

STATE OF MICHIGAN
IN THE SUPREME COURT

DEAN McMASTER,

Plaintiff-Appellant,

v

DTE ELECTRIC COMPANY,

Defendant-Appellee,

and

FERROUS PROCESSING AND TRADING CO

Defendant.

Supreme Court No.:162076

Court of Appeals No. 339271

L.C. No. 15-147414-NO

DEFENDANT-APPELLEE
DTE ELECTRIC COMPANY'S
BRIEF ON FULL CALENDAR APPEAL

***** ORAL ARGUMENT REQUESTED *****

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DEFENDANT-APPELLEE DTE ELECTRIC COMPANY'S BRIEF ON FULL CALENDAR APPEAL

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APPENDIX

PROOF OF SERVICE

Respectfully submitted,

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COUNTER-STATEMENT OF JURISDICTION

On June 2, 2021, the Supreme Court of Michigan Granted Plaintiff's Application for Leave to Appeal.
Appellate jurisdiction is therefore vested in this Court.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. ON LEAVE GRANTED, SHOULD THE MICHIGAN SUPREME COURT HOLD THAT THE FEDERAL MOTOR CARRIER REGULATIONS ADOPTED UNDER MCL 480.11a DICTATE THE DUTIES AND RESPONSIBILITIES OF THE PARTIES IN THIS CASE AND AFFIRM SUMMARY DISPOSITION IN FAVOR OF DTE, WHERE:**
- A. THE INTENT OF THE LEGISLATURE IN PASSING MCL 480.11a WAS TO ABROGATE THE COMMON LAW BY PLACING THE EXCLUSIVE OBLIGATION TO SECURE AND SAFELY TRANSPORT CARGO ON PLAINTIFF;**
 - B. A JUDICIAL IMPOSITION OF A PURPORTED COMMON LAW DUTY OF CARE ON DTE WOULD INEXORABLY CONFLICT WITH THE ADOPTED FEDERAL MOTOR CARRIER REGULATIONS; AND**
 - C. THE REGULATIONS REFLECT INDUSTRY CUSTOMS AND IMPLEMENT BEST PRACTICES FOR THE SAFE TRANSPORTATION OF CARGO?**

Plaintiff-Appellant says "No."
 Defendant-Appellee says "Yes."
 The Trial Court would say "Yes."
 The Court of Appeals would say "Yes."

- II. ON LEAVE GRANTED, SHOULD THE MICHIGAN SUPREME COURT ADOPT THE "SHIPPER'S EXCEPTION" WHICH PRECLUDES LIABILITY FOR A SHIPPER UNLESS THE SHIPPER EXCLUSIVELY LOADS CARGO AND NEGLIGENTLY CREATES A LATENT DEFECT, AND AFFIRM SUMMARY DISPOSITION TO DTE, WHERE:**
- A. THE "SHIPPER'S EXCEPTION" IS CONSISTENT WITH THE FEDERAL MOTOR CARRIER REGULATIONS AND INDUSTRY PRACTICES THAT PLACE THE ULTIMATE DUTY OF INSPECTION AND SAFE TRANSPORTATION OF CARGO ON THE CARRIER;**
 - B. THE "SHIPPER'S EXCEPTION" HAS BEEN ADOPTED BY A SUPER MAJORITY OF STATES; AND**
 - C. DTE DID NOT HAVE EXCLUSIVE RESPONSIBILITY FOR LOADING THE CONTAINER WITH SCRAP METAL AND ANY PURPORTED HAZARD WAS ACTUALLY OBSERVED BY PLAINTIFF ON REPEATED OCCASIONS?**

Plaintiff-Appellant says "No."
 Defendant-Appellee says "Yes," if the answer to question one does not fully resolve the appeal.
 The Trial Court would say "Yes."
 The Court of Appeals would say "Yes."

SUMMARY OF COUNTER-ARGUMENT

Although interchangeably referred to as “abrogation” or “preemption,” Michigan law has long adhered to the principle that the common law must yield when the Legislature has made a policy choice. O'Brien v Hazelet & Erdal, 410 Mich 1, 15, 299 NW2d 336 (1980) (it is the function of the legislature, not the judiciary, to make laws, and legislatively enacted laws will always take precedence over judge-made common law), citing Bean v McFarland, 280 Mich 19, 273 NW 332 (1937); Bradley v Saranac Bd of Ed, 455 Mich 285, 301, 565 NW2d 650 (1997); see also, Kraft v Detroit Entmt, LLC, 261 Mich App 534, 543; 683 NW2d 200 (2004) (noting that preemption typically refers to a federal statute trumping state law, but Michigan Courts have referred to state statutes as “preempting” state common law).

Regardless of the label attached to the analysis, in this case, there is no common law rule imposing a legal duty of reasonable care on Defendant-Appellee DTE Electric Company (“DTE”) for the injury suffered by Plaintiff-Appellant Dean McMaster. There is no judicial decision holding a shipper of cargo like DTE liable to a carrier like Plaintiff for his injury under Plaintiff’s “negligent loading” claim, which at this stage, exists only as a theoretical legal construct. Instead, there is a state statute directly on point that places the exclusive responsibility to secure and safely haul the cargo on Plaintiff and Plaintiff alone, MCL 480.11a, which adopted comprehensive Federal Motor Carrier Regulations for the expressly stated purpose of promoting safety of persons and property in the motor carrier or trucking industry.

While DTE’s liability or duty to Plaintiff under the common law is a highly doubtful proposition, the Legislature’s policy choice of adopting Federal Motor Carrier Regulations to govern the relationship at issue in this case affirmatively forecloses the possibility of any potential liability or duty of care owed by DTE to Plaintiff. Hoerstman Gen Contr’ v Hahn, 474 Mich 66, 74, 711 NW2d 340 (2006) (common law must yield to statutory law). In light of the legislative prerogative to put exclusive responsibility on Plaintiff as the driver under

49 CFR 392.9 for the load of cargo that he was hired to transport, there is no room for Plaintiff's proposed common law duty of care, as held by the Court of Appeals (Ex A, COA Opn, p 5, Appx p 9b: "We find that the adoption of MCL 480.11a abrogated the shipper's common law duty of ordinary care.")

In unambiguous terms, the Federal Motor Carrier Regulations place on Plaintiff the exclusive, non-delegable duty to secure the cargo he was responsible for hauling. 49 CFR 392.9. These regulations were not devised by industry outsiders or detached bureaucrats and instead reflect the ubiquitous experience of entities and individuals in the trucking industry, as noted by case law around the country, and as testified to by the numerous industry veterans, including Plaintiff, who were deposed in this case. The fact witnesses all agreed that a truck driver such as Plaintiff-Appellant, Dean McMaster (1) has exclusive responsibility for securing the cargo he is hauling; (2) has unfettered discretion to implement whichever safety measures he feels should be used; and (3) has the right to refuse to haul any load if he believes it would not be safe to haul. The Federal Motor Carrier Regulations embody these shared, nation-wide experiences within the trucking industry.

Plaintiff "assumes" that a common law duty of care exists on the part of DTE, but at best, the existence of a duty is an open question. And, most likely, if called upon to analyze whether to impose a common law duty of care in this case, this Court would decline to do so. Valcaniant v DTE, 470 Mich 82, 86; 679 NW2d 689 (2004) (whether a duty is owed depends on "foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and ... the burdens and consequences of imposing a duty and the resulting liability for breach.")

Because an examination of these factors strongly weighs against the imposition of a duty on DTE, the common law and Federal Motor Carrier Regulations identified in question one of the Order Granting Leave are not in conflict, nor are these sources of law in conflict with the "shipper's exception" under United States v Savage Truck Line, Inc, 209 F2d 442 (CA4 1953), the focus of the second question in this Court's Order

Granting Leave. The Fourth Circuit Court of Appeals' decision is almost 70 years old and has stood the test of time as it is still the leading guidepost for the "inherent relationship" between a shipper, like DTE, and a carrier-driver, like Plaintiff. The Opinion is still cited and followed by courts across the country despite so many other changes in the law that have not been held to affect the time-honored codification of the practices and standards that have girded the trucking industry for decades. The Federal Motor Carrier Regulations were largely inspired by the Savage Opinion and many courts that have decided legal disputes similar to the case at bar have interpreted and applied Savage with the Federal Motor Carrier Regulations in tandem, *in pari materia*, given their synergy. See, for example, Bujnoch v Natl Oilwell Varco, LP, 542 SW3d 2, 8 (Tex App, 2017) ("The common law *Savage* rule and the subsequent federal regulations are consistent because they require drivers to inspect the security of cargo both before driving a truck and during transport.")

Plaintiff's position in this case, if accepted, would upend well-entrenched procedures and customs within the trucking industry. It is difficult to think of a proposition that would more upset the day-to-day experience of trucking industry veterans than Plaintiff's suggestion that a shipper like DTE should have responsibility to secure cargo before it is shipped, have responsibility for any shifting of the cargo that occurs during the haul, and ultimately have responsibility for the unloading of the cargo at a completely different facility, owned and operated by a completely different entity, 60 miles away. The witnesses all agreed that the loading and unloading processes, along with the commute, cause shifting of the scrap metal and that is impossible to predict how the loose materials will end up at the final destination. This is why the regulations place the exclusive securement and safety responsibility on the carrier-driver, the only individual who stays with the cargo the whole time, from loading at DTE, to hauling and then to unloading 60 miles away.

Not only would Plaintiff's proposition upset the status quo that has existed in the trucking industry for decades, it would also make carriers like Plaintiff and the general public far less safe. The Federal Motor

Carrier Regulations do not impose this exclusive responsibility on a carrier-driver haphazardly without reason or justification. The opposite is true: the regulations are the culmination of shared experiences reflecting that a carrier-driver has the most knowledge of the cargo he is hauling and is in the best position to implement safety measures to protect himself and others. This is why the Legislature adopted the regulations as controlling Michigan law under MCL 480.11a and this is why of the 29 states to consider the “shipper’s exception” under Savage, 28 have adopted it and just 1 has rejected it. On Leave Granted, the Court should hold that the Federal Motor Carrier Regulations define the duties of the parties. DTE believes that resolution of question one fully resolves the appeal, but if the Court decides both questions, the “shipper’s exception” should be adopted under Michigan law and Summary Disposition should be affirmed.

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Background Facts

During the course of routine maintenance and renovation of its facilities throughout the State of Michigan, DTE construction projects generate scrap metal, a valuable commodity to commercial entities in the scrapping industry, such as Ferrous Processing and Trading Company, (“Ferrous”), which entered into a contract to purchase the scrap metal generated by DTE’s maintenance and renovation program (Ex B, Contract between Ferrous and DTE; Appx 12b; Ex C, Bushaw Dep 13; Appx 21b).

Under the contract, Ferrous placed its large, empty metal containers at various DTE facilities so that they could be filled with valuable scrap and then returned to Ferrous (Ex B 1; Appx 12b). Instead of employing its own truck drivers to haul its containers back and forth, Ferrous subcontracted with P & T Leasing (“P & T”) to drop off empty containers at DTE and to bring them back when they were filled (Ex D, Plaintiff Dep 31, 38

Appx 66b ; Appx 68b).¹

Ferrous, DTE, and, P&T are each sophisticated commercial entities that appreciate the potential risks associated with hauling scrap metal. In fact, the contract between DTE and Ferrous specified the possibility of hazardous materials being found within the “surplus materials” that Ferrous contracted to purchase and haul away: *“The surplus materials sold by the Detroit Edison Company may bear or contain materials which may be, or become by chemical reaction or otherwise, directly or indirectly hazardous to life, to health or to property by reasons of toxicity, flammability, cleaning, reconditioning, disposal, etc. Purchaser acknowledges and represents that it has read and understands this warning and undertakes to exercise the degree of care required to protect persons or property that may be exposed to the surplus materials.”* (Ex B; Appx 13b).

Plaintiff-Appellant Dean McMaster was employed by P & T to haul Ferrous’s containers (Plaintiff Dep 45-46; Appx 70b). Prior to his accident, Plaintiff had driven trucks carrying containers for a year and a half and, before that, he had driven tractor trailers for roughly 18 years (*Id.* 21; Appx 64b). During his year and a half tenure with P & T Leasing, Plaintiff picked up and hauled scrap metal containers each day he was on the job, five days per week (*Id.* 44-45; Appx 70b).

Plaintiff trained at and attended the American Trucking School in Coldwater, MI in 1987 (Plaintiff Dep 46-47; Appx 70b). His course work included lessons on the requirements of the Federal Motor Carrier Regulations (*Id.*; Appx 70b-71b). When Plaintiff joined P & T, his nephew provided him with on-the-job training on how to haul containers (*Id.* 50-51; Appx p 71b). This training included on-site work at Ferrous and visits to different locations so that Plaintiff’s nephew could show him how to pick up and drop off containers that were carrying scrap metal (*Id.*)

¹ References to the deposition transcript of Plaintiff Dean McMaster are indicated as “Plaintiff Dep.” Plaintiff’s nephew, Robert McMaster, was also deposed. References to his deposition transcript are indicated as “Robert McMaster Dep”.

During his employment with P & T, Plaintiff had performed hundreds of drop-offs of empty containers and pickups of full containers, including dozens of these runs to and from DTE facilities (Plaintiff Dep 37-38, 43-44; Appx 68b-69b). However, on the morning of October 14, 2014, Plaintiff was injured while attempting to unload a full container at the Ferrous facility after picking it up from the DTE Belle River Power Plant in East China, Michigan, 60 miles away (Id. 11; Appx 61b).

Plaintiff stated that he had performed a very similar hauling job for Ferrous at least a dozen times involving containers at the Belle River Power Plant (Plaintiff Dep 37-38; Appx 68b). In addition to more than a dozen trips to the DTE Belle River Power Plant, Plaintiff had also hauled at least 20 containers from a different DTE facility located in St. Clair back to Ferrous (Id. 43-44; Appx 69b).

October 14, 2014 started as any typical day for Plaintiff during his career as a truck driver and his employment with P & T Leasing. On October 14, 2014, the date of the accident, Plaintiff arrived at the DTE Belle River Power Plant at roughly 5:45 a.m. (Plaintiff Dep 11; Appx 61b). His job was to drop off an empty container and pick one up that had been filled with scrap metal by DTE's construction contractors (Id. 31; Appx 66b). Photographs of Plaintiff's truck and the container are attached as Ex E; Appx 133b-136b.²

Plaintiff's interaction with DTE personnel was limited to brief check-ins with the security desk when he arrived and when he left so DTE could track what was dropped off and what was picked up (Plaintiff Dep 52; Appx 71b). Plaintiff needed no direction or assistance to perform his job (Id.) He had no other interaction with anyone at the DTE facility aside from these two check-ins (Id.)

After dropping off an empty container, Plaintiff backed his trailer up to the roll-off container that was full of scrap metal to be hauled away (Plaintiff Dep; Appx p 66b). He then applied the truck's brakes and got

² Because the container is lifted and rolled onto and then off of the flat-bed truck, the container is sometimes referred to in the record as a "roll-off container" while other witnesses sometimes referred to it as a "can" or "dumpster".

out to initiate the process of loading the container from the ground and up onto his truck's flat-bed trailer (Id.).

Plaintiff always inspected the Ferrous containers and the loose scrap materials within them prior to hauling. As Plaintiff had done before every other departure, on the day of his accident, he climbed up a ladder on the roll-off container to look inside while he was still at the DTE facility (Plaintiff Dep 14; Appx p 62b). In doing so, Plaintiff visually inspected the contents of the container to determine whether the materials needed to be secured during the haul from the Belle River Power Plant in East China to the Ferrous scrap yard in Pontiac (Id. 15; Appx 62b).

Based on his inspection, the container and its contents did not concern Plaintiff at all (Plaintiff Dep 33-34; Appx 67b). Importantly, Plaintiff testified that during his inspection of the container, he noticed the bright blue pipe that later fell out and injured him, but he thought nothing of it at the time (Id. 14, 17; Appx 62b-63b).

At page 17, Mr. McMaster testified as follows:

- Q So when you went up the ladder and you saw that – what did you call it, a pipe?
 A Pipe. Right.
 Q And the pipe was blue; correct?
 A Correct.

* * *

- Q And you said you saw that pipe in the roll-off container before you left the DTE facility?
 A Correct.
 Q And where was it within the container?
 A In the very back up against the back door.
Q And did that cause you any concern at the time?
A No. [Emphasis added.] [Appx 63b].

Mr. McMaster repeatedly testified that the visual inspection of the contents of the container resulted in him observing the blue pipe that was laying parallel to and up against the door (Plaintiff Dep 18-20; Appx 63b). The loading of the pipe parallel to the door informs the central thesis of Plaintiff's Counsel's assertion of negligence as to DTE, but Plaintiff, himself, said that DTE did nothing wrong when loading the container (Id.

20-21; Appx 63b-64b).

If Plaintiff had any concerns with the container or its contents, including the large bright blue pipe that he knew was near the back door, he had at his discretion a number of measures he could have implemented, both at the DTE facility and at the Ferrous scrap yard, or he could have simply refused to accept the load and decline to haul it, his unequivocal right under the Federal Motor Carrier Regulations. 49 C.F.R. § 392.9(a). Plaintiff knew that he could have refused to haul this roll-off container, a right he had exercised in the past (Plaintiff Dep 88; Appx 80b). In addition to refusing the load, Plaintiff could have instructed a DTE crane operator to relocate or remove scrap metal that Plaintiff felt in his judgment was hazardous (Ex G, Baareman Dep 31-32 86, 89; Appx 179b 193b; Ex F, Robert McMaster Dep 37; Appx 148b).

Plaintiff said that decisions as to whether to implement any safety measures or additional steps to secure the container were his and his alone (Plaintiff Dep 34; Appx 67b: "I would make my own judgment.") Plaintiff testified that he was the person with the most knowledge about the contents of the container and that he had the "best view" of what was inside (Id. 123; Appx 89b). Plaintiff was asked whether he would ever direct questions about securing the cargo to others and he forcefully responded in the negative (Id. 33-34; Appx 67b).

Having no concerns with the container or the blue pipe following his inspection at DTE, Plaintiff used his truck's hydraulics to lift the container onto his trailer, secured the container to his truck with hooks and straps and departed the Belle River Power Plant at approximately 6:12 a.m. (Plaintiff Dep 28, 30; Appx 65b-66b), embarking on the 60 mile commute to the Ferrous facility in Pontiac that took roughly an hour and 15 minutes (Id. 22; Appx 64b). Under the Federal Motor Carrier Regulations, Plaintiff was supposed to make one additional inspection of the contents of the roll-off container during his commute to Pontiac to see whether the contents had shifted, but Plaintiff failed to take this additional safety step (Id.); 49 C.F.R. § 392.9(b)(2) (the driver must: "Inspect the cargo and the devices used to secure the cargo within the first 50 miles after

beginning a trip and cause any adjustments to be made to the cargo or load securement devices as necessary, including adding more securement devices, to ensure that cargo cannot shift on or within, or fall from the commercial motor vehicle”).

Upon his arrival at the Ferrous facility at approximately 7:36 a.m., Plaintiff drove his truck and the container to the scale so the amount of scrap metal could be weighed (Id. 54; Appx 72b). While the container was on the scale, a Ferrous employee took an overhead picture of the container and its contents which revealed that the large blue pipe was there to be seen (Photo; Appx 133b; Plaintiff Dep 12; Appx 61b).

While at the Ferrous facility, Plaintiff had another opportunity to inspect the container prior to unloading it, but he chose not to. Plaintiff admitted that the container was loaded at an angle from the ground and up onto the flatbed truck such that the contents were likely to shift during the loading process at the DTE facility (Plaintiff Dep 35-37; Appx 67b-68b). Because the container was full of loose scrap metal, Plaintiff knew that while the container was tipped at an angle, gravity could cause the material in the container to shift and lean against the door (Id.). Plaintiff also knew that the contents could shift again during the 60 mile commute between the DTE Power Plant in East China and the Ferrous scrap yard in Pontiac, but he had no concerns with this load (Id.).

These two events (the loading on an angle and the commute, itself) were known by Plaintiff and the other P & T drivers as possibly causing the contents to shift; as a result, they all knew that the contents pre-departure could be situated differently upon arrival at Ferrous (Ex H, Neumann Dep 14; Appx 367b).

- Q. Do you agree that every load is different, but all loads shift because when they initially load the dumpster it must be picked up on an angle before coming back level on the trailer bed?
- A. I can agree with that.
- Q. Do you agree that when the dumpster is angled the loads usually shift toward the door?
- A. I agree with that. [Plaintiff Dep 113-114; Appx 87b.]

Based on these two variables, P & T employee Neumann said “nobody really knows what that load

is going to do [during the transport].” (Neumann Dep 14; Appx 367b.) Mr. Neumann said he always takes another look at the container once he arrived at the Ferrous facility to inform him of whether he should open the container by hand or if he should have a crane open the door for him so he could keep his distance in the event loose materials fell out (Id., 18, 21; Appx 368b-396b). Ferrous employee Mr. David Wise testified that many drivers take the opportunity while the truck is parked at the scale house to take another look into the container following the haul (Wise Dep 9; Appx 396b), but Plaintiff chose not to (Plaintiff Dep 27; Appx 65b).

After declining a second inspection during the weighing process at the Ferrous scale, Plaintiff got back into his truck and drove to the inspection area to meet with the Ferrous “road inspector” David Wise, whose job is to determine where in the salvage yard it should be dumped (Plaintiff Dep 57; Appx 73b; Wise Dep 7, Appx 395b). The Ferrous facility has different areas designated for particular types of scrap metal and it is up to the road inspector to determine into which pile a particular container should be dumped (Wise Dep 8; Appx 395b). Consistent with the routine procedure, Mr. Wise, the Ferrous road inspector, climbed the ladder on the container for inspection to decide where it should be deposited (Id. 18; Appx 398b). He did not notice anything out of the ordinary with this container or its contents and told Mr. McMaster where to take the material he had picked up (Wise Dep 18; Appx 398b; Plaintiff Dep 57; Appx 73b).

Once Plaintiff drove to the appropriate dumping area, he got out of his truck and walked to the back where the container was secured to his flat-bed trailer (Plaintiff Dep 58; Appx 73b). Plaintiff’s exclusive responsibility for loading and unloading the container continued as Plaintiff performed the unloading of the roll-off container by himself, unassisted, at the Ferrous facility (Id.) Plaintiff kept the truck engine running because it also controlled the hydraulic system that was necessary to lift the container up at a 35-40 degree angle to dump the material out (Id. 59; Appx 73b). Plaintiff next removed the nylon straps that secure the container to the truck (Id. 58; Appx 73b). These steps were consistent with Plaintiff’s routine procedures (Id. 64; Appx 74b).

Once the container's straps were removed, Plaintiff used the hydraulics to shift the roll-off container to the back of the flatbed truck and began to open the door of the container (Plaintiff Dep 63; Appx 74b). Plaintiff could have requested that a Ferrous crane be used to open the door of the truck, instead of doing it by hand, if he believed that debris might fall out when the door was opened (Neumann Dep 12; Appx 366b). Road Inspector Wise confirmed that if Plaintiff had any concerns whatsoever about the potential of scrap falling out during the unloading process, he was authorized to request a crane to open the door depending on "how the driver felt" (Wise Dep 14-15; Appx 397b).

Plaintiff did not invoke this option because he did not view this container or the blue pipe to be hazardous (Plaintiff Dep 17, 33-34; Appx 63b, 67b). As was his custom, Plaintiff did not initially open the door all of the way; instead, as a safety precaution, he cracked it open to see whether any material fell out (Id. 64-65; Appx 75b-76b). Opening the door slightly at first was Plaintiff's custom as well as the custom for the other drivers (Anderson Dep 9; Appx 432b; Robert McMaster Dep 32-33; Appx 146b-147b).

Cracking the door open provided Plaintiff with another opportunity to determine whether any additional measures needed to be implemented for his own safety. Based on his observations when the door was cracked, Plaintiff again had the option of calling for a crane operator to open the door if material fell out or if he felt it was unsafe for any other reason in his judgment (Plaintiff Dep 114; Appx 78b).

Mr. Neumann testified that calling in a crane to open the door was a "frequent thing" (Neumann Dep 11; Appx 366b: "I bet you I'd have an [crane] operator open the door four or five times easy within that week."; Anderson Dep 21; Appx 432b). Plaintiff, himself, said it was "typical" for scrap to fall out of the container once the door was open (Plaintiff Dep 122; Appx 89b). He estimated that 90% of the time material fell out when he opened the door (Id. 151; Appx 96b).

On the day of the accident, nothing fell out of the container when Plaintiff cracked the door open and

his confidence remained that this container, and the bright blue pipe he knew had been resting against the back door, posed no threats to him (Plaintiff Dep 63; Appx 74b). Plaintiff testified that when he cracked the door open, he saw the blue pipe (Id. 95; Appx 82b). Plaintiff opened the door all the way so the material could be dumped out (Id. 64; Appx 74b). Still nothing had moved or fallen out of the container even after the door was opened fully (Id. 65; Appx 75b). Plaintiff testified that when he fully opened the door, he once again saw the blue pipe in the back of the container (Id. 95; Appx 82b).

Q. Let me ask you this: When you opened up the door to the roll-off container about 12 inches, you didn't see anything that appeared to be hazardous?

A. No.

Q. When you opened up the door to the roll-off container all the way and chained on the hook, you didn't observe any danger?

A. No. [Id. 112; Appx 86b.]

The door of the container had been opened completely, nothing had fallen out, but even then, Plaintiff knew he should not stand near the back of the truck with the door open. Plaintiff testified that "common sense" dictated that when the back door of the roll-off container is open, it is not safe to stand directly behind the open container because material could fall out (Plaintiff Dep 62, 78; Appx 74b,78b). But inexplicably, he stood behind the open container for five to fifteen minutes (Id. 16; Appx 62b). Leaving the engine of his truck running created vibrations that could cause the contents to shift and disrupt the material and the bright blue pipe that had up until that point remained undisturbed, but Plaintiff left the engine running the entire time he stood behind the open container (Id. 77-78; Appx 78b; Neumann Dep 34-35; Appx 372b).

Plaintiff said P & T Leasing did not need to instruct him not to stand behind a fully loaded container when the door was open because it was common sense (Plaintiff Dep 99-100; Appx 83b; p 115; Appx p 87b: Plaintiff agreed "**no one should ever stand behind the door of the roll-off container**") (Emphasis added). Road Inspector Wise said that he was taught to stay away from a truck when the door to the container is open

because scrap metal can fall out (Wise Dep 13-14; Appx 397b). Mr. Wise agreed this was a matter of common sense (Id. 71; Appx 411b). Ferrous was ultimately cited and fined by MIOSHA for allowing its employees and Plaintiff to stand behind the container with the door wide open (Edgerton Dep 40; Appx 465b). DTE, on the other hand, was not cited or fined in any way.

Before Plaintiff was able to initiate the hydraulics to dump out the contents of this container, the Ferrous road inspector had second thoughts about where this particular load should be deposited, stalling the process (Plaintiff Dep 67-68; Appx 75b; Wise Dep 22; Appx 399b: "He cracked the door, I took a look at it and then I thought to myself, I better get somebody else over here to take a look at it, get their opinion on it.")

Mr. Wise stated that the "I" beams caught his attention simply because they meant that the load should be dumped in another location; the blue pipe did not capture his attention at all (Wise Dep 25-26; Appx p 400b). Plaintiff testified that being directed to a different area of the Ferrous yard after observation of the contents of the roll-off container once the door was opened was not uncommon (Plaintiff Dep, 154; Appx 97b).

Plaintiff and the two Ferrous employees discussed where this container should be dumped and had casual conversations for more than 5 minutes (maybe up to 15 minutes) while they stood behind the wide open door of the container with the truck's engine running (Plaintiff Dep 76; Appx 77b). Plaintiff, Mr. Wise and Mr. Adamus were so unconcerned about the open door to the container and the blue pipe they saw that the three of them joked around while standing directly behind the door, contrary to their common sense knowledge that this was not safe, not ever (Wise Dep 25; Appx 400b).

Still, up to this point, there was nothing out of the ordinary regarding this process, except for the inexplicably reckless decision of Plaintiff and the Ferrous employees to stand behind this container with the door open. Plaintiff believed that he was roughly eight feet away from the container when he and the Ferrous employees were looking at the container with the door open and from this distance they looked

inside to determine what type of material was in there (Plaintiff Dep 71; Appx 76b). He was still aware of the presence and location of the blue pipe at the rear of the container by the open door:

- Q. And you certainly knew that that blue pipe was in the roll-off container?
 A. Right. Correct.
 Q. And you knew that the cargo inside the roll-off container was not secured in any way; is that right?
 A. Correct. [Id. 100; Appx 83b.]

After shooting the breeze for more than five minutes with the rear door of the container open, the contents exposed and the truck's engine running, Mr. McMaster intended to return to his truck in order to shut off the hydraulics so that he could move the container to the area where the Ferrous employees instructed him to take it (Plaintiff Dep 66; Appx 75b). However, before Mr. McMaster returned to the driver's side of the truck, the blue pipe fell out of the container and struck him as he was walking toward the truck (Id. 67; Appx 75b). The blue pipe also struck Mr. Adamus, but he was not seriously injured (Id. 98-99; Appx 83b).

Plaintiff's Theory of Negligence Against DTE

Plaintiff himself admitted at his deposition that from the time of his inspection of the container at the DTE facility he knew the blue pipe was resting against the back door (Plaintiff Dep 14, 17; Appx 62b, 63b). Plaintiff said the blue pipe, itself, and its position within the container did not concern him at all (Id.), a point of view shared by the Ferrous road inspector (Wise Dep 29, 40; Appx 401b, 403b). Plaintiff also testified that he did not fault DTE in any way and that DTE did nothing wrong (Plaintiff Dep 20-21; Appx 63b-64b).

But Plaintiff's counsel and a retained expert devised a theory of liability that centered around the notion that the manner in which DTE employees or contractors had thrown the scrap metal into the container was negligent (Baareman Dep 64; Appx 187b). Contrary to the position taken by his Counsel, Plaintiff said that DTE was **not negligent** in this regard, as did the owners of P & T Leasing, Plaintiff's employer (Ex L, Phillip Sisson Dep 73-74; Appx 499b; Ex M, Traci Sisson Dep 12; Appx 502b).

Expert Baareman's criticism of DTE was that the blue pipe should not have been positioned parallel to and near the back of the container, but Plaintiff did not deem this to be a hazard (Plaintiff Dep 17; Appx 63b). Expert Baareman testified that this was unreasonably dangerous and it was DTE's fault for its presence near the back of the container (Baareman Dep 64; Appx 187b). Mr. Baareman said that none of the other dozens of pieces of scrap metal, including the heavy "I" beams, were negligently loaded, just this one blue pipe (Id.). The witnesses agreed, however, that it is possible for an item to be loaded away from the rear of the door but to ultimately end up there because of unpredictable shifting during the loading/unloading process and the commute (Neumann Dep 14; Appx 367b): "nobody really knows what that load is going to do [during the transport]." Anderson said a pipe could be loaded perpendicular to the door but end up parallel to and against it due to these inherent feature of hauling scrap metal (Ex J Anderson Dep 45; Appx 441b).

MIOSHA issued citations to Ferrous and P & T Leasing, but not DTE (Ex K, Edgerton Dep 29; Appx 462b). Mr. Edgerton also refuted Mr. Baareman because he testified that there are no industry standards regarding the loading of dumpsters with scrap metal (Id., 40; Appx 465b), a view shared by other witnesses (Robert McMaster Dep 10; Appx 141b; Neumann Dep 8; Appx 365b; Anderson Dep 27-28; Appx 436b).

DTE's Motion for Summary Disposition

On October 28, 2016, Defendant DTE filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10) and Plaintiff filed a Response in Opposition. The Court heard oral argument on DTE's Motion and Granted Summary Disposition to DTE based on lack of duty, breach and causation (Appx 207a-211a).

Court of Appeals Proceedings

The Court of Appeals has twice addressed Plaintiff's challenge to the Trial Court's Grant of Summary Disposition. In its first opinion, the Court of Appeals affirmed the trial court's grant of summary disposition in an unpublished opinion (Ex N, Opinion, 11/8/18; Appx 505b-508b). The portion of this Opinion deciding the

question of common law duty was vacated by the Supreme Court. 504 Mich 967, 933 NW2d 42 (Mich 2019).

On Remand, the Court of Appeals issued a unanimous, unpublished *per curiam* opinion that affirmed the Grant of Summary Disposition in favor of DTE (Ex A, COA Opinion; Appx 5b-10b). The Court's Opinion relied on MCL 480.11a, which adopted Federal Motor Carrier Regulations as controlling statements of Michigan law, to affirm the Grant of Summary Disposition (*Id.* 5; Appx 9b: "We find that the adoption of MCL 480.11a abrogated the shipper's common law duty of ordinary care"). In analyzing the question of duty on remand, the Opinion held that the Legislature has the authority to modify or supplant the common law and analyzed whether the Legislature intended to do so here (*Id.* 4-5; Appx 8b-9b).

Alternatively, the Court of Appeals also held that even if the Legislature did not intend to supplant the common law, adoption of the federal Motor Carrier Regulations expressed a legislative intent to modify and shape the common law (Ex A 5; Appx 9b: "Alternatively, if the legislature did not intend to eliminate the common law duty of care, it certainly expressed an intent to modify it significantly so as to limit the circumstances where a carrier is owed a duty by a shipper to circumstances where the shipper is in a superior position to appreciate and protect against the risk.")

The Court of Appeals also cited the "shipper's exception" as an alternate ground to affirm the Grant of Summary Disposition, holding that the large, bright blue pipe was not a hidden defect under the leading national Savage case (Ex A 6; Appx 10b: "The pipes and their arrangement in the truck bed were readily observable and in plain sight. Therefore, even under the shipper's exception the defendant did not owe a duty to the plaintiff.") This Court subsequently Granted Leave to Appeal. — Mich —; 959 NW2d 531 (Mich 2021).

COUNTER-ARGUMENT

The Supreme Court's Order Granting Leave to Appeal identifies three different sources of law to guide the decision in this case: (1) the common law; (2) the Federal Motor Carrier Regulations adopted by MCL

480.11a; and, (3) the “shipper’s exception” under United States v Savage Truck Line, Inc, 209 F2d 442, 445 (CA4 1953). The Court framed these sources of law as potentially in conflict by asking the parties to answer the question of, “whether the enactment of MCL 480.11a abrogated [DTE]-appellee’s common law duty of ordinary care with respect to loading cargo for transport by a commercial motor vehicle operated by [plaintiff]-appellant”. McMaster v DTE Energy Co, — Mich —; 959 NW2d 531 (2021).

These sources of law are not conflicting, however, and are in complete harmony. The legal outlier is Plaintiff’s proposed rule that would impose a legal duty of care on a shipper like DTE under these circumstances which, if adopted, would force a major course correction on drivers, carriers and shippers, including the industry veterans who testified in this case with virtual unanimity about how they have always performed their jobs. Adoption of Plaintiff’s proposed rule of law would make these individuals and the public at large much less safe if DTE or any other shipper had the authority to tell a driver like Plaintiff how to do his job and retained authority over the cargo he was hauling after it left the shipper’s premises, during the commute and at its ultimate destination, in this case, the Ferrous facility 60 miles away.

In addition to the potential chaos and mischief posed by Plaintiff’s position, there is no Michigan legal authority to support Plaintiff’s view of the common law, which Plaintiff concedes is an assumption at page 1: “This appeal assumes (as the Court of Appeals determined in *McMaster I*) that DTE owed Mr. McMaster a common law duty of care.” The Court Vacated this holding from McMaster I and Plaintiff’s assumption is not correct for additional reasons.

First, the Federal Motor Carrier Regulations were not created in a vacuum by disconnected bureaucrats without regard for the manner in which entities, including carriers-drivers such as Plaintiff or shippers such as DTE, operated in the trucking industry. Instead, the regulations codify the everyday experiences of participants in the trucking industry, as noted by leading cases on the subject. E.g., Decker v

New England Pub Warehouse, Inc., 749 A2d 762, 766 (Me 2000) (“The everyday practice and understanding in the trucking industry, as aptly reflected in the federal regulations on the subject, reflect that carriers logically should have the final responsibility for the loads they haul.”), cited with approval by the Michigan Court of Appeals in Neill v Steel Master, 2008 WL 4649020 (Mich App 2008), lv denied 483 Mich 922 (2009) (Ex O, Appx 510b). The trucking industry has long operated this way and not simply because that’s how things were always done; rather, these time tested customs represent best safety practices as codified by the regulations.

Second, even if there were no Federal Motor Carrier Regulations to guide the present case, the common law would recognize that a carrier-driver like Plaintiff has the non-delegable and exclusive responsibility to secure the cargo he is tasked with hauling. A traditional, multi-factorial common law analysis would not impose a duty on DTE, not just because of the experiences of individuals in the trucking industry, not just because Plaintiff’s injury was unforeseeable, but also because imposing the sole duty on Plaintiff promotes public safety and prevent harm. The witnesses in this case, including Mr. McMaster himself, universally testified that the driver has sole discretion to decide whether to secure the cargo and how to do so, whether to implement additional safety measures, such as having a crane remove or re-position the pipe or open the door at Ferrous, and whether to refuse to haul the load altogether if he did not feel it was safe to do so. The driver enjoys this discretion because he knows the most about the contents of the load, any risks it may pose, and is in the best position of control to prevent harm, one hallmark of whether and on which party to impose a legal duty. See, for example, Merritt v Nickelson, 407 Mich 544, 552; 287 NW2d 178 (1980) (duty imposed on the party with control who is in the best position to prevent harm).

Third, the legal doctrine at issue in this Court’s second question on Leave Granted is yet another reflection of the universal experience of entities in the trucking industry dating back decades. The Fourth Circuit Court of Appeals’ seminal decision in Savage pre-dated the Federal Motor Carrier Regulations adopted by

MCL 480.11a, but the predecessor version of these regulations that were examined in Savage also imposed a non-delegable duty on the carrier to inspect and secure the cargo and placed the exclusive duty for safe transit on the carrier, citing 49 CFR 193.9(a) and (b). The Court also noted that the rule of the “shipper’s exception” was based on common law holdings, further proof that the “shipper’s exception” under Savage was a reflection of how the industry has operated for decades. Id.

In light of these time-honored authorities, it is unsurprising that no Michigan authority, published or unpublished, has recognized a “negligent loading” theory of liability on a shipper in the manner advocated by Plaintiff. The Michigan cases to address this potential liability have rejected it. Neill, supra (Ex O; Appx 510b); Ex P, Johnston v Sappi Fire Paper, 2007 WL 1011914 (ED Mich 2007); Appx 516b; Ex Q, Lobdell v Masterbrand Cabinets, 2008 WL 2224094 (ED Mich 2008); Appx 520b; Ex R, McGhee v Hybrid Logistics, Inc., 2014 WL 11281402 (ED Mich 2014); Appx 532b.

But even assuming *arguendo* the existence of a common law rule that would impose a legal duty on a shipper like DTE for an unforeseeable injury that occurred 60 miles away from its facility, the adopted Federal Motor Carrier Regulations are so extensive that the Court should hold that the Legislature intended to abrogate or preempt any such common law duty with the passage of MCL 480.11a. The adopted regulations prescribe a detailed course of conduct guiding the entities involved in the trucking industry, including carriers, drivers and shippers. There is no room for Plaintiff’s proposed overly broad, omnibus duty of care stretching from DTE’s facility in East China all the way to the Ferrous facility in Pontiac, that could coincide with the extensive framework adopted by MCL 480.11a. Where the common law and a subsequent statute conflict, the common law must yield. Hahn, supra, 474 Mich at 74; Moning v Alfano, 400 Mich 425, 436; 254 NW2d 759 (1977) (“legislative directive” limits expansion of common law).

Michigan law has long recognized that statutory enactments can define tort duties. Moning, supra;

Hill v Sears Roebuck and Co, 492 Mich 651, 660-661; 822 NW2d 190 (2012) (“Generally, the duty that arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law . . .”); Downs v Saperstein Assoc’ Corp, 265 Mich App 696, 699; 697 NW2d 190 (2005) (holding that a tort duty “may be created expressly by statute, or it may arise under the common law.”)

A number of states have concluded that the Federal Motor Carrier Regulations guide or even control the tort duties between a carrier (Plaintiff) and a shipper (DTE) in the trucking industry. Rector v General Motors, 963 F2d 144, 147 (CA6 1992) (“while not dispositive, CFR 392.9(b) is indicative of the proper allocation of duty as between a common carrier and a shipper for the proper loading of goods.”) (Ky. law); Vargo-Schaper v Weyerhaeuser Co, 619 F3d 845, 848 (CA8 2010) (“Common carriers, such as Fil–Mor, are subject to the Federal Motor Carrier Safety Regulations. These regulations impose a duty of ensuring load security upon the carrier.”) (Minn. law); Stroder v Hilcorp Energy, 242 So 3d 1240, 1244 (La Ct App 2018) (“Federal regulations impose a nondelegable duty upon a carrier to secure all loads safely.”); Decker, supra, 749 A2d at 766.

On Leave Granted, the Court should reject Plaintiff’s novel proposal to create a new duty of care under the common law and instead hold that the tort duties in this case are dictated by the duties and obligations delineated in the Federal Motor Carrier Regulations. If question one does not fully decide the case, the Court should adopt the “shipper’s exception” under Savage as controlling because that decision reflects sound public policy and for good reason has been adopted by the overwhelming majority of jurisdictions to decide the issue.

Summary Disposition would be appropriately affirmed if the Court agrees with DTE’s view on either question on Leave Granted. Michigan law is best served if the Court were to hold that MCL 480.11a abrogated any common law duty of care and defines the duties between a driver, carrier and shipper. If it is necessary to decide both questions to fully decide the case, the Court should also adopt the “shipper’s exception”.

I. ON LEAVE GRANTED THE MICHIGAN SUPREME COURT SHOULD HOLD THAT THE TORT DUTIES BETWEEN CARRIERS AND SHIPPERS ARE DEFINED BY THE FEDERAL

MOTOR CARRIER REGULATIONS, AS ADOPTED BY THE LEGISLATURE UNDER MCL 480.11A, AND SHOULD REJECT PLAINTIFF'S POSITION THAT DTE OWED HIM A DUTY UNDER THESE CIRCUMSTANCES. SUMMARY DISPOSITION AS ORDERED BY THE TRIAL COURT AND COURT OF APPEALS SHOULD BE AFFIRMED.

Introduction

Article 3, Section 7 of the Michigan Constitution of 1963 provides: "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." "This provision has been construed to authorize both judicial change and legislative amendment or repeal." Placek v City of Sterling Hts, 405 Mich 638, 656–657; 275 NW2d 511 (1979), quoting Const.1963, art. 3, s 7. "Insofar as the common-law rule is different, it may, like any other judge-made rule, be changed." Gruskin v Fisher, 405 Mich 51, 65; 273 NW2d 893 (1979). Even assuming Plaintiff is correct that the common law would impose a duty on a shipper like DTE in these circumstances, the Legislature's enactment of MCL 480.11a is indicative of an intent to supplant any such common law duty. Trentadue v Buckler Lawn Sprinkler, 479 Mich 378, 389–391; 738 NW2d 664 (2007) ("It is axiomatic that the Legislature has the authority to abrogate the common law. Further, if a statutory provision and the common law conflict, the common law must yield."), citing Hahn, supra, 474 Mich at 74 and Pulver v Dundee Cement Co, 445 Mich 68, 75 n 8, 515 NW2d 728 (1994).

Three hallmarks established by this Court in Millross v Plum Hollow Golf Club, 429 Mich 178, 183, 413 NW2d 17 (1987) strongly suggest that the Legislature intended the Federal Motor Carrier Regulations to govern the tort duties and legal responsibilities of entities and individuals engaged in the trucking industry, including Plaintiff, the carrier-driver, and DTE, the shipper, in this case: (1) the text and title of the statute at issue, MCL 480.11a, evidence an intent to supplant the common law with regard to the safe hauling of cargo by motor carriers; (2) the Federal Motor Carrier Regulations via MCL 480.11a prescribe in great detail a course of action that governs the parties, and codify rules and responsibilities governing individuals and entities

engaged in the trucking industry; and (3) there is an inexorable conflict between Plaintiff's proposed common law rule and the requirements imposed by MCL 480.11a.

Counter-Statement of Standard of Review

A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to *de novo* review. Spiek v Dep't of Transportation, 456 Mich 331, 337, 572 NW2d 201 (1998).

The existence of a legal duty is a question of law also reviewed *de novo* on appeal. Beaudrie v Henderson, 465 Mich 124, 130, 631 NW2d 308 (2001).

Issues involving the interpretation of a statute, such as the statute at issue here MCL 480.11a, are also questions of law, reviewed *de novo* on appeal. Grimes v MDOT, 475 Mich 72, 76; 715 NW2d 275, 277 (2006). "Determining whether a statute preempts the common law is a matter of legislative intent," Millross, supra, 429 Mich at 183, and the common law remains in force until modified. Wold Architects v Strat, 474 Mich 223, 233, 713 NW2d 750 (2006). "The Legislature is presumed to know of the existence of the common law when it acts." Id. at 234. Where legislation is comprehensive, providing "'in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions,' then there is a legislative intention that a statute preempt common law." Hahn, supra, 474 Mich at 74, quoting Millross, 429 Mich at 183.

Legal Analysis

Michigan already had a "Motor Carrier Act", MCL 475.1, when in 1963, the Michigan Legislature passed the Motor Carrier **Safety** Act, MCL 480.11 *et seq.*, "AN ACT to promote **safety** upon highways open to the public". Promoting public safety is a recurring theme of the comprehensive legislature framework. See MCL 480.11a ("This state hereby adopts the following provisions of title 49 of the code of federal regulations . . . to provide for the **safe transportation** of persons and property . . .") (Emphasis added.)

The Legislature amended MCL 480.11a in 2005 (in immaterial ways to the present case) and the

Legislature again included language that reflects an intent to govern rights and duties in the trucking industry for purposes of public safety. MCL 480.11a: “An act to promote **safety** upon highways open to the public by regulating the operation of certain vehicles” (Emphasis added). The title of the Act is a well-recognized source of legislative intent, and here, indicates an intent to enact rules for the safe hauling of cargo. See Pohutski v Allen Park, 465 Mich 675, 691; 641 NW2d 219 (2002) (an Act’s Title provides notice to legislators and the public regarding the object or purpose of the enactment); Maki v E Tawas, 385 Mich 151, 157; 188 NW2d 593 (1971) (“The constitution has made the title the conclusive index to the legislative intent”); Knott v City of Flint, 363 Mich 483, 495; 109 NW2d 908 (1961) (the Court looked to the Title of the Act to decipher legislative intent); Michigan Consol Gas Co v State, 72 Mich App 426, 443; 250 NW2d 85 (1976), *aff’d sub nom Prod Credit Associations of Lansing v State, Dept of Treasury*, 404 Mich 301; 273 NW2d 10 (1978) (“In interpreting the legislative intent of a statute it is appropriate to consider the legislative intent as expressed in its title.”)

The regulations cast a wide net by providing that they “are applicable to all employers, employees, and commercial vehicles that transport property or passengers”. 49 CFR 390.3(a)(1). The regulations also mandate employers, employees and drivers to be knowledgeable of the regulations and there is an affirmative duty to instruct employees and drivers of all applicable regulations. 49 CFR 390.3(e).

Instead of creating its own set of definitions, the Legislature incorporated the definitions supplied by the Federal Motor Carrier Regulations, including 49 CFR § 390.5 which defines “motor carrier,” “commercial motor vehicle,” “driver” and “shipper,” phrases that guide the decision here. “Motor carrier means a for-hire motor carrier or a private motor carrier.”³ “Commercial motor vehicle means any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property . . .” “Driver means any

³ A number of judicial decisions use the phrases “hauler” and “carrier” interchangeably. DTE uses “carrier” in this Brief on Appeal to track the phrase used in the regulations adopted in Michigan.

person who operates any commercial motor vehicle.” “Shipper means a person who tenders property to a motor carrier or driver of a commercial motor vehicle for transportation in interstate commerce . . .”⁴

A. The Federal Motor Carrier Regulations Impose A Non-Delegable Duty on Commercial Truck Drivers To Ensure that the Cargo Is Secured and to Safely Transport the Cargo

The leading case in Michigan, Millross, 429 Mich at 183, that guides the analysis of the first question posed by the Order Granting Leave of whether MCL 480.11a abrogated the common law, provides:

Whether or not a statutory scheme preempts the common law on a subject is a matter of legislative intent. In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter. [citing Jones v. Rath Packing Co., 430 US 519 (1977) and 2A Sands, Sutherland Statutory Construction (4th ed), § 50:05, pp 440–441.]

The Federal Motor Carrier Regulations provide in exacting detail the rules and responsibilities governing the parties in this case and participants in the trucking industry generally. In light of the far-reaching and detailed rules regarding obligations and responsibilities under the regulations, this Court should hold that the Legislature intended to abrogate any common law duty of care DTE may have owed Plaintiff by the passage of MCL 480.11a.

To further the legislative goal of public safety, the Legislature adopted 49 CFR 392.9(a)(1) as an integral component of the regulatory scheme; it provides “[a] driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial vehicle unless. . . [t]he commercial motor vehicle’s cargo is properly distributed and adequately secured as specified in §§ 393.100 through 393.136 of this subchapter.” Pursuant to 49 CFR 392.9(b)(1), the driver must “[a]ssure himself/herself that the provisions of paragraph (a) of this section have been complied with before he/she drives that

⁴ Under MCL 480.11a(1)(b)(ii), the Legislature specified that the federal rules regarding “interstate commerce” were applicable in the state: “Where ‘interstate’ appears, it means intrastate or interstate, or both, as applicable, except as specifically provided in this act.”

commercial motor vehicle.”

Section 392.9(b)(c) imposes a continuing obligation on a driver like Plaintiff to inspect the cargo every 50 miles of the commute to see if additional securement steps are needed because of shifting during transport: (“the driver of a truck or truck tractor must . . . Inspect the cargo and the devices used to secure the cargo within the first 50 miles after beginning a trip and cause any adjustments to be made to the cargo or load securement devices as necessary, including adding more securement devices, to ensure that cargo cannot shift on or within, or fall from the commercial motor vehicle.”) The fact that the regulations specifically contemplate a potential shifting of cargo during transport, an occurrence testified to by the witnesses, is further confirmation that the regulations accounted for industry experiences and crafted safety rules accordingly.

Although the focus of this case is on the obligation of the driver to ensure for himself or herself that the cargo is adequately secured under 49 CFR 392.9(a)(1), the regulations include additional specific requirements for motor carriers with regard to safely hauling cargo. For example, subsection (a)(3) obligates the driver to ensure that the cargo does not obscure his view, interfere with the ability to move his arms and legs, or obstruct ingress or egress into the vehicle.

This is just one section of the Federal Motor Carrier Regulations that were adopted in Michigan. In addition, MCL 480.11a adopted scores of other regulations, including: “(a) Hazardous materials regulations under 49 CFR parts 105 through 180 . . . (b) Motor carrier safety regulations under 49 CFR parts 40, 356, 365, 368, 371 through 373, 375, 376, 379, 382, 383, 385, 387, 390 through 393, 395 through 399.”

Adoption of these regulations evidences a legislative intent to supplant the common law because the legislation is comprehensive and provides a detailed course of conduct as contemplated by this Court’s Opinions in Hahn, supra, 474 Mich at 74 (comprehensive legislation in Article III of UCC held to supplant common law rules regarding accord and satisfaction) and Kyser v Kasson Twp, 486 Mich 514, 539; 786 NW2d

543 (2010) (by passing comprehensive zoning statute, the Legislature intended to abrogate common law rules regarding land use regulation).

Moreover, unlike other situations where the legislation contains specific limitations on the reach of the statute, no such limitations are found here. For example, in one such case, this Court held that the Legislature had not intended to fully supplant the common law because the statutory language expressly limited the reach of the statute. Dawe v Dr Reuven Bar-Levav, 485 Mich 20, 29-30; 780 NW2d 272 (2010) (abrogation of common law not found: “Although the Legislature partially abrogated a mental health professional’s common-law duties, the language of the statute expressly limits its own scope.”) Here, the legislature’s intent to supplant the common law with the passage of MCL 480.11a is further found in the fact that the statute disallows municipalities and local governments from passing rules that are inconsistent with or more permissive than the state standards. “(1) A township, city, village, county, or another state agency shall not adopt or enforce an ordinance or resolution that is inconsistent with this act or any rule promulgated pursuant to this act.” MCL 480.21. The Regulations also state that they control over any conflicting law, standard or regulation and this “supremacy regulation” was also adopted by the Michigan Legislature under MCL 480.11a. See 49 C.F.R. § 392.9 (“Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, **the Federal Motor Carrier Safety Administration regulation must be complied with.**”) (Emphasis added.)

B. Plaintiff’s Arguments Rest on Erroneous Interpretations of the Regulations and Case Law

Plaintiff asks the Court not to apply the cited Federal Motor Carrier Regulations because they only address the responsibilities of a driver or a carrier and do not address the responsibilities of a shipper

(Plaintiff's Brief, p 17). This is not an accurate assessment of the regulations. 49 CFR 390.5 includes a specific definition of "shipper" which fits DTE: "Shipper means a person who tenders property to a motor carrier or driver of a commercial motor vehicle for transportation in [intrastate or] interstate commerce"

Contrary to Plaintiff's assertion that the cited regulations do not govern shippers, there are dozens of rules within the Federal Motor Carrier Regulations that govern "shippers," most notably a prohibition of a shipper to require a carrier like Plaintiff to haul cargo or a load that the driver felt was not safe to transport. 49 CFR 386.12(c) and 390.6. Moreover, the fact that a driver is specifically given responsibilities to secure and safely transport cargo (while a shipper is not) is strong evidence of a legislative intent to impose this obligation only on the individual mentioned, the driver. Hahn, supra at 74 (use of legal maxim of *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another, to interpret a statute: "The maxim is a rule of construction that is a product of logic and common sense.")

MCL 480.11a did not adopt every single Federal Motor Carrier Regulation and the statutory enactment made changes to some of the regulations that were adopted. MCL 480.11a could have imposed a co-equal obligation on the shipper to inspect and secure cargo, but the legislature chose not to. If the Michigan Legislature was dissatisfied with the manner in which the regulations exempted a shipper from securement responsibilities, Michigan's Motor Carrier Safety Act could have imposed these responsibilities, but deliberately they were not. This reflects a wise choice on safety grounds because the carrier-driver has the most knowledge of and control over the cargo and is the only entity who is with the cargo from initial loading, through hauling and ultimately unloading. A shipper hands over control over the cargo and has no responsibility for it at its final destination.

The failure of Plaintiff to secure the cargo in any way, in addition to his repudiation of his own common sense by standing behind the open container that he knew was full of scrap metal including the bright blue pipe

that had been resting against the rear door, is a violation of the driver's responsibilities under the Federal Motor Carrier Regulations and the cause of his injury. Plaintiff also failed to inspect the cargo after transporting it more than 50 miles, his obligation to see if the cargo had shifted during the haul which the regulations (and Plaintiff's own experience) indicated could cause the cargo to fall from the truck, the precise mechanism of injury here.

Plaintiff is also wrong to assert that this Court previously held that the Federal Motor Carrier Regulations did not abrogate the common law in the case of Dep't of Transp v Initial Transport, Inc, 481 Mich 862, 748 NW2d 239 (2008). In a Peremptory Order, this Court adopted the dissenting opinion of Judge Whitbeck which held that the financial responsibility requirements under the Federal Motor Carrier Regulations did not create a private cause of action that would have had the effect of negating Michigan's financial responsibility requirements under the No-Fault Act, MCL 500.3101 *et seq*. Judge Whitbeck's dissenting opinion addressed the question of whether a statutory enactment created a private cause of action, not the question at issue here of whether a statute impacted a common law negligence action by defining tort duties. As the Court of Appeals noted in a recent published opinion, whether a statute creates a private cause of action is "distinct from the separate question of whether violation of a statute factors into a common-law negligence cause of action". See Randall v MHSAA, — Mich App —; — NW2d — (2020), slip op, p 10, released November 19, 2020, leave denied, — Mich —; 957 NW2d 800 (2021).

The Initial Transp case was not a personal injury matter and tort duties were not at issue. Judge Whitbeck's dissenting opinion in Initial Transp held: "I disagree with the majority's conclusion that the [Motor Carrier Safety Act] creates a private remedy for a third party against an insured or an insurer. Indeed, the majority concedes that no such remedy is provided anywhere in that statutory scheme. I would hold that the no-fault act is the exclusive remedy available to MDOT for the property damage sustained in this case." 276

Mich App at 335 (Whitbeck Dissenting.)

Plaintiff asserts that this holding is a recognition that the Federal Motor Carrier Regulations did not supplant the common law. Plaintiff also asserts that this holding is a repudiation of the “shipper’s exception” or Savage doctrine, discussed in Argument Section II. Neither assertion is correct because those questions were not even before the Court. Moreover, concerning the interplay between the federal regulations and Michigan’s own rules regarding financial security requirements, the Federal Motor Carrier Act expressly creates a carve out which allows states to impose their own financial responsibility requirements, which removes any potential statutory conflict. See 49 USCA 14501.

Plaintiff attempts to frame the theory of liability as only amounting to negligent loading which in this case, would impose a duty of reasonable care for the manner scrap metal is thrown into a dumpster by contractors during a construction project. Plaintiff’s view is that having material at the rear door of a container violates a duty of reasonable care, but there are two major flaws in this position. First, Plaintiff, himself, testified that loose materials, no matter how they are loaded, will always shift to the rear of the container when the container is lifted from the ground at a 45 degree angle and loaded onto the truck (Plaintiff Dep 113-114; Appx 87b). The other witnesses in this case agreed based on their experience (Neumann Dep 15; Appx 367b). The witnesses also agreed that material will shift during the commute as well (Neumann Dep 14; Appx 367b: “nobody really knows what that load is going to do [during the transport].”) The adopted regulations recognize the potential for shifting by imposing a subsequent inspection requirement during the commute. 392.9(b)(c) (a driver must re-inspect the cargo after 50 miles for possible shifting and to prevent cargo from falling out).

Plaintiff said DTE did nothing wrong by loading this container, but his counsel and expert witness claim that loading the pipe parallel to the back door was hazardous and lead to the pipe falling out when the door was open. Mr. Anderson, however, testified that pipes may roll out when they were loaded parallel to the door

and also when they were loaded perpendicular to the door.

Q. [Y]ou have seen pipe roll out when it's loaded parallel to the side of the container?

A. When you open the door.

Q. And have you seen pipe roll out when it's loaded widthwise in the container?

MR. WEGLARZ: Objection; form.

THE WITNESS: Yes.

BY MR. YOUNG:

Q. Yes?

A. Yes.

Q. So you've seen both?

A. Right. [Anderson Dep 45; Appx 441b].

Mr. Neuman reiterated that it would be impossible for the shipper of scrap metal or loose materials to load the container in a way that could accurately anticipate where the materials would end up at the end of the haul (Neumann Dep 14, Appx 367b: it does not matter how a load is arranged because no one knows what the load is going to do; p 9 Appx 366b: "you'll never know what it's going to do when the load shifts.")

Plaintiff admits that after a container is loaded, it undergoes a series of tilts at various angles and then a long commute on the highway (Plaintiff Dep 34-37; Appx 67b-68b). There would be no practical or reasonable way for any entity or person to load the container in such a way that would prevent the materials from shifting during the loading and unloading process or the travel on a highway and ultimately anticipate where the scrap metal would end up in the container.

Since different trucks can differ in size and the angle in which a container may be loaded can also vary, there would be no way for DTE to know in advance which truck or which driver would be dispatched by Ferrous to pick up a particular canister. Plaintiff and fellow driver Anderson identified different tilt angles for their respective trucks hydraulic systems. How could DTE load a container in such a way that would in advance preemptively predict the tilt angle of the truck that would be used to haul away a particular container?

DTE would also have to load different containers in different ways based on the weight and size of the scrap metal because different materials would be more or less likely to shift. Even if these variables could

somehow be navigated, DTE would then also have to account for shifting of the load during the commute, which depending on which scrap yard picked up a particular container could be a short drive on rough, gravel terrain, a medium transit on winding, hilly roads, or a long commute on smooth highway.

These considerations render Plaintiff's proposed imposition of a duty on DTE incapable of implementation. They also only serve to reconfirm the wisdom of the Federal Motor Carrier Regulations that place the responsibility for the cargo on the carrier who is in the best, if not the only, position to protect himself or herself against the risk of falling cargo.

Plaintiff's proposed rule of law would not be a mere duty of reasonable care but would instead rise to the level of insurer or strict liability for a shipper of loose materials who would face liability no matter how the materials were loaded based on their arrangement after the haul, a contingency beyond the control of a shipper of scrap metal. To impose a duty and legal liability on DTE would also create a new cause of action that is inherently based on speculation because the manner in which the load is initially arranged cannot predictably result in any particular arrangement when the haul is complete. Plaintiff's view that if the pipe had been loaded perpendicular to the door it would not have rolled out is rank speculation, as testified to by Anderson at 45; Appx 441b and Neumann 9, 14 Appx 366b-367b: "you'll never know what it's going to do when the load shifts."

The Court should not recognize a cause of action for negligent loading that will result in strict insurer liability based on inherent speculation that a dumpster can be loaded in a specific way that can accurately predict how it will be arranged after loading, the commute, and unloading. See Skinner v Square D Co, 445 Mich 153, 164; 516 NW2d 475 (1994) (any putative cause of action requires proof that "facilitate[s] reasonable inferences of causation, not mere speculation.") Instead, as argued in Section II, the Court's ruling should allow a shipper to be liable only when the hazard is latent and not capable of detection.

C. A Legal Duty Would Not Be Owed to Plaintiff Under Common Law Principles

Plaintiff's appeal brief starts with an unfounded assumption at page 1: "This appeal assumes (as the Court of Appeals determined in *McMaster I*) that DTE owed Mr. McMaster a common law duty of care." The Court of Appeals Opinion in McMaster I was Vacated by this Court in a peremptory order and would not be binding on this Court even if had not been. Furthermore, Plaintiff's assumption does not hold up under Michigan's traditional, multi-factorial duty analysis.

This Court has stated that factors pertinent to the determination of the existence of a duty include the "foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and ... the burdens and consequences of imposing a duty and the resulting liability for breach." Valcaniant, supra, 470 Mich at 86, quoting Buczkowski v McKay, 441 Mich 96, 101 n 4; 490 NW2d 330 (1992). Each factor identified in Valcaniant, supra solidifies that the Grant of Summary Disposition to DTE would be affirmed for lack of legal duty even if the case were decided under the common law.

Foreseeability. The manner in which Plaintiff was injured here was inexplicable and occurred because of Plaintiff's unreasonable conduct of ignoring his own common sense of confronting a known hazard (the possibility of falling material) by standing behind a container with the door wide open, casually shooting the breeze for five or ten, maybe fifteen minutes, while the truck's engine was idling, was completely unforeseeable. If the injury giving rise to the litigation is found to have been unforeseeable, no liability can attach. Valcaniant, supra, 470 Mich at 87 (no duty where the injury is not reasonably foreseeable).

Plaintiff also admitted that it was "common sense" not to stand behind a roll-off container full of scrap when the door is open. The injury to a skilled workman who confronted a known hazard was deemed unforeseeable in the consolidated cases of Groncki v Detroit Edison, 453 Mich 644, 656; 557 NW2d 289

(1996) (“Edison, like the defendant in Dees, could not have reasonably foreseen that a skilled workman, with full knowledge of the power lines, would bring a crane into contact with those power lines.”) Where reasonable foreseeability is lacking, Summary Disposition based on a lack of duty is mandated. Brown v Michigan Bell Telephone, Inc., 459 Mich 874, 585 NW2d 302 (1998).

The degree of certainty of injury. This common law factor also does not support imposition of a duty here. Plaintiff did not perceive any threat posed by the large, bright blue pipe or the manner in which it was loaded (Plaintiff Dep 33-34; Appx 67b-68b). He saw it loaded up against the back door at the DTE facility and again at the Ferrous facility (Id. 17; Appx 63b). Plaintiff also testified that he did not fault DTE in any way and that DTE did nothing wrong (Id. 20-21; Appx 63b-64b).

Ferrous employee Wise said that he had seen containers with pipes similar to the blue one that injured Plaintiff and that this was a daily occurrence on the Ferrous premises, but this was the only time he had ever experienced a pipe falling out of a scrap container (Wise Dep 15, 29; Appx 397b,401b; p 40; Appx 403b: “at that time it [the blue pipe and its location] obviously didn’t cause any concern for me.”)

Closeness of connection between the conduct and injury. The common law case cited by Plaintiff, Clark v Dalman, 379 Mich 251, 261; 150 NW2d 755 (1967), does not support imposition of a duty here. The Opinion noted that “[t]he general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors or inspectors, or anyone else lawfully **on the site of the project.**” (Emphasis added.)

Plaintiff was injured more than 50 miles away from the DTE facility, long after he had left the DTE facility and long after he had assumed exclusive responsibility over the load. The fact that scrap metal will settle and move during the long commute from the Belle River Plant to the Ferrous facility in Pontiac also makes the connection between the loading of the scrap into the container and plaintiff’s injury far too

attenuated to assign blame or a legal duty on DTE (Plaintiff Dep 34-37; Appx 67b-68b). This common law factor does not support imposition of a duty.

Moral blame attached to the conduct. There is nothing immoral about the commercial transaction that brought the parties together. DTE's efforts to upgrade and modernize its facilities generate scrap material that is valuable to scrap yards like Ferrous. DTE creates scrap, sells it to Ferrous for processing, while P&T hauls it between the two. It is also hard to assign moral blame to the manner in which DTE (or the average homeowner) fills a garbage container.

Policy of preventing future harm. Placing responsibility for safe loading and hauling of the cargo on the commercial truck driver promotes safety. Plaintiff agreed he had more knowledge than anyone about the contents of the container and he is therefore in the best position to prevent harm to himself, third parties during the commute, and other laborers at Ferrous (Plaintiff Dep 178; Appx 103b). A driver like Plaintiff is also the only one entrusted with the cargo throughout the entire haul and the only one capable of implementing safety measures from initial pick up, transport, and unloading at its ultimate destination.

In fact, imposing additional duties on DTE or any other shipper to share responsibility with the driver for securing or safely hauling the cargo would run the risk of interfering with the sole discretion enjoyed by the driver to choose which safety measures to implement, if any. No one but the carrier should have the right to refuse a container or cargo. Interfering with the discretion of a driver like Plaintiff runs the risk of actually making the job more dangerous by removing available safety options from the person (the carrier) in the best position to protect himself, other commuters on the road, or third-parties at the facility where cargo is unloaded. Furthermore, imposing an obligation on a shipper would lead to carrier apathy and a less vigorous driver who, instead of conducting inspections, may rest on faulty notions that the shipper has already taken of securement.

The burdens and consequences of imposing a duty and the resulting liability for breach. As

stated above, the witnesses agreed, and the regulations acknowledge, that the cargo will shift while it is being loaded, during the commute and when it is unloaded. The consequences of imposing a duty would be enormous and result in essentially strict or insurer liability because there would be no way for a shipper to anticipate the ultimate resting spot of loose material at its destination. Furthermore, Plaintiff's view that materials can only be safely loaded by being placed perpendicular to the rear door is false because the loading, commute and unloading can also cause materials loaded in that fashion to end up pressed against the rear door (Anderson Dep 45 Appx 441b; .Neumann 9, 14; Appx 366b-367b).

Conclusion-Counter-Argument I

Under the controlling legal authorities, the common law would not recognize a duty on the part of DTE. The seminal decision regarding legal duty under the common law, Moning, supra, 400 Mich at 453–454, expressly acknowledges that, “Statutes and other legislative judgments may themselves be a source of common law. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.” Moning also held that under the common law, “The issue of negligence may be removed from jury consideration if the court concludes that overriding considerations of public policy require that a particular view be adopted and applied in all cases.” Moning, supra, 400 Mich at 450.

The controlling sections of the Federal Motor Carrier Regulations are in and of themselves sufficient to sustain the Trial Court's Grant of Summary Disposition because the extent of any duty owed by DTE has been defined by the Legislature. Hill, supra, 492 Mich at 660-661 (“Generally, the duty that arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law . . .”); Downs, supra, 265 Mich App at 699 (holding that a tort duty “may be created

expressly by statute, or it may arise under the common law.”) Under MCL 480.11a, the Legislature imposed a duty on Plaintiff as “driver”, and declined to impose a duty on a “shipper”. This alone is sufficient to hold that Summary Disposition was properly Granted in favor of DTE.

II. ON LEAVE GRANTED, IF NECESSARY TO FULLY DECIDE THE CASE, THE SUPREME COURT SHOULD ALSO ADOPT THE “SHIPPER’S EXCEPTION” UNDER MICHIGAN LAW AND AFFIRM THE GRANT OF SUMMARY DISPOSITION TO DTE.

Introduction

The Michigan Supreme Court has not formally accepted or rejected the applicability of the “shipper’s exception” under United States v Savage Truck Line, Inc, 209 F2d 442 (CA 4 1953) as a controlling statement of Michigan law. Two Court of Appeals Panels have tacitly accepted the applicability of the “shipper’s exception,” but not expressly and not in a published opinion. Neill, *supra*, Appx 10b; McMaster II, Appx 6b. Similarly, a number of federal courts applying Michigan law have accepted Savage as a source of law when deciding legal disputes similar to the one at issue here. Johnston, *supra*, (ED Mich 2007); Appx 516b (noting that the applicability of Savage had not been decided in Michigan, but applied it to the case at bar because it represents the majority rule); Lobdell, *supra*, (ED Mich 2008) (application of Savage to claims under Michigan law) (Appx 520b); McGhee, *supra*, (ED Mich 2014) (same) (Appx 532b).

In this appeal, if question one does not fully decide the case, the Michigan Supreme Court should put the issue to rest and formally adopt the “shipper’s exception” in Michigan, as the majority of other states have done. The Savage rule, also referred to as the “shipper exception,” provides as follows:

The primary duty as to the safe loading of property is therefore upon the carrier [Plaintiff/P&T]. When the shipper [DTE] assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. [Savage, 209 F2d at 445.]

A formal adoption of the “shipper’s exception” under Michigan law would not be a revolutionary or

ground breaking judicial act. It would not even be controversial. Instead, Michigan would join the overwhelming majority of states that have decided to accept Savage as a controlling statement of the duties and liabilities between shippers and carriers in the trucking industry. Some states have not taken an official position on the applicability of the case, but of the states that have, 28 adopted Savage and 1 state (Iowa) declined to accept it; and this rejection of Savage is found in an unpublished opinion of the state's intermediate appellate court that was later called into question. Ex S, Smith v HD Supply Water Works, Inc, 810 NW2d 25 (Iowa App 2011) (table) (rejection of Savage under Iowa law; Appx 540b); called into question by Slaton v Climax Molybdenum Co, — F3d —, 2021 WL 4056819, at *4 (SD Iowa 2021) (noting that the “outcome in Smith is not necessarily inconsistent with Savage”).

Undoubtedly, when deciding whether to adopt a particular common law rule, this Court does not employ a state by state vote tabulation analysis or employ a majority of states rule. That said, there is a very good reason why so many states have adopted Savage and a single state has not: it represents the shared daily experience of individuals and entities in the trucking industry, just as the Federal Motor Carrier Regulations codified these experiences in the trucking industry.

The Savage Opinion predates the Federal Motor Carrier Regulations at issue here, but courts that have analyzed the applicability of the regulations have looked to the rationale in Savage to more fully comprehend the regulatory framework that was inspired by Savage. E.g., Pierce v Cub Cadet Corp, 875 F2d 866 (CA6 1989) (Federal Motor Carrier Regulations define whether a party was a carrier or shipper for purposes of analyzing the case under the Savage rule); Bujnoch, supra, 542 SW3d at 8 (“The common law Savage rule and the subsequent federal regulations are consistent because they require drivers to inspect the security of cargo both before driving a truck and during transport.”); Smart v Am Welding & Tank Co, Inc, 149 NH 536, 541; 826 A2d 570, 575 (2003) (same); Johnston, supra (discussion of the Savage rule in conjunction

with Federal Motor Carrier Regulations) (Michigan law); Ex T, Jenkins v Duffy Crane & Hauling, 2017 WL 4326484, at *3 (D Colo 2017) (the Savage rule is in harmony with the subsequently adopted Federal Motor Carrier Regulations); Appx p 545b; Vargo-Schaper, supra, 619 F3d at 849 (Federal Motor Carrier Regulations analyzed in conjunction with Savage.)

In a leading decision cited by the Michigan Court of Appeals in Neill at *2, Appx 511b, the Supreme Court of Maine noted that as of the year 2000, the majority of states had wisely adopted the Savage rule because it promotes driver safety:

The policy behind the Savage rule is well founded. The everyday practice and understanding in the trucking industry, as aptly reflected in the federal regulations on the subject, reflect that **carriers logically should have the final responsibility for the loads they haul**. No shipper, such as NEPW, can force a driver to accept a load that the driver believes is unsafe. See 49 C.F.R. § 392.9(b)(1) (2000). By the same token, a driver must take responsibility for the safety of his or her cargo by inspecting and securing the load. See § 392.9(b)(2). The Savage rule does not absolve shippers from all responsibility as they bear the onus when cargo has been loaded improperly and that defect is latent. **The Savage rule simply extends the industry's reasonable understanding to negligence suits involving carriers and shippers.** [Decker, supra, 749 A2d at 766–67 (Emphasis added.)]

As in Argument I where elevation of a common law duty of care over the Federal Motor Carrier Regulations would impose a new understanding of duties and responsibilities in the trucking industry, the same would be true if Savage is rejected in Michigan. The deposition testimony in this case, featuring industry veterans who are employed in different capacities in the trucking industry, was remarkably consistent in reflecting that the responsibilities outlined in Savage is exactly how they have operated. DTE believes that MCL 480.11a is sufficient to decide this appeal, but if the Court addresses both questions, and if the Court were to declare the “shipper’s exception” as controlling Michigan law, the Court would simply affirm the shared experience of these trucking industry veterans. A rejection would compel these very same trucking industry veterans and all others to completely alter and re-calibrate how they have done their jobs during the course of their entire careers.

Counter-Statement of Standard of Review

A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to *de novo* review. Spiek, supra, 456 Mich at 337. The existence of a legal duty is a question of law also reviewed *de novo* on appeal. Beaudrie, supra, 465 Mich at 130.

Whether a legal doctrine applies is also a question of law reviewed *de novo*. Washington v Sinai Hosp of Greater Detroit, 478 Mich 412, 417; 733 NW2d 755 (2007).

Legal Analysis

The Savage case arose out of an accident involving two trucks on a roadway. United States v Savage Truck Line, Inc, 209 F2d 442 (CA4 1953). The shipper of the cargo was the United States, which loaded enormous airplane engines into a container attached to a truck owned by the carrier, Savage Truck Line. While the Savage Line truck was rounding a curve, one of the airplane engines came loose, flew out of the container and landed on another truck being driven by an individual named Brooks, who died instantly. Both trucks ultimately turned over as a result of the engine coming loose. It was alleged that the United States failed to adequately secure the engines in the containers used to ship them.

Four separate lawsuits were filed as a result of the accident, including wrongful death claims by the estate of Brooks against Savage Truck Line and the United States. Suits for property damage to the trucks and cargo were also filed, as were indemnity claims between the parties to establish which entity was ultimately responsible for the liabilities stemming from the accident. The parties did not dispute their liabilities to the estate of Brooks for his death and instead, the seminal decision arose out of an appeal on the question of which party bore responsibility for the property damage caused by the accident.

The Fourth Circuit Court of Appeals framed the central dispute as follows: “The decision of the questions raised by these appeals as to the respective liabilities of the United States [shipper] and of Savage

[carrier] for the damages occasioned by each to the property of the other turns on the rights and liabilities inherent in the carrier-shipper relationship between them in the interstate transaction upon which they were engaged.” 209 F2d at 444–445. The Savage rule, also referred to as the “shipper exception,” provides:

The primary duty as to the safe loading of property is therefore upon the carrier [Plaintiff/P&T]. When the shipper [DTE] assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. [Id. 209 F2d at 445.]

The Court noted that its ruling was based on then-existing federal statutes governing the relationship between carriers and shippers, but also that this rule could be found in a number of federal and state court decisions. Id. at 445: “This rule is not only followed in cases arising under the federal statutes by decisions of the federal courts but also for the most part by the decisions of the state courts.” The Court also looked to a then-existing Federal Regulation that, in a similar fashion to the regulation at issue here, obligated the carrier to ensure the cargo was adequately secured: citing “49 C.F.R. 193.9(a) and (b) that the load on every motor vehicle transporting property shall be secured in order to prevent unsafe shifting of the load and that no motor vehicle shall be driven [sic] unless the driver shall have satisfied himself that all means of fastening the load are securely in place.” Id.

The Fourth Circuit affirmed the lower court’s finding that the United States had negligently loaded the airplane engines and failed to adequately secure the cargo. The appellate court also affirmed the finding that Savage’s driver was aware of the negligent loading and hazards posed by his hauling of the cargo. Under the regulation obligating the driver to ensure the cargo was adequately secured, federal and state common law decisions, and the “inherent relationship” between the parties, the Fourth Circuit held that the carrier Savage was responsible for the damage to the cargo, even though it had been conclusively established that the shipper United States had negligently loaded the airplane engines and failed to secure them.

Although personal injury suits were filed in the case, the responsibility of the defendants to third parties was not decided by the Fourth Circuit because Savage and the United States accepted their liabilities to the estate of Brooks. The Savage opinion was therefore promulgated in a case that decided which party was responsible for the damage to cargo, but this rule has been extended to also govern disputes where a personal injury is suffered, not just property damage. E.g., General Electric Co v Moretz, 270 F2d 780, 785–87 (CA4 1959); Decker, supra, 749 A2d at 767 (“courts extended the Savage reasoning to include personal injuries to employees of carriers caused by the negligent loading of goods.”); Rector, supra at 147 (Savage rule applied by Sixth Circuit Court of Appeals in personal injury action).

Under Savage then, even if the Court agrees with Plaintiff on issue one and finds that DTE does have a duty of reasonable care to Plaintiff, and even assuming that DTE breached that duty and was negligent (which is denied), DTE would still be without liability to Plaintiff under the “shipper’s exception” if the defective loading was apparent. Here any hazard posed by the blue pipe was not just apparent, but actually observed by Plaintiff who repeatedly admitted that he saw the bright blue pipe and knew exactly where it had been loaded (Ex D, Plaintiff Dep, p 17; Appx p 63b).

This is wholly consistent with the Federal Motor Carrier Regulations which ordinarily impose the non-delegable duty to inspect and secure on the driver, but not if the shipper seals the container or prohibits an inspection. “The rules in this paragraph (b) do not apply to the driver of a sealed commercial motor vehicle who has been ordered not to open it to inspect its cargo or to the driver of a commercial motor vehicle that has been loaded in a manner that makes inspection of its cargo impracticable.” 49 C.F.R. 392.9(b)(4).

Liability should be limited to situations where the cargo is negligently loaded and the defect is incapable of being detected. This is a completely fair and just result because no shipper of scrap metal can anticipate the ultimate resting spot of loose materials at the end of the haul.

A. An Overwhelming Super Majority of States Have Adopted the “Shipper’s Exception” under Savage

When deciding whether to adopt of a rule of law that has been accepted elsewhere, the Michigan Supreme Court does not employ a “majority rules” analysis to decide whether a particular rule of law ought to become a fixture of Michigan law. That said, if this Court were to decide question two and reject the Savage doctrine, Michigan would be within a distinct super-minority of states that do not recognize the rule.

Plaintiff’s Brief at 29 has provided the Court with three cases from outside of Michigan where the Savage Doctrine was ostensibly rejected, but the assertion that three states have rejected Savage is an egregious overstatement (“Other jurisdictions that have similar comparative fault legislative schemes have rejected the application of the *Savage* doctrine precisely because it is based on, and propagates, contributory negligence. See *Jenkins v Immedia, Inc*, 389 F Supp3d 925 (D Colo, 2019); *Smith v HD Supply Water Works, Inc*, 810 NW2d 25 (Iowa Ct App 2011); *Spence v ESAB Group, Inc*, 623 F3d 212, 219 (CA 3, 2010).”)

These cited cases do not accurately reflect jurisdictions that have rejected Savage. The Jenkins case, for example, is a federal decision that attempted to predict whether the appellate courts of Minnesota would adopt Savage. A federal district court judge based in Colorado ultimately surmised that Minnesota would not.

The 8th Circuit Court of Appeals, a jurisdiction that actually covers the state of Minnesota, unlike a district court that does not even fall within the 8th Circuit, reached the opposite conclusion. See Vargo, supra, 619 F3d at 849 (diversity action applying Minnesota law: Savage doctrine implemented to affirm summary judgment in favor of shipper: “The policy behind the *Savage* rule reflects the practice and understanding in the trucking industry as to carriers having final responsibility for the loads they haul.”) Minnesota’s appellate courts have not definitively weighed in one way or another, but DTE believes that three judges of the federal appellate court, including Judge Bye, himself admitted to practice law in Minnesota, who are frequently tasked with

applying Minnesota law in diversity cases are in a better position to anticipate the law in Minnesota than a single district court judge from Colorado.

Plaintiff's representation that the Savage doctrine was rejected in the Spence decision is also inaccurate. Savage was not rejected; instead, it was applied but under the very different facts of that case, the Third Circuit Court of Appeals held that there were questions of fact as to the shipper's role in securing the load and whether the defect was latent. Spence, supra, pp 220-221: "Savage acknowledged that a shipper may have liability when an accident results from movement of goods during transport if the shipper created a non-apparent condition that caused the load to shift. . . there are issues of material fact as to whether the lack of blocking and bracing was a latent defect."; see also, Alterra Am Ins Co v Daily Express, Inc, 2017 WL 3891960 (ED Pa 2017) (application of Savage) (Ex U; Appx p 633b).

The one accurate case law citation from Plaintiff is that in Smith, the Iowa Court of Appeals rejected the applicability of Savage in an unpublished opinion. The Iowa Supreme Court has not weighed in on Savage, neither has the intermediate appellate court in a published decision. Plaintiff does not accurately state the results reached under Pennsylvania and Minnesota law, however, as there is authority from federal courts applying state law which held that Savage would be adopted in Pennsylvania and Minnesota. And even concerning Iowa law, there are two federal district court opinions applying Iowa law that call into question whether Savage would be adopted by the Iowa Supreme Court. See Slaton, supra (noting that the "outcome in Smith is not necessarily inconsistent with Savage"); Symington v Great W Trucking Co, Inc, 668 F Supp 1278 (SD Iowa 1987) (application of Savage in a dispute between a carrier and a shipper).

Not including Michigan, 28 states have formally endorsed or at least recognized the Savage doctrine as controlling. Only a single state, Iowa, has formally rejected it. The remaining states have no opinions endorsing or rejecting. Below is a state-by-state breakdown of how each has addressed Savage. The level of

embrace varies because some states have fully and formally adopted the rule, while others stem from federal court decisions predicting whether the state's appellate courts would adopt the rule.

The following states (28) have formally adopted or applied the Savage doctrine

ARIZONA: Alitalia v Arrow Trucking Co, 977 F Supp 973, 984 (D Ariz, 1997) (citing Savage for, "[t]he allocation of responsibility between the shipper and the carrier for improper loading"); **CALIFORNIA:** Convey-All Corp v Pac Intermountain Express Co, 120 Cal App 3d 116, 122; 174 Cal Rptr 443, 447 (1981); Albers v Gehrke, 4 Cal App 3d 463, 478; 84 Cal Rptr 846, 856 (1970); **COLORADO:** Jenkins, supra; **CONNECTICUT:** Trial Court Opinion: Raytar v Mason Fence Co, 1998 WL 27834, at *5 (Conn Super Ct, January 16, 1998); **DELAWARE:** Helm's Exp, Inc v U S, 186 F Supp 521 (D Del, 1960); **FLORIDA:** Akers Motor Lines, Inc v Peaslee Metal Products, Inc, 218 So 2d 498 (Fla Dist Ct App, 1969); **GEORGIA:** Great W Cas Co v Buchanan Express, Inc, 2007 WL 1376362 (MD Ga, May 7, 2007); **ILLINOIS:** Armour Research Found of Illinois Inst of Tech v Chicago, R I & P R Co, 297 F2d 176 (CA 7, 1961); see also Mirski v Chesapeake & O Ry Co, 44 Ill App 2d 48, 55; 194 NE2d 361, 364 (1963) (Savage cited by Illinois Court of Appeals on question of liability), rev'd on grounds of damages, 31 Ill 2d 423; 202 NE2d 22 (1964); **INDIANA:** Regula v HPG Corp, 967 NE2d 578 (Ind Ct App, 2012) (unpublished opinion); Morris v Ford Motor Co, 2012 WL 5947753 (ND Ind 2012); **KENTUCKY:** Musial v PTC All. Corp, 2012 WL 3629012 (Ky Ct App, August 24, 2012); Rector, supra; **LOUISIANA:** Stroder v Hilcorp Energy Co, 242 So 3d 1240 (La Ct App 2018); **MAINE:** Decker, supra; **MARYLAND:** Assn of Maryland Pilots v Baltimore & O R Co, 304 F Supp 548 (D Md, 1969); **MASSACHUSETTS:** Clean Harbors Recycling Services Ctr of Chicago, LLC v Harold Marcus Ltd, 2013 WL 1329532 (D Mass, March 29, 2013); **MINNESOTA:** Vargo-Schaper; **NEW HAMPSHIRE:** Smart v Am Welding & Tank Co, Inc, 149 NH 536; 826 A2d 570 (2003); **NEW JERSEY:** W J Casey Trucking & Rigging Co, Inc v Gen Elec Co, 151 NJ Super 151; 376 A2d 603 (1977); **NEW YORK:** Instrument Sys Corp v Associated Rigging & Hauling Corp, 70 AD2d 529; 416 NYS2d 5 (1979); **NORTH CAROLINA:** Hensley v Natl Freight Transp, Inc, 193 NC App 561; 668 SE2d 349 (2008); **Ohio:** Brashear v Liebert Corp., 2007 WL 184888 (Ohio Ct App 2007); **PENNSYLVANIA:** Spence, supra; Alterra, supra; **SOUTH CAROLINA:** Mastropole v Transit Homes, Inc, 254 SC 332; 175 SE2d 465 (1970); **TENNESSEE:** Wayne Knitting Mills v Delta Motor Lines, 52 Tenn App 164; 372 SW2d 419 (1962); Herring v Coca-Cola Enterprises, 2008 WL 787871 (Tenn App 2008); **TEXAS:** Texas Specialty Trailers, Inc v Jackson & Simmen Drilling Co., 2009 WL 2462530 (Tex. App.—Fort Worth 2009); Unimex Logistics, LLC v Tim Neff Towing, Inc, 2018 WL 2339623 (Tex App 2018); **UTAH:** Grantham v Nucor Corp, 2008 WL 3925211 (D Utah, August 20, 2008); **VIRGINIA:** Franklin Stainless Corp v Marlo Transp Corp, 748 F2d 865 (CA 4, 1984); Hostetter v Pilot Freight Carriers, Inc, (1979) (Trial Court Opinion); **WASHINGTON:** Envtl Transp of Nevada, LLC v Modern Mach Co Inc, 2020 WL 1847747 (WD Wash, April 13, 2020); **WISCONSIN:** Locicero v Interpace Corp, 83 Wis 2d 876; 266 NW2d 423 (1978); Malovanyi v N Am Pipe Corp, 2017 WL 2983064 (WD Wis, July 12, 2017) (Ex U, Collected Cases; Appx 549b-644b).

States (1) that have rejected the Savage doctrine:

IOWA: Smith, supra.

States (20) that have not affirmatively adopted or rejected *Savage*:

ALABAMA: no reported decisions; **ALASKA:** no reported decisions; **ARKANSAS:** no reported decisions; **HAWAII:** no reported decisions; **IDAHO:** no reported decisions; **KANSAS:** no reported decisions; **MISSISSIPPI:** *Patton v Nissan N Am, Inc*, 143 F Supp 3d 468 (2015) (*Savage* discussed but court did not deem it necessary to predict whether the state court would adopt *Savage*); **MISSOURI:** *Johnson v California Spray-Chem Co*, 362 SW2d 630 (Mo, 1962) (suggestion that *Savage* would not be applied), but also see *Aragon v Wal-Mart Stores E, LP*, 735 F3d 807, 810 (CA 8, 2013) (“The Supreme Court of Missouri has not adopted the rule set forth in *Savage*. Assuming, without deciding, that the Supreme Court of Missouri would adopt the *Savage* rule, we hold that Wal-Mart and IFCO did not breach their duty to properly load the cargo because a latent defect in loading did not exist.”); **MONTANA:** *Fletcher v City of Helena*, 163 Mont 337; 517 P2d 365 (1973) (*Savage* discussed generally regarding principles of indemnity, not motor carrier-shipper context); **NEBRASKA:** no reported decisions; **NEVADA:** no reported decisions; **NEW MEXICO:** no reported decisions; **NORTH DAKOTA:** no reported decisions; **OKLAHOMA:** no reported decisions; **OREGON:** no reported decisions; **RHODE ISLAND:** no reported decisions; **SOUTH DAKOTA:** no reported decisions; **VERMONT:** no reported decisions; **WEST VIRGINIA:** no reported decisions; **WYOMING:** no reported decisions.

B. Plaintiff’s Public Policy Arguments Against the “Shipper’s Exception” Should Be Rejected

Plaintiff has not presented a credible ground against adoption of *Savage*. Plaintiff’s Brief on Appeal includes a number of glaring errors in its criticism of the seminal 4th Circuit Decision that is nearly universally praised, with the exception of one unpublished decision of the intermediate appellate court in Iowa. For example, Plaintiff inaccurately argues that the “shipper’s exception” under *Savage* is a rule of law that exists only in a contributory fault system, as opposed to Michigan’s “fair share,” comparative fault scheme.

This argument can be rejected out-of-hand because the vast majority of states have adopted *Savage* and an even greater majority of states feature comparative fault schemes similar to Michigan’s. See *Perez v McConkey*, 872 SW2d 897, 903 (Tenn 1994) (identifying only four states—Alabama, Maryland, North Carolina, and Virginia—that retain a common law contributory negligence scheme). And the majority of states have also adopted the *Savage* rule as noted in *Decker, supra*, and this Court’s Opinion in *Neill, supra*, *2; Appx 510b (“the majority of state courts have adopted *Savage*.”); *Jenkins, supra*, *2; Appx 546b (after noting that a single

jurisdiction held that Savage is incompatible with comparative fault, the Court held that where the vast majority of states adhere to comparative fault and have adopted Savage: “It defies credulity, and the basic principles of negligence, to suggest that the Savage rule and the doctrine of comparative fault are incompatible.”)

Furthermore, Plaintiff is wrong to assert that there is a disconnect between Savage and a comparative fault scheme under which multiple parties may simultaneously owe a duty of care. See Decker, supra, 749 A2d at 766–67 (“The Savage rule does not absolve shippers from all responsibility as they bear the onus when cargo has been loaded improperly and that defect is latent. The Savage rule simply extends the industry’s reasonable understanding to negligence suits involving carriers and shippers.”)⁵

Decker further hammers home the point that the Savage rule is consistent with traditional comparative fault notions, including the rule that a duty can be imposed only when an injury is foreseeable: “The reasoning in Savage comports with the established duty of care notion that an injury must be foreseeable before a duty attaches. Here, the carrier has the opportunity to intercept any problem through inspection. In fact, the carrier’s driver is under the obligation to conduct such a safety inspection pursuant to federal law. See § 392.9(b)(2). Carriers, through their drivers, must ensure the safety of their own loads, even when cargo is loaded by shippers. The Savage rule that imposes liability on carriers for the loading done by shippers, even when negligent, has been accepted by the majority of modern courts and by federal regulators.” 749 A2d at 767.

The connection between Savage and contributory fault is non-existent. The hallmark of the defunct contributory negligence scheme is that a plaintiff’s recovery was completely barred if the plaintiff was at fault in any measure. Placek, supra, 405 Mich at 650. Even a mere 1% of total fault by the plaintiff eliminated a

⁵ Decker at note 3 and other opinions have stressed that the Savage rule only applies in disputes between shippers and carriers who are engaged in the trucking industry and would not be applied in cases involving third parties, such as a pedestrian or other motorists on the road. Rector, 963 F2d at 147–148 (“highway travellers have no power to inspect or ensure against faulty and dangerous loading”).

recovery of damages in total. Kirby v Larson, 400 Mich 585, 611; 256 NW2d 400 (1977). In 1979, the Michigan Supreme Court abolished the contributory fault scheme in Michigan and adopted the comparative fault system currently in place. Placek, supra. The Legislature codified this ruling in MCL 600.2958.

Jurisdictions that follow the Savage doctrine do not provide immunity to shippers or impose the harshness of contributory fault by eradicating a party's liability if the plaintiff is minimally at fault. Rather, the Savage doctrine simultaneously allows for a shipper to be held liable as well as the plaintiff on a comparative fault basis. In this case, there was one other entity held to have a duty of care, Ferrous, which was denied Summary Disposition by the Trial Court and which ultimately entered into a settlement agreement with Plaintiff. Plaintiff's successful pursuit of a claim against Ferrous is definitive proof that Savage is not a relic of the contributory fault system.

Furthermore, although Savage would absolve DTE of liability in this case, a shipper's potential liability in appropriate circumstances is borne out in the cases applying Savage under Michigan law. The applications of Savage to claims arising under Michigan law establish that the "shipper's exception" is a neutral doctrine and cannot be fairly characterized as a pro-plaintiff or pro-defendant rule. In Neill and McMaster II, the Court of Appeals held that Savage would preclude a negligent loading claim because the undisputed facts established that the shipper did not exclusively load or secure the cargo or that it was undisputed that the defect was readily discoverable or actually observed. Similarly, in McGhee, Judge Cohn applied Savage to grant summary judgment to the shipper-defendant. On the other hand, in Lobdell and Johnston, Judges Gadola and Zatkoff respectively found that questions of fact on the question of latency precluded summary judgment. These applications of the same rule of law in different factual scenarios reject Plaintiff's suggestion that Savage should not be adopted as a return to the harsh contributory fault regime.

C. The Court of Appeals Correctly Decided This Case Under the Savage Doctrine

The Court of Appeals looked to Savage as an independent ground for affirming Summary Disposition:

The shipper's exception, however, does not salvage plaintiff's case. The facts viewed in the light most favorable to the plaintiff reveal that he did in fact examine the load several times. . . . The pipes and their arrangement in the truck bed were readily observable and in plain sight. Therefore, even under the shipper's exception the defendant did not owe a duty to the plaintiff. [Ex A, pp 5-6 Appx 9b-10b.]

This analysis is correct. First, the Savage rule places liability upon a shipper like DTE in this case only if the shipper was exclusively responsible for preparing and loading the cargo. Savage, supra at 445; Neill, supra at *2 (Appx 511b). Rector, supra at 174 "a shipper would not be held liable for the injuries of a common carrier's employee sustained while the employee unloaded the shipper's goods from the common carrier's vehicle where it was not shown that the shipper had exclusive control over loading the cargo." The rationale of this rule is that when the carrier participates in loading, the carrier has control over how the cargo is loaded and can appreciate any risks it may pose. Id.

Here, the loading of the containers with scrap metal was performed by DTE, independent contractors, and Plaintiff (Plaintiff Dep 30-31; Appx 66b). In contrast to Lobdell (ED Mich), where the shipper exclusively loaded cargo into the plaintiff's empty trailer, which precluded summary judgment because the plaintiff-driver was forbidden from participating in the loading of the cargo or even observing it, Plaintiff took an active role in loading the container as he is the one who loaded it up onto his flat-bed trailer which he acknowledged will case material to shift, which is ultimately his responsibility to inspect and secure.

In addition to the fact that DTE is not liable where other parties participated in the loading of the container, DTE is not liable to Plaintiff in this case because the large blue pipe was readily observable and actually observed by plaintiff. See Savage, supra at 445: "When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot

be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.”

Here, Plaintiff admitted to having seen the large blue pipe, including its position parallel to, up against the rear door, when he inspected the container at the DTE plant and when he arrived at the Ferrous facility (Plaintiff Dep 14-20; Appx 62b-63b). Plaintiff’s expert agreed that there was no latent defect regarding the blue pipe that injured Plaintiff.

Q. So now what's hidden? What's the hidden part? What's hidden?

A. At that point the door is wide open. There is nothing hidden then. [Baareman Dep 341; Appx 295b.]

There was no latent defect, as correctly held below (Ex A 6; Appx 7b). On Leave Granted, if the Court does not hold that question one is sufficient to fully decide the appeal, the Court should adopt Savage and affirm Summary Disposition to DTE.

CONCLUSION AND RELIEF REQUESTED

The Michigan Legislature made the policy choice that adopting the Federal Motor Carrier Regulations would promote safety. See MCL 480.11a (“This state hereby adopts the following provisions of title 49 of the code of federal regulations . . . to provide for the safe transportation of persons and property”) This Court should not overrule the policy choice of the Legislature. See Devillers v Auto Club Ins Ass'n, 473 Mich 562, 582; 702 NW2d 539 (2005) (“Statutory-or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court.”); Dye by Siporin & Assoc, Inc v Esurance Prop & Cas Ins Co, 504 Mich 167, 180; 934 NW2d 674 (2019) (this Court will not “rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature.”); DiBenedetto v West Shore Hosp, 461 Mich 394, 405, 605 NW2d 300 (2000) (courts must enforce the policy choices made by the legislature).

If starting from scratch with no statutory guidance, this Court would likely decline to impose a duty on DTE in any event. Treating Plaintiff's failure to comply with the Federal Motor Carrier Regulations as part of shared duties between the carrier of goods and the shipper of goods runs the very serious risk of increasing the risks of injury to truck drivers and public at large where the individual with the most knowledge about the contents of the container is stripped of his discretion to decide for himself what safety measures to implement. Indeed this is the exact procedure testified to by each witness in this case that the carrier gets to decide how to secure the cargo, how to haul it, and, if the load is not safe, to refuse to accept it (Plaintiff Dep 14; Appx 62b; Wise Dep 14; Appx 397b; Anderson Dep 21; Appx 435b; Robert McMaster Dep 11, 33; Appx 141b, 147b).

On Leave Granted, the Court should take the approach taken in Decker, supra and other cases by holding that the Federal Motor Carrier Regulations define the tort duties between a shipper, carrier and driver. If this is not sufficient to fully decide the appeal, the Court should adopt the "shipper's exception" under the Savage opinion. Under either authority, Summary Disposition should be affirmed in favor of DTE.

WHEREFORE, for the reasons explained more fully above, Defendant-Appellee DTE Electric Company requests that the Supreme Court of Michigan affirm that Summary Disposition pursuant to MCR 2.116(C)(10) was properly granted to Defendant DTE.

Respectfully submitted,

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Date: November 1, 2021

PROOF OF SERVICE

I hereby certify that on November 1, 2021, I electronically filed the foregoing paper with the Clerk of the Court using the MiFile E-Filing File and Serve System which will send notification of such filing to the following:

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