S181627
B211127

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

DAWN DIAZ,

Plaintiff and Respondent,

vs.

JOSE CARCAMO, SUGAR TRANSPORT OF THE NORTHWEST, LLC., and SCAN-VINO, LLC dba CHEROKEE FREIGHT LINES,

Defendants, Appellants, and Petitioners.

AFTER DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX

ANSWER TO PETITION FOR REVIEW

ROLAND WRINKLE — SBN 73237
GRASSINI & WRINKLE

20750 Ventura Boulevard, Suite 221
Woodland Hills, CA 91364-6235
(818) 348-1717
mail@grassiniandwrinkle.com

Attorneys for Plaintiff and Respondent

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Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CALIFORNIA STATUTES AND CODES

SECONDARY SOURCES

ANSWER TO PETITION FOR REVIEW

PREFACE: THE UNSERIOUS MASKED AS THE SERIOUS, BY USE OF OMISSION.

The Petition manages to create an air of seriousness about itself. After all, it is written by serious people; it purports to raise up to the Court an *ostensibly* serious (albeit rather insular) issue. But it does so by ignoring (not ineffectively addressing—by wholly omitting!) the two concerns which dominated and drove the result during trial, post-trial and appeal. As a result:

A. THE ENTIRE SCOPE AND BREADTH OF THIS ANSWER BOILS DOWN TO THESE TWO SEEMINGLY-DISPOSITIVE (AND PETITIONER-IGNORED) POINTS:

1. Petitioner/Defendant Did Not Brief *Armenta/Jeld-Wen* Until The Day Before The Trial Ended.

The legal issue (i.e., *Armenta/Jeld-Wen*[1]) which the Petitioner/Defendant STN touts as so critically important as to be deserving of this Court's precious resources, was *not even raised and briefed by Petitioner below for the first time until after*:

- A full-day hearing on motions in limine;
- An extensive Section 402 hearing on the issue of negligent hiring/retention when plaintiff's expert witnesses were subjected to extensive direct and cross-examination and the admissibility issue (again, sans *Armenta/Jeld-Wen*) was broadly briefed and argued;
- "Mini"-opening statements were given;

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[1] *Armenta v. Churchill* (1954) 42 Cal.2d 448; *Jeld-Wen v. Superior Court* (2005) 131 Cal.App.4th 853.

- Jury selection was completed;
- Opening statements were given;
- The plaintiff put on her entire case[2].
- The defendant was one day from resting its case.

Thus, Petitioner, while puffing up the role this legal issue supposedly played during the trial in order to win review, did not even bother to offer the trial court any brief even mentioning *Jeld-Wen* or *Armenta until the day before all parties rested*, and only did so as an objection, not to evidence, but as "Defendant's Brief Contra Plaintiff's Proposed Jury Instructions On Negligent Hiring" (CT-I, 1-212). It was all an afterthought—an afterthought that has, so far, consumed two years of appellate process.

2. Petitioner Cannot Cite To Any Case (On Any Level) In Which An Employer Has Been Allowed (Illogically) To Exclude All Evidence Of Its Own Direct And Independent Negligence While Actively Pursuing A Prop. 51 Apportionment Of Fault To Reduce Its Own Liability.

- The defendant/employer in *Armenta* did not attempt to do that;
- The defendant/employer in *Jeld-Wen* did not attempt to do that;

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[2]Independently, the defendant failed to make the pretrial stipulation to vicarious liability as required by *Armenta* and *Jeld-Wen* and did not offer such stipulation until *after seven witnesses had been presented.* Thus, the parties answered ready for trial (CT-I, 440, filed motions in limine on negligent hiring (*id.*, 45-50), argued the motions (*id.*, 68, 86), briefed the 402 hearing on negligent hiring (*id.*, 71-87), participated in the 402 hearing on negligent hiring (RT-1, 77 et seq.), filed trial briefs (CT-I, 96-108), picked a jury and gave opening statements (RT-1, 77-163), examined and cross-examined seven witnesses (RT-1, 164–RT-2, 345)—*all without a stipulation from defendant regarding respondeat superior liability!*

- None of Petitioner's three amici in the Court of Appeal attempted to do that.

To allow this one defendant/employer to go back and retry the case and let it get away with reducing its liability through a Prop. 51 defense while excluding all of its own direct negligence from the apportionment it seeks, would be enormously unfair (as every judicial officer who has touched this case recognized).[3]

B. MORE MEAT ON THE BONES.

1. The Phantom "Conflict" Between *Jeld-Wen* And *Diaz:* The *Jeld-Wen* Defendant Never Asserted, And Affirmatively Renounced, Any Prop. 51 Defense While The Defendant Here Successfully (And Profitably) Asserted It.

a. The "Conflict" Myth.

According to the Petition:

> "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* . . . with the opinion.)" (Petition, p. 1.)

A "conflict" can be conjured up only if one does what Petitioner has done here, i.e., pretend really hard that the two factors involved here but *not* involved in *Armenta* or *Jeld-Wen* do not exist: (1) Petitioner's failure to

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[3]By electing to omit from its Petition the two dominant *Armenta/Jeld-Wen*-related issues which were most active and determinative during the trial, post-trial and appeal, petitioner puts Respondent in the unusual position of presenting an Answer which does not so much respond to the points set forth in the Petition as it points out what was (cleverly) not said.

even brief *Armenta/Jeld-Wen* until the day before the case went to the jury; and (2) the fact that Petitioner here, *uniquely*, insisted on asserting (successfully) a Prop. 51 reduction of its liability while attempting to exclude evidence of its own (concededly) direct negligence from the apportionment of the entire "universe of fault" which it asked for. Petitioner petulantly sticks its head in the sand and refuses to address—let alone resolve—either issue, neither of which was involved in either *Armenta* or *Jeld-Wen.*[4]

Indeed, the Petition starts going wrong in its "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[5] 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* [citation] and the Fourth District reaffirmed in *Jeld-Wen* [citation]?" (Petition, p. 1.)

The answer is entirely dependent on two factual issues which Petitioner has steadfastly and truculently ignored—all the way from post-trial motions to this very Petition: (1) Defendant's "admission of respondeat superior liability" came in the middle of the trial (not pretrial as in *Armenta* and *Jeld-Wen*; and briefing came the day before the trial ended); and (2) Only the defendant here (not the employer/defendant in *Armenta* or *Jeld-Wen*)

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[4]Let alone explain why *this* Court should resolve these issues as opposed to the Court of Appeal.

[5]The use of the word "inflammatory" in the formulation of an "Issue Presented" is, of course, intended to be inflammatory.

successfully sought a 45% Prop. 51 reduction in liability while simultaneously attempting to exclude its own direct independent negligence from the required apportionment of the entire "universe" of tortfeasors.

Simply stated, *Armenta* and *Jeld-Wen* are distinguishable because they did not involve a defendant/employer seeking to reduce its percentage of liability by asserting a Prop. 51 defense based on the comparative fault of a second negligent driver—which neither employer in *Armenta* nor *Jeld-Wen* did but which Sugar Transport of the Northwest LLC ("STN" or "Sugar Transport") sought (successfully) to do here. Defendant STN *sought and received a reduction of 45% of its liability* for plaintiff's general damages by successfully arguing the comparative, causative fault of Karen Tagliaferri. However, while reaping the benefits of a Prop. 51 defense based on the comparative fault of another tortfeasor, STN at the same time (and belatedly) attempted to prevent such fault from being compared to its own direct and contributing fault. That would have been patently unfair and contrary to the "total universe-of-fault" approach mandated by the "fair share" theory of Prop. 51 and its construing cases. *That did not happen in either* Armenta *or* Jeld-Wen.

Moreover, the trial court (as recognized by the Court of Appeal [see Opinion, pp. 11-12]) adequately protected STN from undue prejudice through an all-day 402 hearing, repeated jury instructions, admonitions and the

verdict form.

Petitioner argues the Court of Appeal erred in noting that: "More importantly, however, neither case [*Armenta* nor *Jeld-Wen*] purports to deal with allocation of fault required by Proposition 51." (Opinion, pp. 5-6.)

The Court of Appeal was quite correct. The defendant/employer in *Jeld-Wen did not try to have it both ways*. The *Jeld-Wen* employer *did not seek* to reduce its liability by asserting a Prop. 51 defense (as did defendant STN here). The employer in *Jeld-Wen* expressly took the position that Prop. 51 was "inapplicable" (see defendant Jeld-Wen's Reply to Answer to Petition for Writ of Mandate, p. 22, 2005 WL 2901428). Of course, the defendant/ employer in *Armenta* did not seek a Prop. 51 reduction because *Armenta* was a pre-Prop. 51 case. Here, defendant STN (successfully) attempted to assert Prop. 51 to reduce its own liability.

Not faced with the assertion (let alone successful assertion) of such a defense, the *Jeld-Wen* Court did not have to undertake the following analysis, as did the Court of Appeal here:

> "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." (Opinion, p. 12; emphasis added.)

Where in the Petition is there any answer to the Court of Appeal's terse, and empirically irrefutable, observation of the laws of jurisprudential physics [i.e., that "Absent proof of negligent hiring and retention, the required apportionment of fault would have been impossible." (Opinion, p. 12.)]? A universe of fault" which fails to account for all fault is not a "universe" (i.e., "the entire population under study," according to Dictionary.com)—it is something *less* than a "universe." Noneconomic damages (the liability for which a 45% chunk was taken off Sugar Transport's ledger) "must be apportioned among [the] 'universe of tortfeasors' including 'nonjoined defendants' and those who have settled with the plaintiffs." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603. It just would have been a different story if Sugar Transport had not tried to (successfully) take advantage of its Prop. 51 discount—*or even if it had moved to bifurcate the case*.[6] Wholly aside from waiting until the middle or end of the trial to even raise the issue, let alone stipulate to vicarious liability, from day one until today, Sugar Transport maintained and continues to maintain a 45% reduction in noneconomic

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[6]As one of STN's more far-sighted amicus curiae did.

damages based on an apportionment of a universe which is definitionally less than a "universe."

Where in the petition—indeed, where in any of defendant's many and oversized briefs—is there a hint of a suggestion of a whisper of an answer to the Court of Appeal's unassailable acknowledgment of the obvious: "Absent proof of negligent hiring and retention, the required apportionment of fault would have been impossible"—and plaintiff would add: "mathematically impossible." Why did Sugar Transport do what it did? No one knows and it does not matter. They did what they did—and they did what no tortfeasor (in at least a published case) has ever done before (and will, most likely, never do again), i.e., rely on the sound rule of *Armenta* while simultaneously insisting on a Prop. 51 reduction in noneconomic damages. No prior defendant has chosen to do so. Not in *Armenta* (which was pre-Prop. 51), not in *Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396 (where the Prop. 51-asserting defendant did not rely on *Armenta*)—and, yes, not in *Jeld-Wen*! In *Jeld-Wen*, the defendant employer who successfully excluded all negligent entrustment evidence expressly took the position (contrary to Sugar Transport here) that Prop. 51 was "inapplicable." By not asserting Prop. 51 at the summary adjudication stage in *Jeld-Wen*, the employer successfully obtained relief under *Armenta*. The one thing that Sugar Transport has never pointed out to any court is where in *Jeld-Wen* there is any indication that the *Jeld-Wen* employer

insisted on a Prop. 51 reduction. Indeed, the *Jeld-Wen* employer took the opposite position, i.e., that Prop. 51 was "inapplicable." As the Court of Appeal noted, "A case is not authority for an issue not considered."

But Sugar Transport says the Court of Appeal was wrong when the Court observed that *Jeld-Wen* did not "deal with the allocation of fault required by Proposition 51" (Opinion, pp. 5-6; Petition, p. 19). According to Sugar Transport, "This holding [of the Court of Appeal] 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. 8707) but came to a diametrically opposite conclusion: . . . ." (Petition, p. 20.)

How in the world can the holding of the Court of Appeal and that in *Jeld-Wen* be "diametrically opposed" when the employer/defendant in *Jeld-Wen* never sought a Prop. 51 reduction, i.e., the very issue which distinguishes *Jeld-Wen*? That is the difference between *Jeld-Wen* and here. In *Jeld-Wen*, fault *could* be allocated *but was not* because the defendant employer eschewed the potential Prop. 51 reduction (in favor of exclusion of negligent entrustment evidence—probably a pretty smart move). Here, not only "could" fault be allocated but Sugar Transport insisted (and wildly successfully so) on an apportionable reduction in its liability based on such an allocation. The defendant here actually went ahead and did what was merely hypothetical in *Jeld-Wen*. When the Court of Appeal noted that "*Jeld-Wen* did not have to

deal with the allocation of fault required by Proposition 51" (Opinion, pp. 5-6), it was spot on. Where was the "allocation of fault" in *Jeld-Wen*? Here, it was 45%, 35% and 20%. Where was the assertion of the reduction in *Jeld-Wen*? It did not exist—the defendant employer asserted its "inapplicability." Here, Sugar Transport gleefully took $2,250,000 off the judgment. *Jeld-Wen* did not deal with such an allocation. The Court of Appeal was right and Sugar Transport was wrong.

Petitioner believes it profound (or at least meaningful) that it "located no published California decision that has found negligent hiring or retention liability in a context where respondeat superior applies" and "[t]his appears to hold true in other states as well" citing *Cook v. Greyhound Lines, Inc.* (D.Minn. 1994) 847 F.Supp. 725, 733, and *Tindall v. Enderle* (Ind.Ct.App. 1974) 320 N.E.2d 764, 767-768). (Petition, p. 18.)

Of course! Until this case (and its successive wave of defense attorneys) came along, there has not been (and, most likely never will be) an employer/defendant who has: (1) so thoroughly waived the issue; and (2) insists on reducing its liability by apportioning a universe of fault that inexplicably excludes any consideration of its own fault. The defendant/employer in *Cook* did not do so. The defendant/employer in *Tindall* did not do so. None of Petitioner's amici who (improperly) filed amicus curiae letters before the Court of Appeal urging a rehearing attempted to do so. Only the Petitioner

tried to have its cake and eat it too. That is why it stands alone.[7]

It is sheer sophistry for Petitioner to assert, "In effect, the court [of appeal here] held that the *Armenta* rule no longer has any application after the enactment of Proposition 51." (Petition, p. 20.) It is not the "enactment of Proposition 51" which affected the application of *Armenta* here. It was defendant's decision to ram home a 45% Prop. 51 reduction while illogically and unfairly claiming protection under *Armenta*. *Armenta* and *Jeld-Wen* are alive and well. But eating cake in addition to having it is not?[8]

b. The "Coextensive" Myth.

The *Jeld-Wen* court could not have been more clear: "The damages attributable to both employer and employee *will be co-extensive*." (*Id.* at p. 871; emphasis added.) Not here. There is a second, assertedly negligent driver here. The fault attributable to Carcamo was 20%, the fault attributable to STN was 35%, and the fault attributable to Tagliaferri was

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[7]Moreover, the predictive federal decision in *Cook* was rejected by the Minnesota Court of Appeal in *M.L. v. Magnuson* (1995) 531 N.W.2d 849, 862, fn. 4 ["[W]e find [no] requir[ement] that conduct occur outside the scope of employment if the claimant is to succeed on either of these two claims [of negligent hiring or retention]. Nor can we discern any reason for imposing such a requirement."

[8]The fact that "in fiscal year 2007-2008 alone, 28, 414 lawsuits were filed in California . . . resulting from motor vehicle accidents" (Petition, p. 22) is irrelevant. There has only been one such lawsuit in which a defendant/employer, after waiting until the end of the trial to raise the issue, then insists on the protection of *Armenta* while pocketing a rather sizeable Prop. 51 reduction.

45%—all unleashed by the Pandora's box that is Prop. 51, all within the fact-finding discretion of the jury and all triggered by *defendant STN's decision to plead, defend and try this case based on a Prop. 51 defense asserting the negligence of Karen Tagliaferri.*

According to the Petition:

> "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." (Petition, p. 19.)

Common sense, the trial court, the Court of Appeal and(?) remedial math all concur: Petitioner's fundamental premise is pure bollix *whenever a defendant actively (not theoretically—and especially when successfully [here a 45% reduction]) asserts a Prop. 51 discount in its liability.*

WHERE IS DEFENDANT'S ANSWER TO THIS?

Where did the Court of Appeal go wrong in stating the obvious arithmetical fact that, "Absent proof of negligent hiring and retention, the required apportionment of fault would have been impossible"? (Opinion, p. 12.) Defendant just cannot keep ignoring this elephant while insisting on further and further appellate review.

Once defendant actively pursues a Prop. 51 reduction, the

employee's and employer's negligence is no longer "co-existent" and there is no longer the "same award of damages." The whole point of Prop. 51 is *not to have* "co-extensive" fault or "the same amount of damages. The fundamental premise of this petition is simply inaccurate. Petitioner (legally and mathematically) is flat-out wrong. By continuing (to this very day) to insist on asserting and maintaining its Prop. 51 defense, STN received a Prop. 51 reduction in the amount of Tagliaferri's 45% of the general damages (i.e., $2,250,000) and by including negligent retention, plaintiff received $423,500 more in general damages (assuming the jury, without STN as a part of the apportionment, would have allocated STN's 35% between Carcamo and Tagliaferri in the same ratio of 20% to Carcamo and 45% to Tagliaferri). "These claims added nothing" in *Armenta* and *Jeld-Wen* because neither employer in *Armenta* or *Jeld-Wen* sought to take advantage of a Prop. 51 reduction as did STN here. In *Armenta* and *Jeld-Wen*, "the damages attributable to both employer and employee [were] co-extensive" (and, therefore, a negligent hiring/retention entrustment claim added nothing). But that is not how defendant STN chose to defend the case here. Because of STN's decision, it made a big difference to both STN (a $2,250,000 reduction) and to plaintiff (a $423,500 increase). If defendant STN were jointly and severally liable for all damages, then STN would be correct in saying, "These claims added nothing." But the electorate's decision in 1986 to pass Prop. 51,

and STN's decision to assert it here to its considerable advantage, changed all that.

There is a dispositive difference between a trial involving one negligent driver and a trial involving two negligent drivers with one of them asserting a Prop. 51 defense against the plaintiff by alleging the comparative fault of the other driver.[9] Defendant STN wants to have its cake and eat it too. But it cannot. It cannot assert a Prop. 51 defense based on Tagliaferri's comparative fault and argue that its own vicarious and direct liability is coextensive—because it is not. Defendant STN had the right and opportunity to waive or withdraw its Prop. 51 defense and thereby trigger an argument based on the logic, holding and facts of *Jeld-Wen*. But defendant STN refused to do so. It cannot now have it both ways. It cannot assert a 45% reduction in the general damages based on co-defendant Tagliaferri's comparative fault and, at the same time, rely on *Jeld-Wen*. It made a choice—a choice it must now live with.

Armenta, having been decided in 1954 and 32 years before the passage of Prop. 51, did not involve a defendant seeking to reduce its liability by asserting a Prop. 51 defense based on the apportionable, comparative fault

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[9]Defendant STN has heretofore been wont to talk about how it makes no difference how many defendants or tortfeasors are involved. Strictly speaking, that is true. What makes the difference (and all the difference in the world) is when an employer/defendant actively pursues a Prop. 51 reduction based on the fault of another defendant or non-defendant tortfeasor.

of another tortfeasor. The damages in *Armenta*, as in *Jeld-Wen*, *were* co-extensive—but not here.

Defendant STN cannot both invoke Prop. 51 as a partial defense and yet exclude itself from the apportionable "universe of tortfeasors."[10] That is not how Prop. 51 and California's system of comparative fault works. It is simply impossible to determine the 100% of the causative fault for this accident (i.e., the process triggered by STN's assertion of a Prop. 51 defense) without including the fault based on its own direct negligence.

As this Court made clear, in *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603:

> "[A] 'defendant['s]' liability for noneconomic damages cannot exceed his or her proportionate share of fault as *compared with all fault responsible for the plaintiff's injuries*, ..." (Emphasis is the Court's.)

As the Court of Appeal observed in *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1399:

> "Those [noneconomic] damages 'must be apportioned among [the] "'universe' of tortfeasors" including "nonjoined defendants"' and those who have settled with the plaintiffs."

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[10]The defendant employer in *Jeld-Wen* did not try to have it both ways. The *Jeld-Wen* employer did not seek to reduce its liability by asserting a Prop. 51 defense (as did defendant STN here). The employer in *Jeld-Wen* expressly took the position that Prop. 51 was "inapplicable" (see defendant *Jeld-Wen*'s Reply to Answer to Petition for Writ of Mandate, p. 22, 2005 WL 2901428). Of course, the defendant employer in *Armenta* did not seek a Prop. 51 reduction because *Armenta* was a pre-Prop. 51 case. Here, defendant STN (successfully) attempted to assert Prop. 51 to reduce its own liability.

How can defendant STN's "proportionate share of fault, as compared with *all fault* responsible for the plaintiff's injuries," be determined if we exclude from "all fault" that 35% share of fault attributable to defendant STN? STN seeks a "universe of tortfeasors"—but excluding STN. That is an unfair reading of the "Fair Responsibility Act," and is directly contrary to the terms of the statute (Civ. Code § 1431.2) and Supreme Court law.[11]

Indeed, when the Court of Appeal pointed out that a recent decision clearly concluded that negligently entrusting a car to an unlicensed driver (i.e., one of the "alternative theories" identified in *Armenta* and *Jeld-Wen*) was "independent" liability (i.e., independent of vicarious liability under the owners' liability statute), that same case also held that one of the defendants should have been able to pursue her Prop. 51 defense and have *all fault* determined and allocated.

In *Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396 (cited at page 5 of the Opinion):

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[11]See Haning, Flahavan et al., Cal. Prac. Guide: Personal Injury (The Rutter Group 2009) ¶ 2:261, p. 2-69 ["There may be cases where the employer can be sued on *other* theories as well—e.g., negligent entrustment, negligent supervision or perhaps negligent hiring. If there is an *independent basis* for holding the employer liable, it will usually be to plaintiff's advantage to plead *both* the respondeat superior *and* independent liability theories. Reason: In multi-defendant cases, the trier of fact will have to make a separate determination of what percentage of fault is attributable to the employer under the *independent* theory; the employer, in turn, will be liable for that portion of noneconomic damages resulting from *both* the fault allocated to the employee *and* the fault allocated to the employer on the independent theory!" (Original Italics.)].

"This is a tort action in which three defendants caused an automobile accident, one by negligently driving the car, the other two by negligently entrusting the car to the unlicensed driver. A jury found all three liable to the plaintiff and allocated fault among the three defendants, and the trial court, in entering judgment on the verdict, made the driver jointly and severally liable for the entire judgment (noneconomic as well as economic damages), finding that Proposition 51 did not apply. The driver appeals, contending her liability for the plaintiff's noneconomic damages should be several and limited to the amount of fault allocated to her by the jury. We agree." (*Id.* at p. 397.)

Here is why Division One of the Second District agreed:

"In our case, at least two of the independently acting defendants' liability is primary—Litovsky because she was negligently driving the car at the time of the crash, and Green because he negligently entrusted the car to the unlicensed Litovsky. (*Blake v. Moore* (1984) 162 Cal.App.3d 700, 707, 208 Cal.Rptr. 703 [negligent entrustment is an independent tort].) It follows that Litovsky's liability for Bayer-Bel's noneconomic damages is several, not joint, and that *she is liable only for the amount of noneconomic damages allocated to her by the jury*. [Citation.]" (*Id.* at p. 400; emphasis added.)

Accordingly, the *Bayer-Bel* Court's "Disposition" was that the negligent driver [the analog here being Sugar Transport/Carcamo] is "only severally liable for 40 percent of the 40 percent of [plaintiff's] noneconomic damages." (*Id.* at p. 400.) Here, Sugar Transport took this rule of law (i.e., allowing tortfeasors to assert Prop. 51 in negligent entrustment cases as recognized in *Bayer-Bel*) to obtain a 45% reduction of its liability for noneconomic damages—one which it is not offering to give back. To boot, Sugar Transport is asking to keep the 45% reduction due to Tagliaferri's proportionate share within the universe of fault and tortfeasors while opting

itself (and its relative, apportioned, causative culpability) out of that very same zero-sum universe. While plaintiff has repeatedly referred to this unique advocacy position aphoristically as "trying to have your cake and eat it too," perhaps it is more akin to a student who is asked to take attendance but fails to count herself.

2. *Armenta* And *Jeld-Wen* Were Explicitly And Repeatedly Based On The Defendant Employer's "Admi[ssion] *Before Trial* To Vicarious Liability" Which Defendant STN Did Not Do Here.

a. The Binding Pretrial Stipulation Requirement.[12]

The *Jeld-Wen* court (again, in the distinguishable "one negligent driver" context) based its ruling on the following:

> "*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." (*Jeld-Wen* at 131 Cal.App.4th 870; emphasis added.)

Also see *Jeld-Wen* at 858 [". . . where, as here, there is a binding *pretrial* admission. . . ." (emphasis added)]; *Jeld-Wen* at 870 [". . . *based on the employer's pretrial admission* of liability for any alleged negligence of the employee, which is binding on the employer" (emphasis added).]; and *Jeld-Wen* at 871 ["As applied here, *the employer is admitting on a pretrial basis* to vicarious liability for the employee's negligence" (emphasis added).]. The

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[12]This not a mere "procedural nicety." It is a substantive requirement for the threshold application of *Armenta/Jeld-Wen*.

defendant employer in *Jeld-Wen* admitted course and scope during discovery and in a declaration and then moved for summary adjudication. *Jeld-Wen* was a pretrial writ proceeding. In *Armenta*, the "defendants admitted in their answer the agency and scope of employment of Dale Churchill." (*Armenta* at 42 Cal.2d 456.)

Here, Petitioner STN did neither.

Here, the requisite stipulation came in the middle of the trial. The parties answered ready for trial (CT-I, 44), filed motions in limine on negligent hiring (*id.*, 45-50), argued the motions (*id.*, 68, 86), briefed the 402 hearing on negligent hiring (*id.*, 71-87), participated in the 402 hearing on negligent hiring (RT-1, 77 et seq.), filed trial briefs (CT-I, 96-108), picked a jury and gave opening statements (RT-1, 77-163), examined and cross-examined seven witnesses (RT-1, 164–RT-2, 345)—*all without a stipulation from defendant regarding respondeat superior liability.*

If the issues which defendant STN seeks to generate review were ever in any need of Supreme Court resolution, this case, where the issue was not preserved and presented below, would seem to be a singularly inappropriate and ill-suited vehicle.

b. The Record Reflects The Requisite Stipulation Coming In The Middle Of The Trial.

Here, in her complaint, plaintiff alleged respondeat superior

liability (CT-I, 2, ¶6). Defendant STN (through a permissible general denial) denied plaintiff's respondeat superior allegations (CT-I, 11, ¶1). On August 14, 2006, defendant STN responded to form interrogatories and in particular No. 15, asking for all bases of each denial it made in its answer, and it responded: "Our denials are based upon the fact that Mr. Carcamo operated his truck in a safe manner and was within his lane of travel when Ms. Tagliaferro/Rote pulled into his truck." (CT-IV, ¶878.) In answering 20.2, as to the identity of the truck driver, occupants, owner and whether the driver had permission (CT-IV, 868-869), defendant STN answered: "This information is equally available to plaintiff through the traffic collision report. Mr. 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." (CT-IV, 878.)[13] Prior to trial, defendant STN did not admit respondeat

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[13]Thus, defendant STN answered the form interrogatories regarding permissive use that the driver was a permissive user and that the driver's job was to drive the truck. This is a far (or at least somewhat distant) cry from a binding, irrevocable formal stipulation, "admit[ting] in their answer to agency and course and scope of [the driver]" (*Armenta* at 42 Cal.2d 456) or "before trial . . . admit[ting] vicarious liability for the acts of its employee" (*Jeld-Wen* at 131 Cal.App.4th 857). The issue of respondeat superior liability is not removed from the case by an answer to interrogatory saying the driver permissibly drove the vehicle and that it was his job to do so. Moreover, and more critically, *answers to interrogatories are not binding admissions or stipulations. That is why* Armenta *and* Jeld-Wen *are based on binding pretrial admissions.*

The Court in *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 672, emphasized the *nonbinding* nature of interrogatory answers:

"While a party may be precluded from introducing evidence based on

(continued...)

superior liability in its answer (as in *Armenta*) and did not stipulate to it by declaration (as in *Jeld-Wen*). The parties answered ready for trial (CT-I, 44), filed motions in limine on negligent hiring (*id.*, 45-50), argued the motions (*id.*, 68, 86), briefed the 402 hearing on negligent hiring (*id.*, 71-87), participated in the 402 hearing on negligent hiring (RT-1, 77 et seq.), filed trial briefs (CT-I, 96-108), picked a jury and gave opening statements (RT-1, 77-163), examined and cross-examined seven witnesses (RT-1, 164–RT-2, 345)—*all without a stipulation from defendant regarding respondeat superior liability.*

Plaintiff then presented and examined, as the eighth trial witness, a trucking practices expert on the issue of negligent hiring and discussed with

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[13](...continued)
a response to a request for admission (Code Civ. Proc. § 2033, subd. (n)), depositions and interrogatories do not perform the same function as request for admissions, issue preclusion: 'As Professor Hogan points out, "[t]he request for admission differs fundamentally from the other five discovery tools (depositions, interrogatories, inspection demands, medical examinations, and expert witness exchanges). These other devices have as their main thrust the uncovering of factual data that may be used in proving things at trial. The request for admission looks in the opposite direction. It is a device that seeks to eliminate the need for proof in certain areas of the case." [Citation] The Supreme Court put it in similar terms, "[m]ost of the other discovery procedures are aimed primarily at assisting counsel to prepare for trial. Requests for admission, on the other hand, are primarily aimed at setting at rest a triable issue so that it will not have to be tried. Thus, such requests, in a most definite manner, are aimed at expediting the trial." [Citation.]' (*Brigante v. Juang* (1993) 20 Cal.App.4th 1569, 1577, 1578, 25 Cal.Rptr.2d 354.)"
It is the *binding* nature of the pretrial admissions in both *Armenta* and *Jeld-Wen* that allowed the argument to be made.

the jury documentary evidence of negligent hiring—but all without a stipulation from defendant STN (RT-2, 346-432). A significant amount of water had flowed irretrievably under the bridge. Then, late in the afternoon of February 20, two months after filing its motion in limine on negligent entrustment and two weeks after the start of trial, defendant STN finally offered to stipulate to vicarious liability—not on its own initiative but only in response to a question from the Court ["THE COURT: Mr. Rennie, is your client, the trucking company, willing to admit that if Mr. Carcamo is found negligent in the driving of his vehicle on February 20, 2006, that Mr. Carcamo's employer, the trucking company, is liable? MR. RENNIE: Yes. He's in the course and scope of his employment, and the employer, Sugar Transport, is liable for those actions that occurred in the course and scope of his employment." (RT-2, 432:8-21).] In no way, shape or form can this be construed as a "*pretrial admission*" as required by *Armenta* or *Jeld-Wen.* Defendant STN simply waited nearly three months (and only then when prompted by the Court) and until the jury had heard extensive voir dire, opening statements, eight witnesses and testimony and had seen documents regarding negligent entrustment until it finally agreed to the stipulation. As counsel for codefendant Tagliaferri observed at the time (and eight days before STN ever mentioned *Jeld-Wen*), "*at this point in time, we are so far down the road, there's no turning back.*" (RT-2, 435:20-24; emphasis added.)

Critical to the application of *Jeld-Wen* here, the *Jeld-Wen* Court *refused to order summary adjudication for the codefendant truck owner (who did not make the same admission)*:

> "[I]n the separate statement prepared by all defendants to support their joint motion for summary adjudication, the only admission of liability under respondeat superior is made by the employer Jeld-Wen/ Summit (not the owner/leasing company Penske). There is simply no basis on this record to entitle Penske to the same treatment as the employer in this factual context, for purposes of applying the rules of *Armenta, supra*, 42 Cal.2d 448, 267 P.2d 303, in this writ proceeding." (131 Cal.App.4th at 873.)

Armenta and *Jeld-Wen* are further, and dispositively, distinguishable on this basis as well.

3. Petitioner, By The Hands Of Its Prior Attorneys (Law Firms Nos. 1, 2 and 3), Blatantly And Multiply Waived The Issue For Which Petitioner's Current Attorneys (Law Firm No. 5) Seek High Court Review.

a. Why Waive An Issue So Important As To Warrant Review?

Here are four additional reasons why this case is (dispositively) different (procedurally) from *Armenta* and *Jeld-Wen*:

1. As noted, in both *Armenta* and *Jeld-Wen,* the employer made a formal, *binding* pretrial (not midway-through-trial) admission of vicarious liability;

2. Here, defendants' briefing of *Jeld-Wen* for the first time on the day before trial ended and while the jury was deliberating came too late under *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.

3d 1220;

3. By waiting until the middle of the trial to switch from its "nexus argument" to an *Armenta/Jeld-Wen* argument, reversal is precluded under Evidence Code section 353, which requires a timely objection "so stated as to make clear the specific ground of the objection or motion." "Lack of nexus" (the argument Petitioner advanced for months until the end of the trial) is not a "*Jeld-Wen* admission of vicarious liability"; and

4. Defendant waived any "no negligent hiring/retention" argument it might have had by not asking for bifurcation (a mistake its amicus says it will avoid making).

The Court of Appeal never reached these arguments, noting in Footnote 8 at page 12 of the Opinion: "Because we resolve the issue on the merits, we need not address the procedural arguments made by the parties." Accordingly, if the Court grants review and reverses the Court of Appeal, the case would have to be transferred to that court to resolve all of the waiver issues; See Eisenberg et al., Cal. Prac. Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 13.188, pp. 13-50.1-13-50.2 ["The supreme court can decide fewer than all issues in a case (even if review was not granted on fewer than all issues) and then remand the case to the court of appeal for a decision on the issues left undecided. [CRC 8.528(c); see *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 C4th 368, 389, 97 CR2d 67, 82] [¶] Such a disposition is

likely to occur, e.g., if the appellate court did not reach certain issues because it reversed on an overriding ground that the supreme court determines to have been erroneous. [See *Colmenares v. Braemar Country Club, Inc.* (2003) 29 C4th 1019, 1031, 130 CR2d 662, 670; *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 C4th 1127, 1149-1150, 95 CR2d 701, 716; *DaFonte v. Up-Right, Inc.* (1992) 2 C4th 593, 604-605, 7 CR2d 238, 245]"].

If *Jeld-Wen* stands for what defendant says it stands for, then why did defendant not raise it in its two motions in limine during the motion-in-limine process, during the all-day 402 hearing and during most of the trial? Before and during trial, STN argued that the issue of its negligent hiring/retention should not go to the jury *because there was an insufficient "nexus"* between the negligent hiring and the negligent driving—*not* because an admission of vicarious liability, pursuant to *Armenta* and *Jeld-Wen*, causes negligent hiring to become subsumed into respondeat superior. Why did STN wait until the middle or end of the trial to stipulate to vicarious liability and raise *Jeld-Wen*—as an afterthought?

b. Why Five Law Firms In Succession For The Defendant? Because The First Three Missed The Issue For Which The Fifth Seeks Review.

(1) A California lawyer from Orange County handled the case from answer to motions in limine (none of which mentioned *Armenta/Jeld-Wen*) and to the start of trial. He made his last appearance when all parties

answered ready for trial (CT-I, 1-44 and 1-68).

(2) The defendant then brought in a (highly skilled) trial lawyer from Ohio to try the case (CT-I, 1-34).

(3) The Ohio lawyer then associated in local counsel on February 6, 2008 (denominated by the clerk as "Day-Fifth"), the same day the new local counsel filed "Defendants' Trial Brief" (not mentioning *Armenta* or *Jeld-Wen*).

(4) Post-trial, defendant then brought in nationally recognized appellate counsel (Paul E.B. Glad of Sonnenschein Nath & Rosenthal from San Francisco) to come down and handle the post-trial motions and the appeal.

(5) Now, former Justice Elwood Lui is brought in to attempt to garner Supreme Court review.

The point is that these post-trial appellate lawyers are (at least, now) well-versed in all things *Armenta* and *Jeld-Wen*. The first three law firms, who handled the case from inception through trial, simply missed it. All the grandeur and eloquence produced by law firms Nos. 4 and 5 after the trial cannot change that.

C. THE "PERVERSE INCENTIVE" CANARD.

The Petitioner, for the first time in this long and winding auto accident case, sounds the alarm of a purported "traffic safety" issue, i.e., that, absent high court intervention, employers will "replace experienced commercial drivers with untested ones . . . ." (Petition, p. 3; also see pp. 25-26.) To

borrow from Justice Capaccioli, "This is an argument only a lawyer could love . . . ." *Gallo v. Superior Court* (1988) 200 Cal.App.3d 1375, 1380. Here, Petitioner hired and retained the subject driver knowing (from prior employers and their own experience) that his quality of work was poor; his safety habits were poor; he was involved in multiple accidents; he was fired by a previous employer during a probationary period and the employer would not hire him back; and he had a problem with authority (RT-2, 467:26-468:13; 468:16-17; CT-V, 1166; RT-6, 1027:8-10), yet hired and retained him because "*we needed to have bodies to work*" (RT-6, 1010:6-12; emphasis added). "Public safety" (Petition, p. 25) will not be aided by immunizing employers who "need to have bodies" to work[14] *and* who also seek Prop. 51 liability reductions.

D. THE "*SYAH*-CALLED-*ARMENTA*-DICTUM" CANARD.

At pages 12-13 of the Petition, the defendant brings *Syah v. Johnson* (1966) 247 Cal.App.2d 534, into the category of "conflicting" decisions, thereby enticing review. *Syah* has nothing whatsoever to do with this case. In *Syah*, the employee/driver was found not negligent (because he blacked out while driving) and the employer was found negligent for failing to follow up on medical exams for the employee. Under the unusual facts of *Syah*, the

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[14]And then, when the predictable accident happens, they destroy the truck's tachograph which would have shown the "accident circumstances" and is referred to as the "silent witness." (RT-5, 799:25-800:7; 801:22-24; RT-6, 1029:6-8; 1051:12-16; 1052:10-15; RT-7, 1053:27-1054:12; 1091:27-1092:7; 1092:13; and 1093:27-1094:11.)

employer's negligence was not dependent on any negligence of the employee. *Syah did not involve respondeat superior liability, i.e., the predicate for an* Armenta/Jeld-Wen *issue.* So what is *Syah* doing in the Petition in this case?

> "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." (Petition, p. 13.)

Whether the subject observation was dictum or not, it does not even remotely implicate any issue presented or decided here. Here, the employee *was* negligent. The fact that a 44-year-old appellate decision characterized as dictum an observation on an issue not involved here, is no basis for granting review based on a "conflict" grounds. *Syah* doesn't have a dog in this fight.

E. THE "PLEADING-EQUALS-ADMISSIBILITY-OF-EVIDENCE" CANARD.

Next comes: "If plaintiffs can plead around the [*Armenta*] rule simply by alleging negligent hiring rather than negligent entrustment, *Armenta* will be a dead letter." (Petition, p. 2.)

When did mere pleading result in the introduction of any evidence or a judgment by the sheer force of pleading? Courts knock out what does not belong in a case or trial. Pleadings define and circumscribe a case—they do not dictate a judgment absent evidence, persuasion and a verdict.

When will the horribles stop parading? When petitions for review stop being filed.

CONCLUSION

The need for review asserted by Petitioner is alchemized out of an unalloyed base metal with no admixture of waiver and a 45% Prop. 51 reduction in liability. Any "conflict is" flickering and feigned:

> "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, ..." (Petition, p. 20.)

Balderdash. It raises none of them:

(1) The Court of Appeal never called *Armenta* dicta. (A 44-year-old case did—and on a different issue.)

(2) *Armenta* is left undisturbed by the Court of Appeal's Opinion as to any "alternate theory of liability"—as long as the defendant does not simultaneously insist on slashing its liability by pursuing a Prop. 51 reduction.

(3) That issue was fully and finally resolved in previous cases and is not presented here.

(4) Of course *Armenta* was not statutorily abrogated by the passage of Prop. 51. But a directly and independently negligent employer/defendant cannot have its cake and eat it as well.

To date, Defendant/Petitioner/STN has never even attempted to address the issue—an issue which animated the careful and deliberate trial judge and

the three justices of the Court of Appeal[15]—that it would be fundamentally and inexplicably unfair to allow an employer/defendant to wait until the middle of trial to judicially admit respondeat superior liability and until the end of the trial to raise *Armenta/Jeld-Wen and* then be able to win a 45% reduction in liability under Prop. 51 while excluding its own direct and independent fault from the apportionment it seeks.

Respectfully, the Petition should be denied.

Respectfully submitted,

ROLAND WRINKLE
GRASSINI & WRINKLE

Attorneys for Plaintiff/Respondent

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[15]"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. . . . [¶] 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, ... [¶] 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. . . . [¶] Absent proof of negligent hiring and retention, the required apportionment of fault [defendant requested] 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.*" (Opinion, pp. 11-12; emphasis added.)

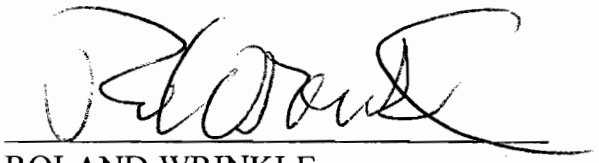
CERTIFICATE OF WORD COUNT

I, ROLAND WRINKLE, declare:

According to the word count of the computer program used to prepare the foregoing brief, the number of words in the brief is 7,734.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 15th day of April, 2010, at Woodland Hills, California.



ROLAND WRINKLE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES } ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 20750 Ventura Boulevard, #221, Woodland Hills, CA 91364-6235.

On April 16, 2010, I served the foregoing document described as ANSWER TO PETITION FOR REVIEW on the interested party or parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Paul E.B. Glad
David R. Simonton
Sonnenschein Nath & Rosenthal
525 Market Street, 26th floor
San Francisco, CA 94105
and
Elwood Lui
Peter E. Davids
Jones Day
555 South Flower Street, #5000
Los Angeles, CA 90071-2300

Co-counsel for Defendants, Appellants and Petitioners Jose Carcamo and Sugar Transport of the Northwest, LLP

Jay M. Borgeson
Henderson, Thomas & Borgeson
201 N. Calle Cesar Chavez, #105
Santa Barbara, CA 93140-4460
and
Kristi Weiler Dean
Stone, Rosenblatt & Cha
21550 Oxnard Street, #200
Woodland Hills, CA 91367

Co-counsel for defendant Karen Tagliaferri

Michael D. Planet, Executive Officer
For the Hon. Frederick Bysshe
Ventura Superior Court
800 South Victoria Avenue
Ventura, CA 93009-0001

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

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

J. SMITHHART