

In the
Indiana Supreme Court

Supreme Court Case No. _____

ONB Insurance Group, Inc.,)	Appeal from the Jennings
d/b/a Old National Insurance,)	Circuit Court
and Joseph E. Kenworthy)	
)	
Appellants-Defendants,)	Court of Appeals Case No.
)	40A01-1707-CT-1513
v.)	
)	
The Estate of Joann Marie)	Trial Court Case No.
Megel; the Estate of Edward)	40C01-1105-CT-110
Megel; Darcy Megel; Nicholas)	40C01-1205-CT-16
Megel; Christina Megel; and)	
Amy Jones,)	Hon. Jon W. Webster
)	Judge
Appellees-Plaintiffs.)	
)	

AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE
BRIEF IN SUPPORT OF TRANSFER

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QUESTION PRESENTED ON TRANSFER

Whether a motor carrier insurance broker who enables a motor carrier to furnish false or misleading information to the Federal Motor Carrier Safety Administration, with the intent to qualify a high-risk “chameleon carrier,” owes a duty of care to persons injured by the chameleon carrier or is jointly liable for negligent actions of the motor carrier.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Association for Justice (“AAJ”) is a voluntary national bar association whose trial lawyer members practice in every state, including Indiana. AAJ members primarily represent plaintiffs in personal injury cases, including auto accident lawsuits, as well as plaintiffs in consumer rights, employment rights, and civil rights cases. AAJ’s mission includes the development of tort law. By holding accountable those who are responsible for wrongful injury, AAJ aims to improve safety for all. AAJ is concerned that the decision below undermines the enforcement of federal safety regulations adopted to protect the public by failing to recognize that the defendant assumes a duty of care when it assists a trucking company with multiple and continuing safety violations to shed one corporate identity and assume a new corporate identity to fraudulently obtain a federal carrier license.

TABLE OF CONTENTS

Question Presented on Transfer2
Statement of Interest of *Amicus Curiae*.....3
Table of Authorities5
Background and Prior Treatment of Issues on Transfer.....6
Argument.....6
 I. What is a “chameleon carrier?”6
 II. Chameleon carriers are dangerous7
 III. Chameleon trucking companies and the FMCSA8
 IV. Public policy favors finding a duty exists when an unscrupulous
 insurance broker knowingly conspires to reincarnate a high-risk carrier ...10
Conclusion13
Word Count Certificate.....14
Certificate of Service.....14

TABLE OF AUTHORITIES

Cases:	Page
<i>Douglass v. Irwin</i> , 549 N.E.2d 368 (Ind. 1990)	10-11
<i>Hooks SuperX, Inc. v. McLaughlin</i> , 642 N.E.2d 514 (Ind. 1994)	10
<i>Pfenning v. Lineman</i> , 947 N.E.2d 392 (Ind. 2011).....	10
<i>Webb v. Jarvis</i> , 575 N.E.2d 992 (Ind. 1991)	10
Statutes, Regulations, Rules, and Constitutional Provisions:	
49 C.F.R. § 387.7	12
49 C.F.R. § 387.303T	12
49 C.F.R. §§ 1001-1019	9
Ind. Appellate Rule 46(G).....	6
Other Sources:	
New Entrant Safety Assurance Process, 71 Fed. Reg. 76734 (proposed Dec. 21, 2006)	6
Patterns of Safety Violations by Motor Carrier Management, 77 Fed. Reg. 67613 (proposed Nov. 13, 2012).....	9
Patterns of Safety Violations by Motor Carrier Management, 79 Fed. Reg. 3520 (Jan. 22, 2014)	9
U.S. Gov’t Accountability Office, GAO-09-924, <i>Reincarnating Commercial Vehicle Companies Pose Safety Threat to Motoring Public</i> (2009)	6-7
U.S. Gov’t Accountability Office, GAO-12-364, <i>New Applicant Review Should Expand to Identify Freight Carriers Evading Detection</i> (2012)	7, 10-11

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Pursuant to Indiana Appellate Rule 46(G), the American Association for Justice (“AAJ”) adopts by reference the Background and Prior Treatment of Issues on Transfer as stated in the Appellee’s Petition to Transfer.

ARGUMENT

This appeal asks whether an insurance broker who knowingly aids a high-risk motor carrier in subverting FMCSA regulations owes a duty of care to persons injured by the high-risk carrier. High-risk carriers like the one in this case pose a danger to every Hoosier who drives on the road. AAJ submits this brief in order to educate this Court concerning the danger of chameleon carriers and the danger of allowing insurance brokers to aid and abet those carriers without consequence.

I. What is a “chameleon carrier?”

For several years, the Federal Motor Carrier Safety Administration (“FMCSA”)—and the AAJ—has recognized a category of high-risk carriers dubbed “chameleon carriers.” *See* New Entrant Safety Assurance Process, 71 Fed. Reg. 76734 (proposed Dec. 21, 2006). A “chameleon carrier” is a company that has engaged in a practice known as “morphing” or “reincarnating,” whereby unscrupulous owners attempt to evade FMCSA fines, regulations, and licensure revocations by simply shutting down and re-opening a “new” company. *See* U.S. Gov’t Accountability Office, GAO-09-924,

Reincarnating Commercial Vehicle Companies Pose Safety Threat to Motoring Public (2009).

II. Chameleon carriers are dangerous.

Chameleon carriers pose a danger to everyone on the road. A chameleon carrier opts to reincarnate in order to eliminate poor safety ratings, evade FMCSA compliance reviews, avoid inspections, and erase suspensions or revocations of operating authority. Appellant's App. Vol. 11, 79-80. The carrier amasses a history of violations and employs unsafe drivers and continues to operate with reckless abandon.

Analysis performed by the U.S. Government Accountability Office ("USGAO") has made clear that chameleon carriers pose a high safety risk relative to non-chameleon carriers. U.S. Gov't Accountability Office, GAO-12-364, *New Applicant Review Should Expand to Identify Freight Carriers Evading Detection* (2012). Among "new applicant carriers" between 2005 through 2010, eighteen percent (18%) of chameleon carriers were involved in a "severe crash," compared to only six percent (6%) of ordinary carriers. *Id.* During that same five-year span, chameleon carriers accounted for, at least, 217 fatalities and 3,561 injuries. *Id.*

A chameleon carrier is *three times more likely* to cause a roadway injury or death than ordinary carriers. *Id.* Crashes involving commercial trucks cause tremendous damage to passenger vehicles. Death, brain

damage, paralysis, and other permanent injury are common injuries to the people who are in collisions with chameleon carriers.

Unfortunately, the USGAO has observed that the FMCSA had been unable to adequately identify and discourage the growing problem of chameleon carriers, as of 2012. *Id.* This is due primarily to a perceived lack of resources. *Id.* Despite the FMCSA's awareness of the problem and promulgation of regulations, *see infra*, the number of new carrier applicants with "chameleon attributes" increased from 759 in 2005 to 1,136 in 2010. *Id.*

It is apparent that chameleon carriers and their enablers have not been deterred. It seems that the temptation of profits outweighs the risk of detection by the FMCSA.

III. Chameleon trucking companies and the FMCSA.

The FMCSA is the federal governmental agency that regulates commercial motor carriers. The FMCSA's stated mission is to "prevent commercial motor vehicle-related fatalities and injuries." *See* FMCSA.dot.gov, *available at* <https://www.fmcsa.dot.gov/mission/about-us> (last visited Oct. 30, 2018). Among other things, the FMCSA seeks to accomplish its mission by promulgating and enforcing of safety regulations, conducting compliance reviews, and "targeting high-risk carriers." *Id.*

In December 2006, the FMCSA began taking action to combat the rise of chameleon carriers, proposing regulations targeted specifically at

“Chameleon’ Carriers” and recognizing the need to improve the agency’s safety auditing process. 71 Fed. Reg. 76734. The result, in February 2009, was the adoption of 49 CFR § 385.306, which penalizes any “carrier that furnishes false or misleading information, or conceals material information in connection with the registration process.”

In November 2012, the FMCSA proposed additional regulations aimed specifically at the issue of “reincarnation.” *See* Patterns of Safety Violations by Motor Carrier Management, 77 Fed. Reg. 67613 (proposed Nov. 13, 2012). The FMCSA observed that the practice of reincarnation “creates an unacceptable risk of harm to the public, resulting in the continued operation of at-risk carriers” *Id.* In 2014, the FMCSA enacted an entire subpart of the Code of Federal Regulations to be dedicated specifically to identification and penalization for reincarnation and chameleon carriers. *See* 49 C.F.R. §§ 1001-1019 (“Reincarnated Carriers”). In enacting these more recent regulations, the FMCSA’s commentary expressed the need for “flexibility” in combatting reincarnation due to the variety of tactics used by chameleon carriers to evade detection. *Patterns of Safety Violations by Motor Carrier Management*, 79 Fed. Reg. 3520 (Jan. 22, 2014).

As the facts of this case aptly demonstrate, utilization of independent insurance brokers to guide chameleon carriers through the process of

reincarnation is one way in which high-risk carriers succeed in evading the FMCSA.

Despite the efforts by FMCSA to identify and stop chameleon carriers, it remains a serious and growing problem. U.S. Gov't Accountability Office, GAO-12-364.

IV. Public policy favors finding a duty exists when an unscrupulous insurance broker knowingly conspires to reincarnate a high-risk carrier.

Given the disproportionate risk posed by chameleon carriers, a fact known in the trucking industry for over a decade, public policy weighs in favor of finding that an insurance broker who knowingly aids a chameleon carrier owes a duty of care to persons injured by the carrier.

Whether a duty exists depends on balancing three factors “(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.” *Pfenning v. Lineman*, 947 N.E.2d 392, 398 (Ind. 2011) (quoting *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991)). Whether a duty exists is typically a question of law. *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 517 (Ind. 1994). However, implicit factual questions may require jury involvement to determine whether a duty exists. *Douglass v. Irwin*, 549 N.E.2d 368, 369 n.1 (Ind. 1990). “[A] factual question may be interwoven with the determination of the

existence of a relationship, thus making the ultimate existence of a duty a mixed question of law and fact.” *Id.* (citation omitted).

Placing chameleon carriers on the roadways creates an extraordinary risk to the public. According to the USGAO, eighty percent of freight carriers in the United States are “small” companies that operate between one and six vehicles, and freight carriers make up ninety-eight (98%) of new carrier applicants. U.S. Gov’t Accountability Office, GAO-12-364. It is reasonable to assume that these small companies are relatively unsophisticated and may seek the assistance of a more sophisticated entity to successfully skirt FMCSA regulations. This is precisely what the Plaintiffs/Appellees allege that the designated evidence shows in this case.

The AAJ believes it is in the public’s interest for the Indiana Supreme Court to recognize a duty of care for an insurance broker in the trucking industry who materially aids a chameleon carrier to evade FMCSA regulations. The recognition of such a duty would disincentivize brokers from conspiring with chameleon carriers and result in less high-risk motor carriers on the roadways.

Acquiring and maintaining insurance coverage is mandatory for any chameleon carrier. Without casualty insurance coverage, the chameleon carrier cannot legally operate on our nation’s highways. *See* 49 C.F.R. §§ 387.7, 387.303T.

Insurance brokers are financially rewarded when they choose to guide and enable a chameleon carrier to maintain its unsafe operation by merely changing its corporate identity. The chameleon carrier evades detection by the FMCSA by acquiring a new corporate clean slate, and the chameleon carrier pays premiums to the enabling insurance broker. The insurance broker simply cashes the checks from a trucking company that would have otherwise been put out of business; meanwhile, the broker passes all the financial risk on to an unwitting insurance underwriting company. These unscrupulous insurance brokers have sought to earn a quick buck at the expense of the public's safety. Holding a conspiring insurance broker accountable in civil lawsuits will serve a dual function of safeguarding the citizens who use Indiana's roads and protecting insurance underwriters who have been duped by chameleon carriers and their colluding insurance broker.

To the extent that the Indiana Court of Appeals panel suggested the "public policy" question rests on what parties are in a position to prevent injury, the AAJ contends that an insurance broker that is actively and materially aiding a reincarnating chameleon carrier to evade FMCSA regulations should be held accountable. An insurance broker is in a position to prevent injury by saying "no" to assisting a chameleon carrier.

CONCLUSION

The American Association for Justice respectfully requests that this Court grant transfer.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 4,200 words.

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CERTIFICATE OF SERVICE

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