaint that Contreras was under the influence of alcohol and/or drugs on the date of the collision. (1 PE 62-63; 3 PE 545; 4 PE 958-960.) In light of the trial court granting Contreras' summary adjudication motion (5 PE 1067), plaintiffs' allegations on that point no longer can support punitive damages against CRST (5 PE 1049-1050, 1061.)

and their related assertion that CRST knew or should have known that Contreras had a history of arrests or convictions for alcohol or drug use and was homeless at the time of the collision. (See 1 PE 17; 3 PE 582-588, 594-595.)

20. Plaintiffs argued that whether Contreras was intoxicated at the time of the collision was "the pivotal issue presented before the Court" and "that someone who chooses to ingest intoxicating substances knowing they will be driving a vehicle on behalf of others has acted despicably." (3 PE 594.) Plaintiffs argued that CRST never should have hired Contreras given what it allegedly knew about his past record of alcohol and drug use, or allowed him to operate the Freightliner Semi-Truck on the date of the collision, and for that reason CRST's conduct was despicable, malicious and done in willful and knowing disregard of the public safety. (1 PE 24, 27-28; 3 PE 585-587, 594-595.)

21. Plaintiffs also argued that the following pre-collision matters showed that CRST acted in conscious disregard of public safety: (1) Contreras allegedly caused four collisions within an eight month period, but CRST only required he attend one defensive driving course, and company policy allowed a driver to cause up to six collisions in that time frame before he would be terminated (3 PE 588-589), (2) Contreras allegedly was ticketed while speeding through a construction zone, and CRST's Marge Davis did not investigate the incident, or warn or fire

Contreras (3 PE 589), and (3) four days before the collision, the Qualcomm system on the Freightliner recorded Contreras driving at 99 miles per hour, and Davis, who knew this, never investigated, reprimanded or fired Contreras (3 PE 589; see also 1 PE 12-13, 61).

22. But plaintiffs failed to muster evidence supporting their arguments.

23. Plaintiffs failed to present evidence showing that Contreras had been in more than two preventable accidents prior to the July 7, 2014 accident with plaintiffs, or that CRST knew any such thing. Specifically, plaintiffs proffer a CRST document that lists five events regarding Contreras' driving history. (4 PE 915.) It lists the July 7, 2014 collision that is the subject of this lawsuit. It lists the two minor backing up accidents referred to above. After those, it lists Contreras' post-accident retraining resulting from those two minor backing accidents. Then, it lists Contreras being "[h]it by other vehicle." (*Ibid*.) Thus, this evidence shows only two preventable accidents that Contreras caused.

24. Plaintiffs conceded that it was "undisputed" that Contreras' Qualcomm unit was operational from June 25 through July 7, 2014. (3 PE 604, 607.) Plaintiffs did not present evidence that the Qualcomm unit would allow a driver to manually accelerate over 65 miles per hour.

25. Plaintiffs presented evidence that Contreras was ticketed in a construction zone for speeding or because his co-driver was not wearing

a seat belt or both. (3 PE 694-697; 4 PE 870-875 [CRST co-driver claimed Contreras was speeding in construction zone but got ticketed not for that but because he (the co-driver) was not wearing his seat belt].)

26. Plaintiffs claimed that Marge Davis and Dale Spanek were CRST's managing agents because Davis held a leadership post in that she oversaw about one hundred truck drivers nationwide, had the power to fire drivers, and "was the first person in charge of her drivers from a safety standpoint," while Stanek had the power to fire drivers or submit them to retraining, and that he had his own staff. (3 PE 589-590.)

27. While plaintiffs characterized Davis and Stanek's positons as "important leadership posts," they did not dispute that Davis and Stanek had multiple layers of bosses and that neither set corporate policy—i.e., that at most, they made decisions about particular drivers in the framework of company policy. Moreover, plaintiffs' evidence showed that while Davis was known as a dispatcher or fleet manager, the nature of her job did not involve any policy making. (See 3 PE 704-707; 4 PE 873-874, 881-882, 900, 901-905.) As to Stanek, plaintiff's evidence showed that he had limited authority and could not set company policy. (See 3 PE 713, 714-716 [Stanek attended weekly safety meetings, didn't disseminate memos to the other supervisors; if he had questions, he would discuss with "my direct supervisors"], 718-720; 4 PE 906.)

28. ***Reply***. In its reply, CRST elaborated on why Davis and Stanek were not managing agents. Citing case law, CRST argued that a managing agent must have the power to exercise broad, high-level authority over decisions that ultimately determine formal corporate policies. (4 PE 957-959.)

29. CRST presented additional evidence showing that neither Davis nor Stanek had such powers; at most, they had the power to hire and fire employees; they primarily dealt with day-to-day driver problems. (1 PE 64; 2 PE 447; 3 PE 545; 4 PE 900-905, 960-963.)

30. In other words, they may have had some supervisory authority, but they had no discretion in their roles and did not set corporate policy. (See pp. 39-40, 54-56, *post*.)

E. The Trial Court Grants Summary Adjudication To Contreras As To Punitive Damages But Denies Summary Adjudication As To Punitive Damages Against CRST.

31. The trial court summarily adjudicated in Contreras's favor the punitive damages claim him. (5 PE 1066-1067.) It found no evidence that Contreras was intoxicated at the time of the accident. (5 PE 1067.)

32. The trial court acknowledged that its grant of summary adjudication as to Contreras removed vicarious liability as a basis for awarding punitive damages against CRST. (5 PE 1046-1047, 1050.) But the court still denied summary adjudication of punitive damages as to

CRST. Despite finding no evidence of punitive damage-worthy conduct by Contreras (i.e., no intoxication), the court held that his employer CRST could be liable for punitive damages.

33. In so holding, the court focused on plaintiffs' argument that Contreras displayed conduct that "*should have* warned or alerted CRST" that Contreras was "potentially dangerous when he gets on the road, and nothing was done." (5 PE 1047, 1050, italics added.) The court reasoned: "[T]here are triable issues of fact as to whether this—the issue of vicarious liability and *negligent* entrustment and their determination under *Diaz* [*v. Carcamo* (2011) 51 Cal.4th 1148 (claim for negligent hiring or retention of employee moot where employee was acting within course and scope of employment and employer is thereby vicariously liable)] how that pans out. [¶] My view of this would be that they're two separate and alternative causes of action that can be brought falls [*sic*] within *Diaz*. *Negligent* entrustment you're basically saying their training, supervising, and hiring of Mr. Contreras was *negligent*, and when you consider all of these issues that happened before he was hired, but between the time of hiring and the incident, there was certainly triable issues of material fact as to whether

CRST should have gotten rid of Mr. Contreras or disciplined him in a more appropriate manner." (5 PE 1061, italics added.)[4]

34. The court did not explain how plaintiffs' negligence and "should have known" arguments sufficed to show "*conscious* disregard" and despicable conduct required for punitive damages. Nor did the court explain how negligent entrustment could be a basis for punitive damages. Nor did the court explain how Davis or Stanek could be "managing agents" when there was no evidence they could set corporate policy. (5 PE 1047, 1050, 1061.)

F. The Trial Court Signs The Order Denying CRST's Motion For Summary Adjudication.

35. On December 19, 2016, plaintiffs submitted a proposed order in the personal injury case stating that "Defendant CRST's Motion for Summary Adjudication as to Plaintiffs' claims for punitive damages is DENIED." (5 PE 1071.)

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[4] Absent punitive damage liability, if Contreras was acting within the course and scope of his employment at the time of the accident, CRST's liability is vicarious and there can be no basis for a negligent hiring or entrustment claim. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1158.) CRST had sought summary adjudication of the negligent hiring, supervision and entrustment claims on that basis, but the trial court denied it. (5 PE 1061-1062.)

36. The trial court signed the order on January 9, 2017. (5 PE 1071-1072.)

G. The Trial Court Clearly Erred In Allowing The Punitive Damages Claim To Proceed Against Employer CRST, Having Found No Evidence That Employee Contreras Was Intoxicated Or Engaged In Other Punitive-Damages-Worthy Conduct.

37. Respondent superior court committed clear error in denying CRST's summary adjudication motion as to punitive damages.

38. As the hearing transcript makes clear, the court failed to decide the issues on which writ review is sought: Was any act or omission by CRST despicable or in *conscious* disregard of public safety as required to support an award of punitive damages? And, if so, was such act done, authorized or ratified by a "managing agent" as also required? (See 5 PE 1045-1062.)

39. "Malice" requires clear and convincing evidence that with respect to its hiring, supervision and retention of Contreras, CRST either had to "intend" to cause plaintiffs injury or to engage in "despicable conduct" "with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).)

40. There is no evidence, or indeed allegation, that CRST intended to harm plaintiffs or anyone else. Thus, the question is whether

there is any evidence that CRST engaged in *despicable conduct* with *conscious disregard*.

41. "Despicable conduct" requires conduct so "vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 331.)

42. This standard requires something more than carelessness and more than even "an obstinate persistence in an ill-advised initial position." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc*. (2000) 78 Cal.App.4th 847, 892.)

43. Rather, "conscious disregard" requires proof that the defendant is "'*aware of* the *probable* dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences.'" (*Pfeifer v. John Crane, Inc*. (2013) 220 Cal.App.4th 1270, 1299, italics added, quoting *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1228.)

44. "Aware of" requires an actual, subjective state of mind; it requires *actual* knowledge. "Should have known" is not good enough. (See *Piutau v. Federal Express Corp*. (N.D.Cal. Apr. 21, 2003, No. C01-0028 MMC) 2003 WL 1936125 *5 [manager's mistaken belief that he could suspend plaintiff without pay did not suffice].)

45. "The noun 'probability' commonly suggests *a relative likelihood* that a particular outcome will occur." (*College Hospital, Inc. v. Superior Court*, *supra*, 8 Cal.4th at 715, italics added.) In other words, the dangerous consequences must be more than possible to occur; they must be *likely* to occur. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 895-896 ["the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences"].)

46. There is no evidence rising to these stringent standards. With the issue of Contreras' alleged intoxication out of the case, the trial court was left with allegations and evidence sufficient at most to raise triable issues of fact on claims of *negligence*. But those allegations, even if true, cannot support punitive damages.

47. As noted, the sole question is whether there is evidence that rises to a clear and convincing level that CRST acted *despicably* and in *conscious* disregard of others' safety—that is, that what CRST is alleged to have done is vile, base, contemptible, miserable, wretched or loathsome and likely to produce dangerous consequences.

48. There is *no* evidence, let alone "clear and convincing evidence," that CRST *consciously* disregarded public safety—that is, evidence that there was *actual* awareness that there were *probable* dangerous consequences from employing Contreras. (See *Food Pro*

Intern., Inc. v. Farmers Ins. Exchange (2008) 169 Cal.App.4th 976, 994 [sufficiency of punitive damage evidence must be viewed through the "prism" of clear and convincing evidence standard].)

49. The court denied summary adjudication on the basis that the evidence sufficed to bring *negligence* claims against CRST for hiring and continuing to employ driver Contreras. But the court said nothing about what evidence had satisfied the *conscious* disregard standard for imposing *punitive damages* against a corporate employer. (5 PE 1061.)

50. The court did not discuss either the requirement that punitive damages be proven by clear and convincing evidence, or the need to show the employer acted despicably and with *conscious* disregard for public safety, or whether there was evidence rising to that level. (5 PE 1046-1065.)

51. In denying summary adjudication, the court stated the issue before it purely in terms of negligence, to wit, whether CRST's "training, supervising, and hiring of Mr. Contreras was *negligent*" and "whether CRST *should have* gotten rid of Mr. Contreras or disciplined him in a more appropriate manner." (5 PE 1061, italics added.) The court's reasoning manifestly did *not* meet the punitive damages standards. If circumstances allow an employer to choose between disciplining an employee or firing him, or between levels of discipline, the employer is almost certainly *not* facing employee conduct that allows a jury to find the employer acted with conscious disregard of others' safety.

52. None of the evidence or arguments proffered by plaintiffs dictates a different result. For example, plaintiffs assert that CRST did not fire Contreras although, according to plaintiffs, he caused four preventable collisions within an eight-month period. Plaintiffs have never made clear what accidents they are referring to. In fact, the evidence shows that CRST was aware of only *two* minor accidents Contreras caused, which involved backing up his vehicle, and which caused no injuries and only minimal property damage; and they occurred some seven months prior to the collision with plaintiffs. (2 PE 461, 463; 3 PE 551; 4 PE 915.) In response to the backing accidents, CRST required Contreras to complete a Defensive Driving Course for backing, which he did within weeks of the accidents. (2 PE 466-488; 3 PE 551; 4 PE 915.)

53. Even if plaintiffs' allegations were supported—i.e., even if Contreras was involved in four collisions in an eight-month period—that would at most support a finding of *negligence*. Indeed, there would still be a complete dearth of evidence that CRST actually thought—i.e., was *consciously aware*—that Contreras likely to cause a serious accident.

54. Simply put, there was nothing base or contemptible about CRST's conduct. As CRST's Charles Haffenden testified: "We're a training company, so minor backing accidents happen. There is [*sic*] a lot of them. We don't fire them for every minor backing accident." (4 PE 889.)

55. As to Contreras, there was not a level of collisions—either in frequency or severity—that suggested that a serious collision was virtually inevitable if CRST continued to allow Contreras to drive. Without such evidence of *conscious* disregard, there can be no punitive damages.

56. Nor is there anything despicable about CRST requiring that Contreras attend one defensive driving course rather than, in the language of the trial court, "disciplin[ing] him in a more appropriate manner." (5 PE 1061.) Choosing less appropriate discipline, even if a mistake, is not despicable. By definition, measures of appropriateness are not the stuff of despicable conduct; they are the stuff of *negligence* claims.

57. The same reasoning disposes of plaintiffs' assertions about Contreras' speeding—i.e., that he may have been speeding once in a construction zone. Again, the fact that CRST continued to employ Contreras cannot support a finding of "despicable" conduct.

58. At most, CRST's conduct falls within the realm of human fraility, i.e. misguided adherence to an inappropriate judgment—and therefore *outside* of punitive damages, as a matter of law. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc*., *supra*, 78 Cal.App.4th at p. 892 [in insurance bad faith case: "Unreasonable and negligent as it may have been, Northbrook's conduct falls within the common experience of human affairs, both with respect to its careless initial evaluation and its stubborn persistence in error"]; *Tomaselli v. Transamerica Ins. Co*. (1994) 25 Cal.App.4th 1269, 1288, fn. 14

["'punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness,'" but only upon evidence "that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence, or other such noniniquitous human failing'"]; *Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 894 ["mere negligence, even gross negligence, is not sufficient to justify an award of punitive damages", italics omitted].)

59. Finally, the trial court failed to acknowledge that neither Marge Davis nor Joe Stanek qualified as a managing agent. (Civ. Code, § 3294, subd. (b); 5 PE 1044-1065 [court did not address managing agent issue in summary adjudication denial order].)

60. Plaintiffs' assertions about what CRST knew or did depends on what Davis or Stanek knew or did. (E.g., 1 PE 11-13.) If those people do not qualify as managing agents, plaintiffs' case for punitive damages cannot succeed. But the evidence doesn't exist to lift ordinary mid-level employees to the level of policy-making management. Davis and Stanek needed more than the power to supervise, hire and fire, and far more than the power to discipline drivers or regulate loading and delivery of their freight. (*White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 573; see *Muniz v. United Parcel Service, Inc.* (N.D.Cal. 2010) 731 F.Supp.2d 961, 976 [evidence that employee "'in charge of 6 divisions, 23 package centers and

approximately 40 managers, 150 supervisors and 4,200 employees'" insufficient to "constitute evidence that he set corporate policy"].) To be managing agents, Davis and Stanek needed the power to determine formal corporate policy. (*Ibid*; *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 714-715.)

61. They had no such powers. Rather, under the undisputed facts, neither was a managing agent. (See pp. 25-26, *ante*; pp. 54-56, *post*.) Accordingly, no punitive damages can be imposed based on what Davis or Stanek did or did not do with regard to Contreras.

H. CRST Has No Plain, Speedy Or Effective Remedy At Law.

62. CRST has no plain, speedy, or adequate remedy at law for respondent court's denial of summary adjudication of plaintiffs' punitive damages claims. There is no right of immediate appeal from such an order. And, appeal from any final judgment could not repair the harm in allowing plaintiffs' punitive damages claims to go to the jury.

63. Code of Civil Procedure section 437c, subdivision (m) so recognizes, affording a right to seek writ relief from denial of summary adjudication as to punitive damages. Punitive damages are special. Allowing an improper punitive damages claim to proceed taints the rest of the trial. This is why punitive damages are the sole damages claim for

which a separate summary adjudication right is provided. (See Code Civ. Proc., § 437c, subd. (f).)

64. The impact of a punitive damages claim in the present case cannot be overstated. Without the punitive damages claim, it is likely that evidence regarding CRST's hiring and retention of Contreras will be irrelevant and never come into evidence. The sole issue will be whether Contreras was acting within the course and scope of his employment. In the absence of a punitive damages claim, the issues subject to discovery and trial will necessarily be significantly narrowed and there may be possibilities of settlement. By contrast, if a punitive damage claim is allowed to go to trial, it will change the tenor, duration and focus of the proceedings. For the employer whose negligence case becomes a punitive damages case, even if he prevails at trial, the process unleashed by punitive damages is the real punishment.

65. Given the high cost of litigation and the continuing effect on the courts from the various economic crises California has endured, this case should not proceed to trial on an issue where it is plain that the trial court has failed to apply or misapplied basic, widely-accepted principles of the law that confine punitive damages to their proper sphere—i.e., clear and convincing evidence showing not negligence but *conscious* disregard for public safety.

66. Moreover, the trial court's clear judicial error requires writ relief. (E.g., *Babb v. Superior Court* (1971) 3 Cal.3d 841, 850.) It is indisputable that punitive damages are not available for negligence—even gross negligence. But "should have known" is the most that the evidence proffered by plaintiffs here supports.

67. Writ review is also appropriate where such relief can resolve a substantial issue of first impression and to set guidelines for the bench and bar. (See, e.g., *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816 [writ relief appropriate to address issue of "widespread interest"]; *Interinsurance Exchange of Automobile Club v. Superior Court* (2007) 48 Cal.App.4th 1218, 1225 [writ relief appropriate where "'necessary to resolve an issue of first impression promptly and to set guidelines for bench and bar'"]; *Rodrigues v. Superior Court* (2005) 127 Cal.App.4th 1027, 1032 [same]; *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1315 [writ relief appropriate to address "novel and important question"].)

68. Here, CRST is aware of no case where an employer has been held liable for punitive damages for failing to prevent what the evidence shows is at most the negligent conduct of an employee. That, of course, is this case exactly—the sole basis for plaintiffs' claim for punitive damages against Contreras, that the collision here occurred while he was under the influence of alcohol or drugs, has been adjudicated by the trial court to be factually unsupportable as a matter of law.

69. If an employee is not liable for punitive damages for his conduct, and the employer thus has no vicarious punitive liability for that conduct, can the employer face direct punitive liability for not preventing merely negligent conduct? If so, that would make the employer liable for punitive damages in relation to an employee-caused injury for which the employee is not liable for punitive damages.

70. Under the rule embodied by the trial court's order, every case of employee negligence is easily transformed into a negligence-based punitive damages case against the employer. This case thus demonstrates the need for a far sharper doctrinal line to separate an employer's actions in the ordinary course of business in hiring, supervising and retaining employees—which actions could in certain circumstances lack ordinary care—and employer actions that demonstrate punitive damages-worthy conduct.

71. Under the rule embodied by the trial court's order, transportation employers across the State may be exposed to *punitive* liability on the sole basis that they *should have* fired employees more quickly or *should have* been more selective in hiring particular employees. Such negligence-based punitive liability can have consequences for both employers and prospective and current employees who wish to obtain or retain jobs. This will vastly—and unjustifiably—expand punitive liability.

I. This Petition Is Timely.

72. Code of Civil Procedure section 437c, subdivision (m)(1), authorizes a party to petition a reviewing court for a writ of mandate within 20 days of such the service of an order denying summary adjudication, plus five days for mailing. The order denying CRST's summary adjudication of the punitive damages claims was signed on January 9, 2017 and mailed on January 10, 2017, making this petition timely.

J. An Immediate Stay Of The February 10, 2017 Trial Is Needed.

73. The trial in this case is currently set for February 10, 2017.

74. An application to assign this trial to a long cause courtroom will be filed early next week.

75. Given the present trial date, the need for an immediate stay is pressing. This Court should stay the trial so that it can rule on the writ petition and the parties can avoid having to engage in expensive and protracted discovery and to prepare for and litigate the multiple discovery issues that are likely to arise if punitive damages are left in the case.

PRAYER

WHEREFORE, petitioners CRST, CRST Expedited, Inc., CRST Van Expedited, Inc., and CRST Lincoln Sales, Inc. (collectively, CRST) pray that this Court:

1. Issue a peremptory writ of mandate, prohibition or other such appropriate relief as is warranted by the facts, directing respondent court (1) to set aside or stay its January 9, 2017 order denying CRST'S motion for summary adjudication of the punitive damages claims against it in the personal injury action; and (2) enter a new and different order summarily adjudicating the punitive damages claims in favor of petitioners;

2. In the alternative, issue an alternative writ of mandate, prohibition or other such appropriate relief as is warranted by the facts or order to show cause directing respondent court (1) to set aside or stay its January 9, 2017 order denying CRST'S motion for summary adjudication of the punitive damages claims against it; and (2) to enter a new and different order summarily adjudicating the punitive damages claims in favor of petitioners, or to show cause why it should not do so;

3. Immediately vacate or stay the February 10, 2017 trial date in the personal injury case, until at least such time as this Court has considered and ruled on this writ petition;

4. Award petitioners their costs of suit herein; and

5. Grant such other and further relief as may be just and proper.

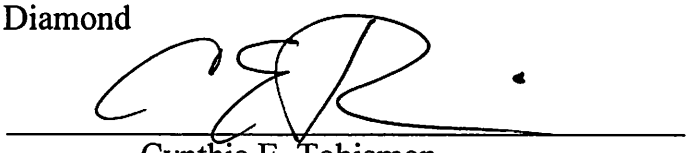
Dated: January 20, 2017

Respectfully submitted,

BASSI, EDLIN, HUIE & BLUM LLP
Fred M. Blum, Esq.
Michael E. Gallagher, Esq.
Lisa Dawn Levin, Esq.
E. Reno Cross, Esq.
Lisa M. Stevenson, Esq.

YOKA & SMITH, LLP
Alice Chen Smith
Christopher E. Faenza
Benjamin A. Davis

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Cynthia E. Tobisman
Alan Diamond

By: 

Cynthia E. Tobisman

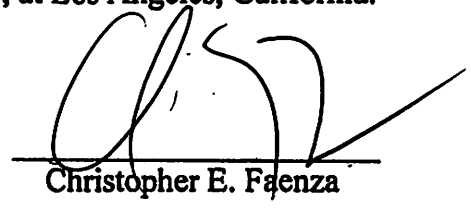
Attorneys for Petitioners
CRST, INC., CRST EXPEDITED, INC., CRST VAN EXPEDITED, INC. and CRST LINCOLN SALES, INC.

VERIFICATION

I, Christopher E. Faenza, am an attorney with the law firm of Yoka & Smith, LLP, who, together with Bassi, Edlin, Huie & Blum LLP, represents petitioners CRST, INC. CRST EXPEDITED, INC., CRST VAN EXPEDITED, INC. and CRST LINCOLN SALES, INC. in the instant writ proceedings. I have personally reviewed and am familiar with the records and files described in and the subject of this petition, and based on this review know the facts set forth in the petition to be true and correct. Counsel is signing rather than the petitioners themselves because counsel is more familiar with the records in the underlying action.

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

Executed on January 20, 2017, at Los Angeles, California.



Christopher E. Faenza

MEMORANDUM OF POINTS AND AUTHORITIES

I. EMPLOYER CRST SHOULD NOT FACE PUNITIVE DAMAGES WHEN THE TRIAL COURT HAS DISMISSED ALL PUNITIVE DAMAGES CLAIMS AGAINST THE EMPLOYEE.

A. The Trial Court Clearly Erred In Denying Summary Adjudication As Plaintiffs Presented No Evidence That CRST Was Aware That Contreras Would Almost Inevitably Cause A Serious Accident Or That CRST's Hiring Or Retention Of Him Was "Despicable" Beyond Conduct Normally Tolerated In Society.

Civil Code section 3294 requires clear and convincing evidence that a defendant targeted with a punitive damages claim engaged in "despicable conduct" "with a willful and conscious disregard of the rights or safety of others." First, then, a plaintiff must prove the defendant's conduct is "'so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.'" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 331.) Despicable conduct "has been described as [having] the character of outrage frequently associated with crime." (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1050.)

No evidence in this case approaches this type of conduct. For example, according to plaintiffs, CRST should either have fired Contreras after he caused four preventable collisions within an eight month period, but instead CRST required he attend one defensive driving course. But even assuming the evidence supported plaintiffs' allegations (it doesn't), this conduct cannot be characterized as "vile, base, contemptible, miserable, wretched or loathsome." These allegations, even accepted at face value, fall far short of establishing entitlement to punitive damages. And given the apparently undisputed evidence that prior to the collision with plaintiffs, Contreras was involved in only two minor accidents involving backing up the truck resulting in no personal injuries and minimal property damage, a claim for punitive damages has even less justification. (See pp. 25, 28, *ante*.)

By the same token, plaintiffs assert that the Qualcomm system on Contreras' vehicle recorded him driving once at 99 miles per hour, and that Marge Davis, who knew of this behavior, never investigated, reprimanded or fired Contreras. But even the trial court did not treat these assertions as evidence of "despicable conduct," but rather treated them as allegations of mere negligence, noting that there might be a "negligent entrustment" claim because there were "triable issues of material fact as to whether CRST should have gotten rid of Mr. Contreras or disciplined him in a more appropriate manner." (5 PE 1061.) And, in fact, the evidence does not support plaintiffs' assertions. (See pp. 25, 28, *post*.)

Moreover, beyond proving despicable conduct—which plaintiffs have not done—plaintiffs must further show that the despicable conduct was carried out with a "willful and conscious disregard" of the safety of others. (See pp. 33-36, *ante*.) That showing requires proof that the defendant is "'*aware of* the *probable* dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences.'" (*Pfeifer v. John Crane, Inc*. (2013) 220 Cal.App.4th 1270, 1299, emphasis added.) That is, the dangerous consequences must be more than possible to occur; they must be *likely* to occur. (See *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 895-896 ["the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences"].)

Here, there is *no* evidence, let alone "clear and convincing evidence," that in hiring and retaining Contreras, CRST did something despicable in a manner that *consciously* disregarded public safety. There is no evidence that CRST had an *actual* awareness that there were *probable* dangerous consequences from employing Contreras. Without such evidence, there can be no punitive damages claim here.

B. The Trial Court's Finding That Contreras Was Not Intoxicated Absolves CRST Of Any Punitive Liability Based On Any History He Might Have Had As To Intoxication.

Punitive damages in a personal injury case cannot be proven in a vacuum. They must have some causal connection to the event that caused the injury. Here, the event is a collision between Contreras' vehicle and plaintiffs' vehicle. Plaintiffs sought punitive damages against Contreras on the sole ground that Contreras was under the influence of alcohol or drugs when the collision occurred. As an offshoot of that assertion, plaintiffs also alleged that CRST knew or should have known that Contreras had a history of driving under the influence, and thus acted in a punitive damage-worthy manner by allowing him to operate the Freightliner Semi-Truck. (1 PE 9-11, 16-17.)

But those allegations are no longer of any relevance because the trial court *dismissed* all punitive damages claims against Contreras on the basis that he was not under the influence of drugs or alcohol at the time of the accident. No evidence demonstrated a triable issue of fact on the matter. Inasmuch as intoxication did not cause the collision, CRST cannot be liable based on what it knew or should have known about Contreras' history, even leaving aside that "knew or should have known" is not a standard that can support a claim for punitive damages.

C. The "Mere Negligence" Evidence That Plaintiffs Rely Upon Is Not Enough For Punitive Damages.

By definition, even gross negligence, let alone ordinary negligence, is not a sufficient basis for awarding punitive damages. (E.g., *Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 894.)

Numerous cases hold that punitive damages cannot be premised on evidence of negligence. (See, e.g., *Ebaugh v. Rabkin, supra,* 22 Cal.App.3d at p. 894 ["mere negligence, even gross negligence is not sufficient to justify an award of punitive damages", italics omitted]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc*. (2000) 78 Cal.App.4th 847, 892 [no punitive damages warranted where insurer's "careless initial evaluation and its stubborn persistence in error" may have been "[u]nreasonable and negligent," but fell "within the common experience of human affairs"]; *Tomaselli v. Transamerica Ins. Co*. (1994) 25 Cal.App.4th 1269, 1288, fn. 14 ["'punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness,'" but only upon evidence "that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing'"].)

Yet here, there is no evidence permitting an inference of anything more than negligence. Plaintiffs' theory of liability is that CRST *should have known* that Contreras was going to cause a serious collision. But "should have known" is a negligence standard, not a punitive damages one.

By seeking punitive damages, plaintiffs necessarily assert that the choices made by CRST in response to Contreras' alleged carelessness on certain occasions while driving were "'so vile, base, contemptible, miserable, wretched or loathsome that [they] would be looked down upon and despised by ordinary decent people.'" (3 PE 583-596; 5 PE 1052-1054, 1056-1057.) According to plaintiffs, those choices were either to fire Contreras or to discipline him more frequently or in a different manner, or maybe even just to investigate a matter further. (1 PE 11-14; 3 PE 588-589.) But that is a "negligent entrustment" theory, not a punitive liability theory. And, in fact, this was the trial court's understanding of the basis of plaintiffs' case—it held that "there was [*sic*] certainly triable issues of material fact as to whether CRST should have gotten rid of Mr. Contreras or disciplined him in a more appropriate manner." (5 PE 1061.)

Negligence isn't enough. But there is no evidence that would allow a jury to find that CRST acted despicably or with *conscious* disregard of the probability of dangerous consequences if it had made one choice rather than the other—i.e., if it had fired Contreras or disciplined Contreras in a different, "more appropriate" manner. Indeed, the only serious accident

plaintiffs can attribute to Contreras is the one that is the subject of this lawsuit. Otherwise, the evidence shows minor accidents caused by Contreras backing up his vehicle. Everything else plaintiffs assert against Contreras is irrelevant: a past history of intoxication; a false and easily disprovable report that he drove his vehicle once at a speed of 99 miles per hour. How CRST reacted to Contreras' mistakes or carelessness is not the stuff of despicable conduct.

Simply put, this is, at most, a negligence case. This is not a punitive damages case. That being so, the trial court should have dismissed the punitive damages claims against CRST.

D. No Officer, Director Or Managing Agent Had The Requisite Awareness Or Engaged In The Requisite Despicable Conduct To Support Punitive Damages.

And there is another problem, too: There is no evidence that any managing agent committed, ratified or otherwise was responsible for CRST's alleged wrongdoing. Yet, Civil Code section 3294, subdivision (b) not only requires (1) evidence that meets the clear and convincing threshold, (2) of despicable conduct, (3) in conscious disregard of probable dangerous consequences, it also requires that all of that be as to an "officer, director, or managing agent."

Plaintiffs' case for punitive damages rises or falls on whether Marge Davis or Joe Stanek are managing agents of CRST. (E.g., 1 PE 11-13; 3 PE

5889-590 [plaintiffs contend that Davis and Stanek were the CRST supervisors responsible for whatever CRST knew or did with respect to Contreras].) Unless Davis and Stanek were managing agents, their knowledge and actions cannot be attributed to CRST for purposes of maintaining a claim for punitive damages.

But the evidence shows that neither Davis nor Stanek qualify as managing agents. To be a managing agent, Davis or Stanek had to have more than just the power to hire and fire. (*White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 573.) They needed to exercise "substantial discretionary authority over decisions that ultimately determine corporate policy." (*Ibid*.) And those decisions must determine "formal policies that affect a substantial portion of the company and that are the type likely to come to the attention of corporate leadership. It is this sort of broad authority that justifies punishing an entire company for an otherwise isolated act of oppression, fraud, or malice." (*Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 714-715.)

Yet, plaintiffs furnished no evidence that in their supervisory roles, if they are even that, that Davis or Stanek have the power to determine CRST's formal policies or that their decisions come to the attention of corporate leadership. Rather, Davis and Stanek were, respectively, a dispatcher and a safety supervisor. (See p. 26, *ante*.) While they might have had the power to hire and fire, they had no ability to set corporate

policy. Plaintiffs failed to establish otherwise; they barely even tried to argue that either Davis or Stanek qualified as a managing agent, and they submitted no evidence carrying their burden of establishing that they acted as such. On the contrary, as shown above, plaintiffs' evidence shows that Davis and Stanek were at best mid-level employees with the authority to manage the day-to-day activities of the drivers. Nothing in the record indicates that either person had any ability to set corporate policy.

The purpose of the punitive damages statute is to restrict corporate exposure to such damages to those instances "of broad authority that justifies punishing an entire company for an otherwise isolated act of oppression, fraud, or malice." (*Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at p. 715.) There is no evidence that would permit the imposition of punitive liability and damages here.

CONCLUSION

An employer cannot be liable for punitive damages where its driver has not engaged in punitive damage-worthy conduct. Yet that's what the trial court's order here permits. It allows the imposition of punitive liability and damages on the theory that the employer "should have known" that its driver would cause a serious accident. But "should have known" is a negligence standard, not a punitive one. The trial court should have granted summary adjudication of the punitive damages claims against CRST. The Court should grant the requested writ relief.

Dated: January 20, 2017 Respectfully submitted,

BASSI, EDLIN, HUIE & BLUM LLP
Fred M. Blum, Esq.
Michael E. Gallagher, Esq.
Lisa Dawn Levin, Esq.
E. Reno Cross, Esq.
Lisa M. Stevenson, Esq.

YOKA & SMITH, LLP
Alice Chen Smith
Christopher E. Faenza
Benjamin A. Davis

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Cynthia E. Tobisman
Alan Diamond

By: 
Cynthia E. Tobisman

Attorneys for Petitioners
CRST, INC., CRST EXPEDITED, INC., CRST VAN EXPEDITED, INC. and CRST LINCOLN SALES, INC.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER RELIEF** contains **9,929 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: January 20, 2017

Cynthia E. Tobisman