S181627

No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DAWN DIAZ,

Plaintiff and Respondent,

v.

JOSE CARCAMO and
SUGAR TRANSPORT OF THE NORTHWEST, LLC,

Defendants, Appellants, and Petitioners.

Petition from a Published Opinion, Court of Appeal,
Second Appellate District, Division Six, No. B211127

Appeal from a Judgment of the Superior Court of Ventura County,
No. CIV 241085, Hon. Frederick Bysshe

PETITION FOR REVIEW

Paul E. B. Glad (#79045)
David R. Simonton (#199919)
SONNENSCHEIN NATH & ROSENTHAL LLP
525 Market Street, 26th Fl.
San Francisco, CA 94105
Telephone: (415) 882-5000
Facsimile: (415) 882-0300
Email: pglad@sonnenschein.com

Elwood Lui (#45538)
Peter E. Davids (#229339)
JONES DAY
555 South Flower Street, 50th Fl.
Los Angeles, CA 90071-2300
Telephone: (213) 489-3939
Facsimile: (213) 243-2539
Email: elui@jonesday.com

Counsel for Petitioners
JOSE CARCAMO and
SUGAR TRANSPORT OF THE NORTHWEST, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes and Codes

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

ISSUE PRESENTED

Does an employer's admission of respondeat superior liability for the alleged negligence of an employee in operating a motor vehicle bar a plaintiff from introducing inflammatory evidence regarding the employee's driving record and employment history to prove an alternative theory of employer liability, as this Court held in *Armenta v. Churchill* (1954) 42 Cal.2d 448 (*Armenta*) and the Fourth District reaffirmed in *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853 (*Jeld-Wen*)? Or is the *Armenta* rule limited to negligent entrustment actions not involving the allocation of fault required by Proposition 51, as the Court of Appeal here held, even though this would contravene the purpose of the rule, no allocation is possible between an employer and employee once respondeat superior liability is admitted, and *Jeld-Wen* rejected both of these purported limitations?

WHY REVIEW SHOULD BE GRANTED

Review should be granted in this case to resolve an important, recurring issue on which Court of Appeal decisions are in direct conflict: the scope and continued viability of the *Armenta* rule. (Compare *Jeld-Wen*, *supra*, 131 Cal.App.4th at pp. 865-871 with the opinion attached at Appendix A ("Opn."), at pp. 5-12.)

For more than 50 years, the rule in California has been that if an employer admits respondeat superior liability for an employee driver's negligence in causing an accident, the plaintiff cannot pursue alternative theories of employer liability that would allow the plaintiff to introduce evidence of the employee's prior accidents, poor driving record, or poor character. (*Armenta*, *supra*, 42 Cal.2d at pp. 456-458; *Jeld-Wen*, *supra*, 131 Cal.App.4th at pp. 869-871.) The purpose of the *Armenta* rule,

adopted by a majority of jurisdictions that have addressed the issue, is to promote judicial economy and protect the reliability of the trial process. Allowing plaintiffs to introduce character evidence to prove theories of negligent hiring, retention, or entrustment distracts the jury from its task of determining responsibility for the accident at issue. (See Evid. Code, §§ 1101, 1104.) The rule prevents plaintiffs from doing indirectly what they cannot directly do—influence the jury to find against the employee driver based on evidence of his character for lack of care or skill—while at the same time preserving plaintiffs' rights to be made whole through respondeat superior liability.

In this case, the Court of Appeal, Second Appellate District, Division Six (Perren, J., with Gilbert, P.J., and Coffee, J., conc.) issued a published opinion that directly contravenes the evidentiary rule *Armenta* announced. The court held that *Armenta* applies in negligent entrustment actions, not negligent hiring and retention actions. (Opn. at p. 5.) This is a distinction without a difference, however, because these theories are functionally equivalent and substantively indistinguishable in the context of vehicular accident lawsuits against employees and their employers. Moreover, the evidentiary policy underlying the *Armenta* rule and Evidence Code section 1104 applies regardless of the theory of direct negligence at issue. If plaintiffs can plead around the rule simply by alleging negligent hiring rather than negligent entrustment, *Armenta* will be a dead letter.

The opinion also creates conflicts in the Court of Appeal. The holding that the *Armenta* rule is limited to negligent entrustment actions directly conflicts with the Fourth District's decision in *Jeld-Wen*, which held that the rule applies *whenever* an employer admits respondeat superior liability for the alleged negligence of an employee. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 868.) The court below also held that the *Armenta*

rule does not apply if a jury must determine comparative fault under Proposition 51. (Opn. at pp. 5-6, 12.) This too is directly contrary to the Fourth District's holding that the enactment of comparative liability principles in Proposition 51 has not adversely affected the *Armenta* rule. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at pp. 870-871.) Indeed, regardless of the allocation of fault for noneconomic damages, an employer that admits respondeat superior liability will always be liable for the entire amount of damages caused by an employee's negligence.

If left unresolved, the conflict between the Court of Appeal's decision in this case and the decision in *Jeld-Wen* will leave litigants and trial courts in uncertainty as to whether and when *Armenta* applies. *Jeld-Wen* disagreed with an earlier Fourth District opinion regarding the scope of the holding in *Armenta*, which will add to the confusion. The *Armenta* rule is potentially at issue in thousands of actions filed each year in California concerning accidents involving employee drivers. To the extent trial courts follow the Court of Appeal's opinion in this case, the result will be longer, less focused trials with less reliable outcomes. Litigation costs will also rise, with more discovery into employees' prior accidents, driving record, employment history, and character, as well as employers' practices with regard to hiring, training, supervising, and retaining employees. The opinion could even reduce traffic safety by giving employers a perverse incentive to replace experienced commercial drivers with untested ones who, by virtue of their lack of experience, have completely clean driving records.

This petition presents a unique opportunity to resolve the conflicts in the Court of Appeal's decisions with respect to the *Armenta* rule. Three panels have reached contradictory conclusions about whether *Armenta* is controlling, the scope of its holding, and whether the enactment of

comparative liability principles in Proposition 51 has affected that holding. The opinion below squarely presents all of these issues, and will allow this Court to bring much-needed uniformity to the law on this important question. At a minimum, the Court should grant review and transfer the case to the Court of Appeal with instructions to apply the *Armenta* rule.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Accident

This action concerns injuries that plaintiff and respondent Dawn Diaz sustained in a freeway accident in which a pickup truck driven by defendant Karen Tagliaferri collided first with a Sugar Transport truck driven by defendant and appellant Jose Carcamo and then with Diaz's vehicle.

The accident occurred while Carcamo was driving north in the middle lane of the 101 freeway. (9 RT 1436:14-28.) The one neutral eyewitness, Rose Gamboa, described the events leading up to the accident as follows. Tagliaferri was driving behind Carcamo in the middle lane at about the same speed. Surrounding traffic was light. Tagliaferri then accelerated, moved into the fast lane, and went past Carcamo. Without signaling, Tagliaferri pulled back into the middle lane but "didn't quite clear" the front of Carcamo's truck. Tagliaferri spun out of control, flew over the center median, and landed on top of a southbound car driven by plaintiff Diaz. (2 RT 271:7-284:16, 311:12-312:8.) A report prepared by the California Highway Patrol contained a nearly identical description (3 RT 512:5-523:8), and Carcamo's testimony was consistent (9 RT 1433:19-1437:7). Tagliaferri had no recollection of what happened. (2 RT 328:12-21.)

One of Diaz's theories of liability was that Carcamo may have accelerated while Tagliaferri was passing him, to "close the gap." No direct evidence supported this theory. Gamboa testified that Carcamo maintained a consistent speed (2 RT 318:2-11), and Carcamo flatly denied trying to cut Tagliaferri off (9 RT 1416:1-12). Diaz argued that Sugar Transport's loss of tachographic evidence supported an inference that Carcamo was speeding (10 RT 1554:24-1558:21, 1645:19-28), and presented evidence to suggest that Carcamo should have been driving in the right lane, was inattentive, and should have slowed down when Tagliaferri moved into the left lane (4 RT 743:13-27; 5 RT 829:25-830:15; 6 RT 953:11-954:4; 8 RT 1276:11-1277:14, 1355:10-22; 9 RT 1413:28-1414:6, 1419:12-25, 1420:16-1421:5, 1423:22-1424:3, 1425:3-19).

B. Sugar Transport Admits Liability for Any Negligence by its Driver

Diaz sued Tagliaferri, Carcamo, and Sugar Transport, alleging Carcamo had "act[ed] within the course . . . of [his] . . . employment" with Sugar Transport. (1 CT 2, ¶ 6.) Diaz also alleged that Sugar Transport had negligently "*entrusted*, permitted use of, bailed, [and] controlled" the truck. (*Id.* at 3-4, ¶¶ 9, 15, italics added.) At trial, Diaz's attorneys rephrased the theory of liability as negligent hiring and negligent retention. (2 RT 444:17-445:9.)

From early in the litigation, Sugar Transport admitted respondeat superior liability for Carcamo's actions. In verified responses to Diaz's form interrogatories, Sugar Transport admitted that "Carcamo was *given permission* to operate the Sugar Transport truck by Sugar Transport of the Northwest LLC, as *it was his job to operate that truck*." (4 CT 878:22-24, italics added.) At trial, Sugar Transport formally stipulated that Carcamo was acting in the course and scope of his employment, and that Sugar

Transport was liable for any negligence by Carcamo. (2 RT 432:8-21.) Immediately after the stipulation was put on the record, Diaz's attorney acknowledged that Sugar Transport's vicarious liability had never been disputed: "[T]hey are agreeing to—that it's respondeat superior. *That's never been an issue.*" (2 RT 434:7-8, italics added.)

C. The Evidence at Trial

Despite Sugar Transport's stipulation to respondeat superior liability and its repeated objection that the *Armenta* rule precluded plaintiff from pursuing negligent hiring and retention theories of liability (2 RT 430:15-432:7, 434:16-437:13, 443:2-9; 451:4-16), the trial court allowed plaintiff to offer evidence at trial that Sugar Transport was liable under those theories (2 RT 453:3-21).

Over objection, Diaz introduced evidence that Carcamo had several on-the-job accidents before the January 20, 2006 accident at issue, including one in 1999, for which Carcamo was sued and found "at fault," and another on January 4, 2006, while he was with Sugar Transport.[1] Diaz questioned multiple witnesses about the reference form Sugar Transport received from one of Carcamo's prior employers. Among other things, the form indicated that Carcamo had been involved in two accidents, had a "poor" ranking for "[s]afety habits," and that the prior employer would not rehire him.[2] In response to Diaz's questions, her expert on negligent hiring testified that he had never seen such a poor evaluation in 45 years. (2 RT 473:1-21.) Diaz also introduced a copy of Carcamo's entire driver

---

[1] 2 RT 242:19-243:21, 428:1-10, 454:18-456:23; 6 RT 994:7-16, 1038:25-1039:14; 7 RT 1073:3-1075:25; 9 RT 1366:6-21, 1374:6-18, 1392:13-24, 1400:5-1406:20; 5 CT 1080-1082, 1131-1133; Ex. 169.

[2] 2 RT 467:5-468:24; 4 RT 729:21-730:3; 6 RT 1009:25-1010:12; 5 CT 1134-1135, 1166; Exs. 13, 81.

qualification file and solicited testimony from numerous witnesses about its contents.[3]

Diaz also used the negligent hiring and retention theories to go through Carcamo's employment history in detail, highlighting the most inflammatory evidence. For example, Diaz repeatedly forced Carcamo to admit that he had used a "phony" Social Security number in the past, because of his status as an illegal alien. (9 RT 1380:4-1384:22, 1392:6-8, 1438:25-27.) Diaz emphasized that Carcamo had been fired by previous employers and, between jobs, returned to "his country" of Honduras. (9 RT 1389:1-1390:25, 1393:8-19, 1399:14-26.) Diaz introduced evidence that Carcamo had filed multiple claims for workers' compensation and unemployment benefits, and that he and his wife had filed for bankruptcy. (9 RT 1379:9-16, 1382:13-22, 1384:15-1386:14, 1388:18-1390:9, 1393:8-1395:19.)

Diaz also questioned Sugar Transport's employees at length about the company's procedures for screening job applicants generally and as applied to Carcamo. (6 RT 1004:18-1005:6, 1007:21-1015:12, 1038:2-12.) Likewise, Tagliaferri's counsel took Sugar Transport to task for failing to take additional steps to verify whether Carcamo "had any prior at-fault motor vehicle accidents." (6 RT 1032:24-1034:9; 7 RT 1154:23-26, 1156:21-1157:27.) Based on this evidence, Diaz's expert on negligent hiring described Sugar Transport's screening procedures as violating industry standards, as well as California and federal regulations. (2 RT 346:1-347:15, 363:8-366:3, 369:19-371:25, 393:1-395:2, 462:4-475:1;

[3] 2 RT 371:26-373:12, 375:9-378:10, 384:7-390:7, 393:8-394:26, 425:19-426:12; 4 RT 730:4-13; 5 RT 776:6-16; 6 RT 1014:1-1015:12, 1026:8-1027:21, 1038:25-1039:14; 7 RT 1063:21-1066:10; 9 RT 1380:4-12, 1383:1-18, 1386:20-1387:15, 1392:25-1396:25; 5 CT at 1074-1079, 1134-1184; Ex. 13.

5 RT 778:4-25.) Over Sugar Transport's objection, the expert opined that, based on what Sugar Transport knew, it should not have hired Carcamo. (2 RT 474:19-475:1.)

In closing arguments, Diaz's attorney concentrated on the negligent hiring and retention theories, highlighting evidence that Carcamo had the character of an unsafe driver. He argued that Sugar Transport "puts profits over safety" by hiring "unsafe drivers," so it could "put bodies behind the wheel" and "put checks in the bank." (10 RT 1554:8-14, 1565:12-1566:7; 1569:1-1572:5.) He condemned Sugar Transport's hiring practices as insufficient to "protect you or me or anyone else," and warned that Sugar Transport would continue to put unsafe drivers "behind the wheel . . . right next to you or me or your family or Dawn Diaz[.]" (10 RT 1553:2-21.) He implored the jury to teach Sugar Transport a lesson about "safety" and "moral responsibility," and to "tell them that this is not the way the folks in Ventura, in Southern California, expect the trucking companies to operate[.]" (10 RT 1553:16-28, 1573:18-21.)

D. Jury Instructions, Verdict, and Post-Trial Motions

Appellants objected to Diaz's proposed instruction on negligent hiring and retention, again urging that those theories of liability were unavailable because Sugar Transport stipulated to vicarious liability. As support, appellants once again highlighted *Jeld-Wen*, as well as this Court's prior decision in *Armenta.* (1 CT 212-219.) The trial court overruled the objections (10 RT 1695:2-1696:27) and instructed the jury on Diaz's negligent hiring and retention theory (2 CT 250, 270-271). Among other elements, the instruction asked whether Sugar Transport "knew or should have known . . . that Jose Carcamo was unfit to perform the duties for

which he was employed and that he would pose an undue risk of harm to persons such as the plaintiff Dawn Diaz[.]" (2 CT 270; 10 RT 1665:2-22.)

The jury rendered its verdict, finding both Carcamo and Tagliaferri negligent. (2 CT 332-335.) With respect to Sugar Transport, the jury found that it negligently hired and retained Carcamo, but that only the negligent retention was a substantial factor in causing Diaz's damages. (2 CT 333-334.) The jury allocated 20% of fault to Carcamo (for which Sugar Transport was vicariously liable), another 35% to Sugar Transport (for negligent retention), and the remaining 45% to Tagliaferri. (2 CT 334.) Effectively, the verdict imposed a combined 55% of the fault on Sugar Transport.

The total damage award was $22,566,373, including $17,566,373 in economic damages and $5,000,000 in noneconomic damages. (2 CT 334.) The Court entered judgment (2 CT 430-435), and appellants moved for a new trial (4 CT 728-782). Although acknowledging that the *Jeld-Wen* decision presented a "difficult question" (10 RT 1763:6-18), the trial court denied appellants' motion (5 CT 1048-1051.)

E. The Appeal

Sugar Transport and Carcamo appealed, raising as a ground of error the trial court's admission of evidence of negligent hiring and retention, as well as the instruction of the jury on these theories, despite Sugar Transport's admission of liability under the doctrine of respondeat superior. Appellants also challenged the trial court's instruction of the jury on "spoliation of evidence." (Appellants' Opening Brief, at p. 1.) On February 25, 2010, the Court of Appeal affirmed the judgment in all respects. (Opn. at p. 15.)

With respect to the evidence of negligent hiring and retention, the Court of Appeal held that "neither *Armenta* nor *Jeld-Wen* is controlling or persuasive" because both cases involved negligent *entrustment* claims and "[m]ore importantly" neither case dealt with the allocation of fault required by Proposition 51. (Opn. at pp. 5-6.) The court distinguished negligent hiring on the ground that it is a *direct* theory of liability (Opn. at pp. 5-8) and noted that evidence of Carcamo's employment and driving history had substantial probative value in determining whether Sugar Transport had negligently hired him (Opn. at pp. 10-11). The court held that the apportionment of fault for noneconomic damages required under Civil Code section 1431.1 would have been impossible without such evidence, a circumstance not present when this Court decided *Armenta*. (Opn. at p. 12.) On March 29, 2010, the court summarily denied appellants' petition for rehearing and made a minor, nonsubstantive modification to the opinion. (See Appendix B.)

LEGAL DISCUSSION

I. REVIEW IS NECESSARY TO RESOLVE CONFLICTS IN THE COURT OF APPEAL AS TO THE SCOPE OF THE *ARMENTA* RULE

A. *Armenta*

In *Armenta*, this Court addressed the issue of whether evidence of an employee's previous auto accidents is admissible to prove that an employer negligently entrusted a vehicle to an employee after the employer admits vicarious liability under the doctrine of respondeat superior. The Court answered in the negative, concluding that the direct theory of employer liability had no continuing validity once the employer admitted vicarious liability for the employee's allegedly negligent driving. (*Armenta*, *supra*, 42 Cal.2d at pp. 456-458.)

In *Armenta*, the plaintiff sued a wife and husband employer-employee team, under two theories of liability: negligence of the employee-husband in driving a truck while acting within the scope of his employment, and negligence of the employer-wife in entrusting the truck to her husband. In support of the negligent entrustment claim, the plaintiff sought to introduce evidence that the employee-husband had 37 prior traffic violations, including a manslaughter conviction. The wife had admitted before trial and again at trial that her husband was driving the truck in the course of his employment. (*Id.* at p. 456.)

Based on these admissions, this Court held that a theory of negligent entrustment had no continuing legal validity. The Court noted that the wife's admission of vicarious liability "was not directly responsive to plaintiff's added allegations of fact contained in the second count relating to her *personal negligence*." (*Id.* at p. 457, italics added.) The Court explained, however, that negligent entrustment was an "alternative theor[y]" under which the plaintiff was seeking to impose "the same legal liability" as might be imposed on the employee—i.e., the liability arising from the allegedly negligent driving. (*Id.* at p. 457 ["Plaintiffs could not have recovered against [the employer] upon either count in the absence of a finding of liability upon the part of [the employee] . . . ."].) Once the employer admitted vicarious liability for the employee's conduct, "the legal issue of her liability for the alleged tort was . . . removed from the case[.]" (*Ibid.*) Accordingly, evidence of the employee's prior traffic violations was properly excluded, because "there was no material issue remaining to which [that] evidence could be legitimately directed." (*Id.* at pp. 457-458.)

B. *Syah*

Twelve years after *Armenta*, the Fourth District distinguished a situation involving an accident caused by an employee's physical incapacity, for which he had no personal fault. (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 543 (*Syah*).) In that circumstance, the employer's admission of respondeat superior liability did not remove the employer's direct liability from the case. *Syah* involved a delivery driver who experienced dizzy spells, accidents, and falls while working. (*Id.* at pp. 536-537.) The employer arranged for the driver to be examined by a doctor, who found nothing wrong but asked the driver to report back if he experienced dizziness again. (*Id.* at p. 537.) The employer did not follow up with the doctor and allowed the employee to resume driving. (*Ibid.*) Afterward, the employee blacked out while driving a vehicle for his employer and crashed into another car, killing a passenger. (*Id.* at pp. 537-538.) The jury found the employee had not been negligent, but the employer had been negligent in entrusting the vehicle to the employee. (*Id.* at p. 538.)

The *Syah* court held that, unlike in *Armenta*, evidence of the employee's three previous incidents would not have inflamed the jury. (*Id.* at p. 543.) Indeed, given the absence of any dispute that the employee's driving while unconscious had caused the accident, the evidence of prior incidents could not have had any prejudicial effect but rather went solely to whether the defendants had notice of the medical condition before the accident. The court noted that "[a] remarkable direct causal connection here exists between the entrustee's *physical incompetency* or unfitness and the collision resulting therefrom, inasmuch as it is undisputed that the epileptic seizure resulted in the complete blackout suffered by [the employee] immediately prior to the actual collision." (*Id.* at p. 545, italics

added.) Unlike the situation in *Armenta* involving *negligent driving*, the employer's liability for allowing the employee to resume driving without determining the cause of his dizzy spells was not dependent on the employee's negligence. (*Id.* at pp. 543-545.)

Although *Armenta* involved no evidence of physical incapacity, the *Syah* court characterized as dictum and as "contrary to the common law" this Court's observation that the employer-wife's liability for negligent entrustment was dependent on a finding of liability on the part of her employee-husband. (*Syah*, *supra*, 247 Cal.App.2d at p. 543.)

C. *Jeld-Wen*

Like *Armenta*, the Fourth District's decision in *Jeld-Wen* was a case in which a plaintiff alleged that an employee's negligent driving caused a fatal accident. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at pp. 858-859.) In discovery and in a declaration, the driver's employer admitted that it was vicariously liable for any alleged negligence of its employee. By making the admission, the employer sought to keep out prejudicial evidence of the employee's prior accidents. (*Id.* at p. 859.) When the trial court denied defendants' motion for summary adjudication on negligent entrustment, they sought writ relief. (*Id.* at pp. 859-860.)

The Court of Appeal granted the writ, holding that *Armenta* and subsequently enacted Evidence Code section 1104 controlled. (*Id.* at pp. 869-870.) "Once an employer has admitted before trial to vicarious liability for its employee's negligence, if proven, the exclusionary rule of Evidence Code section 1104 operates to protect the employer from being exposed to prejudicial evidence that would be used to show the employer's prior knowledge of an employee's prior accidents, for purposes of imposing direct and separate liability on the employer." (*Id.* at p. 870.) Although

Jeld-Wen twice distinguished cases involving potentially non-negligent drivers (*id.* at pp. 862-863, 870), and noted that there was no evidence that the employee driver was "incompetent, ill, or otherwise unfit to drive" on the day of the accident (*id.* at p. 859), the *Jeld-Wen* court concluded that *Syah* was contrary to binding precedent and should not be followed. (*Id.* at pp. 868-869.) The court also held that the enactment of comparative liability principles in Proposition 51 did not negatively affect the *Armenta* rule. (*Id.* at pp. 870-871.)

Although the results in *Jeld-Wen* and *Syah* can be reconciled, the decisions are in express conflict. *Syah* describes the holding in *Armenta* as "dictum" and as "contrary to the common law." (247 Cal.App.2d at p. 543.) *Jeld-Wen* holds that *Armenta* is binding precedent, rejects any suggestion that it is dicta, and criticizes *Syah* for disregarding a holding of this Court. (131 Cal.App.4th at pp. 865, 868-869.) This conflict raises uncertainty as to whether *Armenta* controls in an accident case where the employer has admitted vicarious liability.

D. The Opinion Below Upsets More Than 50 Years of Precedent and Creates Conflicts in the Court of Appeal

1. The Opinion Contravenes *Armenta*

The *Armenta* rule is based on two policy concerns: "to promote judicial economy by avoiding unnecessary litigation" and "to ensure that prejudicial evidence on negligence is kept out pursuant to the principles of Evidence Code section 1104, because the existence of negligence on a particular occasion should be determined from the nature of the subject act or omission, 'not by defendant's character for care [or lack thereof] . . . . [Citation].' [Citation]." (*Jeld-Wen*, *supra*, 131 Cal.App.4th at pp. 866-867.) Thus, when an employer admits respondeat superior liability for the negligence of an employee, the rule acts to preclude a plaintiff from

pursuing any alternative theory under which the employer might be directly liable for the negligence of its employee. (*Armenta*, *supra*, 42 Cal.2d at pp. 457-458.)

Until the opinion in this case, Court of Appeal precedent following *Armenta* remained true to its evidentiary holding. Although *Syah* and *Jeld-Wen* conflict on the scope of the *Armenta* rule, the results in both cases are consistent with the principle expressed in *Armenta* that torts such as negligent hiring, retention, and entrustment are *alternatives* to liability under the doctrine of respondeat superior. For this reason, a plaintiff may not pursue these theories once vicarious liability is admitted if doing so will allow the admission of prejudicial character evidence.

The opinion in this case, by contrast, directly contravenes *Armenta*. Whereas *Syah* distinguished *Armenta* on its facts, and explained why its evidentiary concerns did not apply in a case in which the cause of the accident was not in dispute, the Court of Appeal here declined to apply *Armenta* in a case that turned upon whether an employee had caused an accident by driving negligently. As in *Armenta* and *Jeld-Wen*, Sugar Transport could have no liability under any theory unless Carcamo himself were found negligent. (2 CT 270-271 [jury instruction on negligent hiring]; 10 RT 1665:5-22 [instruction read to jury]; see also 2 RT 434:10-15 [admission by plaintiff's counsel that Sugar Transport's liability was dependent on Carcamo having driven negligently].) As in *Armenta* and *Jeld-Wen*, this is a case in which Sugar Transport admitted vicarious liability for any alleged negligence of Carcamo. (2 RT 432:8-21; see also 4 CT 878:22-24.) Contrary to the holding of *Armenta* and *Jeld-Wen*, however, plaintiff was allowed to introduce extensive and inflammatory evidence of Carcamo's driving and employment history at trial to show that Sugar Transport was negligent in hiring and retaining him.

2. The Attempt to Distinguish *Armenta* Fails and Creates a Conflict with *Jeld-Wen* on the Scope of the *Armenta* Rule

The first reason given by the Court of Appeal for not applying *Armenta* and *Jeld-Wen* is that those decisions dealt with negligent entrustment rather than negligent hiring and retention. (Opn. at p. 5.) This holding—that the *Armenta* rule is limited to negligent entrustment actions—conflicts with the Fourth District's holding in *Jeld-Wen* that the rule applies more broadly: "The lower courts are not authorized to depart from [*Armenta*] in cases such as this, *involving a factual context of employment and injury to a third party by an employee acting in the course and scope of employment.*" (131 Cal.App.4th at p. 868, italics added.)

The Court of Appeal attempted to justify its distinction by explaining that negligent hiring and retention is a *direct* theory of liability independent of vicarious liability. (Opn. at pp. 6-8.) This is a distinction without a difference. As the Court of Appeal appeared to recognize (Opn. at p. 5), negligent entrustment is also a direct theory of liability that arises from the act of entrustment, not the relationship of the parties. (See, e.g., *Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396, 400; *Blake v. Moore* (1984) 162 Cal.App.3d 700, 707; *Syah*, *supra*, 247 Cal.App.2d at pp. 538-539.) In the context of a motor vehicle accident involving an employee driver, negligent hiring and retention is substantively identical to negligent entrustment. Whatever the label given by a plaintiff, the theory rests upon an employer's negligence in allowing an employee to drive. Indeed, Diaz never pleaded negligent hiring or retention but instead alleged that Sugar Transport "negligently . . . *entrusted*" the truck to Carcamo. (1 CT 3-4, italics added.) Nor did Diaz ever move to amend her complaint to conform to proof. (5 CT 1185-1234 [docket].)

Moreover, nothing in *Armenta* suggests that its holding is limited to the specific context of negligent entrustment. The Court noted that although the employer's admission of vicarious liability was not directly responsive to the allegations regarding her personal negligence, the admission barred the plaintiff from pursuing an alternative, direct theory of liability. (*Armenta*, *supra*, 42 Cal.2d at p. 457.) Accordingly, the Court concluded that evidence showing the employer knew of the employee's bad driving record was properly excluded because there "was no *material issue remaining* to which [that] evidence could be *legitimately* directed." (*Id.* at pp. 457-458, italics added.) As the Fourth District explained, the rule of *Armenta* is based upon *evidentiary concerns* of allowing plaintiffs to pursue direct theories of employer negligence once the employer has admitted vicarious liability for any alleged negligence of its employee. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 866.) The rule promotes judicial economy and "ensure[s] that prejudicial evidence on negligence is kept out pursuant to the principles of Evidence Code section 1104." (*Id.* at pp. 866-867.)

The rationale of *Armenta* applies with equal force to theories of negligent hiring, retention, and entrustment, or any other direct theory of employer liability. These are alternative theories of recovery from the employer: respondeat superior liability applies to acts committed within the scope of employment, whereas negligent hiring, retention, and entrustment generally apply in situations where an employee is acting outside the scope of his or her employment. (See *Armenta*, *supra*, 42 Cal.2d at p. 457 [negligent entrustment is an "alternative theor[y]" to liability under respondeat superior]; *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 395 [describing negligent hiring, supervision, and retention as an "alternative theory" to that of liability under the doctrine of respondeat superior]; *Golden West Broadcasters, Inc. v. Superior Court*

(1981) 114 Cal.App.3d 947, 951 [same]; cf. *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244 [although negligent hiring is a direct theory of liability, it is in essence vicarious or derivative because it derives from the act or omission of the contractor hired].)

Indeed, we have located no published California decision that has found negligent hiring or retention liability in a context where respondeat superior applies.[4] This appears to hold true in other states as well. As one federal district court noted:

> [A]fter an exhaustive survey of the case law, in this jurisdiction and elsewhere, we have failed to uncover any decision in which the doctrine of negligent hiring or retention has been applied to conduct which arises *within* the course and scope of an employment relationship. This lack of precedential authority is not surprising, given the fact that the *raison d'etre* for the negligent hiring and retention doctrines was the unavailability of a recovery for conduct which was unactionable under traditional principles of vicarious liability.

(*Cook v. Greyhound Lines, Inc.* (D.Minn. 1994) 847 F.Supp. 725, 733; see also *Tindall v. Enderle* (Ind.Ct.App. 1974) 320 N.E.2d 764, 767-768 [negligent hiring "generally arises only when an . . . employee steps beyond the recognized scope of his employment to commit a tortious injury upon a third party. [Citation] . . . [The] theory is of no value where an employer

---

[4] The Court of Appeal quoted dictum in *Far West Financial Corp. v. D&S Co.* (1988) 46 Cal.3d 796, 812, that "a defendant who is vicariously liable for another's acts may also bear some direct responsibility for an accident, . . . for example, the negligent hiring of an agent." (Opn. at p. 7) *Far West* addressed principles of equitable indemnity, and does not suggest that a plaintiff may pursue negligent hiring once vicarious liability is admitted. (See *Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 868, fn. 9 [discussing *Far West*].)

has stipulated that his employee was within the scope of his employment.")[5]

Once an employer admits vicarious liability under the doctrine of respondeat superior, it is liable to the same extent as the employee—their liability is "coextensive"—and the plaintiff has no legitimate reason to proceed against the employer for "the same award" of damages under an alternative theory. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 871.) In these circumstances, the alternative theory becomes essentially superfluous. The only remaining purpose the theory serves is as a back-door method of introducing prejudicial character evidence that would otherwise be inadmissible under Evidence Code section 1104. (*Id.* at p. 869.)

3. The Opinion Also Directly Conflicts with *Jeld-Wen* on Whether Proposition 51 Has Undermined the *Armenta* Rule

The second basis the Court of Appeal gave for distinguishing *Armenta* and *Jeld-Wen* is that "neither case purports to deal with the allocation of fault required by Proposition 51." (Opn. at pp. 5-6.) The court reiterated that negligent hiring and retention is an independent theory of liability, and without evidence of Carcamo's driving and employment history, the jury would not have been able to apportion noneconomic damages as required by Civil Code section 1431.1. (Opn. at p. 12.) The court noted that "[u]nlike *Armenta*, while Sugar Transport's concession of

---

[5] Indeed, negligent hiring developed specifically in situations where the respondeat superior doctrine did not apply. (See Camacho, *How to Avoid Negligent Hiring Litigation* (1993) 14 Whittier L.Rev. 787, 790 ["The doctrine of negligent hiring developed out of the common law fellow servant rule rather than from the respondeat superior doctrine. This rule held that the master is *not* liable for injuries to a servant, caused by the negligence of a fellow servant engaged in the same general business, when the master has exercised due care in selection of servants."].)

liability for Carcamo's driving established the fact of its liability, it did not establish the degree of its liability for noneconomic damages." (*Ibid.*) In effect, the court held that the *Armenta* rule no longer has any application after the enactment of Proposition 51.

This holding is in direct conflict with *Jeld-Wen*, which not only explicitly addressed the allocation of fault required by Proposition 51 (131 Cal.App.4th at p. 870) but came to a diametrically opposite conclusion: "There is nothing in *Armenta* that is adversely affected by the development of these comparative negligence principles, because *Armenta* represents a different and still viable policy rule that is based upon evidentiary concerns about the vicarious liability of an employer for employee negligence." (*Id.* at p. 871.) Once an employer has conceded respondeat superior liability for its driver, the liability of the employer and employee is identical and coextensive and no need exists to apportion liability among them. (*Ibid.*) Regardless of any apportionment, the employer is liable for the entire amount of damages caused by the employee's negligent driving.

E. A Grant of Review Will Allow the Court to Resolve These Conflicts

As the discussion above shows, the Court of Appeal is in conflict as to (1) whether *Armenta* is binding precedent or dicta; (2) whether *Armenta* applies only in negligent entrustment actions or more broadly; (3) whether negligent entrustment is a direct theory of liability or a vicarious one; and (4) whether the *Armenta* rule has survived the enactment of comparative liability principles in Proposition 51. The published opinion in this case raises all these issues, and this petition presents a unique opportunity to bring uniformity to this area of the law. Without a grant of review, trial courts will be unsure how to proceed in the thousands of motor vehicle

accident cases filed each year in which employers and their employee drivers are defendants. This will almost certainty result in conflicting decisions as some trial courts choose to follow the opinion in this case and others adhere to *Armenta* and *Jeld-Wen*. If left unresolved, the conflicts will result in more appeals, the possibility of additional conflicting Court of Appeal decisions, and the need for retrials. This unnecessary but inevitable consumption of scarce judicial resources alone justifies a grant of review in this case.

II. IF ALLOWED TO STAND, THE COURT OF APPEAL'S OPINION WILL HAVE ADVERSE CONSEQUENCES IN ACTIONS ALLEGING NEGLIGENCE BY EMPLOYEES

The *Armenta* rule serves an important role. It prevents plaintiffs from circumventing the character evidence prohibition of Evidence Code section 1104 and thereby defeating the policies on which it is based. The plaintiff in a motor vehicle accident case can have only one recovery. Once an employer is liable for any negligence of its driver involved in the accident, the plaintiff's right to pursue a separate theory direct liability against the employer *based on the same allegedly negligent driving of its employee* is outweighed by the prejudice that can result from the introduction of evidence to prove that theory.

For this reason, the rule in *Armenta* has been followed by a majority of jurisdictions that have addressed the issue presented in this case. (See *Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 862; Powell, *Submitting Theories of Respondeat Superior and Negligent Entrustment/Hiring* (1996) 61 Mo. L.Rev. 155, 162; Annot., Propriety of Allowing Person Injured in Motor Vehicle Accident to Proceed Against Vehicle Owner Under Theory of

Negligent Entrustment Where Owner Admits Liability Under Another Theory of Recovery (1984) 30 A.L.R.4th 838.)[6]

By holding that *Armenta* has little if any application, the Court of Appeal's opinion has the potential to work mischief in a great many cases. The opinion opens the door to the introduction of otherwise inadmissible character evidence in actions alleging the negligence of employees in operating motor vehicles—truck drivers, bus drivers, taxi drivers, ambulance drivers, train conductors, aircraft pilots, among others. In fiscal year 2007-2008 alone, 28,414 lawsuits were filed in California for personal injury, property damage, or wrongful death resulting from motor vehicle accidents. (Judicial Council of Cal., 2009 Court Statistics Rep., Statewide Caseload Trends, 1998-1999 Through 2007-2008, p. 49.)[7] Indeed, the issue can arise in any case in which an employee is alleged to have been negligent within the scope of his or her employment, regardless of whether a motor vehicle is involved. For these reasons, the City of Santa Monica and the Association of California Insurance Companies submitted *amicus curiae* letters in support of rehearing in the Court of Appeal.

---

[6] See, e.g., *Gant v. L.U. Transport, Inc.* (Ill.Ct.App. 2002) 770 N.E.2d 1155, 1159; *McHaffie v. Bunch* (Mo. 1995) 891 S.W.2d 822, 826-827; *Hackett v. Washington Metropolitan Area Transit Authority* (D.D.C. 1990) 736 F.Supp. 8, 9-10; *Wise v. Fiberglass Systems, Inc.* (Idaho 1986) 718 P.2d 1178, 1181-1182; *Elrod v. G & R Construction Co.* (Ark. 1982) 628 S.W.2d 17, 18-19; *Clooney v. Geeting* (Fla.Ct.App. 1977) 352 So.2d 1216, 1219-1220; *Tindall v. Enderle* (Ind.Ct.App. 1974) 320 N.E.2d 764, 768; *Willis v. Hill* (Ga.Ct.App. 1967) 159 S.E.2d 145, 157-158, revd. on other grounds (Ga. 1968) 161 S.E.2d 281; *Rodgers v. McFarland* (Tex.Ct.Civ.App. 1966) 402 S.W.2d 208, 210-211; *Nehi Bottling Co. of Ellisville v. Jefferson* (Miss. 1956) 84 So.2d 684, 686; *Tuite v. Union Pacific Stages, Inc.* (Ore. 1955) 284 P.2d 333, 338; *Heath v. Kirkman* (N.C. 1954) 82 S.E.2d 104, 107; *Houlihan v. McCall* (Md. 1951) 78 A.2d 661, 664-665; *Prosser v. Richman* (Conn. 1946) 50 A.2d 85, 87.

[7] The report is available at http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf.

The distinction the Court of Appeal drew between negligent entrustment (subject to the *Armenta* rule) and negligent hiring and retention (not subject to the rule) gives plaintiffs a huge incentive simply to plead around the rule. In cases involving the negligence of employees while operating motor vehicles, "negligent hiring and retention" and "negligent entrustment" are interchangeable. Under either theory, the plaintiff must prove the employer should not have allowed an unfit driver to drive. The act of hiring or retaining an employee cannot lead to employer liability in this context *unless the employer entrusts the employee with a vehicle.* If plaintiffs can evade the *Armenta* rule simply by renaming their theory of liability, the rule will have no effect. Plaintiffs will allege negligent hiring and retention in every employee accident case for the sole purpose of being able to present prejudicial character evidence to the jury. Indeed, it would arguably be malpractice not to do so.

The Court of Appeal's opinion also creates uncertainty about whether other theories of employer liability (e.g., negligent supervision, negligent training, or negligent control) are subject to the *Armenta* rule. Moreover, these theories are rarely distinct. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 664 [negligent supervision claim "adds little, if anything" to the concept of liability for negligent entrustment].) In *Jeld-Wen*, the plaintiff alleged negligent training as part of a negligent entrustment theory, and the *Armenta* rule applied. (131 Cal.App.4th at pp. 859, 872.) Here, Diaz alleged negligent supervision, entrustment, and control as part of a single cause of action for negligence, but the Court of Appeal held the *Armenta* rule did *not* apply because she pursued a theory of negligent hiring and retention at trial (without ever amending her complaint to conform to proof). (Opn. at pp. 5, 12; see 1 CT 1, 3-4 [complaint]; 2 CT 430, 433 [judgment]; 5 CT 1185-1234 [docket]).

The Court of Appeal also held that the *Armenta* rule does not apply where a jury must determine comparative fault under Proposition 51. (Opn. at pp. 5-6, 12.) But *every case* in which *Armenta* applies involves at least two defendants—the employee and his or her employer—regardless of whether the plaintiff pursues a theory of negligent hiring, negligent retention, negligent supervision, negligent control, or negligent entrustment. Thus, under the logic of the Court of Appeal's opinion, the *Armenta* rule never applies.

Without the *Armenta* rule, Evidence Code sections 352 and 1104 will not prevent the introduction of evidence regarding an employee's character and history. The Court of Appeal's opinion permits a separate theory of negligent hiring and retention regardless of any admission of vicarious liability. Hence, as the court concluded, character evidence that would otherwise be excluded under the mandatory language of section 1104 will be admissible as evidence of the employer's negligence. (Opn. at pp. 9-10.) Likewise, such evidence will rarely if ever be excluded under section 352 because it will always be the most probative evidence of negligent hiring. Indeed, as the Court of Appeal noted, "such evidence is likely the only way [negligent hiring and retention] could be shown." (Opn. at pp. 10-11.) This is precisely why the *Armenta* rule is necessary in the first place—because in these circumstances sections 1104 and 352 provide no protection whatsoever.

Judicial economy and the reliability of civil trials in motor vehicle accident cases involving employee drivers will suffer accordingly. As the Law Revision Commission explains, the admission of character evidence in a civil case carries the following risks. "*First,* character evidence is of slight probative value and may be very prejudicial. *Second,* character evidence tends to distract the trier of fact from the main question of what

actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third,* introduction of character evidence may result in confusion of issues and require extended collateral inquiry." (Cal. Law Revision Com. com., 29B pt. 3B West's Ann. Evid. Code (2009 ed.) foll. § 1101, p. 438.) These risks, which were on full display in the trial of this action, will recur absent review by this Court.

The *Armenta* rule has several important virtues, which the Court of Appeal's opinion threatens. The rule protects the policies of Evidence Code sections 1101 and 1104 by closing a loophole that allows the introduction of character evidence in support of an alternative theory of employer negligence once vicarious liability is admitted. This results in shorter trials with more reliable verdicts. The rule also provides employers with an incentive to admit liability under the doctrine of respondeat superior, even in cases where it may be debatable. This promotes the policies underlying the doctrine: "(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209.) The rule also reduces the cost of litigating cases by avoiding protracted disputes over discovery into employees' characters, employment histories, and driving records, as well as into employers' practices with regard to hiring, training, supervising, disciplining, and retaining employees.

The opinion could even have adverse consequences on public safety. Prior to the Court of Appeal's decision, liability under the doctrine of respondeat superior provided employers with an incentive to hire safe and skilled drivers. By making any evidence of an employee driver's lack of

care or skill admissible at trial whenever a plaintiff alleges negligent hiring or retention, the opinion greatly increases the risk of liability regardless of whether an employee is at fault. This gives employers a perverse incentive to make hiring and termination decisions based not on the competence and experience of drivers but instead on whether they have spotless driving records. This will reduce traffic safety if seasoned commercial drivers are replaced with untested ones whose very lack of experience makes it more likely that they have completely clean driving records.

CONCLUSION

The opinion below contravenes *Armenta*, deepens a conflict in the Court of Appeal regarding the scope of its rule, and creates a new conflict as to whether the rule survived the enactment of Proposition 51. The opinion undercuts the policies served by Evidence Code section 1104 and will have adverse consequences in thousands of motor vehicle cases filed each year. For these reasons, this Court should grant review to secure uniformity and settle an important issue of law or, alternatively, to transfer the case to the Court of Appeal with instructions to apply *Armenta*.

Dated: April 6, 2010

Respectfully submitted,

JONES DAY

By: Elwood Lui /PD
Elwood Lui

Attorneys for Petitioners
JOSE CARCAMO and SUGAR TRANSPORT OF THE NORTHWEST, LLC

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies, pursuant to Rule 8.504(d) of the California Rules of Court, that the enclosed brief was produced using 13-point type, including footnotes, and contains 7,419 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 6, 2010

Respectfully submitted,

JONES DAY

By: Elwood Lui /pd
Elwood Lui

Attorneys for Petitioners
JOSE CARCAMO and SUGAR TRANSPORT OF THE NORTHWEST, LLC

Diaz v. Carcamo et al.

APPENDICES

Appendix A	Court of Appeal's Opinion, filed February 25, 2010
Appendix B	Order Modifying Opinion and Denying Rehearing [No Change in Judgment], filed March 29, 2010

Appendix A

Court of Appeal's Opinion

Filed 2/25/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DAWN RENAE DIAZ,

Plaintiff and Respondent,

v.

JOSE CARCAMO et al.,

Defendants and Appellants.

2d Civil No. B211127
(Super. Ct. No. CIV 241085)
(Ventura County)

Dawn Diaz was seriously injured when she was struck by a car that had jumped a freeway center divider following its collision with a truck. She sued Karen Tagliaferri,[1] the driver of the car that struck her, and Jose Carcamo, the driver of the truck with which Tagliaferri collided. Diaz also sued Carcamo's employer, Sugar Transport, alleging it was vicariously liable as Carcamo's employer. She further alleged that Sugar Transport was liable for its independent negligence in its hiring and retention of Carcamo. The jury returned a verdict against each defendant awarding plaintiff a total of $22,566,373 in damages. Pursuant to Proposition 51[2] it apportioned fault among Tagliaferri, Carcamo, and Sugar Transport.

Appellant, Sugar Transport, contends that because it admitted it was vicariously liable for Carcamo's conduct on a theory of respondeat superior, the trial court erred in permitting Diaz to proceed against it for its negligent hiring and retention

[1] Tagliaferri settled with Diaz prior to trial and is not a party to this appeal.

[2] Civil Code section 1431 et seq. (Prop. 51, adopted by initiative June 3, 1986.)

of Carcamo. It claims that this error was compounded by admitting evidence of Carcamo's background. Relying on *Jeld-Wen, Inc. v. Superior* Court (2005) 131 Cal.App.4th 853, Sugar Transport contends that its concession of vicarious liability removed all question of its independent fault and rendered evidence of Carcamo's character and conduct prior to the accident inadmissible. (Evid. Code, § 1104.) Sugar Transport also asserts that the trial court erred by giving a spoliation of evidence instruction regarding a missing tachograph chart. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent Dawn Diaz was seriously injured in an automobile accident as she and two passengers were driving southbound on the 101 freeway in Camarillo. Jose Carcamo was driving a truck northbound on the 101 freeway. He was making a delivery for his employer, Sugar Transport. Tagliaferri had moved to the number one lane to pass Carcamo and was attempting to return to the number two lane in front of Carcamo when her right rear bumper came into contact with Carcamo's left front tire. Tagliaferri lost control of her vehicle, and flew over the median landing on top of Diaz's car.

Diaz sued alleging that Carcamo was negligent and that Sugar Transport was vicariously liable as his employer. The complaint also alleged that Sugar Transport was directly negligent in its hiring and retention of Carcamo. Sugar Transport answered denying liability, that it was Carcamo's employer, and that Carcamo was acting in the course and scope of his employment when the collision occurred. At trial, it abandoned the last two contentions.

The cause of the accident was hotly disputed. Diaz asserted that the collision occurred because Carcamo was not driving in the truck lane, was speeding and inattentive, failed to yield the right-of-way, and failed to take evasive action to avoid the collision. Carcamo and Sugar Transport contended that Tagliaferri was the sole cause of the collision because she pulled in front of Carcamo's truck without allowing for adequate clearance between her car and the truck.

After a lengthy trial, the jury returned a special verdict awarding Diaz $22,566,373 in damages comprising $17,566,373 in economic damages and $5 million in noneconomic damages. As required by Proposition 51, the jury apportioned 45 percent of fault for the accident to Tagliaferri, 20 percent to Carcamo, and 35 percent to Sugar Transport.[3] The trial court denied Carcamo and Sugar Transport's motion for a new trial.

On appeal, Sugar Transport contends that having admitted that it was vicariously liable as Carcamo's employer under the doctrine of respondeat superior, the trial court erred in admitting evidence of Carcamo's prior employment, driving, and accident history as well as by instructing the jury on the theory of negligent hiring and retention. It also asserts the trial court erred in instructing the jury on Diaz's theory of evidence spoliation relative to the disappearance of Carcamo's tachograph chart.[4]

DISCUSSION

Evidence of Carcamo's Prior Employment and Driving History Were Properly Admitted; the Jury was Properly Instructed Concerning Negligent Hiring and Retention

A. Negligent Hiring and Retention is a Theory of Direct Liability

Sugar Transport contends the trial court erred as a matter of law in denying its motion in limine to exclude evidence of Carcamo's involvement in several prior accidents and an evaluation from Carcamo's previous employer who dismissed Carcamo after three months and gave him a poor performance review. Relying on *Armenta v. Churchill* (1954) 42 Cal.2d 448, and *Jeld-Wen,* Sugar Transport contends that because it had admitted it was liable for Carcamo's conduct this evidence was irrelevant.

---

[3] Civil Code section 1431.2, subdivision (a) states: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount."

[4] A tachograph is a "device attached to the speedometer cable of the truck which measured on a . . . chart with three steel styli the revolutions of the engine, the vehicle's speed, the distance traveled by the vehicle, and time." (*People v. Williams* (1973) 36 Cal.App.3d 262, 266.)

In *Armenta* a road-paving worker was killed when a dump truck backed over him. The defendants were the truck driver and his wife, who was the driver's employer and registered owner of the truck. The complaint charged husband with negligence while acting in the course and scope of his employment. The complaint also alleged negligence against wife for entrusting the truck to her husband who she knew was a careless, negligent and reckless driver. Defendants admitted in their answer that husband was wife's employee and was acting within the scope of employment at the time of the accident. They denied the allegations of the wife's independent negligence. At trial, plaintiff offered evidence that husband had been found guilty of 37 traffic violations, including a conviction for manslaughter, and that wife knew these facts. Defendants objected on the ground that this evidence was directed to an issue which had been removed from the case by their admission in the pleadings that husband was acting in the course and scope of his employment.

Our Supreme Court held the trial court properly excluded the evidence. The court reasoned: "It is true that defendant [wife's] admission of vicarious liability as the principal for the tort liability, if any, of her husband was not directly responsive to plaintiffs' added allegations of fact . . . relating to her personal negligence. But the only proper purpose of the allegations . . . with respect to [wife] was to impose upon her the same legal liability as might be imposed upon [her husband] in the event the latter was found to be liable. Plaintiffs could not have recovered against [wife] upon either count in the absence of a finding of liability upon the part of [her husband]; and [wife] had admitted her liability in the event that [her husband] was found to be liable. Plaintiffs' allegations in the two counts with respect to [wife] merely represented alternative theories under which plaintiffs sought to impose upon her the same liability as might be imposed upon her husband. Upon this legal issue concerning the liability of [wife] for the tort, if any, of her husband, the admission of [wife] was unqualified, as she admitted that [her husband] was her agent and employee and that he was acting in the course of his employment at the time of the accident. Since the legal issue of her liability for the

alleged tort was thereby removed from the case, there was no material issue remaining to which the offered evidence could be legitimately directed." (*Armenta v. Churchill, supra,* 42 Cal.2d at pp. 457-458.)

Jeld-Wen also involved negligent entrustment of a truck driven by an employee in the course and scope of his employment. Defendants moved for summary adjudication of the issue on the ground that, before trial, the defendant employer had admitted vicarious liability for the acts of the driver under the doctrine of respondent superior. The trial court denied the motion and defendants sought a writ of mandate. They asserted that they were entitled to summary adjudication as a matter of law because negligent entrustment was not a separate, independent tort, but rather a theory of vicarious liability. Relying on *Armenta,* they argued that the pretrial admission by the employer that its employee was acting in the course and scope of his employment at the time of the accident made the negligent entrustment theory superfluous.

The court in *Jeld-Wen* granted the petition. In doing so it distinguished the earlier opinion of a sister panel in *Syah v. Johnson* (1966) 247 Cal.App.2d 534, 543-545, which held that the tort of negligent entrustment was a distinct tort and imposed direct liability on the owner of a vehicle. The court in *Jeld-Wen* concluded that plaintiffs' negligent entrustment claim against the employer could not be separately pursued because the employer had made a binding pre-trial admission of responsibility under the doctrine of respondeat superior. It concluded that the admission ended any question of its liability in the event its employee was found liable.

We conclude that neither *Armenta* nor *Jeld-Wen* is controlling or persuasive. Both cases involve negligent entrustment but do not discuss negligent hiring and retention. A case is not authority for an issue not considered. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 323.) Moreover, a recent case from the Second District holds, contrary to *Jeld-Wen,* that negligent entrustment is an independent tort imposing direct liability. (*Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396, 400; see also *Blake v. Moore* (1984) 162 Cal.App.3d 700, 707 [same].) More importantly, however, neither

case purports to deal with the allocation of fault required by Proposition 51. (Civ. Code, § 1431 et seq.)

With respect to negligent hiring and retention, our Supreme Court recognized, in a decision prior to *Armenta*, that negligent retention is a theory of direct liability independent of vicarious liability. In *Fernelius v. Pierce* (1943) 22 Cal.2d 226, 233-234, the court stated: "The *neglect* charged here was not that of the subordinate officers . . . . The *neglect* that is pleaded is that of the defendants themselves. The legal fault charged here as the ground of liability is directly and personally that of the superior officers (the defendants). Responsibility is not claimed to devolve up to them merely derivatively through a relationship of master and servant or principal and agent. The fact that the killer-officers were employees subordinate to the defendants is essentially material here, not for the purpose of tracing responsibility for their acts up to defendants through the ordinary principles of agency but rather as showing that the homicidal officers were in effect an *instrumentality under the control of the defendants* in the handling of which the defendants were given and charged with responsibility and power, and the question of proximate cause of the injury relates directly to the neglect of the defendants."

In *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal.App.3d 57, 68-69, the court explained: "[T]here is a division of authorities on whether negligent hiring may serve as an independent basis for an employer's liability to a third person. [¶] One line of cases is to the effect that an employer's failure to hire only competent and proper employees does not of itself constitute an independent ground of actionable negligence. [Citations.] In other words, if liability to a third person for the act of an employee is to exist, it must be predicated upon the wrongful act or omission of the employee, and not upon the care or lack of it exercised by the employer in selecting the employee. [Citation.] [¶] The other view, however, which California follows, is that an employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. [Citations.] The rule is stated in Restatement

Second of Agency section 213: 'A person conducting an activity through servants . . . is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper persons . . . involving the risk of harm to others: . . .' [¶] Comment d reads in part: 'The principal may be negligent because he has reason to know that the servant . . . , because of his qualities, is likely to harm others in view of the work . . . entrusted to him. . . . [¶] An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity . . . . [¶] *Liability results under the rule . . . , not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. . . .*'"

The rule of direct liability for negligent hiring and retention has been followed in numerous subsequent cases. (See *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [negligent hiring and retention imposes direct, not vicarious, liability]; see also *Far West Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 812 ["there are many instances in which a defendant who is vicariously liable for another's acts may also bear some direct responsibility for an accident, either on the basis of its own action—for example, the negligent hiring of an agent—or of its own inaction—for example, the failure to provide adequate supervision of the agent's work"]; *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 ["Liability for negligent . . . retention of an employee is one of direct liability for negligence, not vicarious liability"]; *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 [negligence liability will be imposed upon the employer if it "knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes"]; *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564 ["An employer may be liable to a third person for the employer's negligence in hiring or retaining an

employee who is incompetent or unfit"]; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 842 ["California law on negligent hiring follows the rule and comment set forth in the Restatement Second of Agency section 213"].)

In *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal.App.3d 793, this court rejected an argument, similar to that made by Sugar Transport, that an employer's liability is derivative only and it could not be liable for damages greater than that imposed on its employee. "That rule, applicable in suits by an injured victim against the driver and the driver's employer as respondeat superior, is inapplicable where the company was aware of the complaints and sanctioned the conduct of its employees and managing agent. 'The liability of an innocent, nonparticipating principal under the respondeat superior doctrine is based upon the wrongful conduct of the agent; the principal cannot be liable unless the agent is liable. . . .'. . . 'If an employee acts *under the direction of his employer*, the employer participates in the act, and his liability is based on his own fault. . . .' [Citations.] This rule holds true where, as here, the principal is under an obligation or liability independent of the agent's acts." (*Id.* at p. 800.)

Sugar Transport's reliance on *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, also is misplaced. In *Camargo*, our Supreme Court rejected an attempt to assert "direct" liability against the hirer of an independent contractor. There, the plaintiffs' decedent Camargo was killed when his tractor rolled over. Camargo had been an employee of an independent contractor, Golden Cal Trucking, which had been hired by a dairy to clear the manure out of its corrals. Camargo's heirs sued the dairy, asserting it was directly liable to them on a theory of negligent hiring, since the dairy had failed to determine whether the trucking company and Camargo were qualified to operate the tractor decedent was operating at the time of his death. (*Id.* at p. 1238.) This effort to recast the dairy's possible vicarious liability as a "theory of *direct* liability" was rejected; *Camargo* ruled the liability of the hirer of an independent contractor was necessarily vicarious and derivative rather than direct, because such liability derives from the act or omissions of the hired contractor who caused the injury by failing to use reasonable care.

(*Id.* at p. 1244.) In addition, the high court pointed out that it is unfair as a matter of policy to subject the hirer of an independent contractor to such "direct" liability for negligent hiring as a result of injuries to its own employees, when the independent contractor itself is immune from suit. Workers' compensation exclusivity principles prevent employees from suing their own employers for failure to provide a safe working environment, and the same rule should apply to the hirers of those independent contractors. (*Id.* at pp. 1244-1245.)

The case is factually inapposite. Here, it is not a contractor's employee who was injured and seeking damage as in *Camargo,* but a third party who was injured by the contractor's employee. Thus, the policy reason underlying the decision—it would be unfair to subject the hirer of an independent contractor to liability for negligent hiring when the independent contractor, because of our workers' compensation system, is immune from suit—is absent.

B. Carcamo's Employment and Driving History is not Inadmissible Character Evidence

Sugar Transport argues that evidence of Carcamo's employment and driving history is character evidence inadmissible under Evidence Code sections 1101, subdivision (a),[5] and 1104.[6] We disagree. Relevant character evidence is admissible in civil cases except where it is offered to prove conduct, or quality of conduct, on a specific occasion. (*Carr v. Pacific Tel. Co.* (1972) 26 Cal.App.3d 537, 544.)

"Evidence that is relevant and admissible for one purpose may be admitted for such purpose even though it is inadmissible for another purpose." (*People v. Eagles* (1982) 133 Cal.App.3d 330, 340.) Although evidence of prior accidents is inadmissible to prove Carcamo was at fault in the present accident (Evid. Code, § 1101, subd. (a)), it is

---

[5] Evidence Code section 1101, subdivision (a), states: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

[6] Evidence Code section 1104 states: "Except as provided in Sections 1102 and 1103, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion."

admissible where it tends to show motive, knowledge, identity, intent, opportunity, preparation, plan, or absence of mistake or accident. (Evid. Code, § 1101, subd. (b);[7] *People v. Brogna* (1988) 202 Cal.App.3d 700, 706.)

An employer's duty of care in hiring is breached "when the employer knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons in *light of the particular work to be performed.*" (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1214.) Where, as here, knowledge of a fact has important bearing upon the issues, evidence is admissible which relates to the question of the existence or nonexistence of such knowledge. (*Larson v. Solbakken* (1963) 221 Cal.App.2d 410, 418.) In this case, the evidence was not offered to show Carcamo's propensity to be involved in accidents, but to show that Sugar Transport had knowledge of Carcamo's involvement in prior accidents before he was hired.

Such evidence, of course, remains subject to exclusion under section 352. (*People v. Brogna, supra,* 202 Cal.App.3d at p. 706.) "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, evidence of Carcamo's prior employment and driving history had substantial probative value in determining whether Sugar Transport was negligent in

---

[7] Evidence Code section 1101, subdivision (b) states in part: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ."

hiring or retaining Carcamo as a driver. Indeed, such evidence is likely the only way this could be shown. (*Lehmuth v. Long Beach Unified School Dist.* (1960) 53 Cal.2d 544, 554.) The record demonstrates that at a lengthy Evidence Code section 402 hearing, the trial court carefully balanced the probative value of the evidence against the potential for prejudice resulting from its improper use by the jury. The evidence was introduced not for the purpose of showing Carcamo's negligence but rather for the purpose of showing Sugar Transport's disregard of Carcamo's checkered past when it hired him and the unreasonable danger to which others were exposed by his driving.

"'When evidence is admissible for a limited purpose . . . a party who could be adversely affected if the evidence is not so restricted is entitled to have the trial judge restrict the evidence to the limited purpose . . . and instruct the jury accordingly.'" (*People v. Eagles, supra,* 133 Cal.App.3d at p. 340.) Here, the trial court gave the standard limiting instruction that evidence of Carcamo's prior employment and driving history could be used only for the purpose of finding negligent hiring and retention. The jury was instructed both during trial, when the evidence was introduced, and again during jury instructions, as follows: "During the trial, I explained to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I described and not for any other purpose. . . . [¶] You may not consider whether Jose Carcamo had any prior accidents to determine negligence relating to this accident. Any evidence of specific acts or incidents of accidents is irrelevant to the question of whether Jose Carcamo was negligent on the day of this accident."

We must presume that the jury followed these admonitions and limited its consideration of the evidence as instructed. (*People v. Brogna, supra,* 202 Cal.App.3d at p. 710.) If Sugar Transport thought the limiting instruction was inadequate in informing the jury not to consider evidence of Carcamo's prior accidents as propensity evidence, it was its responsibility to request additional clarifying language. (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1192.)

It is evident that the trial court was properly concerned with the ramifications flowing from the admission of this evidence and exercised care in its admission. It did so with a full recognition that plaintiff was proving Sugar Transport's independent and direct negligence - its own responsibility for Diaz's injuries. In California, negligent hiring and retention are theories of direct liability, independent of vicarious liability. Therefore, the court did not err in admitting evidence and instructing the jury regarding those issues.[8]

Pursuant to Civil Code section 1431.1, the jury was required to apportion fault amongst the defendants to insure that each bore its share of responsibility for noneconomic damages ". . . in proportion to their degree of fault." (*Id.* at subd. (c).) Plaintiff relied on distinct theories of independent tort liability to implicate defendants. One of the theories was negligent hiring and retention, a theory of fault which plaintiff claimed imposed greater responsibility on Sugar Transport than would be attributed to it for simply being Carcamo's employer. Absent proof of negligent hiring and retention, the required apportionment of fault would have been impossible. But such proof raised the likelihood of prejudicing the jury. The trial judge sought to resolve this tension in his detailed examination of the evidence and his admonitions and instructions to the jury. Unlike *Armenta*, while Sugar Transport's concession of liability for Carcamo's driving established the fact of its liability, it did not establish the degree of its liability for noneconomic damages. There was no error.

The Jury Was Properly Instructed on Willful Suppression of Evidence

Sugar Transport asserts the trial court erred in denying its motion to exclude evidence of the disappearance of the tachograph chart. Evidence Code section 413 states: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure

---

[8] Because we resolve the issue on the merits, we need not address the procedural arguments made by the parties.

to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

On this issue, the court gave the standard instruction on willful suppression of evidence, as follows: "You may consider the abilities of each party to provide evidence. If a party provided weaker evidence when it could have presented stronger evidence, you may distrust the weaker evidence.

"If you find that defendants willfully suppressed the tachograph chart [for] the subject truck for the day of the subject accident, you may draw an inference that there was something damaging to defendants' case contained on that chart. Such an inference may be regarded by you as reflecting defendants' recognition of the strengths of defendants' case generally and/or the weakness of their own case. The weight to be given such circumstance is a matter for your determination."

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) The substantial evidence test applies to jury instructions, and it is prejudicial error to instruct the jury on willful suppression of evidence in the absence of such evidence. However, a willful suppression of evidence instruction does not require direct evidence of fraud. (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 992, disapproved on another point in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664.)

In *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 835-836, footnote 2, our Supreme Court explained that the rule of section 413 "'. . . is predicated on common sense, and public policy. The purpose of a trial is to arrive at the true facts. A trial is not a game where one counsel safely may sit back and refuse to produce evidence where in the nature of things his client is the only source from which that evidence may be secured. *A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the*

risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse.'"

Sugar Transport's argument that the instruction was not justified because there was no evidence that it knew what the tachograph chart would reveal is unavailing. One of Diaz's experts stated that tachographs have been in use "since the 1930's." Almost 60 years ago, the court described the information charted by a tachograph. "This instrument registered and recorded the speed of that vehicle and shows that it was going about 42 miles an hour just before the accident." (*Fortier Transportation Co. v. Union Packing Co.* (1950) 96 Cal.App.2d 748, 756; see also *Warren v. Pacific Intermountain Exp. Co.* (1960) 183 Cal.App.2d 155, 163 ["Its purpose was to determine the various speeds obtained by the truck at different times and the duration of stopping periods"]; *People v. Williams, supra,* 36 Cal.App.3d 262, 272 ["the tachograph was a device attached to the speedometer cable of the truck which measured on a chart the revolutions of the engine, the vehicle speed, and the distance traveled. These factors were also correlated with time by a clock in the device. Certain motions of the styli also indicated swerving or side motion"].)

"Evidence of the actions and conduct of a party, particularly as to the rate of speed and method of driving an automobile just before a collision occurs, is admissible if not too remote." (*Larson v. Solbakken, supra*, 221 Cal.App.2d at p. 421.) Here, the tachograph evidence would have been relevant to show whether Carcamo sped up to prevent Tagliaferri from passing him. Sugar Transport cross-examined Diaz's experts about weaknesses in his interpretation. In addition, it had the opportunity to present evidence that the tachograph was unintentionally lost rather than intentionally destroyed, and to argue to the jury the weight of the evidence.

Diaz presented sufficient evidence from which the jury could draw an inference that Sugar Transport did not merely lose or misplace the tachograph chart, but destroyed it to prevent the disclosure of damaging information. (Evid. Code, § 413;

Williamson v. Superior Court, supra, 21 Cal.3d at pp. 835-836, fn. 2; *Walsh v. Caidin* (1991) 232 Cal.App.3d 159, 164-165.)

The judgment is affirmed. Respondent shall recover costs on appeal.

CERTIFIED FOR PUBLICATION.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Frederick Bysshe, Judge

Superior Court County of Ventura

Sonnenschein Nath & Rosenthal LLP, Paul E. B. Glad and David R. Simonton for Defendants and Appellants.

Grassini & Wrinkle and Roland Wrinkle for Plaintiff and Respondent.

Appendix B

Order Modifying Opinion and Denying Rehearing

Filed 3/29/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DAWN RENAE DIAZ,

Plaintiff and Respondent,

v.

JOSE CARCAMO et al.,

Defendants and Appellants.

2d Civil No. B211127
(Super. Ct. No. CIV 241085)
(Ventura County)

ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on February 25, 2010, be modified as follows:

On page 1, revise footnote 1 to read as follows: Tagliaferri is not a party to this appeal.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

PROOF OF SERVICE
(CCP §§ 1013a, 2015.5)

STATE OF CALIFORNIA)
) **ss.**
COUNTY OF SAN FRANCISCO)

I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is: **555 California Street, 26th Floor, San Francisco, California 94104-1500.**

On **April 6, 2010**, I served the foregoing **PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

Lawrence P. Grassini, Esq.
Roland Wrinkle, Esq.
GRASSINI & WRINKLE
20750 Ventura Boulevard, Suite 221
Woodland Hills, CA 91364-6235
Counsel for Dawn Diaz, Plaintiff and Respondent

Jay M. Borgeson, Esq.
HENDERSON, THOMAS & BORGESON
201 N. Calle Cesar Chavez, # 105
P.O. Box 4460
Santa Barbara, CA 93140-4460
Counsel for Karen Tagliaferri, Defendant

Kristi Weiler Dean, Esq.
STONE, ROSENBLATT & CHA
21550 Oxnard Street, Suite 200
Woodland Hills, CA 91367
Counsel for Karen Tagliaferri, Defendant

Court of Appeal
Second Appellate District
Division Six
200 East Santa Clara Street
Ventura, CA 93001

Clerk of Court
Ventura County Superior Court
800 South Victoria Avenue
Ventura, CA 93009

[X] **VIA MAIL:** I caused such envelope to be deposited in the mail at San Francisco, California. The envelope was mailed with postage thereon fully prepaid.
As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] **BY UPS EXPRESS:** I placed such envelope for deposit in the UPS Express drop slot for service by UPS. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with UPS on that same day at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if service is more than one day after date of deposit for express service in affidavit.

[X] **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[ ] **FEDERAL** I declare that I am employed within the office of a member of the bar of this Court at whose direction the service was made.

Executed on **April 6, 2010,** at San Francisco, California.

Jeannie Jew