CASE NO. 23-1672

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

ANDRE G.H. LE DOUX, V,

Plaintiff-Appellant,

v.

WESTERN EXPRESS, INC.; ERVIN JOSEPH WORTHY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA AT LYNCHBURG

BRIEF OF *AMICI CURIAE* THE AMERICAN TRUCKING ASSOCIATIONS, INC. (ATA) & THE TRUCKING INDUSTRY DEFENSE ASSOCIATION (TIDA) IN SUPPORT OF APPELLEES

Gibson S. Wright
D. Cameron Beck, Jr.
McCandish Holton, PC
P.O. Box 796
Richmond, VA 23218
804-775-3100

Counsel for Amici Curiae - ATA & TIDA

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1672 Caption: Andre Le Doux, V v. Western Express, Inc. and Worthy

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Trucking Associations, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: Oct. 31, 2023

Counsel for: American Trucking Associations, Inc.

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1672 Caption: Andre Le Doux, V v. Western Express, Inc. and Worthy

Pursuant to FRAP 26.1 and Local Rule 26.1,

Trucking Industry Defense Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: Oct. 31, 2023

Counsel for: Trucking Industry Defense Association

Print to PDF for Filing

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

CONCISE STATEMENT OF IDENTITIES OF AMICI CURIAE, INTERESTS IN THE CASE, AND AUTHORITY TO FILE

ATA and TIDA state pursuant to Federal Rule of Appellate Procedure 29(a)(2) that all parties have consented to their filing of this amicus brief, which is limited to the issue of whether the district court properly dismissed Plaintiff-Appellant Andre G.H. Le Doux, V's ("Mr. Le Doux") claim for negligent hiring and retention (generally referenced hereafter as "negligent hiring"), identified as the first issue presented on page three of Mr. Le Doux's Opening Brief.

ATA is the national association of the trucking industry, with a membership of approximately 1,500 trucking companies and industry suppliers of equipment and services. In conjunction with its 50 affiliated state trucking organizations, including the Virginia Trucking Association, the ATA represents over 30,000 motor carriers of every size, type, and class. The motor carriers represented by ATA and its federation of state associations haul a significant portion of freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states, including Virginia.

TIDA, an international organization comprised of motor carriers, transportation logistics companies, insurers of motor carriers, third party claims administrators, and defense counsel, represents the interests of the trucking industry. The motor carrier members of TIDA include common carriers, private

carriers, and private fleets. The insurance company members provide transportation liability insurance for the trucking industry. TIDA assists the trucking industry on various issues regarding risk management, personal injury, property damage, insurance, and workers' compensation claims.

Claims of negligent hiring arise in numerous lawsuits in Virginia, including suits against motor carriers, many of whom are members of ATA and TIDA. Trucking companies and their insurers often defend personal injury claims in which plaintiffs have alleged both vicarious liability for a driver's negligence and direct negligence claims for negligent hiring against the motor carrier. In situations where a motor carrier employer admits vicarious liability when the driver's actions occurred within the scope of employment, the plaintiff often will still pursue claims for negligent hiring against the motor carrier. Permitting such direct negligence claims to proceed despite this admission subjects a motor carrier defendant to the plaintiff putting on evidence that serves only to inflame the factfinder unfairly. Accordingly, ATA and TIDA members have a strong interest in prohibiting negligent hiring and retention claims when a motor carrier admits vicarious liability.

Amici believe their brief will be of assistance to the Court's adjudication of the appeal since it provides the position and rationale of two national organizations that represent the trucking industry. Due to the frequency that direct negligence

claims for negligent hiring are asserted against motor carriers in conjunction with vicarious liability claims, it is particularly important for the Court to consider the collective position of the trucking industry.

STATEMENT REGARDING AUTHORSHIP AND FUNDING

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel has authored this brief in whole or in part; no party or its counsel has contributed money that was intended to fund preparing or submitting this brief; and, no person other than amici, their members, or their counsel contributed money that was intended to preparing or submitting this brief.

SUMMARY OF ARGUMENT

The district court rightly granted summary judgment on Mr. Le Doux's negligent hiring claim because Western Express, Inc.'s ("Western Express") stipulation that it was vicariously liable for the tortious acts of its driver Ervin Worthy ("Mr. Worthy") relieved Le Doux of the need to seek another theory of Western Express's liability for its employee's wrongful acts. It saved "days of evidence on extraneous topics" (JA558) at trial that would also have been unfairly prejudicial. The decision fits the purpose and history of negligent hiring in Virginia law, which is meant to impose liability upon an employer for a dangerous employee's wrongful acts when vicarious liability is uncertain.

It is also good policy. It directs claimants to try cases not on irrelevant issues of an employee's past acts but the actual issue in any tort case: whether a tortfeasor's acts were wrongful and, if so, what damages those acts caused the claimant. Virginia law does not support the pursuit of a negligent hiring claim against a trucking company when the reason for which negligent hiring claims were recognized does not apply. Presenting evidence of negligent hiring in such a context is needless, meant only to inflame juries and risk a company's liability for drivers' actions that, as the jury decided in this case, were not negligent.

The Court should affirm the district court's prohibition of Mr. Le Doux from presenting his negligent hiring claims.

ARGUMENT

I. Liability for negligent hiring of a tortfeasor developed from, and has been meant for, cases where a principal's respondeat superior liability for the agent tortfeasor's acts is uncertain.

Virginia has always recognized direct liability of employers for negligent hiring of employees in contexts where the claimant's ability to recover against the employer for vicarious liability for the employee's act is questionable. Direct liability for negligent hiring solves that problem for claimants.

The Supreme Court of Virginia has repeatedly observed that the "alternate approach . . . to assign liability to the employer" in those tough scope of employment cases is "directly through the torts of negligent hiring and retention."

Gina Chin & Assocs. v. First Union Bank, 537 S.E.2d 573, 578 n.4 (Va. 2000); *see also Parker v. Carillion Clinic*, 819 S.E.2d 809, 826 n.15 (Va. 2018) (citing sources for how direct liability for negligent hiring solves a problem of proving vicarious liability when difficult, in explaining how "[t]he tort of negligent hiring reflects direct, as opposed to vicarious, liability"); *see also Interim Personnel of Central Va. v. Messer*, 559 S.E.2d 704, 707 (Va. 2002) (recognizing how "the two theories differ in focus" and that an employer's direct liability for hiring unfit employees "enables a plaintiff to recover in circumstances when respondeat superior's 'scope of employment' limitation protects employers from liability"). The approach's purpose is to "'enable[] plaintiffs to recover in situations where respondeat superior's "scope of employment" limitation previously protected employers from liability.'" *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391, 394 (Va. 1988) (quoting Note, *Minnesota Developments-Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory:* Ponticas v. K.M.S. Investments, 68 Minn. L. Rev. 1301, 1306–07 (1984)).

Because Western Express stipulated to scope of employment, there was no need for Mr. Le Doux to resort to another theory—such as a theory of direct liability for negligent hiring—to impose liability on Western Express for any wrongful act of Mr. Worthy.

Like all simple negligence claims, direct liability of a company for negligent hiring arises from "a duty 'to exercise reasonable care'"— in this context, in selecting agents—"'for the safety of members of the general public.'" *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 910 (Minn. 1983) (citing Restatement (Second) Agency § 213 (1958)); *see also Southeast Apts. Mgmt., Inc. v. Jackman*, 513 S.E.2d 395, 397 (Va. 1999) ("The cause of action is based on the principle that one who conducts an activity through employees is subject to liability for harm resulting from the employer's conduct if the employer is negligent in the hiring of an improper person in work involving an unreasonable risk of harm to others.") (citing *Ponticas*, 331 N.W.2d at 911). The distinction between such "direct" claims of liability and "indirect" claims for vicarious liability of an employee's failure to use reasonable care is one of agency. A company will be indirectly liable for its employee's failure to use reasonable care when acting within the scope of employment through respondeat superior, or it may be directly liable for negligent hiring in its failure to use reasonable care in retaining an unreasonably dangerous agent when that employee commits a wrongful act.[1] The two theories are different

[1] Mr. Le Doux contends that the district court's citation to *Interim Personnel* and *Gina Chin*, both early 2000s cases, ignored negligent hiring's earlier roots in Virginia law. Opening Brief at 23. He cites *Davis v. Merrill*, 112 S.E.2d 628 (Va. 1922), not cited by the district court, in which the administrator of an estate whose decedent was shot by a drunken railroad crossing attendant presented evidence on a company official's liability for negligence in employing the employee and vicarious liability for the employee shooting the decedent. Agency is central to

approaches at the company's same overarching duty to use reasonable care, either through selecting its agents or acting through them. See Restatement (Third) Agency § 7.05 cmt. a (noting that the rules of § 7.05(1), concerning negligent hiring, and § 7.05(2), concerning a principal's special relationship duty to protect, "are specific instances of general tort-law principles").

When a company stipulates that its employee was acting within the scope of his employment, the distinction as to how the company may be liable for the tort of its employee is immaterial, since the company is liable for any wrongful act of the agent regardless of negligence theory. The question then becomes whether the agent, admittedly acting on the company's behalf, exercised reasonable care.

Ignoring the importance of questionable agency as the reason direct liability for negligent hiring developed misses its purpose: to provide an avenue for claimants to impose liability on an employer for the wrongful acts of an employee who may have been acting outside of the scope of employment. Because Western Express relieved Plaintiff of any need to resort to that alternate theory, the district

---

Davis. *Davis* repeatedly addressed cases on the bounds of a master's liability for a servant's tort. Without using the term "negligent hiring," the court found liability for unreasonably employing a dangerous employee as one of "two grounds" toward the same object of pinning liability for an employee's wrongful act on an employer: a master may be liable for the wrongs of a servant done within the scope of employment, but a master may also be liable for the dangerous servant's wrongs even if performed outside of the scope of his authority if the master did not use reasonable care in selecting the employee. *Davis*, 112 S.E. at 629–630.

court rightly streamlined the case to focus on the remaining core issue of whether its employee was negligent and, if so, the damages that negligence caused.

Mr. Le Doux seeks to impose liability on employers for hiring allegedly dangerous employees irrespective of whether the employee did anything wrong to cause the accident. This approach takes negligent hiring liability to an extreme that Virginia law has not recognized.

Under Virginia law, the employer's direct liability for failure to use reasonable care in hiring an unfit employee is not severed from the wrongful actions of the employee. Regardless of whether the employee was acting within the scope of employment, the employer's direct liability for negligence in hiring an unfit employee requires the employer to foresee "that an injury might probably (not possibly) result from the negligent act." *Interim Personnel of Central Va. v. Messer*, 559 S.E.2d 704, 708 (Va. 2002); *see also id.* ("A party is not charged with foreseeing that which could not be expected to happen.") (citing *Norfolk Shipbuilding & Drydock Co. v. Scovel*, 397 S.E.2d 884, 885 (1990)). Negligent hiring, then, depends upon a connection between the unfit quality that made the employee's hiring unreasonable and the harmful act of the employee.[2] *See also*

[2] In *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391 (Va. 1988), not cited by Mr. Le Doux in his Opening Brief, a claimant sued a church and its employee for the alleged repeated rape and sexual assault of her ten-year old daughter. In response to the argument that a negligent hiring claim needed proof that "the negligently hired individual negligently injured the plaintiff," the Supreme Court

Restatement (Second) Agency § 213 cmt. d ("The employer is subject to liability only for such harm as is within the risk. If, therefore, the risk exists because of the quality of the employee, there is liability only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause harm."). If an employer stipulates vicarious liability for any

---

of Virginia observed that "[t]here is no requirement that the negligently hired employee injure another through negligence." *Victory Tabernacle*, 372 S.E.2d at 394. It immediately added, though, "Indeed, the very thing that allegedly should have been foreseen in this case is that the employee would commit a violent act upon a child." *Id.* The point about negligence, then, is about whether there need be allegations or proof that the wrongful act be within the scope of employment. As the court then concluded,

> To say that a negligently hired employee who acts willfully or criminally thus relieves his employer of liability for negligent hiring when willful or criminal conduct is precisely what the employer should have foreseen would rob the tort of vitality by improperly subjecting it to factors that bear upon the separate concept of employer liability based upon *respondeat superior*.

Id. The court was discussing issues of agency and how a principal may be liable for a servant's wrongful act. Clearly in that context, the court did not mean that an employer could be liable in negligent hiring for an employee who did not commit a wrongful act. Indeed, it reaffirmed that negligent hiring liability requires a connection between the unfit quality of the employee and the wrongful act that injured the claimant.

Moreover, the court cited *Davis* (discussed above) as a case that "did not involve negligent conduct by the negligently hired employee." *Id.* Since the employee in *Davis* shot and killed someone on the job, the phrase "not involve[ing] negligent conduct" must relate to the unavailability of vicarious liability for intentional torts. It cannot mean that non-wrongful conduct can support a negligent hiring claim, since shooting and killing someone is certainly wrongful.

wrongful action of an employee, the reason for that distinct form of direct liability disappears entirely. It also avoids a claimant's need to establish the requisite foreseeability of the injury for a negligent hiring claim, since the employer would already be liable for any wrongful act of the employee.

The distinction between direct liability for negligent hiring and indirect liability for vicarious liability does not justify ignoring—indeed, flipping—negligent hiring's purpose. Negligent hiring provides a remedy for clearly wrong, often criminal acts of an employee when the employer knew of or should have foreseen the dangerous quality of the employee's act in contexts where vicarious liability is questionable. Direct negligence claims should not allow claimants, when vicarious liability is certain, to readdress why the employer should be liable for its agent's wrongful act, using "egregious" evidence of irrelevant past acts of the employee to bolster recovery.[3] Opening Brief 28.

Va. R. & P. Co. v. Davidson's Adm'r., 89 S.E. 229 (Va. 1916) stands for these two propositions: that negligent hiring requires a negligent act of the employee, and that the exception of direct liability for negligent hiring when vicarious

[3] Mr. Le Doux presents a hypothetical plaintiff who "[f]or strategic reasons . . . only wants to sue the employer, and . . . thin[king] his strongest claim is negligent hiring," chooses only a claim for negligent hiring. Opening Brief at 28. Mr. Le Doux did not take that route in this case. He sought damages against Western Express for negligence both in hiring Mr. Worthy and vicariously through Mr. Worthy.

liability is uncertain (with its attendant evidence of an agent's reputation and past acts that would otherwise not generally be admitted) must not swallow the rule that a principal is liable for its agent's negligence through respondeat superior when recovery through vicarious lability is available.

In that case, a streetcar killed a boy whose estate sued the street railway company for negligence. The Supreme Court of Virginia found it error to instruct the jury that the company had a duty of reasonable care in retaining employees and if the jury found the company failed to do so, and that as a result the child was killed, the company was negligent. *Davidson's Adm'r*, 89 S.E. at 319. The court reasoned that "[t]he mere retention in service of a careless employee does not give rise to a cause of action against the employer . . . even in cases between master and servant where the foundation of the liability [in response to the fellow-servant doctrine] is in the employment of incompetent or unfit fellow-servants." *Id.* "The unfitness must result in some specific act of negligence or incompetency before any liability attaches." *Id.*[4] Negligent hiring liability requires that the employee act wrongfully.

[4] The court also read *Big Stone Gap Iron Co. v. Ketron*, 45 S.E. 740 (1903), an early Virginia negligent hiring case involving an allegedly unfit surgeon, to mean "that in order for the plaintiff to have recovered [for negligent hiring], he must also have shown, as an independent fact, that the incompetence of the surgeon was the cause of the injury." *Davidson's Adm'r*, 89 S.E. at 231.

Continuing, the court addressed whether "the evidence of the motorman's reputation for carelessness [was] material and relevant." *Id.* at 231. It reasoned that such evidence was for cases where the fellow servant doctrine barred recovery of a servant against a master for injuries by a fellow-employee, so the claimant had to seek direct liability against the employer for negligent hiring of the employee. *Id.* "In actions brought by a stranger [whose recovery the fellow servant doctrine did not bar] the reason for the rule which permits evidence of reputation does not exist, and the rule itself, therefore, does not apply." *Id.* Discussing direct and vicarious liability for an agent's negligence in an evidentiary context, the court found that when there was no need to resort to direct liability for negligent hiring (in cases between fellow servants where "the doctrine of *respondeat superior* does not apply"), then respondeat superior should be the avenue of liability. *Id.* (citing *Fonda v. St. Paul City Ry. Co.*, 74 N.W. 166 (Minn.1898)).

The reasoning of the "general rule" against such evidence and its exception in the fellow servant context in *Davidson's Administrator* should apply here in assessing the distinction between direct liability for negligent hiring and vicarious liability. *Id.*

II. Most jurisdictions that have addressed the issue of stipulated vicarious liability prohibit pursuit of a negligent hiring claim.

The Supreme Courts of California, Connecticut, Idaho, Maryland, Mississippi, Missouri, North Carolina, Arkansas, Oklahoma, Washington, and

Wyoming have all found that an employer's stipulation of 100% liability for an employee's negligence precludes a claim for negligent hiring. *See Armenta v. Churchill,* 267 P.2d 303, 308–09 (Cal. 1954); *Prosser v. Richman,* 50 A.2d 85, 87 (Conn. 1946); *Wise v. Fiberglass Sys., Inc.,* 718 P.2d 1178, 1181 (Idaho 1986); *Houlihan v. McCall,* 78 A.2d 661, 665 (Md. 1951); *Nehi Bottling Co. v. Jefferson,* 84 So.2d 684, 686 (Miss. 1956); *McHaffie v. Bunch,* 891 S.W.2d 822, 826 (Mo. 1995); *Bogdanski v. Budzik,* 408 P.3d 1156, 1164 (Wyo. 2018); *Elrod v. G&R Const. Co.,* 628 S.W.2d 17, 19 (Ark. 1982); *Jordan v. Cates,* 935 P.2d 289, 293 (Okla. 1997); *Heath v. Kirkman,* 82 S.E.2d 104, 107 (N.C. 1954); *Shielee v. Hill*, 287 P.2d 479, 480–81 (Wash. 1955).

So, too, have intermediate appellate courts in New Mexico, Indiana, and Texas. *Clooney v. Geeting,* 352 So.2d 1216, 1220 (Fla. Dist. Ct. App. 1977); *Ortiz v. N.M. State Police*, 814 P.2d 117, 120 (N.M. Ct. App. 1991); *Tindall v. Enderle,* 320 N.E.2d 764, 768 (Ind. Ct. App. 1974); *Rodgers v. McFarland,* 402 S.W.2d 208, 210 (Tex. Ct. App. 1966).

It is right to do so. Prior bad acts are irrelevant to the issue of whether an employee committed such an act on the day of the incident and inadmissible pursuant to Federal Rules of Evidence ("Rules") 403 and 404. Such evidence vilifies the employee and his employer for failing to fire him, so much so that an

inflamed jury could find against the defendants regardless of whether the employee did anything wrong in the motor vehicle accident itself.

Mr. Le Doux does not deny that plaintiffs may present such inflammatory evidence unmoored from the accident at issue in trucking collision personal injury cases. He asks the Court to "[c]onsider a case where the plaintiff is injured by an employee working in the scope of his employment" where "[t]he employee's prior record was egregious." Opening Brief at 28. Of course, if the employee were acting within the scope of his employment and negligent, then the employer would be liable. Mr. Le Doux's point: The "egregious" past acts will help move the needle where evidence from the date of the accident would otherwise have a jury find the employee not negligent. His "strategic reasons" are simply how he may best inflame a jury, or make it think that the driver was negligent because he had been negligent before, with evidence of prior bad acts. Opening Brief at 28. [5] That use of negligent hiring evidence is the worst sort of character and prior bad act

[5] That Mr. Le Doux cites a class action suit under the False Claims Act for the proposition that a claimant has "autonomy to shape his claims" shows that his view of negligent hiring goes too far afield. Opening Brief at 28 (citing *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 405–06 (4th Cir. 2013)). Stipulation to vicarious liability does not "give[] the defendant strategic veto power how the plaintiff proves his case." Opening Brief at 29. The issues in Mr. Le Doux's case were whether Mr. Worthy acted wrongfully and whether Western Express was liable for that wrongful act. The scope of employment stipulation streamlined the case by resolving the latter issue—after its stipulation, Western Express would be liable for any wrongful act of Mr. Worthy.

evidence that Rule 404 is meant to exclude. It is unfairly prejudicial in violation of Rule 403 because it is highly inflammatory but has no bearing on the issues left for the jury after Western Express's stipulation of vicarious liability—whether Mr. Worthy was negligent and what damages that negligence caused.

Negligent hiring should not be a back door to introduce unfairly prejudicial evidence when an employer, by stipulation, has filled the gap the tort was meant to address. *See, e.g.*, *Houlihan v. McCall*, 78 A.2d 661, 665 (Md. 1951) (excluding evidence of "the alternative theory [of negligent hiring] in order to hold the corporate defendant" since agency had been admitted, noting the "danger" "that the jury might draw the inadmissible inference that because the plaintiff had been negligent on other occasions he was negligent at the time of the accident"); *Heath v. Kirkman*, 82 S.E.2d 104,107 (N.C. 1954) (noting that the "principle [of negligent hiring liability] is applicable only when the plaintiff undertakes to cast *liability* on an owner not otherwise responsible for the conduct of the driver," immediately adding that "evidence of . . . acts of negligence on prior unrelated occasions is not competent to show that the driver was negligent on the occasion of plaintiff's injury") (emphasis by court) (citing *Robbins v. Alexander*, 14 S.E.2d 425 (N.C. 1941)).

Davidson's Administrator recognized the need to guard against that evidentiary danger inherent in negligent hiring claims in Virginia law more than a

hundred years ago, well before either the Rules or the evidentiary rules of the Rules of the Supreme Court of Virginia. *See Va. R. & P. Co. v. Davidson's Administrator*, 89 S.E. 229, 231 (Va. 1916) ("Subject to the qualification above recognized [when the "doctrine of *respondeat superior* does not apply"], the general rule, and in our opinion the better and safer one, is that evidence of ["character and reputation of the defendant for care, competency, and skill, or the reverse"] is not admissible.") (internal quotation and citation omitted). The Court should not lose sight of that principle now.

Direct liability for negligent hiring developed to hold employers liable for their dangerous employees' wrongful acts when claimants otherwise might not be able to do so through vicarious liability. It should not give claimants free rein to argue that an employee was such a horrible or unfit person that no reasonable person would retain him, all to establish the already stipulated liability of the employer for any wrong the employee may have caused. Here, when a motor carrier is on the hook for its driver's wrong and the attendant damages, the only relevant evidence as to liability is that which shows whether the driver was actually wrong in the motor vehicle accident.

CONCLUSION

The Court should affirm the district court's dismissal of Mr. Le Doux's negligent hiring claim.

Dated: October 31, 2023

Respectfully submitted,

/s/ Gibson S. Wright

Gibson S. Wright
D. Cameron Beck, Jr.
McCandish Holton, PC
P.O. Box 796
Richmond, VA 23218
Tel.: (804) 775-3100
Fax: (804) 775-3800

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. The foregoing brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, the foregoing brief contains 4,118 words.

3. I understand that a material misrepresentation can result in the Court striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief with the word or line printout.

/s/ Gibson S. Wright
Gibson S. Wright