No. S181627

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DAWN RENAE DIAZ,

Plaintiff and Respondent,

v.

JOSE CARCAMO and
SUGAR TRANSPORT OF THE NORTHWEST, LLC,

Defendants and Appellants.

After a Decision by the 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

OPENING BRIEF ON THE MERITS

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 Appellants
JOSE CARCAMO and
SUGAR TRANSPORT OF THE NORTHWEST, LLC

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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*), review den. Oct. 19, 2005? 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?

INTRODUCTION

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, and 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. If the employee drove appropriately on the occasion at issue, any unreasonableness in hiring the employee or in entrusting him or her with a vehicle was not a proximate

cause of the accident. Alternatively, if the employee drove negligently, the employer is strictly liable under the doctrine of respondeat superior for any and all harm caused by its employee, regardless of the reasonableness of the hiring or entrustment. Either way, once respondeat superior is admitted, alternative direct theories of liability (such as negligent hiring, retention, or entrustment) serve no purpose other than as a means to inject prejudicial character evidence into the proceeding. The *Armenta* 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 preserving the plaintiff's right to be made whole through respondeat superior liability.

The *Armenta* rule applies in this case, which concerns a highway accident in which plaintiff and respondent Dawn Renae Diaz was injured. She sued the other drivers involved in the accident, including appellant Jose Carcamo, for negligent driving. Plaintiff maintained that Carcamo's employer, appellant Sugar Transport of the Northwest, LLC, was liable in respondeat superior. She also maintained that Sugar Transport was negligent in hiring and retaining Carcamo. Although Sugar Transport admitted respondeat superior liability, the trial court declined to apply the *Armenta* rule. As a result, Plaintiff introduced extensive evidence of Carcamo's driving history and character at trial, and the jury found that Carcamo and Sugar Transport had been negligent. The Court of Appeal affirmed the judgment.

The Court of Appeal gave two reasons for declining to follow *Armenta*, neither of which is valid. First, the court distinguished *Armenta* and *Jeld-Wen* on the ground that they involved negligent entrustment claims, whereas the plaintiff here framed her claims as negligent hiring and

negligent retention. (Opn. at pp. 5-8.)[1] This is a distinction without a difference because these theories are indistinguishable in the context of vehicular accident lawsuits against employees and their employers. Both theories require proof of the same allegedly negligent conduct on the part of the employer: allowing the employee to operate the motor vehicle. Without the subsequent entrustment of the vehicle, the employer's alleged negligence in hiring and retaining the employee would be nonactionable. The common purpose of all these theories, moreover, is to make the employer liable for any harm caused by its employee's driving in cases where the respondeat superior doctrine does not apply. Hence, once the employer admits respondeat superior liability, the direct liability claims become superfluous, merge with the respondeat superior claim, and cannot be pursued.

The second reason the Court of Appeal gave for distinguishing *Armenta* and *Jeld-Wen* is "neither case purports to deal with the allocation of fault required by Proposition 51." (Opn. at pp. 5-6.) Without evidence of negligent hiring and retention, the court concluded, the jury could not have apportioned noneconomic damages as required by Civil Code section 1431.2. (Opn. at p. 12.) Yet, the *Jeld-Wen* decision *does* specifically address Proposition 51 and properly holds that it has no effect on the *Armenta* rule: "There is nothing in *Armenta* that is adversely affected by the development of . . . 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." (*Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 871.)

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[1] The Court of Appeal's opinion ("Opn.") is attached at the appendix to this brief along with the order denying rehearing, which made a minor, nonsubstantive modification to the opinion.

As *Jeld-Wen* recognized, Proposition 51 simply requires that noneconomic damages be allocated by fault. It does not increase the pool of legally recognized fault, allow plaintiffs to pursue duplicative causes of action, or suggest that the rationale underlying the *Armenta* rule is no longer valid. Moreover, an employer's fault in failing to prevent an employee's negligent driving cannot exceed the fault of the employee in causing the accident at issue. Once an employer has conceded respondeat superior liability for its driver, the liability of the employer and employee is identical and coextensive, and no basis exists to apportion liability among them. The proportional fault of the drivers involved in an accident does not change based on whether one of them is employed.

Even if evidence of negligent hiring, retention, or entrustment had some relevance to the apportionment of noneconomic damages, this would not override the strong public policies underlying the *Armenta* rule and Evidence Code section 1104. Holding that Proposition 51 has superseded *Armenta* would open the door to the discovery and admission of otherwise inadmissible character evidence in thousands of actions filed each year in California alleging the negligence of employees in operating motor vehicles. Such evidence will rarely if ever be excluded under Evidence Code section 352 or 1104, because it will always be the most probative evidence of negligent hiring or entrustment. The result will be longer, less focused trials with less reliable verdicts. Also, employers will have far less incentive to admit respondeat superior liability, especially in cases where it may be debatable.

This case is a prime example of what can happen when the *Armenta* rule is not applied. Plaintiff's counsel used the barest allegations of

negligence by Carcamo[2] to introduce extensive evidence of his previous accidents, immigration status, employment history, and character, as well as Sugar Transport's employment practices and polices. The evidence plaintiff introduced on negligent hiring and retention dwarfed the testimony she introduced regarding the accident at issue. Plaintiff's counsel continued this focus in closing arguments, and compounded the prejudicial effect by warning jurors that unless they found Carcamo negligent, they would be putting a "big seal of approval" on his driving history and on Sugar Transport's hiring practices over seven years. Heeding this warning, the jury found Carcamo 20% at fault for the accident and Sugar Transport *an additional* 35% at fault. By contrast, the jury found that the other driver was only 45% at fault, despite the undisputed evidence that she set the accident in motion through an unsafe lane change.

For these reasons, the Court should hold that the *Armenta* rule applies in negligent hiring and retention actions, as well as negligent entrustment actions, and that Proposition 51 has no effect on the rule's application. Because appellants preserved the *Armenta* issue, and because the trial court's error in not applying the rule was plainly prejudicial, the Court should remand the case to the Court of Appeal with instructions to grant a new trial.

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[2] Specifically, plaintiff claimed Carcamo was negligent because he should have driven in the right lane, even though he moved into the middle lane to pass a slow-moving vehicle, and because he should have prevented the accident by avoiding the vehicle that sideswiped him, even though the other driver moved into his lane suddenly and without signaling.

STATEMENT OF FACTS

A. The Accident

This action concerns injuries that plaintiff sustained in a freeway accident in which a pickup truck driven by defendant Karen Tagliaferri collided first with a Sugar Transport truck driven by Carcamo and then with plaintiff'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. Gamboa testified that "it all happened so fast, and we [Gamboa and Carcamo] were both unclear why [Tagliaferri's] black truck would move so quickly back into his lane because there was no one in front of her vehicle or [Carcamo's] white, commercial vehicle." (2 RT 306:24-307:12.) Tagliaferri spun out of control, flew over the center median, and landed on top of a southbound car driven by plaintiff. (2 RT 271:7-284:16, 310:12-312:8.) A report prepared by the CHP 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 memory of what happened. (2 RT 328:12-21.)[3]

[3] Although Tagliaferri suffered serious injuries in the accident and was left in a coma for two weeks afterwards, she never sued Carcamo or Sugar Transport for their supposed negligence in causing her injuries. (2 RT 331:13-333:8; 5 CT 1185-1234 [docket].)

One of plaintiff's theories of liability was that Carcamo accelerated while Tagliaferri was passing him. No direct evidence supported this theory. Gamboa testified that Carcamo maintained a consistent speed (2 RT 318:2-11), and Carcamo denied trying to cut Tagliaferri off (9 RT 1416:1-12). Plaintiff 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 that Carcamo must have accelerated because he was driving faster than he testified in his deposition (but not faster than he told CHP officers immediately after the accident) (8 RT 1284:9-20, 1317:4-1318:8). Plaintiff also introduced evidence to suggest Carcamo should have been driving in the right lane, was inattentive, and should have slowed down to avoid the accident. (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

Plaintiff sued Tagliaferri, Carcamo, and Sugar Transport, alleging Carcamo had "act[ed] within the course . . . of [his] . . . employment" with Sugar Transport. (1 CT 2, ¶ 6.) Plaintiff pled no claims for negligent hiring or retention, but instead 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, plaintiff's attorneys rephrased the theory of liability as negligent hiring and retention but never moved to amend the complaint to conform to proof. (2 RT 444:17-445:9; 5 CT 1185-1234 [docket].)

Early in the litigation, Sugar Transport admitted respondeat superior liability for Carcamo's actions. In verified responses to plaintiff'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 afterward, plaintiff's attorney acknowledged that Sugar Transport's vicarious liability was never disputed: "[T]hey are agreeing to — that it's respondeat superior. *That's never been an issue.*" (2 RT 434:7-8, italics added; see also 2 RT 436:20-27.)

C. The Trial Court Nevertheless Admits Evidence of Carcamo's Character and Sugar Transport's Hiring and Safety Practices

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 430:15-432:21, 434:16-435:6, 442:14-443:9, 451:4-16; 7 RT 1078:11-17, 1081:13-25), the trial court allowed plaintiff to introduce evidence at trial that Sugar Transport was liable under those theories (2 RT 453:3-21; 7 RT 1170:22-1171:12; 9 RT 1374:6-17).

Over objection, plaintiff 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.[4] Plaintiff questioned multiple witnesses about a reference form Sugar Transport

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[4] 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.

received from one of Carcamo's prior employers. Among other things, the form indicated that Carcamo had been involved in two accidents, had poor safety habits, and the prior employer would not rehire him.[5] Plaintiff's expert on negligent hiring testified that he had never seen such a poor evaluation. (2 RT 473:1-21.) Plaintiff also introduced a copy of Carcamo's entire driver qualification file and solicited testimony from numerous witnesses about its contents.[6]

Plaintiff used the negligent hiring and retention theories to go through Carcamo's employment history in detail, highlighting the most prejudicial evidence. For example, plaintiff repeatedly forced Carcamo to admit that he had used a "phony" Social Security number, because of his status as an illegal alien. (9 RT 1380:4-1384:22, 1392:6-8, 1438:25-27.) Plaintiff emphasized that Carcamo had been fired by previous employers and, between jobs, returned to "[his] country" of Honduras. (9 RT 1389:1-1390:25 [four references to "your country" over two pages], 1393:8-19, 1399:14-26.) Plaintiff 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.) Plaintiff used a comment in a performance evaluation of Carcamo that he was harsh and condescending and became frustrated easily as propensity evidence to support an inference that Carcamo had accelerated to prevent Tagliaferri from passing him. (4 RT 730:4-731:20.)

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[5] 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.

[6] 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.

Plaintiff 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, plaintiff'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; 5 RT 778:4-25.) The expert opined that, based on what Sugar Transport knew, it should not have hired Carcamo. (2 RT 474:19-475:1; 4 RT 729:26-730:3; 6 RT 971:1-6.)

D. In Closing Arguments, Plaintiff Focuses on Carcamo's Character as an Unsafe Driver

In closing arguments, plaintiff's attorney concentrated on the negligent hiring and retention theories, highlighting the 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 inadequate 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.) He also told the jury members that unless they found Carcamo negligent, they would be putting "a big seal of approval" on his truck driving and on Sugar Transport's practices. (10 RT 1643:19-25, 1646:28-1648:1.) Such a verdict, plaintiff's counsel warned, would tell Carcamo that he should keep driving the same way he had in the past, and would tell Sugar Transport that it had no reason to change the hiring practices it had followed for seven years. (*Ibid.*)

E. After Being Instructed on Negligent Hiring and Retention, the Jury Finds Carcamo 20% at Fault for the Accident and Sugar Transport 35% at Fault

Appellants objected to plaintiff's proposed instruction on negligent hiring and retention, again urging that these theories of liability were unavailable because Sugar Transport stipulated to respondeat superior liability. As support, appellants once again highlighted *Jeld-Wen*, as well as this Court's decision in *Armenta.* (1 CT 212-219.) The trial court overruled the objections (10 RT 1695:2-1696:27) and instructed the jury on plaintiff's negligent hiring and retention theories (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 trial court instructed the jury to disregard Carcamo's previous accidents in determining whether he was negligent on the day of the accident, but placed no limitations on the evidence plaintiff had introduced regarding Carcamo's employment history, immigration status, and general character, and regarding Sugar Transport's practices for hiring and retaining its employees. (2 CT 274; 10 RT 1666:9-13.)

The jury rendered its verdict, finding both Carcamo and Tagliaferri negligent. (2 CT 332-335.) With respect to Sugar Transport, the jury found it had negligently hired and retained Carcamo, but that only the negligent retention was a substantial factor in causing plaintiff'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 damages award was $22,566,373, including $17,566,373 in economic damages and $5,000,000 in noneconomic damages. (2 CT 334.) The trial court entered judgment (2 CT 430-435) and appellants moved for a new trial (4 CT 728-782). The court acknowledged that *Jeld-Wen* presented a "difficult question" (10 RT 1763:6-18) but denied appellants' motion (5 CT 1048-1051.)

F. The Court of Appeal Affirms, Holding that the *Armenta* Rule is Inapplicable

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 to the jury on these theories, despite Sugar Transport's admission of respondeat superior liability. 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 and retained him (Opn. at pp. 10-11). The court held that the apportionment of fault for noneconomic damages required under Civil Code section 1431.2 would have been impossible without such evidence, a circumstance not present when this Court decided *Armenta*. (Opn. at p. 12.) The court summarily denied appellants' petition for rehearing.

LEGAL DISCUSSION

I. THE *ARMENTA* RULE

A. The Rule Has Long Governed in California

In 1954, 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. (*Armenta*, *supra*, 42 Cal.2d at pp. 456-458.) 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. (*Ibid.*)

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, the 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.) The Court explained, however, that negligent entrustment was an "alternative theor[y]" under which the plaintiff sought to impose "the same legal liability" as might be imposed on the employee — i.e., the liability arising from the employee's allegedly negligent driving. (*Ibid.* ["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.)

In 2005, the Fourth District reaffirmed the *Armenta* rule in a post-Proposition 51 context. Like *Armenta*, *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 a declaration, the driver's employer admitted 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.)[7] "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.) After requesting further briefing on the impact of Proposition 51, the *Jeld-Wen* court further concluded that the enactment of comparative liability principles in Proposition 51 did not affect the *Armenta* rule, because *Armenta* "represents a different and still viable policy rule that is based upon evidentiary concerns[.]" (*Id.* at pp. 860, 870-871.)

There is one rare circumstance in which an employer's admission of respondeat superior liability will not necessarily render claims of negligent hiring, retention, or entrustment superfluous. In *Syah v. Johnson* (1966) 247 Cal.App.2d 534 (*Syah*), the Fourth District found *Armenta* inapplicable to a situation involving an accident caused by an employee's physical incapacity, for which he had no personal fault. (*Id.* at p. 543.) Perhaps for this reason, *Jeld-Wen* twice distinguished cases involving potentially non-negligent drivers who nevertheless cause accidents (131 Cal.App.4th at pp. 862-863, 870), and noted that there was no evidence that the employee

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[7] Although section 1104 was enacted in 1965, eleven years after *Armenta*, it codified common law evidentiary rules that California had recognized long before. (See, e.g., *Perotti v. Sampson* (1958) 163 Cal.App.2d 280, 286 ["Evidence of previous accidents is properly excluded since it has no probative value on the question of the party's negligence in the case at issue."].)

driver was "incompetent, ill, or otherwise unfit to drive" on the day of the accident (*id.* at p. 859).[8]

Syah involved a delivery driver who experienced dizzy spells, accidents, and falls while working. (247 Cal.App.2d at pp. 536-537.) His employer arranged for him 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

[8] The *Jeld-Wen* panel nevertheless criticized the *Syah* panel for having distinguishing *Armenta* on this ground, concluding that "[a]t the very least, the decision in *Syah* may properly be called result-oriented, with respect to its support of a separate basis for tort liability for negligent entrustment of the vehicle by the employer, where the vehicle driver/employee was exonerated by the jury (possibly due to sympathy for his illness)." (*Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 868-869.)

added.) Unlike the situations in *Armenta* and *Jeld-Wen*, both of which involved *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.)

B. The Rule Has Been Adopted By A Majority Of Jurisdictions

This Court's rule in *Armenta* has gained wide acceptance, and is 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.)

Most other jurisdictions that have considered the issue hold that "once an employer admits responsibility under *respondeat superior*, a plaintiff may not proceed against the employer on another theory of imputed liability such as negligent entrustment or negligent hiring." (*Gant v. L.U. Transportation, Inc.* (Ill.Ct.App. 2002) 770 N.E.2d 1155, 1158 (*Gant*).)[9] The "direct liability claims merge with the vicarious liability

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[9] See, e.g., *Neiger v. City of New York* (N.Y.App.Div. 2010) 72 A.D.3d 663, 664; *Kelley v. Blue Line Carriers, LLC* (Ga.Ct.App. 2009) 685 S.E.2d 479, 483; *Gant*, *supra*, 770 N.E.2d at p. 1158; *Taylor v. Cabell Huntington Hosp.* (W.Va. 2000) 538 S.E.2d 719, 725; *Jordan v. Cates* (Okla. 1997) 935 P.2d 289, 293; *McHaffie v. Bunch* (Mo. 1995) 891 S.W.2d 822, 826 (*McHaffie*); *Hackett v. Washington Metro Area Transit Auth.* (D.D.C. 1990) 736 F.Supp. 8, 9-11; *Wise v. Fiberglass Sys., Inc.* (Idaho 1986) 718 P.2d 1178, 1181; *Elrod v. G&R Constr. Co.* (Ark.

claim when the employer has admitted an agency relationship, and are therefore properly dismissed." (*Scroggins v. Yellow Freight Systems, Inc.* (E.D. Tenn. 2002) 98 F.Supp.2d 928, 932; see also *Cole v. Alton* (N.D. Miss. 1983) 567 F.Supp. 1084, 1086-1087 [dismissing negligent entrustment claim where employer conceded employee was acting within scope of employment].) In addition to being the majority rule, the *Armenta* rule is followed in the five most populous states in the union — California, Texas, New York, Florida, and Illinois.

Many of these courts have cited *Armenta* or its rationale approvingly. (See, e.g., *Clooney v. Geeting*, *supra*, 352 So.2d at p.1220; *Neff v. Davenport Packing Co.* (Ill.Ct.App. 1971) 268 N.E.2d 574, 575; *Willis v. Hill* (Ga.Ct.App. 1967) 159 S.E.2d 145, 153, 157-159, revd. on other grounds (Ga. 1968) 161 S.E.2d 281.) The rule operates to preclude the admission of evidence that is ultimately irrelevant. "If all of the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where the imputation of negligence is admitted, the evidence laboriously submitted to establish other theories serves no real purpose." (*McHaffie*, *supra*, 891 S.W.2d at p. 826.) Also, "[p]ermitting evidence of collateral misconduct such as other automobile accidents or arrests for violation of motor vehicle laws would

(continued...)

1982) 628 S.W.2d 17, 18-19; *Arrington's Estate v. Fields* (Tex.Ct.App. 1979) 578 S.W.2d 173, 178-179; *Clooney v. Geeting* (Fla.Ct.App. 1977) 352 So.2d 1216, 1220; *Tindall v. Enderle* (Ind.Ct.App. 1974) 320 N.E.2d 764, 768; *Nehi Bottling Co. of Ellisville v. Jefferson* (Miss. 1956) 84 So.2d 684, 686; *Shielee v. Hill* (Wash. 1955) 287 P.2d 479, 480-482; *Tuite v. Union Pacific Stages, Inc.* (Ore. 1955) 284 P.2d 333, 338; *Heath v. Kirkman* (N.C. 1954) 82 S.E.2d 104, 107-108; *Houlihan v. McCall* (Md. 1951) 78 A.2d 661, 664-666; *Prosser v. Richman* (Conn. 1946) 50 A.2d 85, 87.

obscure the basic issue, namely, the negligence of the driver . . . ." (*Neff v. Davenport Packing Co.*, *supra*, at p. 575.) Such evidence may "influence the jury to find against the driver on account of some negligent act which he may have committed at a prior time, on another occasion, in a different situation and with other parties." (*Willis v. Hill*, *supra*, 159 S.E.2d at p. 158.) Finally, admitting the evidence would undermine judicial economy. (See *Tindall v. Enderle*, *supra*, 320 N.E.2d at p. 768 [admitting "[p]roof of the additional elements of negligent hiring" where agency is admitted "is wasteful of the court's time . . ."].)

As in *Syah*, some other jurisdictions permit evidence of negligent hiring or negligent entrustment in limited situations where an employer's liability is not coextensive with that of its employee. Thus, the rule may not apply where an accident is caused by an employee driver's physical incapacity, and the employer had reason to know of the incapacity. (E.g., *Wishone v. Yellow Cab Co.* (Tenn.Ct.App. 1936) 97 S.W. 2d 452, 453-454 [epilepsy].)[10] Also, some courts permit claims of negligent hiring or negligent entrustment where punitive damages could be assessed against the employer. (E.g., *Watson v. Strack* (N.Y.App.Div. 2004) 5 A.D.3d 1067, 1068; *Arrington's Estate v. Fields*, *supra*, 578 S.W.2d at pp. 178-179; *Tindall v. Enderle*, *supra*, 320 N.E.2d at p. 768.) Neither of these possible exceptions to the *Armenta* rule is at issue in this case.

Jurisdictions that follow the minority rule generally conclude that negligent hiring, retention, and entrustment are independent causes of action and the rules of evidence should prevent undue prejudice, but go no

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[10] See also *Freeman v. Martin* (Ga.Ct.App. 1967) 156 S.E.2d 511, 513 ("By the great weight of authority, if not universally, the rule is that there is no liability for negligence or for gross negligence on the part of an operator of a motor vehicle who, while driving, is suddenly stricken by a fainting spell, or loses consciousness from some unforeseen reason.").

deeper in their analysis. (See, e.g., *James v. Kelly Trucking Co.* (S.C. 2008) 661 S.E.2d 329, 332; *Poplin v. Bestway Express* (M.D.Ala. 2003) 286 F.Supp.2d 1316, 1319-1320; *Marquis v. State Farm Fire & Cas. Co.* (Kan. 1998) 961 P.2d 1213, 1225; *Lim v. Interstate System Steel Div., Inc.* (Minn.Ct.App. 1989) 435 N.W.2d 830, 832-833; *Clark v. Stewart* (Ohio 1933) 185 N.E. 71, 73.)

C. The Rule Serves Important Purposes

In California, as in other states, character evidence is inadmissible to show a person's conduct on a particular occasion. (Evid. Code, §§ 1101, 1104.) 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.)

Thus, evidence that a driver has been involved in previous accidents is inadmissible to prove that the driver was negligent in the accident at issue. This reflects the possibility that "[a] very poor or careless driver may have been wholly free from fault in the particular instance involved and, likewise, the most skilful driver, accustomed to exercising the utmost care, may be grossly negligent on one particular occasion." (*Holberg v. McDonald* (Neb. 1940) 289 N.W. 542, 543.) If an action raises claims of negligent hiring, retention, or entrustment, however, an employee's conduct on previous occasions may become material to show that the employee was

unfit and that the employer has liability for the accident because it should have known of this unfitness. The dangers of prejudice are still present, but the probative value of the evidence is high.

The *Armenta* rule balances these competing concerns, barring evidence of negligent hiring, retention, and entrustment when the employer's liability for any negligence of its employee is already admitted. *Armenta* recognizes that respondeat superior and claims of negligent hiring, retention, and entrustment are *alternative theories* by which to impute an employee's negligence to his or her employer. (42 Cal.2d at p. 457; see also, e.g., *Gant*, *supra*, 770 N.E.2d at p. 1160 ["The doctrine of *respondeat superior* and the doctrine of negligent entrustment are simply alternative theories by which to impute an employee's negligence to an employer."].) Once an employer admits respondeat superior, theories of negligent hiring, retention, or entrustment can result in no separate or additional liability for the employer. "Since the . . . counts impose no additional liability but merely allege a concurrent theory of recovery, the desirability of allowing these theories is outweighed by the prejudice to the defendants. See *Armenta v. Churchill*, *supra*." (*Clooney v. Geeting*, *supra*, 352 So.2d at p. 1220.)

This is shown by the following scenarios. First, if the employee at issue was *not* negligent, no basis exists for imposing liability on the employer for negligent hiring, retention, or entrustment. That is, if the employee drove appropriately, any unreasonableness in hiring or retaining the employee is not a proximate cause of the accident. (See, e.g., *Gier v. Los Angeles Consol. Elec. Ry. Co.* (1895) 108 Cal. 129, 133-135 [reversing judgment in negligent retention action where plaintiff had introduced no evidence that the unfit employee's negligence caused the accident]; *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1057

[negligence in hiring and retention cannot logically cause any harm absent tortious conduct by the employee that causes harm].) Alternatively, if the employee *was* negligent, the employer is strictly liable under the doctrine of respondeat superior for any and all harm caused by its employee regardless of the reasonableness of the hiring, retention, or entrustment. Any negligence by the employer in this regard cannot increase the amount of the plaintiff's damages. (See *Jeld-Wen*, *supra*, 131 Cal.App.4th at pp. 861-862; see also *Karoon v New York City Tr. Auth.* (N.Y.App.Div. 1997) 241 A.D.2d 323, 324; *Tuite v. Union Pacific Stages, Inc.*, *supra*, 284 P.2d at p. 338.)

Nor can any negligence in employing an unsafe driver change the proportional fault of the parties actually involved in the accident. (See section II.B.2, *infra*.) The admission of respondeat superior makes the employer's fault coextensive with that of its employee, obviating any need to apportion fault between the employer and employee. And, no matter how negligent the employer's hiring, retention, or entrustment may have been, that negligence cannot reduce the proportional fault of *other drivers* involved in the accident. "Although negligent entrustment may establish independent fault on the part of the employer, it should not impose additional liability on the employer. The employer's liability under negligent entrustment, because it is predicated initially on, and therefore is entirely derivative of, the negligence of the employee, cannot exceed the liability of the employee." (*Gant*, *supra*, 770 N.E.2d at p. 1159; see also, e.g., *Wise v. Fiberglass Systems, Inc.*, *supra*, 718 P.2d at pp. 1181-1182; *Elrod v. G & R Construction Co.*, *supra*, 628 S.W.2d at p. 19.)

Indeed, allowing a plaintiff to go to the jury on a negligent hiring, retention, or entrustment claim after respondeat superior has been admitted invites the jury to apportion damages incorrectly. (*Thompson v. Northeast*

Illinois Regional Commuter R.R. Corp. (Ill.Ct.App. 2006) 854 N.E.2d 744, 747 ["To allow both causes of action to stand would allow the jury to assess or apportion the principal's liability twice."].) Before a jury decides the question of the employer's negligence, it must find that the employee was negligent. If a jury finds, as in this case, the employee driver 20% at fault in the accident, an unacceptable risk exists that the jury will then consider evidence of the employer's negligence in hiring or retaining the employee and apportion *additional* fault to the employer. The employer ends up paying noneconomic damages for all the fault of its driver in causing the accident, and then *additional* amounts based on the employer's fault in having inadequate hiring and retention procedures. This result is "plainly illogical" given that the inadequate procedures could only have caused harm through the negligent driving of the employee. (*McHaffie*, *supra*, 891 S.W.2d at p. 827.)

II. THE COURT OF APPEAL'S REASONS FOR NOT APPLYING *ARMENTA* ARE UNSOUND

A. The *Armenta* Rule Applies To Negligent Hiring and Retention Actions

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 ["A case is not authority for an issue not considered."].) The Court of Appeal explained that negligent hiring and retention is a direct theory of liability, independent of vicarious liability. (Opn. at pp. 6-8.) Thus, the court reasoned, evidence of Carcamo's previous accidents and driving history was relevant to prove Sugar Transport's direct liability for hiring and retaining him. (Opn. at pp. 9-11.) The Court of Appeal's distinction does not survive close analysis.

1. Negligent Entrustment and Negligent Hiring/Retention Are Functionally Identical in the Context of Motor Vehicle Accidents

Negligent entrustment and negligent hiring/retention are all "direct" theories of liability in that they require some fault on the part of the hirer or entrustor, so this is not a legitimate basis upon which to distinguish *Armenta*. (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.) Indeed, in the context of a motor vehicle accident involving an employee driver, negligent hiring and retention are substantively identical to negligent entrustment. Whatever the label given by a plaintiff, the theory of liability rests upon an employer's negligence in allowing an employee to drive. Here, plaintiff never even 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 plaintiff ever move to amend her complaint to conform to proof. (5 CT 1185-1234 [docket].)[11]

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[11] Plaintiff's reliance on allegations of negligent entrustment as the sole pleading underlying her claim of Sugar Transport's direct negligence is telling. As a traditional rule, "a party must prevail, if at all, on the case (or cause of action) made by his or her pleadings, and not on some other developed by the proofs." (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1209, p. 641; see also *Lewis v. South San Francisco Yellow Cab Co.* (1949) 93 Cal.App.2d 849, 852 ["[W]here, as here, an entirely separate set of facts constituting an entirely different cause of action from that pleaded appears, the trial judge should grant a nonsuit."].) When no prejudice will result, modern cases favor allowing plaintiffs to amend their pleadings to proof, so that facts proven "to establish one cause of action" can "establish another cause of action[.]" (*County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1618.) This amendment rule would not apply to plaintiff because she never sought leave to amend. (See *Lewis*, *supra*, at 853 ["[T]he court properly granted the nonsuit as the plaintiff failed to request permission to amend her complaint to conform to the proof."].)

Additionally, nothing in *Armenta* suggests that its holding is limited to negligent entrustment actions. Even though the employer's admission of vicarious liability in *Armenta* "was not directly responsive to plaintiffs' added allegations of fact . . . relating to [the employer's] personal negligence," the Court held that the admission still barred the plaintiff from pursuing an alternative, direct theory of liability. (*Armenta*, *supra*, 42 Cal.2d at p. 457.) Accordingly, 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.)

Nor have other jurisdictions that have adopted the *Armenta* rule drawn a distinction between claims for negligent hiring/retention and negligent entrustment. (See, e.g., *Arrington's Estate v. Fields*, *supra*, 578 S.W.2d at p.178 [rule is "equally applicable" to negligent hiring and negligent entrustment cases]; *Tindall v. Enderle*, *supra*, 320 N.E.2d at pp. 767-768 [applying rule in negligent hiring case].) The rule applies to all such "concurrent theor[ies] of recovery." (*Clooney v. Geeting*, *supra*, 352 So.2d at p.1220; see also *Wise v. Fiberglass Systems, Inc.*, *supra*, 718 P.2d at p.1181 [under majority rule, agency admission forecloses actions based on "the independent negligence theories of negligent entrustment and negligent hiring or training"].)

Moreover, the concerns underlying the *Armenta* rule apply equally whether the direct theory at issue is labeled negligent entrustment or negligent hiring and retention. The rule is based upon evidentiary concerns of allowing plaintiffs to pursue direct theories of employer negligence such as negligent entrustment or training 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.)

Finally, 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 strong incentive simply to plead around the rule. 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. If plaintiffs can evade the *Armenta* rule simply by renaming their theory of liability, the rule will have no effect.

2. Negligent Entrustment and Negligent Hiring/Retention Are Alternatives to Liability under Respondeat Superior

Second, although negligent hiring and entrustment are "direct" theories of liability, they are simply alternative means to establish the employer's liability for the torts of an agent (See, e.g., *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].)

As alternative theories, negligent hiring, retention, and entrustment generally apply in situations where respondeat superior is inapplicable. Under the doctrine of respondeat superior, an employer is held liable for the torts of an employee acting within the scope of employment. (Rest.3d Agency §§ 7.04, 7.07; see *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209.) Under the theory of negligent hiring, by contrast, an employer may be liable for the torts of an employee acting outside the scope of

employment. (Rest.3d Agency § 7.05 com. b ["[A]n employer may be subject to liability under this rule for injury caused by tortious conduct of an employee acting outside the scope of employment. Such conduct does not subject an employer to vicarious liability under the rule stated in § 7.07(1)."]; see *John R. v. Oakland Unified School District* (1989) 48 Cal.3d 438, 452-453.) In *Najera v. Southern Pacific Company* (1961) 191 Cal.App.2d 634, Justice Tobriner quoted the Restatement of Torts as support for the existence of a negligent hiring and retention cause of action under FELA in a situation where respondeat superior does not apply: "'A master is under a duty to exercise reasonable care so to control his servant *while acting outside the course of his employment* . . . .'" (*Id.* at p. 638 & fn. 1, quoting Rest.2d Torts, § 317, italics added.)[12]

Indeed, none of the negligent hiring cases cited by the Court of Appeal for the proposition that it is a direct theory of liability addressed a situation, such as here, where respondeat superior applied. (Opn. at pp. 6-8; see *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1136-1137 [shooting and killing of customer by *former* employee]; *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 813-814 [cyber-threats made outside scope of employment]; *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1042, 1044-45 [allegations of gang rape, plaintiff abandoned claims based on vicarious liability]; *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1559, 1565 [allegations of criminal sex abuse; no claim of respondeat superior]; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 831, 840, fn. 2 (1992)

[12] See Rest.2d Torts, § 317, com. a ("The rule stated in this Section is applicable only when the servant is acting outside the scope of his employment. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of Agency.").

[allegations of criminal acts of molestation; court specifically noting that respondeat superior did not apply]; *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal.App.3d 57, 71 [insurance coverage case in which respondeat superior claims were excluded]; *Fernelius v. Pierce* (1943) 22 Cal.2d 226, 233 ["Both plaintiffs and defendants unite in stating that plaintiffs' case is not laid on the doctrine of *respondeat superior*."].)

Beyond these cases, we have located no published California decision that has found separate negligent hiring or retention liability in a context where respondeat superior applies. 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*, *supra*, 320 N.E.2d at pp. 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 has stipulated that his employee was within the scope of his employment."]; *Di Cosala v. Kay* (N.J. 1982) 450 A.2d 508, 515 ["[T]he negligent hiring theory has been used to impose liability in cases where the employee commits an

intentional tort, an action almost invariably outside the scope of employment . . . ."].)

The function of negligent hiring and retention as alternative forms of liability is consistent with their history. Negligent hiring developed in situations where the respondeat superior doctrine did not apply — *i.e.*, the fellow servant rule. (See *Daves v. Southern Pac. Co.* (1893) 98 Cal. 19, 21-24 (*Daves*).) Former section 1970 of the Civil Code provided:

> "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, *unless he has neglected to use ordinary care in the selection of the culpable employee.*"

(*Daves*, *supra*, at p. 21.) This rule operated to absolve an employer of respondeat superior liability when an employee was injured due to the negligence or intentional misconduct of a fellow employee, *except* if the employer had failed to use reasonable care in hiring and retention decisions. (*McLean v. Blue Point Gravel Min. Co.* (1876) 51 Cal. 255, 257-258 [section 1970 provides that "*respondeat superior* shall not apply, unless there has been want of ordinary care upon the part of the defendant *in the selection of the culpable employee.*" (Original italics)].) These early decisions show that, in its origins as well as its application, negligent hiring and retention is an alternative to, or even a variant of, liability under respondeat superior.

As this Court explained in the directly analogous context where an owner is sued for negligently hiring an independent contractor, negligent hiring is in essence vicarious or derivative because it derives from the act or

omission of the person hired. (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244 (*Carmargo*).) This is so even though, technically speaking, "the [owner] is *directly* negligent in the sense of having failed to take precautions" to prevent the injury. (*Id.* at p. 1243, original italics.) Indeed, "[b]y concocting a duty in a particular situation to prevent another from acting negligently, as an exception to the general rule that 'one owes no duty to control the conduct of another' [citation], it is always possible to impose liability on one person for the negligence of another and to label that liability 'direct.'" (*Toland v. Sunland Housing Group* (1998) 18 Cal.4th 253, 265, fn. 3.) There is a distinction, however, between "this artificial 'direct liability' and the liability imposed on the hiring person for injuries resulting from the hiring person's own conduct, such as, for example, concealing a hidden danger [citation] or insisting on use of an unsafe method to execute the work." (*Ibid.*)

Thus, like respondeat superior, negligent hiring and retention are simply alternative means of making an enterprise liable for the acts of its employees. (See *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339 ["Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, *the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees*." (Italics added)].) The harm caused by the negligent hiring is coextensive with the harm caused by the negligent employee: "A principal who conducts an activity through an agent is subject to liability for harm to a third party *caused by the agent's conduct* if the harm was *caused by the principal's negligence* in selecting, training, retaining, supervising, or otherwise controlling the agent." (Rest.3d Agency, § 7.05(1), italics added; see also *Deutsch v. Masonic Homes of California, Inc.* (2008)

164 Cal.App.4th 748, 783 ["[T]he standard for negligent hiring or supervision is generally in accord with the Restatement Second of Agency, section 213, which allows for *liability of a principal for the acts of his agents* where the principal is either negligent or reckless in the hiring or supervision of the agent." (Italics added)].)

Consistent with these principles, 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.) The alternative theory becomes essentially superfluous. (Rest.3d Torts, Liab. Physical Harm § 19, com. e ["[T]o the extent that vicarious liability applies, the employer's liability for negligent hiring becomes largely irrelevant."].) The only remaining purpose the alternative theory serves is as a back-door method of introducing prejudicial character evidence that would otherwise be inadmissible under Evidence Code section 1104. (*Jeld-Wen*, *supra*, at p. 869.) As the authors of a well-regarded evidence treatise have explained,

> [e]ven though it is true that a party may not, by offer to stipulate, make evidence irrelevant, the sounder decisions are the ones excluding the evidence [of negligent hiring or entrustment once respondeat superior is conceded]. Where respondeat superior is conceded, it seems that the only real use for proof of other accidents is to show that the third person was negligent on the occasion in issue—and this is the one purpose for which the evidence is not admissible. The stipulation makes it unnecessary to accept the clear risk of jury misuse of this evidence.

(1 Mueller and Kirkpatrick, Federal Evidence (3d ed. 2007) § 4.39, pp. 886-887.)

B. The *Armenta* Rule Is Unaffected by the Enactment of Comparative Negligence Principles

The second basis the Court of Appeal gave for not following *Armenta* is that neither it nor *Jeld-Wen* "purports to deal with the allocation of fault required by Proposition 51." (Opn. at pp. 5-6.) Because negligent hiring/retention is a "direct" theory of liability, the court concluded, the jury could not have apportioned noneconomic damages as required by Civil Code section 1431.2 without evidence of Carcamo's driving and employment history. (Opn. at p. 12 ["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."].) In effect, the court held the *Armenta* rule has been superseded by Proposition 51.

The Court of Appeal was incorrect: Proposition 51 neither explicitly nor implicitly affects the *Armenta* rule. As the Fourth District held in *Jeld-Wen*, "[t]here is nothing in *Armenta* that is adversely affected by the development of . . . 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." (131 Cal.App.4th at p. 871.) Once an employer admits 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.*)

1. Proposition 51 Did Not Affect the *Armenta* Rule

Three decades after this Court decided *Armenta*, California voters approved Proposition 51, which eliminated the rule of joint and several liability with regard to noneconomic damages. Proposition 51 added a new Civil Code section that declares: "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." (Civ. Code, § 1431.2, subd. (a).) The new code section further specifies that "[e]ach 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 . . . ." (*Ibid.*; see *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 599-600.)

Nothing in Proposition 51 indicates the voters overturned *Armenta*. To the contrary, the purpose of Proposition 51 was to address the perceived unfairness of "deep pocket" defendants being financially liable for all the damages in a lawsuit when they share only a small fraction of the fault. (Civ. Code, § 1431.1; *DaFonte v. Up-Right*, *supra*, 2 Cal.4th at p. 603.) The *Armenta* rule similarly protects "deep pocket" employer defendants from the unfairness of being liable for more than their share of the fault. Once an employer admits liability for any harm caused by the negligence of an employee driver, the rule prevents plaintiffs from skewing the jury's assessment of liability by focusing on character evidence. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at pp. 866-867.) The Court of Appeal's conclusion that Proposition 51 eliminated the *Armenta* rule runs counter to the very the purpose of the initiative.

Proposition 51 is also consistent with application of the *Armenta* rule. Under *Armenta*, once an employer admits respondeat superior, the

plaintiff may not proceed on alternative theories of employer liability such as negligent hiring or entrustment. Respondeat superior is the only remaining basis for the employer's liability, and Proposition 51 does not require or allow an apportionment between the employer and employee in these circumstances. (*Miller v. Stouffer* (1992) 9 Cal.App.4th 70, 83-85 [Proposition 51 inapplicable in respondeat superior context]; cf. *Myrick v. Mastagni* (Cal.App., Jun. 21, 2010, 2d Civil No. B209854) 2010 WL 2473568, *5 [Proposition 51 inapplicable to the liability of the members of a partnership or a joint venture]; *Srithrong v. Total Inv. Co.* (1994) 23 Cal.App.4th 721, 728 [Proposition 51 inapplicable to alleged negligence of independent contractor sued under non-delegable duty doctrine].)

In sum, Proposition 51 requires that fault be apportioned once the jury has decided to award noneconomic damages. No basis exists to interpret Proposition 51 as reviving duplicative negligent hiring and entrustment claims — especially when the reason those claims are barred under *Armenta* is because proving separate employer fault injects prejudicial character evidence into trials and is unnecessary to make the plaintiff whole.

2. Because a Negligent Hirer's Liability is Coextensive with That of its Employee, No Separate Fault Exists to Apportion

The Court of Appeal's conclusion that Proposition 51 has superseded the *Armenta* rule rests on the premise that Sugar Transport's degree of liability for negligent hiring was *separate* from Carcamo's degree of liability for any negligence in causing the accident. According to the Court of Appeal, because plaintiff claimed her theory of negligent hiring and retention "imposed greater responsibility on Sugar Transport than would be attributed to it for simply being Carcamo's employer," the

required apportionment of fault would have been impossible without evidence of Carcamo's character. (Opn. at p. 12.)

As discussed above in section II.A.2, however, this premise is incorrect. The theory of negligent hiring/retention serves the same purpose as the doctrine of respondeat superior — both make the employer liable for any and all harm caused by the employee's negligence. Once an employer admits respondeat superior, its liability is coextensive with that of its employee and no need exists to apportion liability among them. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 871; see also *Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1196 [for purposes of comparative fault, "vicariously liable defendants are viewed, for policy reasons, as a single entity"].) Regardless of any apportionment, the employer is liable for the entire amount of harm its negligent hiring caused, which by definition is the same as the harm caused by the employee's negligent driving. (See Haning, et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2009) ¶ 2:415 ["[T]he employer's pretrial binding admission of respondeat superior liability bars plaintiff from pursuing a negligent entrustment claim against the employer; i.e., the negligent entrustment claim is subsumed within the pretrial assumption of vicarious liability because, 'at bottom,' the employer (though possibly guilty of a separate tort) is still only liable for the employee's negligence, which has already been established. [Citation.]"].)

Jeld-Wen involved three defendants — the employee, the employer, and the company that leased the truck to the employer — as well as a potentially negligent plaintiff's decedent. (131 Cal.App.4th at p. 858-859 & fn. 3.) Nevertheless, the *Jeld-Wen* court concluded that Proposition 51 was immaterial because the employer's liability was coextensive with that of the employee. (*Id.* at p. 871.) More specifically, the court noted that the

negligent entrustment claim sought the same award of damages as the negligence claim against the employee, and that "[a]n employer's liability under the doctrine of negligent entrustment is dependent on a finding of negligence and causation of harm on the part of the employee." (*Id.* at pp. 861, 864, 869-870; *see also Vice v. Automobile Club of So. Cal.* (1966) 241 Cal.App.2d 759, 767 [negligent entrustment claim subject to general demurrer for failure to allege the driver was negligent].)

A majority of other jurisdictions that have analyzed the impact of comparative liability principles on the *Armenta* rule have likewise concluded the rule is unaffected. (E.g., *Gant*, *supra*, 770 N.E.2d at p. 1159; *McHaffie*, *supra*, 891 S.W.2d at p. 826; see Powell, *supra*, 61 Mo. L.Rev. at p. 163 & fn. 55.) As one court has explained:

> In a motor vehicle accident, comparative fault as it applies to the plaintiff should end with the parties to the accident. . . . Although negligent entrustment may establish independent fault on the part of the employer, it should not impose additional liability on the employer. The employer's liability under negligent entrustment, because it is predicated initially on, and therefore is entirely derivative of, the negligence of the employee, cannot exceed the liability of the employee. Regardless of whether the employer is actually guilty of the separate tort of negligent entrustment, the employer who concedes responsibility under the theory of *respondeat superior* is strictly liable for the employee's negligence. The employer is thus responsible for *all* the fault attributed to the negligent employee, but *only* the fault attributed to the negligent employee as compared to the other parties to the accident.

(*Gant*, *supra*, 770 N.E.2d at p. 1159; accord *McHaffie*, *supra*, 891 S.W.2d at p. 826.)[13]

Here, Sugar Transport's alleged "direct" liability for negligent hiring and retention was wholly derivative of Carcamo's liability as it depended on a finding that Carcamo was negligent and that his negligence caused plaintiff harm. (2 CT 270-271 [jury instruction on negligent hiring].) Indeed, on several occasions, plaintiff's and Tagliaferri's attorneys acknowledged that Sugar Transport could have no liability for negligence absent a finding that Carcamo himself was negligent. (2 RT 434:10-15, 435:7-11, 437:8-438:13.) In asserting theories based on negligent hiring and retention, plaintiff sought to impose liability — and the jury ultimately imposed liability — on Sugar Transport for the *same damages* that plaintiff sought from Carcamo.

Because Sugar Transport's fault for negligent hiring and retention was coextensive with that of Carcamo, Sugar Transport's fault could not have reduced the proportional fault of the *other driver* involved in the accident, Karen Tagliaferri. Accordingly, the jury should not have been allowed to allocate an additional percentage fault to Sugar Transport. The jury's verdict in this case, which assigns Sugar Transport a separate and

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[13] Of the jurisdictions that observe the *Armenta* rule, the following have adopted some form of comparative fault: Arkansas (Ark. Code Ann. § 16-64-122), Connecticut (Conn. Gen. Stat. Ann. § 52-572h), Florida (Fla. Stat. Ann. § 768.81(2)), Georgia (Ga. Code Ann. § 51-12-33), Idaho (*Wise v. Fiberglass Sys., Inc., supra*, 718 P.2d at p. 1185), Illinois (*Gant v. L.U. Transport, Inc.*, *supra*, 770 N.E.2d at p.1159), Indiana (Ind. Code § 34-51-2-6), Maryland (*Gustafson v. Benda* (Mo. 1983) 661 S.W.2d 11, 16), Mississippi (Miss. Code Ann. § 11-7-15), New York (N.Y. C.P.L.R. § 1411), Oklahoma (Okla. Stat. Ann. Tit. 23, § 13), Oregon (Or. Rev. Stat. § 31.600), Texas (Tex. Civ. Prac. & Rem. Code Ann. §§ 33.001-33.017), Washington (Wash. Rev. Code Ann. § 4.22.070), and West Virginia (*Bradley v. Appalachian Power Co.* (W.Va. 1979) 256 S.E.2d 879, 885).

greater percentage of fault than its driver (2 CT 334) is "plainly illogical." (*McHaffie*, *supra*, 891 S.W.2d at 827; see also *Gant*, *supra*, 770 N.E.2d at p. 1160.) No basis exists to believe that the proportional fault of the drivers involved in an accident can change based on whether one of them is employed.

3. Even if Evidence of the Employer's Fault Had Some Relevance, It Would Be Outweighed by the Important Policies the *Armenta* Rule Protects

Even assuming *arguendo* Sugar Transport could have fault separate from and in addition to that of Carcamo, this would not justify jettisoning the *Armenta* rule. (See *Jeld-Wen*, 131 Cal.App.4th at p. 871 [*Armenta* represents a "different and still viable policy rule that is based upon evidentiary concerns"].) 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 of 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. (See *ibid.* ["[I]n the employer-employee context, the negligent entrustment theory may not be separately pursued once the employer admits to vicarious liability . . . because only the *single injury* claimed by the plaintiffs should be compensated." (Italics added)].)

The *Armenta* rule prevents plaintiffs from circumventing the character evidence prohibition of Evidence Code section 1104 and thereby defeating the policies on which it is based. A holding that Proposition 51 superseded *Armenta* would open the door to discovery regarding, and 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.)[14] Abandoning the *Armenta* rule would add a costly new aspect to these lawsuits, as California courts struggle to address the new layers of discovery and proof involved.

Without the *Armenta* rule, Evidence Code sections 352 and 1104 will not prevent the introduction of evidence regarding an employee's character and history. Plaintiffs will be able to pursue separate theories of negligent hiring and retention regardless of any admission of vicarious liability. Evidence that would otherwise be excluded under the mandatory language of section 1104 will be admissible as evidence of the employer's negligence. Absent *Armenta*, 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.

In short, the *Armenta* rule protects the policies of Evidence Code sections 1101 and 1104 by closing a loophole that would allow 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. Importantly, the rule also

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

provides employers with a powerful 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. [Citation.]" (*Mary M. v. City of Los Angeles*, *supra*, 54 Cal.3d at p. 209.) The rule thus 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 preserving plaintiffs' right to be made whole through respondeat superior liability.

III. THE ERROR IN NOT APPLYING *ARMENTA* REQUIRES THE GRANT OF A NEW TRIAL

A. Appellants Preserved the *Armenta* Issue

Plaintiff argued below and in opposing the petition for review that appellants failed to preserve the *Armenta* issue. Plaintiff contends that Sugar Transport (1) did not admit respondeat superior early enough in the proceeding, and (2) did not alert the trial court to the *Armenta* issue until the middle of trial, when it was too late for the court to apply the rule. Both contentions are incorrect.

Sugar Transport's admission of respondeat superior was timely and unconditional. Sugar Transport admitted the facts establishing respondeat superior liability long before trial, in form interrogatory responses. (4 CT 878:22-24.) These responses were verified under penalty of perjury (4 CT 880) and are directly analogous to, and equally as binding as, the pretrial admissions in *Jeld-Wen*, which were made in discovery and in a sworn declaration in support of the employer's summary adjudication motion

(131 Cal.App.4th at p. 859). At trial, plaintiff's counsel conceded what he could not deny: Sugar Transport's admission of respondeat superior had "never been an issue" in the case. (2 RT 434:7-8; see also 2 RT 436:20-27.) Although plaintiff has characterized Sugar Transport's formal stipulation as coming in the middle of trial, it was actually made on the second day of trial testimony, when plaintiff called her expert on negligent hiring to the stand. (2 RT 432:8-21.) The seven witnesses who testified before then were asked nothing relevant to the claims for negligent hiring and retention.[15]

Appellants also timely raised the *Armenta* issue. Before any evidence of negligent hiring or retention was introduced, Sugar Transport objected to the evidence and cited *Jeld-Wen* to the trial court, including a full case citation. (2 RT 430:15-432:7, 434:16-437:13, 443:2-9; 451:4-16.) Both the trial court and the parties were fully aware of the *Armenta* issue. The trial court tentatively decided that it would admit evidence of negligent hiring *unless* Sugar Transport admitted liability under respondeat superior. (2 RT 432:8-17.) After Sugar Transport promptly confirmed that it was liable for any negligence by Carcamo, the court asked "what additional liability would the trucking company have that is not covered by the stipulation?" (2 RT 432:22-433:1.) Counsel for plaintiff and Tagliaferri both responded that the evidence was relevant to the apportionment of

[15] On the first day of trial testimony, plaintiff called four witnesses: Matthew Falat, a paramedic who responded to the accident scene (1 RT 164:1-16); Cynthia Davis and Jerrold Morton, who saw Karen Tagliaferri's truck land on top of plaintiff's vehicle (*id.* at 185:1-186:16, 191:1-192:14); and Sonia Calzada, a friend and former coworker of plaintiff who was riding with her at the time of the accident (*id.* at 194:12-195:16). On the second day, plaintiff called two live witnesses — Guy Martin, plaintiff's former fiancée (2 RT 254:9-22), and Tagliaferri (*id.* at 327:1-8) — and read the deposition testimony of Rose Gamboa, the one neutral eyewitness to the accident (*id.* at 271:27-272:8).

noneconomic damages under Proposition 51. (2 RT 433:2-20, 435:7-24; 443:25-444:12.) Sugar Transport's counsel argued that it had no percentage of fault independent from that of Carcamo, and the negligent hiring cause of action was a way to distract the jury with otherwise inadmissible evidence. (2 RT 434:16-23; 442:14-443:9.) He also distinguished negligent hiring cases in which employees committed torts outside the scope of their employment. (2 RT 434:26-435:6.)

After the trial court decided to admit character evidence such as previous accidents, Sugar Transport continued to raise the *Armenta* issue and cite *Jeld-Wen* to the court. (7 RT 1078:11-17, 1081:13-25.) Sugar Transport briefed the issue before the witness testimony ended and before the trial court instructed the jury. (1 CT 212-219.) Finally, Sugar Transport moved for a new trial on the basis of *Armenta* and *Jeld-Wen.* (4 CT 728-782.) The trial court did not find waiver by Sugar Transport but instead considered the arguments on their merits. (See 10 RT 1763:3-18 [trial court noting that the *Jeld-Wen* issue is "interesting and difficult" and "I expect that no matter what my decision in this case is, that it's going up on appeal and that we will have some definition of the application of the *Jeld-Wen* argument that the defendant has made to the particular facts in a case such as this."].)

B. The Error in Failing to Apply *Armenta* Was Prejudicial

The Court will not reverse a judgment unless "after an examination of the entire cause, including the evidence," it appears the error caused a "miscarriage of justice." (Cal. Const., art. VI, § 13.) In the case of state law error in a civil case, this standard is met when "there is a reasonable probability that in the absence of the error, a result more favorable to the

appealing party would have been reached." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)

In *Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, the court found that allowing evidence of even a single prior auto accident "constitutes reversible error and result[s] in a miscarriage of justice." (*Id.* at p. 525.) There, the accident occurred when the defendant suddenly moved into the left lane, without signaling or breaking, in an apparent attempt to start a left turn, and then turned back across the right lane, where the plaintiff was driving. (*See id.* at p. 522.) At trial, the defendant made an "allusion" to the fact that the plaintiff was involved in one "prior accident." (*Id.* at p. 525.) The jury returned a defense verdict. Given these facts, "[t]he conclusion [was] inescapable" that the plaintiff suffered undue prejudice. (*Ibid.*) "[T]he suggestion of accident-proneness insinuated into the trial . . . may well have been the factor that tipped the scales in favor of the defense." (*Ibid.*)

If evidence of just one prior accident makes a finding of prejudice inescapable, the repeated introduction of highly prejudicial evidence cannot be deemed harmless. The trial strategy of plaintiff's attorneys here closely mirrors that of the plaintiff's attorney in *Stafford v. United Farm Workers of America., AFL-CIO* (1983) 33 Cal.3d 319. There, this Court found that, based on the exclusionary rule of Evidence Code section 1104, the trial court erroneously admitted evidence of a temporary restraining order that had been issued against the defendant labor union before the accident in question. (*Id.* at p. 325.) Turning to the issue of prejudice, the Court noted that the TRO formed the centerpiece of the plaintiff's case, and that "[t]estimony referring to the TRO . . . fell on the jury like volcanic ash." (*Id.* at pp. 326-327 & fn. 9.) Moreover, "[t]he union's failure to comply with the TRO was . . . the 'theme' of [plaintiff s] closing argument," which

"portrayed the union as . . . an organization that had to be punished, that needed to receive a 'message' that courts and the law could not be ignored with impunity." (*Id.* at p. 326.) In these circumstances, "[t]he erroneous admission of the TRO was clearly prejudicial." (*Id.* at p. 327.)

Here, as in *Stafford,* plaintiff orchestrated the theme of her case around her theory that Sugar Transport knew, or should have known, that Carcamo had the character of an unsafe driver. In his opening statement, plaintiff's counsel made negligent hiring his very first point of emphasis. (1 RT 103:2-109:16.) Throughout the trial, plaintiff focused on the evidence regarding Carcamo's employment history, his prior accidents, his illegal immigration status, his performance reviews from prior employers, the efforts Sugar Transport took (or failed to take) to investigate these issues. (See *supra* at pp. 8-10.) Plaintiff solicited testimony about these issues from many witnesses, including Robert Wilson, her expert on negligent hiring. (*Ibid.*)

Plaintiff's attorney also used negligent hiring and retention as a platform to capitalize on highly prejudicial evidence that otherwise would have been inadmissible. Plaintiff's attorney repeatedly questioned Carcamo about his prior use of "phony" Social Security numbers and his illegal immigration status. (9 RT 1380:4-1384:22, 1392:6-8, 1438:25-27.) Plaintiff's attorney noted four times that Carcamo had returned to "his country" of Honduras during periods of unemployment and made sure the jury knew that Carcamo had filed multiple claims for workers' compensation and unemployment benefits and had filed for bankruptcy. (9 RT 1379:9-16, 1382:13-22, 1384:15-1386:14, 1388:18-1390:25, 1393:8-1395:19; 1399:14-27.) Absent the theories of liability based on negligent hiring and retention, none of this evidence would have been relevant.

In contrast to the steady stream of prejudicial evidence showing Carcamo's immigration status, employment history, and prior accidents, plaintiff's direct examination of her accident reconstruction expert, Jon Landerville, consumed less than one full day. (7 RT 1173:1-1215:12; 8 RT 1232:17-1316:19.) Plaintiff's counsel was even more brief in his examination of Tagliaferri, which takes up only four pages of the 10-volume transcript, and consisted mainly of verifying that she was an experienced driver who had no previous difficulty passing trucks. (2 RT 327:1-331:2.) Had plaintiff not been allowed to pursue theories of liability based on negligent hiring and retention, the trial likely would have concluded in less than half the time it actually took. The result would almost certainly have been more favorable to appellants, as the jury would have decided liability for the accident at issue based on evidence of that accident, rather than on prejudicial character evidence.

Plaintiff's closing argument compounded the prejudice that resulted from introduction of the evidence of negligent hiring and retention. According to plaintiff's counsel, the case involved bigger issues than what happened "two seconds before [the] impact" or legal responsibility for the accident:

> We are going to talk all about the legal responsibility that they have and the laws . . . But you know what? There's a moral responsibility for these trucking companies to make sure if they are going to put someone behind that wheel, if they are going to put somebody out there that's going to be driving right next to you or me or your family or Dawn Diaz, that they make sure that they follow the rules.

(*Id.* at 1553:4-21.) Plaintiff's counsel argued that Sugar Transport was an uncaring company that "rip[ped] the heart right out of this community" because it "puts profits over safety" and hires "unsafe drivers" so it can "put bodies behind the wheel" and "put checks in the bank." (10 RT 1554:8-13, 1565:12-13, 1570:3-25, 1571:1-27.) He asked the jury, "Do you think [Sugar Transport] care[s]? Do you think they care at all about the drivers' safety down here in Southern California that are driving right through Ventura?" (10 RT 1565:18-1566:7.)

Plaintiff's counsel then implored the jurors to send Sugar Transport a message about safety, through their verdict:

> What's it going to take to tell them that this is not the way the folks in Ventura, in Southern California, expect the trucking companies to operate? What's it going to take?
>
> Thank God for Dawn Diaz and the fact that she's going to let you decide this case .... [M]aybe your verdict will tell them that they should have some kind of a safety program. Maybe your verdict will tell them that they should comply with the rules.

(10 RT 1573:18-28.) In his rebuttal argument, he explicitly told the jurors that unless they found Carcamo negligent, they would be putting "a big seal of approval" on his truck driving and on Sugar Transport's employment practices. (10 RT 1643:19-25, 1646:28-1648:1.) Such a verdict, plaintiff's counsel warned, would tell Carcamo that he should keep driving the same way he had in the past, and would tell Sugar Transport not to change the hiring practices it had followed for seven years. (*Ibid.*)

The resulting prejudice is illustrated by the verdict itself. The jury allocated only 45% of the fault for the accident to Tagliaferri's negligent

driving, despite the undisputed evidence that she was primarily responsible for causing the accident. (2 CT 334.) All the percipient witnesses — including the one neutral eyewitness, Gamboa — described the events leading up to the accident the same way: Tagliaferri accelerated, moved into the fast lane, and then suddenly pulled back into Carcamo's lane without signaling. (Cf. *Monreal v. Tobin* (1998) 61 Cal.App.4th 1337, 1351 [driver not negligent as a matter of law for failing to move over to allow a speeding driver to pass].) Nevertheless, the jury allocated 20% of the fault to Carcamo for negligent driving and 35% of the fault to Sugar Transport for its negligent retention of Carcamo. Given that Sugar Transport's fault for the accident cannot exceed that of its negligent driver, this shows that the jury accepted plaintiff's invitation to punish Sugar Transport for its hiring and retention practices in addition to any fault it bore for causing the accident in question.

Finally, given the amount of evidence plaintiff presented to show that Carcamo had a bad character and that Sugar Transport was careless and cavalier in hiring and retaining him, the jury's award may well have been lower had the court applied *Armenta*. The jury awarded plaintiff more than $22.5 million in damages, including over $17.5 million in economic damages — more than 75% of the huge amount ($23,073,444) plaintiff had requested in closing argument. This amount included more than $3,000,000 for friends who were helping plaintiff free of charge. The request also included the cost of hiring licensed vocational nurses to attend to plaintiff 24 hours a day to prevent her from attempting suicide or falling, which added at least $10 million to her economic damages as compared to the established cost of part-time certified nursing assistants. (4 RT 619:13-620:13, 636:6-637:24, 689:15-690:2, 699:17-701:3, 720:24-28; 10 RT 1591:3-1593:8, 1636:9-1639:18.) In these circumstances, and in light of

counsel's impassioned plea to send Sugar Transport a message, it is reasonably probable the jury's award included a punitive element even though punitive damages were unavailable.

CONCLUSION

For the foregoing reasons, the Court should hold that *Armenta* rule applies in negligent hiring and retention actions as well as negligent entrustment actions, and that Proposition 51 has not affected application of the rule. The Court should also remand this case to the Court of Appeal with instructions to grant a new trial.

Dated: July 12, 2010

Respectfully submitted,

JONES DAY

By: Elwood Lui /pp
Elwood Lui

Attorneys for Appellants
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 13,825 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 12, 2010

Respectfully submitted,

JONES DAY

By: Elwood Lui /PD
Elwood Lui

Attorneys for Appellants
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

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[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.

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[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

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[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

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[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

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[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 **July 12, 2010**, I served the foregoing **OPENING BRIEF ON THE MERITS** 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

Jeanette Schachtner, Esq.
Anthony P. Serritella, Esq.
OFFICE OF THE CITY ATTORNEY, City Hall
1685 Main Street
PO Box 2200
Santa Monica, CA 90407-2200
Counsel for Amicus Curiae, City of Santa Monica

H. Thomas Watson, Esq.
Karen M. Bray, Esq.
HORVITZ & LEVY LLP
15760 Ventura Boulevard
18th Floor
Encino, CA 91436-3000
Counsel for Amici Curiae Foster Farms, Association of California Insurance Companies, and the American Insurance Association

Laurence L. Angelo, Esq.
ANGELO, KILDAY & KILDUFF
601 University Avenue
Suite 150
Sacramento, CA 95825
Counsel for Amici Curiae County of Yolo, City of Woodland, City of Davis, City of West Sacramento, City of Esparto, and California State Association of Counties-Excess Insurance Authority

Michael D. Campbell
CEO/Executive Vice President
California Trucking Association
4148 E. Commerce Way
Sacramento, CA 95834

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.

[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 **July 12, 2010,** at San Francisco, California.

Jeannie Jew