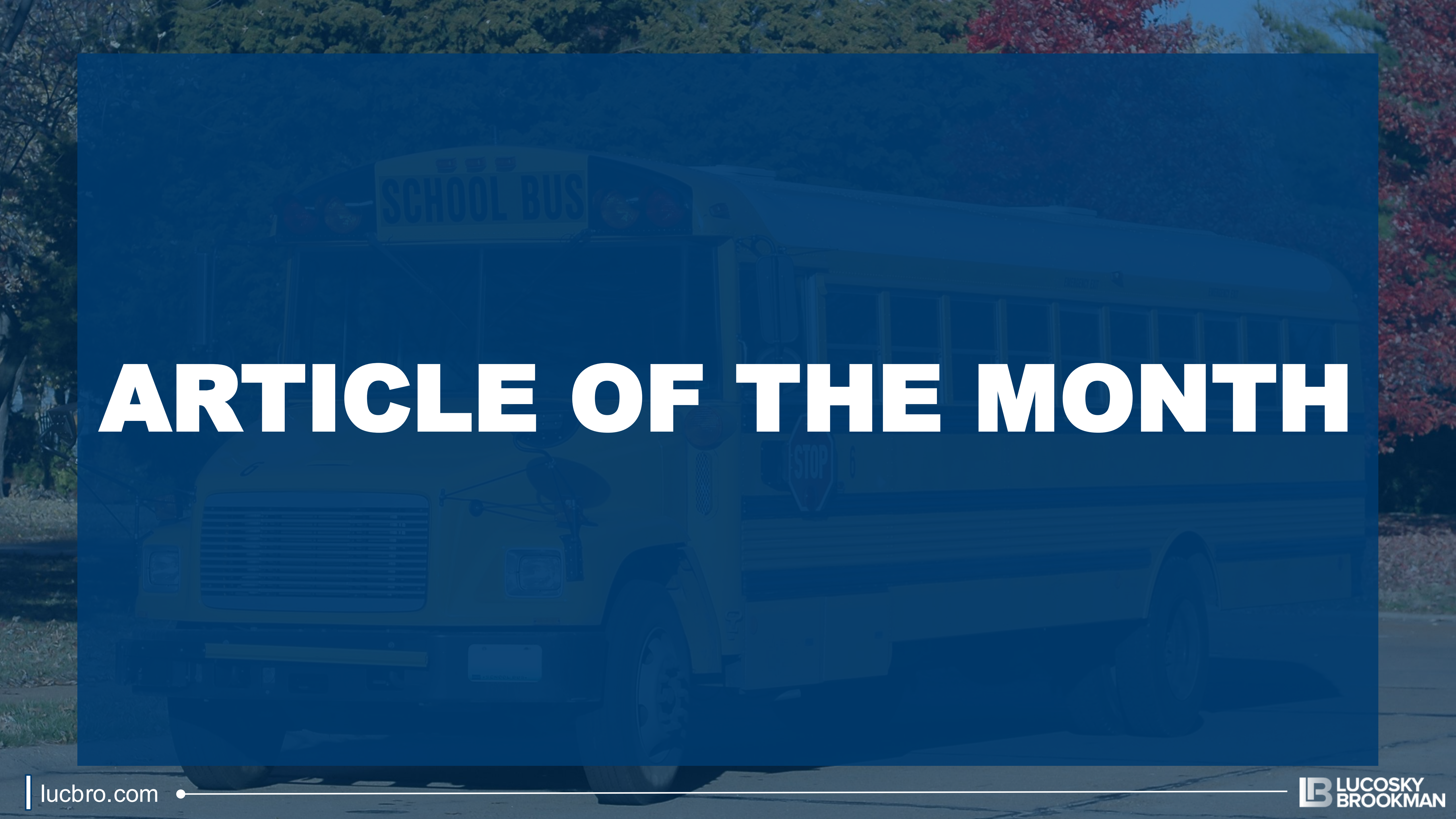
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Fifth Circuit Re-Instates Negligent Selection Claims Dismissed on Pre-Emption Grounds Following Supreme Court Decision in *Montgomery*

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In May of this year, the Supreme Court's Decision in *Montgomery v. Caribe Transport II, LLC et al, Docket 24-1192,* ended the Federal Aviation Administration Authorization Act ("FAAAA")'s federal preemption of state tort law claims against freight brokers by finding that state tort law fell within the statute's safety exception. This decision exposed freight brokers to potential liability under state tort law for negligent hiring, vetting, or selection claims when contracting with freight transportation companies. There is no longer the clear bar to liability that large freight broker and logistics companies can enjoy when the underlying accident does not involve their direct vehicles or employees.

One of the first tests of this change in the law took place in the Fifth Circuit Court of Appeals in *Crane v. Penske Transportation Management, L.L.C.*, No. 25-40012 (5th Cir. Aug. 4, 2026), where the Circuit Court reversed summary judgment in favor of Penske for negligent selection claims previously granted pursuant to the federal preemption of 49 USC § 14501. It is important to note that the Court did not speak to the soundness or sufficiency of the claims itself but has instead reinstated the claims and returned the matter to the District Court, as the basis for the prior dismissal is no longer applicable under *Montgomery*.

Perhaps the most eye-opening aspect of this decision is the reinstatement of these claims against and potential liability against Penske despite a significantly attenuated link between Penske and the subject driver. In this matter, not only did Penske not employ the driver and contract with a third-party company, the third-party company Penske contracted with hired *another* company itself. Penske contracted with Liberty Lane, which then contracted with a third company, OK Trans, which then in turn hired the driver. This highlights the new reality created by the elimination of federal preemption under *Montgomery*: a logistics company such as Penske could be held responsible for injuries caused by the alleged conduct of drivers that were not even hired by the initial independent contractor. This creates a line of analysis where a jury may determine whether Penske was negligent in selecting Liberty Lane because of Liberty lane's alleged negligent selection of OK Trans. This theoretically could require large freight brokers to ensure whatever definition exists of sufficient vetting for the entire corporate shipping chain.

Following *Montgomery*, we discussed Justice Brett Kavanaugh's adoption of the petitioner/plaintiff's words that brokers "just have to hire carriers that actually have a reasonable policy." Now it appears that brokers have to hire carriers who hire other carriers with reasonable policies. The slippery slope is evident on its face. It was former Supreme Court Justice Benjamin Cardozo when he sat as the Chief Judge for the New York State Court of Appeals spoke of the danger of "enlargement of the zone of duty" noting that "[e]very one making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun. The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together. Again we may say in the words of the Supreme Court of the United States, 'The law does not spread its protection so far'." H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160 (1928). Unfortunately it appears contractors can no long enjoy the same peace of mind that jurisprudence considered relatively sacrosanct a century ago.

In *Crane*, the District Court previously dismissed the claim that Penske was negligent for selecting Liberty, which of course, in-turn, hired OK Trans and the driver. In reversing this dismissal, the Fifth Circuit, citing to *Montgomery*'s holding that the claim falls within the FAAAA's safety exception, further noted that while it was not holding that Penske had a duty to plaintiff under Texas law that it was *not* addressing that issue since the issue was not addressed by the District Court. This does leave open the issue as to whether under Texas state law plaintiff can establish that Penske had a duty to the plaintiff when it retained Liberty Lane, which then hired OK Trans.

This however, only creates liability if it is proven that Penske was negligent in its retention of Liberty Lane. Perhaps more impactful was the Fifth Circuit's reversal of the District Court's finding that Penske could not be considered the driver's statutory employer because Penske had no direct agreement with OK Trans. The Fifth Circuit disposed of this issue, finding that because Penske assumed control and responsibility of the OK Trans vehicle as interpreted under 49 CFR § 376.22 that Penske could be considered the driver's statutory employer. *This now creates the potential for strict vicarious liability to logistics companies for the negligence of the driver regardless of the degrees of separation between the logistics company and the driver.* This shift may be more damaging than *Montgomery*. If Penske and other freight brokers can be held vicariously liable for the driver's conduct, potential liability for negligent vetting or selection will pale in comparison to the imposition of vicarious liability for the conduct of a driver the freight broker does not employ.

The question now is what can the transportation and freight broker industry do to combat wildly increasing personal injury exposure as the courts continue to expand the theories under which these companies can be held liable. Plaintiff lawyers are always going to pursue the *reptile* and twist the meaning of even the best policies, procedures, and training. Strong defense, indemnification, and additional insured protection in all contractual agreements with sufficient coverage is going to be the best way for companies to protect themselves. The issue this presents is that smaller companies, i.e. an OK Trans, may not be able to secure coverage that will insulate larger companies from high seven-figure and eight-figure exposure. This could have an increasingly damaging impact on the industry itself if smaller transportation companies are unable to procure and afford insurance. The courts at large, unfortunately, seem blind to the practical, real-life, and economic impact, as even the Supreme Court believes companies can protect themselves by having sound policies. In a world where plaintiff attorneys are holding weekly Continuing Legal Education seminars on how to sue freight brokers, sound policies and adequately vetting independent contractors is only a small part of the equation.

We often discuss the importance of immediate investigation and response to all claims, accidents, etc. because so much information and evidence, whether it be video, text communication, or electronic vehicle data, is quickly lost if not retained. However, when combatting broker liability claims and seeking to preclude a vicarious liability finding as to a non-employee, the defense process could start years before any claim in the form of continued oversight of vendors and contractors, updating of training and guidelines, and establishing systems and redundancies to ensure that these smaller transportation companies are managing their fleet and drivers as legally required. Email and document retention policies, so that the aforementioned information can be accessible possibly years down the road, will be equally integral.

This may be a watershed moment for the industry. For the immediate future and time-being, diligently ensuring any entity transporting goods on your company's behalf has sound policies and is properly vetting, screening, and training their own drivers is non-negotiable. Meticulous contract drafting and verification that companies are procuring the required insurance is another must. In a time when the cost of living and inflation are part of our everyday discourse, the only answer may be articulating to elected officials and the public that the increased costs in the shipping and logistics industry will only find their way downstream into grocery, department, and warehouse stores and the Targets and Wal-Marts of the world. These issues do not exist in a vacuum. The much-reported $600 million dollar verdict against C.H. Robinson out of Dallas, Texas, in *Lipe v. Lupus Superior LLC & C.H. Robinson Company, Inc.* may only be the beginning of this new reality for freight brokers and the shipping and logistics industries.