S181627
B211127

IN THE

SUPREME COURT

OF THE STATE OF CALIFORNIA

DAWN DIAZ,

Plaintiff and Respondent,

vs.

JOSE CARCAMO and SUGAR TRANSPORT OF THE NORTHWEST, LLC.,

Defendants, Appellants, and Petitioners.

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

ANSWER BRIEF ON THE MERITS

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ANSWER BRIEF ON THE MERITS

INTRODUCTION AND SUMMARY

1. A TEETER-TOTTER ON WHICH PETITIONER ALLOWS ONLY ITSELF TO SIT

> "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 [v. Churchill (1954) 42 Cal.2d 448]*, 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." (Court of Appeal Slip Opinion, p. 17; emphasis added).

The fundamental flaw in the presentation of Petitioner's argument is its failure to acknowledge what is really going on here, i.e., the clash of *competing policy concerns in need of judicial balancing*. Sugar Transport ("STN") is quite right in being disquieted about the potential that evidence of an employer's negligent hiring practices may have an impact on the issue of negligent employee driving. That is a legitimate concern. But Petitioner is blind to the *other* and conflicting judicial policy, i.e., that Proposition 51 advantages be measured against the "universe of tortfeasors" and not a "universe-minus-the-direct-negligence-of-the-employer." STN successfully sought to reduce its liability for general damages by apportioning fault (and thereby saved itself $2,250,000) *but wanted the required apportionment to exclude its own direct culpable and causative negligent conduct.*

This Court (as the Court of Appeal) is in the business of judicially (and judiciously) balancing competing public policies. (See *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 856 ["we attempt to balance competing public policies."].) Yet Petitioner myopically sees only one concern, i.e., the concern that concerns it.

The Court of Appeal credited both policies and sought to resolve the tension between the two based on the factual record presented to it. Here's how it saw the conflict:

> "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." (Slip Opinion, p. 12)

Now, here's the balance it struck:

> "The trial judge sought to resolve this tension in his detailed examination of the evidence [during an all-day 402 hearing and during trial] 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." (*Ibid.*)

2. "ABSENT PROOF OF NEGLIGENT HIRING AND RETENTION, THE REQUIRED APPORTIONMENT OF FAULT WOULD HAVE BEEN IMPOSSIBLE."

Where in the Petitioner's briefing is there any answer to the Court of Appeal's terse, and empirically irrefutable, observation of the laws of jurisprudential physics, i.e., that "Absent proof of negligent hiring and retention, the required apportionment of fault would have been impossible." (Opinion, p. 12)? A "universe of fault" which fails to account for all fault is

not a "universe" (i.e., "the entire population under study," according to Dictionary.com)—it is something less than a "universe." Noneconomic damages (the liability for which a 45% chunk was taken off Sugar Transport's ledger) "must be apportioned among [the] 'universe of tortfeasors' including 'nonjoined defendants' and those who have settled with the plaintiffs." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603.)

Armenta is distinguishable because it was decided 32 years before the enactment of Proposition 51 and accordingly did not involve a defendant employer *seeking to reduce its percentage of liability by asserting a Prop. 51 defense based on the comparative fault of a second negligent driver*—which STN sought (*successfully*) here. Petitioner STN sought and received a reduction of 45% of its liability for plaintiff's general damages by successfully arguing the *comparative*, causative fault of a second, negligent driver, Karen Tagliaferri. However, while reaping the benefits of a Prop. 51 defense based on the *comparative* fault of another tortfeasor, STN at the same time (and belatedly) attempted to prevent such fault from being compared to its own direct and contributing fault. That would have been patently unfair and contrary to the "total universe-of-fault" approach mandated by the "fair share" theory of Prop. 51 and its construing cases. That was not an issue in *Armenta*.

What Petitioner is attempting to accomplish here is akin to a defendant admitting liability, excluding all evidence of its own negligence

and then asserting the comparative fault of the plaintiff. Without evidence of the defendant's negligence, there is simply nothing to compare the plaintiff's negligence with—or measure it against. The plaintiff's negligence cannot be compared to something the trier of fact never learns or knows, i.e., the nature and extent of the defendant's negligence. Just substitute "the comparative fault of the second, negligent driver" in our case for "the comparative fault of the plaintiff" in this hypothetical. The calculation simply cannot be performed.

3. STN SEEKS TO UNFAIRLY SHIFT ITS OWN 35% OF THE TOTAL FAULT TO ITS 100% FAULT-FREE VICTIM.

To preclude the jury from considering all of the causative fault would place the burden of the defendant employers' own direct negligence unfairly upon the fault-free victim of that negligence.

> "The initiative [Prop. 51] explicitly shifts to the injured party some of the burden of noncontribution or undercontribution by some tortfeasors." *DaFonte v. Up-Right, Inc.,* (1982) 2 Cal.4th 593, 605, Fn 6

This is a far cry from what petitioner seeks here, i.e., the shifting of 35% of its own direct, non-vicarious fault for Plaintiff's general damages from the defendant to the plaintiff. This is not an issue of whether the plaintiff or the defendant should bear the burden of undercompensation due to the fault of a judgment-proof or immune third party. Rather, it is taking the (proportional) fault of the defendant and transferring it from the party-

defendant tortfeasor to the innocent victim. There is not a single identifiable public policy which this serves—and plenty which it offends.

4. PETITIONER'S "IDENTICAL AND COEXTENSIVE" ARGUMENT IS BASED ON THE MISASSUMPTION THAT WHAT IS BEING APPORTIONED IS CAUSATION AND NOT RELATIVE DEGREES OF FAULT.

Petitioner's argument is that, once the employer's vicarious, fault-free liability for the negligent (fault-based) conduct of its employee is conceded, then the "liability" of the employer and employee is "identical and coextensive," and "there can be no Proposition 51 ... apportionment between the employer and employee." But this superficially-appealing logic[1] only works if what is being apportioned or compared in California's system of "pure comparative fault" is not fault, but causation. Petitioner's "single unit" or "identical and coextensive" theory is dependent upon the apportionment being an apportionment of causation. The employer's negligence could not have *caused* the harm in the absence of the employee's negligence. It is in this sense, that Petitioner can say, "the employer is liable for the entire amount of harm its negligent hiring *caused*,

---

[1] After all, says Petitioner, the employer's negligence in hiring and retaining an unsafe driver cannot cause harm in the absence of an accident negligently caused by the employee. Until that time, the employer's negligence is merely negligence "in the air." Thus, Petitioner's argument continues, the employer and employee should be viewed as an indivisible (i.e., nonapportionable) single unit.

which by definition is the same as the harm *caused* by the employee's negligent driving." (OBM p. 35; emphasis added.)

But that cannot be said, and the argument breaks down, if what is being apportioned is fault or blameworthiness. As we show in Section III *ante*, the foundational assumption of Petitioner's argument is legally unsound because California adopted a system of pure comparative fault—not pure comparative causation.

According to STN: "The jury's verdict in this case, which assigns Sugar Transport a separate and greater percentage of fault than its driver (2 CT 334) is 'plainly illogical.'" (OBM p. 37-38.) But it is plainly *logical* if the apportionment is of culpability and not causation. It would be "plainly illogical" only if what is apportioned *is* relative, comparative causation. Assume that an employer's policy requires each employee to drink two six packs of beer during working hours and an intoxicated employee commits a relatively minor act of negligence (say, allows a pen to slip out of his/her hand, and someone loses an eye). Would it be "plainly illogical to assign[] [the employer] a separate and greater percentage of fault than its [employee]?" Or, assume an employer negligently creates an unguarded hole on its property and then an employee becomes aware of it but negligently forgets to guard the hole. In both of these examples, the totality of fault attributable to the employee/employer unit is *greater than merely*

the employee's negligence which is imputed to the employer. In both, the employer's fault is, logically and legally, greater than that of the employee.

5. DOES PETITIONER'S OWN 35% OF DIRECT, NEGLIGENCE-BASED, NON-VICARIOUS FAULT SIMPLY EVAPORATE INTO THE ETHER?

Because STN invoked Proposition 51 (by asserting the comparative negligence of Tagliaferri as a partial defense), the trial court entered a several judgment against STN for 55% of the general damages, *which 55% consisted of the sum of STN's own direct negligence (35%) plus the driver's negligence (20%) for which STN was vicariously liable (without fault).*

All agree that Tagliaferri is liable for 45% of the general damages and Carcamo (directly) and STN (vicariously) are liable jointly for 20%. So what happens to STN's 35% of the total causative negligence? Under STN's proposed system for handling such matters, what do we do with that 35%? Ignore it? Forgive it? STN unburdens itself of its own fault and puts it on the back of innocent Dawn Diaz.

6. THAT THE COURT OF APPEAL "OVERRULED" AND "ABANDONED" *ARMENTA* IS RANK SOPHISTRY.

Petitioner's brief is liberally peppered with the accusation that the Court of Appeal held "that Proposition 51 eliminated the *Armenta* rule" (OBM, p. 33), that in Proposition 51 the voters overturned *Armenta* (OBM, p. 33), and that "the *Armenta* rule has been superseded by Proposition 51" (OBM, p. 4, 32, 38); and that the Court of Appeal "jettison[ed] the *Armenta* rule" (OBM, p. 38) and "abandon[ed] the *Armenta* rule." (OBM, p. 39)

Nonsense. Outside of a case where a negligent employer is seeking a comparative reduction in its own liability, no one (especially Dawn Diaz) and no case argues against the continued vitality of *Armenta*, and the important policy concern it protects. But the Court decided *Armenta* 32 years before the adoption of comparative fault. The Court of Appeal here was careful to accord due regard to the holding and reasoning of *Armenta*; but also noted (correctly and obviously) that *Armenta* did not "purport[] to deal with the allocation of fault required by Proposition 51" (Slip Opinion, p. 6). The Court then went on to consider the application of *Armenta* in a Proposition 51 context, *giving full force to the policy concerns expressed in Armenta*. It did so by carefully examining (and eventually approving of) the manner in which the trial court gave due respect to both of the competing policies and resolved this inescapable conflict in a reasoned, thoughtful and balanced manner.[2]

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[2] As Petitioner points out, another Court of Appeal (*Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853) *purported* to deal with *Armenta* in a post comparative fault world, but *Jeld-Wen* did not involve the post-trial review of a negligent employer who obtained a Prop. 51 reduction in liability based on the comparative negligence of a second, negligent driver, and accordingly, in the four-paragraph portion of the opinion dealing with the issue, the *Jeld-Wen* court never got to the meat of the issue presented here, never discussed the issue in any context of actual application of Proposition 51 (as opposed to untethered generalities), never even recognized or stated the conflict or tension, let alone attempted to resolve it (because it was a summary adjudication case) and, failed to address the concerns posed by the Court of Appeal (and Respondent's briefing) here. Thus, this Court's involvement.

7. STN NEVER MADE THE REQUIRED PRE-TRIAL BINDING ADMISSION OF RESPONDEAT SUPERIOR LIABILITY.

Armenta and *Jeld-Wen* are triggered, "[o]nce an employer has admitted *before trial* to vicarious liability for its employee's negligence ...." (*Jeld-Wen at* 131 Cal.App.4th at 870; emphasis added.). But that is not what happened here. It happened in both *Armenta* and *Jeld-Wen*, but not here. Here, Petitioner went through a succession of (now) five different law firms to represent it and the first three did not offer such a stipulation until the middle of the trial and *after seven witnesses had been presented.* Thus, the parties answered ready for trial (CT-I, 440), filed motions in limine on negligent hiring (*id.*, 45-50), argued the motions (*id.*, 68, 86), briefed the 402 hearing on negligent hiring (*id.*, 71-87), participated in the 402 hearing on negligent hiring (RT-1,77 et seq.), filed trial briefs (CT-I, 96-108), picked a jury and gave opening statements (RT-1, 77-163), examined and cross-examined seven witnesses (RT-1, 164–RT-2, 345)—*all without a stipulation from defendant regarding respondeat superior liability!*

Petitioner represents that, "[e]arly in the litigation, Sugar Transport admitted respondeat superior liability for Carcamo's actions." (OBM, p.7). What it is referring to is a *nonbinding* answer to the Form Interrogatory on *permissive use* (not respondeat superior). There simply was no binding pretrial admission of respondeat superior liability.

8. PETITIONER, BY THE HANDS OF ITS THREE PRIOR ATTORNEYS, MULTIPLY WAIVED, OR ARE ESTOPPED FROM ASSERTING, THE ISSUE PRESENTED HERE.

It cannot be overemphasized: While Petitioner STN has launched the *Armenta* issue to the lofty heights of high court review, it was a neglected stepchild at trial. STN did not even bother to trouble itself with *Armenta* until deep into the trial—after much too much trial water had irretrievably passed under the bridge. The doctrine of waiver/estoppel, here, takes the form of a triptych:

First, Petitioner's raising of *Armenta/Jeld-Wen* for the first time in the middle of the trial came too late under *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220 because it would have been prejudicial to the Plaintiff Diaz.

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

Third, Petitioner is estopped from asserting any *Armenta/Jeld-Wen* argument it might have had by not asking for the simple remedy of bifurcation. While bifurcating the case would have eliminated even the

possibility of prejudice, Petitioner, for tactical reasons, decided to try all issues at the same time.

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

FACTUAL STATEMENT

1. NEGLIGENT DRIVING

Here is the evidence not referenced in Petitioner's Opening Brief on the Merits:

(a). The STN Driver Was Angry And Closed The Gap On Tagliaferri; She Was "Trying To Cut Me Off." Carcamo described his state of mind at the time of the accident as follows: "I see a lot of crazy drivers on the road, and I memorize it [i.e., the phone number for the CHP] and I report them" (RT-9, 1429:2-9); and "She passed me by *trying to cut*

me off'—"that was her intention." (*Id.*, 1416:13-16, 1423:8-11; emphasis added.)

(b). STN Destroyed The ("Tattletale," "Silent Witness") Tachograph Chart Of The Accident, which would have shown "the accident circumstances: (CT-II, 262; RT-10, 1662:16-24). A tachograph is an on-board recording device used on trucks to tell trucking companies the driving behavior of their truck drivers. They are known as the "silent witness." (RT-2, 359:10-23.) Defendant STN's Terminal Manager, Mark Stephens, refers to it as "The Tattletale." (RT-6, 1019:1-5.) "Accident circumstances do show up on charts. It will show you the speed it [sic] at impact, what the speeds were before impact, the speeds after impact, and the direction of impact, unlike a digital or GPS device does, because a stylus will move towards the direction of impact." (RT-5, 799:25-800:7.) "[I]t's the silent witness. It will tell you objectively what happened." (*Id.*, 801:22-24.)

Here, STN got rid of the chart so there would be no tachograph evidence of its employee's driving immediately prior to, and at the time of, the accident. Carcamo entered the odometer reading on the tachograph chart in addition to all other required information on the morning of the accident (RT-4, 736:17-20). After the accident, he took the chart and handed it over to his supervisors (*id.*, 736:21-24). The STN supervisors and managers testified they "really don't know" what happened to the

tachograph chart Mr. Carcamo turned in after the accident (RT-6, 1029:6-8). Seven days after the accident, STN hired an expert, at which time the tachograph chart "should have been in Stockton" (*id.*, 1052:10-15). John Ott, STN's person most knowledgeable about what happened to the tachograph chart from the accident (RT-7, 1091:27-1092:7) testified that if speed were something involved in an accident, either going too slow or too fast, speeding up, that would be shown on a tachograph chart (*id.*, 1099:27-1100:3).

> "Q. And if it showed that the circumstances of the accident were not as STN wanted them to be, it wouldn't be helpful for STN or Carcamo to have that chart, would it be?
>
> "A. I wish we had the chart." (*Id.*, 1102:2-10.)

(c). The STN Driver Was In The Wrong Lane. (RT-9, 1419:12-25; RT-4, 740:3-9; and RT-6, 954:2-4; RT-9, 1413:28-1414:6). Moreover, the driver admitted he was in the wrong lane. (RT-9, 1413:28-1414:6; 1420:16-1421:5).

(d). The STN Driver Was Inattentive. (RT-4, 742:26-744:1; RT-8, 1354:16-20; RT-9, 1423:25-27); (RT-4, 742:12-25). (RT-9, 1425:3-19.) (RT-9, 1423:17-24 and 25-27), (1424:4-8; 1425:12-18) (RT-8, 1355:10-22, 1276:17-28).

(e). The STN Driver Lacked Credibility. He lied about numerous matters (RT-9, 1386:20-25; 1387:8-15; 1392:25-1393:5; 1387:16-1388:17; ["that was the best I could come up with"]; 1385:3-

1386:19; 1387:8-15; 1389:10-22; 1392:25-1393:5; 1399:14-20; 1378:9-1380:3; 1390:27-1391:27; and 1396:1-8).

Petitioner simply dismisses all of this evidence as "the barest allegations of negligence by Carcamo." (OBM p. 4-5) Petitioner's driver was angry and attempted to close the gap on Tagliaferri because she "was trying to cut [him] off." And Petitioner knew it—that is why they destroyed the tachograph chart.

2. NEGLIGENT HIRING/RETENTION: "WE NEEDED TO HAVE BODIES TO WORK."

According to Petitioner's terminal manager, who "oversees hiring, firing, etc": "From time to time, it is hard for us to find drivers that their DMV printout is not a deterrent and we were in a situation at that moment where we needed to have drivers" and "I would say *we needed to have bodies to work.*" (*Id.*, 1010:6-12; emphasis added.) This was STN's explanation for why it knowingly hired an unsafe driver.

As a part of the federally-mandated application process, Petitioner STN was provided written information regarding Jose Carcamo from a prior employer, who had earlier hired and fired Carcamo to drive a "bobtail truck" because he was a proven unsafe truck driver. (RT-6, RT-2, 467:26-468:13; 468:14-17; 471:5-10; RT-6, 1027:4-10 and 1033:28-1034:9; Exh. 81; CT-V, 1166-1168.)

LEGAL DISCUSSION

I.

PETITIONER IGNORES THE CONFLICTING PUBLIC POLICY CONCERNS THE TRIAL AND APPELLATE COURTS ATTEMPTED TO PROPERLY BALANCE.

A. STN CAN ONLY SEE ONE SIDE OF THE EQUATION.

> *"The greater part of mankind ... see objects only on one side, and have no idea of any counter-poising argument. To hesitate or balance perplexes their understanding, checks their passion, and suspends their action."* David Hume, An Enquiry Concerning Human Understanding (1910).

Once again, here are the competing-policies that faced the trial court and the Court of Appeal:

> "[Policy No. 1:] Absent proof of negligent hiring and retention, the required apportionment of fault would have been impossible. But [Policy No. 2:] such proof raised the likelihood of prejudicing the jury." (Slip Opinion, p. 12.)

An "impossibility of apportionment" versus "likelihood of prejudice." In the next section, we will get into *how* the trial court (with the approval of the Court of Appeal) resolved, balanced, accommodated this tension. But for now: How does Petitioner suggest this clash be resolved? It doesn't. It is silent. All it does is hammer home, again and again, that side of the scale with which it is concerned, (i.e., "likelihood of prejudice") and pretends there is nothing to balance. Petitioner points the Court to "prejudice," "prejudicial," "inflame" and "character evidence" 65 times in its 48 page opening brief. In contrast, it mentions the Court of Appeal's observation that, "the required apportionment of fault would have been impossible

without evidence of Carcamo's character" only once in its argument and then summarily dismisses it out of hand as "incorrect" because "[t]he theory of negligent hiring/retention serves the same purpose as the doctrine of respondeat superior" (OBM p. 35)—a quizzical proposition at best, given that one form of liability is vicarious and the other is fault-based. One cannot balance that which one does not recognize or acknowledge.[3]

B. THE BALANCE STRUCK BELOW—A BALANCE PETITIONER SIMPLY IGNORES.

1. As Recounted By The Court Of Appeal:

Here is how the "[t]rial judge sought to resolve this tension" (a tension Petitioner cannot even acknowledge) as recounted by the Court of Appeal:

> "The trial judge sought to resolve this tension in his detailed examination of the evidence and his admonitions and instructions to the jury" (Slip Opinion, p. 12) "... [T]he evidence [of negligent hiring/retention] 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." (*Id.* at 10.)

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[3] See *Abbott Ford, Inc. v. Superior Court*, (1987) 43 Cal.3d 858, 902: ['[W]e have generally attempted to harmonize the competing public policies, taking into account the specific context in which the potential conflict between the various policies appears. Accordingly, the fact that we have determined, in one setting, that a particular goal should properly give way to another objective, does not mean that the goal that prevailed should always 'trump' the competing objective when a conflict arises between the two in a different setting."]

a. Section 352 Balancing

"Such evidence, of course, remains subject to exclusion under section 352. ... 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 miscarriage of justice. [Citations.]' "

"Here, evidence of Carcamo's prior employment and driving history had substantial probative value in determining whether Sugar Transport was negligent in hiring or retaining Carcamo as a driver. Indeed, such evidence is likely the only way this could be shown. (*Id.* at 10-11; citations omitted)

b. The Lengthy Section 402 Hearing.

"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." (*Id.* at 11; emphasis added.)

c. Multiple and Repeated Limiting Instructions.

" '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.' (Citations.) 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. (Citations.) 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*." (*Ibid*; citation omitted; emphasis added.)

d. The Exercise of Judicial Care In The Admission Of Such Evidence.

"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." (*Id.* at 12.)

2. A Little Greater Detail As To The All-Day 402 Hearing, Jury Instructions, Admonitions And The Verdict Form, All Of Which Were Carefully Employed By The Trial Court.

Petitioner uncharitably ignores all of the hard work and diligent, careful and persistent efforts by the trial court to avoid prejudice and to afford all parties a fair trial:

- Before the jury was even impaneled, the trial court required the plaintiff, in an all-day 402 hearing, to present evidence and witnesses to the court so that the court could determine that there was sufficient evidence to go to the jury on Carcamo's negligent driving, negligent hiring and causation before the case could be tried to a jury on all issues. (RT-1, 11-

97.) In essence, plaintiff's case was "pretried" to the court in order to ensure fairness.

- At the end of the hearing, the court found sufficient evidence of negligent driving and negligent hiring/retention to go to the jury. (CT-1, 1-89 ["The Court will allow the evidence re negligent hiring in the special verdict form."].

- Before plaintiff was allowed to examine Jose Carcamo, the trial court cautioned the jury as follows:

> "You may not consider whether Jose Carcamo had any prior accidents to determine negligence relating to this accident. Any evidence of specific acts or instances of accidents is irrelevant to the question of whether Jose Carcamo was negligent on the day of this accident, but it may relate to other issues in the case. And so, I have determined that it should be allowed.

- The trial court indeed re-read this instruction to the jury at the end of the case (CT-II, 274.)[4]

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[4] This Court and the courts of appeal have recognized the ability of juries to deal with complex and sophisticated legal and factual problems, including heeding limiting instructions in connection with otherwise highly prejudicial evidence. (See, e.g., *People v. Kelly* (2007) 42 Cal.4th 763, 782-787 [evidence of prior improper financial dealings with other women, of prior assault on a woman, and of rapes of three other women admitted in capital rape/murder case for limited purposes of showing identity, common plan or design and intent]; *People v. Roldan* (2005) 35 Cal.4th 646, 704-707 (overruled, on another ground, as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn 22) [evidence of prior robbery admitted in capital robbery/murder case for limited purposes of showing identity, motive and intent]; *Piscitelli v. Salesian Society* (2008) 166 Cal.App.4th 1, 7-13 [evidence of cleric's prior felony sexual abuse conviction admitted in civil action against priesthood for failure to protect plaintiff against sexually (cont'd)

- The Court also read them CACI No. 5005: "There are three defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of his or her own defenses." (CT-II, 254.)

- The trial court also instructed the jury 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." (CT-II, 260.)

- Finally, the verdict form presented the issue of Carcamo's negligence as the first question and, if answered "no", then defendant STN was absolved of all liability. (CT-II, 332.)

- While yet another procedural device, bifurcation, was available to guard against the possibility of the prejudice of which Petitioner now

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predatory priest for limited purposes of impeaching witness and to show bias]; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 597-599 & fn. 6 [evidence of Nicole Brown Simpson's telephone calls to battered women's shelter, diary entries and letter referring to prior incidents of domestic violence admitted in civil wrongful death and survival action for limited purpose of showing Nicole's state of mind about her relationship with O.J. Simpson].)

If properly instructed juries can handle this kind of potentially prejudicial evidence in very serious—even life and death—cases, surely juries can consider, with proper instruction, the evidence of simple negligence at issue here. Petitioner's position reflects a fundamental distrust of the jury system.

complains, *Petitioner elected not to take advantage of it.* Instead, it made the tactical decision to have all of the issues tried at the same time.

The trial court did much to mitigate and minimize any potential prejudice. Yet Petitioner has nothing to say about how the "trial judge sought to resolve this tension." It unbudgingly wants no evidence of its own negligence **AND** a Prop. 51 reduction in its liability.

> "*Wolde you both eate your cake, and have your cake?*" John Heywood, A Dialogue Conteinying the Number in Effect of All the Prouerbes in the Englishe Tongue (1546).

II.

ARMENTA DID NOT INVOLVE A DIRECTLY-NEGLIGENT EMPLOYER ASSERTING A PROP. 51 COMPARATIVE DEFENSE AGAINST A SECOND, NEGLIGENT DRIVER WHICH NECESSARILY REQUIRES AN EVALUATION OF THE EMPLOYER'S OWN FAULT.

A. THE "IMPOSSIBLE APPORTIONMENT"

> "*Absent proof of negligent hiring and retention, the required apportionment of fault would have been impossible.*" (Slip Opinion, p. 12)

During the trial below, Petitioner belatedly came to rely on *Armenta v. Churchill, supra*, 42 Cal.2d 448, as entitling it to another trial in the event it lost. However, the defendant employer in *Armenta* (because *Armenta* was decided prior to the adoption of comparative fault) *never had the opportunity to assert a Prop. 51 defense attempting to attribute comparative fault to another driver and thereby reduce its own liability.* The fault attributable to Petitioner's driver, Jose Carcamo, was 20%, the

fault attributable to STN was 35%, and the fault attributable to Tagliaferri was 45%—all triggered by *Petitioner STN's decision to plead, defend and try this case based on a Prop. 51 defense asserting the negligence of Karen Tagliaferri.*

By continuing (to this very day) to insist on asserting and maintaining its Prop. 51 defense based on the negligence of a second driver (which did not happen in *Armenta*), STN received a Prop. 51 reduction in the amount of Tagliaferri's 45% of the general damages, i.e., $2,250,000. If "these claims added nothing" in *Armenta*, it was because the employer there did not seek to take advantage of a Prop. 51 reduction by asserting the negligence of a second driver, as did STN here. Because of the successful Prop. 51 defense here, it made a big difference to STN (a $2,250,000 reduction). *If STN were jointly and severally liable for all damages*, then STN would be correct in saying, "These claims added nothing." But the electorate's decision in 1986 to pass Prop. 51, and STN's decision to assert it here to its considerable advantage, changed all that.

Petitioner STN should not be able to both invoke Prop. 51 as a partial defense and yet exclude itself from the apportionable "universe of tortfeasors." That is not how Prop. 51 and California's system of comparative fault should work. As the Court of Appeal recognized, it is simply impossible to determine the 100% of causative fault for this

accident (i.e., the process triggered by STN's assertion of a Prop. 51 defense) without including the fault based on STN's own direct negligence.

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

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

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

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

How can Petitioner STN's "proportionate share of fault, as compared with *all fault* responsible for the plaintiff's injuries," be determined if we exclude from "all fault" that 35% share of fault attributable to defendant STN? STN seeks a "universe of tortfeasors"—but excluding STN. That is an unfair reading of the "Fair Responsibility Act," and is directly contrary to the terms of the statute (Civ. Code § 1431.2) and this Court's precedents.[5]

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[5]See Haning, Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group 2009) paragraph 2:261, p. 2-69 ["There may be cases where the employer can be sued on other theories as well—e.g., negligent entrustment, negligent supervision or perhaps negligent hiring. If there is an independent basis for holding the employer liable, it will usually be to plaintiff's advantage to plead both the respondeat superior and independent (cont'd)

B. IF A DEFENDANT STIPULATES TO LIABILITY AND ASSERTS THE COMPARATIVE FAULT OF THE PLAINTIFF, MAY IT EXCLUDE ALL EVIDENCE OF ITS OWN NEGLIGENCE? OF COURSE NOT.

There would then be nothing for the jury to compare the plaintiff's comparative fault with. The jury hears all of the evidence of the plaintiff's negligence, hears none of the evidence of the Defendant's negligence and then gets a verdict form saying: "Assuming 100% represents the total fault which caused the harm, what percentage is attributable to the negligence of the plaintiff? Answer: ___%." That simply cannot be done without any evidence of what fault the rest of that 100% represents (i.e., the defendant's negligence.) No one would ever think that a defendant could admit liability, keep out evidence of its own negligence and then ask a jury to apportion a percentage of fault to the plaintiff's comparative negligence. How could the jury determine that the plaintiff is, say, 23% of the total fault when they have no basis for determining that the defendant is 77% of the fault? They can't.

Here Petitioner STN would ask the jury to make the same (impossible) calculation, i.e., to determine what percentage of the 100% of total fault is attributable to the second driver (instead of the plaintiff) and to

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liability theories. Reason: In multi-defendant cases, the trier of fact will have to make a separate determination of what percentage of fault is attributable to the employer under the independent theory; the employer, in turn, will be liable for that portion of noneconomic damages resulting from both the fault allocated to the employee and the fault allocated to the employer on the independent theory!" (Original italics.)]

the defendant's employee *and do so without any evidence of the defendant's own negligence.*

III.

PETITIONER'S "IDENTICAL AND COEXTENSIVE" ARGUMENT IS BASED ON THE MISASSUMPTION THAT WHAT IS BEING APPORTIONED IS CAUSATION AND NOT RELATIVE DEGREES OF FAULT.

A. PETITIONER'S "IDENTICAL AND COEXTENSIVE" ARGUMENT IS BASED ON THE ASSUMPTION THAT THE TRIER OF FACT IS APPORTIONING CAUSATION AND NOT FAULT

Here is Petitioner's mantra:

Once the employer's vicarious, fault-free liability for the negligent (fault-based) conduct of its employee is conceded, then the "liability," the "fault," the "apportionment," the "harm *caused*" is "identical and coextensive," "the employer is liable to the same extent as the employee," "there can be no Proposition 51 ... apportionment between the employer and employee," there can be no "additional fault to the employer," and "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." (OBM 4, 22, 23, 30, 31, 32, 33, 34 and 35; emphasis added.) If so, says Petitioner, then to "assign[] Sugar Transport a separate and greater percentage of fault than its driver is plainly illogical." (OBM, p. 37-38; also 23.)

But this syllogism only works if what California law means by "liability," "fault," "harm caused" and "apportionment" is an apportionment of causation as opposed to the apportionment of fault, i.e., culpable conduct, tortious wrongdoing, blameworthiness. If California's system of pure (and highly inclusive) comparative fault apportions causation, then petitioner's superficially-attractive argument has some substance to it. If, however, the requisite apportionment is not of causation but of relative, comparative degrees of culpability or wrongdoing, then Petitioner's argument collapses into itself.

Petitioner is right that its negligent hiring did not cause any greater injury, any more harm or a single broken bone more than did its employee's negligent driving. Petitioner is also right that its vicarious, fault-free respondent superior liability is identical and coextensive (i.e., the same as) the negligence-based liability of its employee. But it is not causation that is being apportioned — it is fault (i.e., culpability/wrongdoing) and *the employer's tortious, wrongful, culpable, direct and non-vicarious fault is* ***not*** *identical to and coexistence with the negligence-based fault of its employee/driver.*

The employer's and employee's *causation*, on these facts, *is* identical. STN did not cause 35% of Dawn Diaz's brain injury and Carcamo cause 20%. The injury is indivisible. Also, the employer's fault-free liability and the employee's fault-based liability *is* identical, i.e., 20%. *But*

their respective degrees of comparative, apportionable, relative fault, culpability, or wrongdoing are significantly different, i.e., 20% versus 35%. Both of their respective (and quite different) acts of negligence *caused* the same indivisible harm, but their respective, relative culpable acts varied significantly in both kind and degree. The employee simply committed an act(s) of simple, everyday negligence (albeit with catastrophic consequences to Dawn Diaz), while the employer's negligence was reckless, dangerous, callous and shocking, and combined with the employee's negligence to cause the same, identical, indivisible, catastrophic injuries.

So, if Petitioner's argument is based on the object of the mandated "apportionment of fault" being causation as opposed to, well, fault, then the foundational question becomes: What are we in California apportioning when we say our pure system of comparative fault requires an apportionment of fault and an assignment or allocation of percentages of fault which add up to 100%? Is it causation (as Petitioner's "identical and coextensive" argument implies) or is it real-life, nitty-gritty, apportionable, relative, comparable fault/blameworthiness which must be divvied up among the universe of (joined, unjoined, liable and immune) tortfeasors/wrongdoers/culpable actors? Diaz suggests that the answer is rather clear and noncontroversial, (i.e., we apportion fault, not causation)—and that discussion follows.

B. THIS COURT ADOPTED A SYSTEM OF PURE COMPARATIVE FAULT — NOT PURE COMPARATIVE CAUSATION

As noted, Petitioner's argument is implicitly, but necessarily, based on an apportionment of causation, instead of culpability: "This result [the jury's verdict] is 'plainly illogical' given that the inadequate procedures could only have *caused* harm through the negligent driving of the employee." (OBM p. 23; emphasis added.).

But causation is not what we apportion. We apportion relative, comparative, fault (i.e., negligence, wrongdoing, tortuous conduct). As this Court observed three years after adopting a system of pure comparative fault for California:

> "[E]ven when a plaintiff is partially at fault for his own injury, a *plaintiff's culpability is not equivalent to that of a defendant.* In this setting, a plaintiff's *negligence* relates only to a failure to use due care for his own protection, while a defendant's *negligence* relates to a lack of due care for the safety of others. Although we recognized in *Li* that a plaintiff's self-directed *negligence* would justify reducing his recovery in proportion to his degree of fault for the accident, the fact remains that insofar as the plaintiff's conduct creates only a risk of self-injury, such conduct, unlike that of a *negligent* defendant, is not tortuous." *Am. Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 589 (emphasis added.)
>
> and
>
> "[W]e hold that after *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only '*in proportion to the amount of negligence* attributable to the person recovering.'" (*Id.* at 590; emphasis added.)

When the Court adopted pure comparative negligence three years earlier in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 828-829, it clearly described the new job the trier of fact would have: "... to assign responsibility and liability for damage *in direct proportion to the amount of negligence of each of the parties.* ... the damages awarded shall be diminished *in proportion to the amount of negligence attributable to the person recovering*." (Emphasis added.) And in *Richards v. Owens-Illinois Inc.* (1997) 14 Cal.4th 985, 998: "[D]efendant's fault must be compared to all other 'fault' responsible for the injury."

"Comparative negligence" then came to embrace all forms of "comparative fault," including equitable indemnity (*American Motorcycle, supra*) strict products liability (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 328) and intentional tortfeasors (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 151), ["[I]n all cases in which a negligent actor and one or more others jointly caused the plaintiff's injury, the jury should be instructed that, assuming 100 percent represents the total causes of the plaintiff's injury, liability must be apportioned to each actor who caused the harm *in direct proportion to such actor's respective fault*, whether each acted intentionally or negligently or was strictly liable." (Emphasis added.)] Causation is a qualifying prerequisite but it is then fault which gets apportioned.

As one Court of Appeal put it:

> "*Since the comparative fault doctrine was first adopted in California in Li v. Yellow Cab Co., our Supreme Court has repeatedly acknowledged that it is* ***designed to permit the trier of fact to consider all relevant criteria in apportioning liability.*** *The doctrine 'is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss.' (Knight v. Jewett) '"[C]omparative negligence" does not lend itself to "the exact measurements of a micrometer-caliper.' (Daly v. General Motors Corp.)*" (Other citations omitted; emphasis added.) *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1233.

Thus, the jury here was instructed through CACI 406 (CT 2-284) and a special verdict (CT 2-334) based on CACI VF-402, to "assign percentages of responsibility."

How could this jury do what it was asked to do if 35% of the negligent conduct or blameworthiness was kept from its consideration? Or, as the Court of Appeal put it: "Absent proof of negligent hiring and retention, the required apportionment of fault would have been impossible. ... 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." (Slip Opinion, p. 127.)[6]

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[6] The Uniform Comparative Fault Act, 12 U.L.A. 41, counsels that, in allocating fault, a fact finder should consider (1) the causal relationship between the respective actors' conduct and the plaintiff's injuries and (2) various factors relating to the blameworthiness of the respective parties. It blends the two concepts together (i.e., blameworthiness and causation), but the Act has only been adopted in two states, Iowa (Iowa Code Ann. §685.3) (cont'd)

IV.

CAN WE ALL AGREE ON THIS: AN EMPLOYER'S LIABILITY FOR NEGLIGENT ENTRUSTMENT, HIRING, AND/OR RETENTION IS DIRECT, AND NOT VICARIOUS, LIABILITY?

A. NEGLIGENT HIRING/RETENTION IS DIRECT LIABILITY.

As noted above, if negligent hiring/retention is vicarious liability (a mere variant of respondeat superior) then Respondent Diaz's argument loses some of its logic. If such a claim is indeed vicarious, then Petitioner STN's "coextensive and identical," "to the same extent" and "cannot be greater than" argument starts to make more sense. So, what is it?

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and Washington (Wash. Rev. Code Ann. §422.040), which means that 48 states have not adopted it. Moreover, even under the Uniform Act, blameworthiness is a factor yet cannot be factored in if the directly-negligent employer's own negligence is excluded, as Petitioner here would have it. A few other states have adopted the Uniform Act's blended approach, but without adopting the Act (e.g., *Hilen v. Hays* (Ky. 1984) 673 SW 2d 713, 720, Ky. Ref. Stat. Ann. 411-182; *Watson v. State Farm Fire & Cas. Ins. Co.* (1985) (La., 1985) 469 So.2d 967, 973-974; and Mich. Comp. Law section 600 - 6304(2). The Kansas Supreme Court has referred to "degrees of causation" (*Kennedy v. City of Sawyer* (Kan. 1980) 228 Kan.439, 450, 618 P.2d 788,797. Texas uses a "comparative causation" approach in strict products liability actions. (*General Motors Corp. v. Hopkins* (Tex. 1977) 548 S.W.2d 344 and *Duncan v. Cessna Aircraft Co.* (1984) 665 S.W.2d 414, 423) which decisions resolved the issue differently than this Court did in *Safeway v. Nest-Kart, supra.* Indeed, California uses an apportioned causation approach in selt-belt defense cases (*Truman v. Vargas* (1969) 275 Cal.App.2d 976) and crashworthiness cases (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548). But once again, even in a "blended" system, the blameworthiness component needs to be "blended" in and not entirely excluded.

- **Respondent Diaz's Position:** In California, negligent hiring is not vicarious liability—it is direct liability. See *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 ["Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability. (2 Dobbs, The Law of Torts, § 333, p. 906.)"]; *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1565 ["The rule of direct employer liability under Restatement Second of Agency, section 213 . . . ."]; *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 ...."]; and *Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396 at 400 ["negligent entrustment is an independent tort," citing *Blake v. Moore* (1984) 162 Cal.App.3d 700, 707].

- **The Court of Appeal's Position:** "*Negligent Hiring and Retention is a Theory of Direct Liability*" (Slip Opinion, p. 3; emphasis is the Court's). "Our Supreme Court recognized in a decision prior to *Armenta*, that negligent retention is a theory of direct liability independent of vicarious liability." (*Id.* p. 6; citing *Fernelius v. Pierce* (1943) 22 Cal.2d 226, 233-244; *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal.App.3d 57, 68-69; and others.)

- **Petitioner STN's Position:** "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, …." (OBM, p.24)

- **Is There A Dispute Here?** In a different part of its brief, Petitioner argues: "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* …." (OBM, p. 29-30, referring to *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244; emphasis added.)

Thus, in order to make its argument work, Petitioner risks advancing the mutually-contradictory claims that negligent hiring/entrustment is direct liability but, at the same time, is "in essence vicarious" or "a variant of respondent superior" liability. This effort is merely Petitioner's attempt to sneak what is clearly direct liability in the back door as "vicarious" liability in order to dove-tail into the *Armenta* rubric of "identical and coextensive." Respondent submits, based on all the cases cited above by the Court of Appeal and by Respondent herein (and, indeed, by Petitioner elsewhere), that Petitioner is simply wrong on the law. Negligent hiring/retention is, in substance, form, essence or whatever, direct and not vicarious liability.

As to Petitioner's "in essence vicarious" argument based on *Camargo*, the Court of Appeal answered it as follows:

> "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." (Slip Opinion, p. 9)

Thus: respondeat superior is vicarious liability (here 20%), negligent hiring/retention is direct liability (here, 35%) and the two cannot logically, mathematically or juridically be characterized as "identical and coextensive" or considered to be two different expressions or iterations of the same thing. STN's 35% of direct fault can simply not be made to go away.

B. THE FACT THAT THE NEGLIGENT HIRING CLAIM IS CONDITIONAL ON NEGLIGENT DRIVING DOES NOT CONVERT IT FROM DIRECT TO VICARIOUS AND MAKE THE LIABILITY "IDENTICAL AND COEXTENSIVE."

Petitioner's theory ("the liability of the employer and employee is identical and coextensive") simply cannot work if the employer's negligent hiring/retention is direct liability. That is why, after seemingly conceding the point, Petitioner drifts into negligent hiring/retention being "essentially vicarious." Its argument will never stand up if what the jury found it to be 35% guilty of was direct, nonvicarious liability. So, next, STN attempts, through a different but related approach, to stuff the square peg of what

California clearly recognizes as direct liability into the round hole of vicarious liability. Now, negligent hiring/retention is "derivative."

> "Negligent hiring is in essence vicarious or derivative because it derives from the act or omission of the person hired." (OBM p. 29-30; citing *Camargo, supra*)

But this argument, being based on *Camargo*, was effectively answered by the Court of Appeal at pages 8-9 of the Opinion, as discussed above. *Camargo* was a post-*Privette* case where an injured employee, covered by workers compensation insurance functionally paid for by the hirer of an independent contractor, tried to sue the hirer after the employee was injured by the negligence, not of the hirer, but of the independent contractor who was the plaintiff's employer.

Suffice it to say, this is not that situation.

Next:

> "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." (OMB p. 37)

Again, the Court of Appeal responded to this claim by relying on a decision of this Court and one its own earlier decisions:

> "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.' " (Slip Opinion, p. 6; emphasis added.)
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> "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.)" (Slip Opinion, p. 8; emphasis added.)

A directly-negligent employer's liability is no more "derivative" (in the sense of being "vicarious," "in essence" vicarious, or fault-free) than an employer's punitive liability is derivative (vicarious) for the malicious acts of an employee as to whom the "employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others ...." (Civil Code § 3294(b)). Similarly, a negligent attorney's liability for blowing the statute of limitations on an auto accident case is not derivative (vicarious) because his/her liability for legal malpractice is conditional or dependent on a finding of negligent driving. No malicious act by the employee = no punitive liability of the employer. No negligent driving = no legal

malpractice liability. The employer's conscious disregard or the attorney's negligence may well be said to "derive from the act or omission of the person hired [or person driving]," but that does not mean that the employer or attorney was not malicious, negligent, culpable or blameworthy. Rather, it means only that the element of causation is lacking.

Petitioner's "vicarious because derivative" argument is casuistry—slippery wordplay. Derivativeness does not solve the problem that, "absent proof of negligent hiring and retention, the required apportionment of fault would have been impossible." (Slip Opinion, p. 12.)[7]

V.

THE COURT OF APPEAL OPINION WAS BASED ON THE TRIAL COURT'S PROPER BALANCING OF "IMPOSSIBILITY OF APPORTIONMENT" VERSUS "LIKELIHOOD OF PREJUDICE"—NOT UPON A DISPOSITIVE DISTINCTION BETWEEN NEGLIGENT ENTRUSTMENT AND NEGLIGENT HIRING/RETENTION.

According to Petitioner:

> "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." (OBM, p. 23)

[7] Petitioner claims, at OBM 21, that this Court in *Armenta* "recognize[ed]" that a claim of negligent hiring "inpute[s] an employee's negligence to his or her employer (42 Cal.2d at p. 457)." Critically, *the Court said no such thing*—at p. 457, elsewhere or ever.

But it never quotes from the Opinion. This then allows Petitioner to knock a straw man down by asserting:

> "Negligent Entrustment and Negligent Hiring/Retention are Functionally Identical in the Context of Motor Vehicle Accidents" (OBM p. 24)

The Court of Appeal (and Respondent) *do not disagree*. The Court of Appeal was responding to an argument made in *Jeld-Wen* (and adopted by Petitioner here):

> "They [the *Jeld-Wen* defendants] 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* ....[¶]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." (Slip Opinion, p. 5; emphasis added.)

The Court of Appeal then went on to recognize that both negligent entrustment and negligent hiring/retention were *both theories of direct, and not vicarious, liability:*

> "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.... [¶]The rule of direct liability for negligent hiring and retention has been followed in numerous subsequent cases." (Slip Opinion, pp. 6-7)

This discussion (i.e., that negligent entrustment/hiring/retention are all theories of direct and not vicarious) liability was necessitated because Petitioner STN advanced the very same argument that the employer

advanced in *Jeld-Wen*, that negligent hiring/retention is vicarious, and not direct, liability and, therefore, Proposition 51 should have no application:

> "[E]ven if negligent hiring and retention somehow remained viable theories of liability, Proposition 51 still would be inapplicable *because Sugar Transport's liability was essentially passive and vicarious in nature*." (Appellant's Opening Brief, p. 33; emphasis added.)[8]

The Court of Appeal was required to respond to Petitioner's (then) argument. It did—and rejected it. The Court of Appeal's decision was simply not based on any "functional" distinction between negligent entrustment and negligent hiring/retention because, in this context and for these purposes, there is none; both are forms of direct, and not vicarious, liability—contrary to the position taken by STN before the Court of Appeal.[9]

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[8] Compare this statement from STN's appellate briefing with the contrary position it takes now:

> "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 …." (OBM p. 24)

[9] This discussion then allows Petitioner to allege that "Plaintiff never even pleaded negligent hiring or retention but instead alleged that Sugar Transport 'negligently … entrusted the truck to Carcamo'" (OBM, p.24) and then goes on to discuss cases involving the consequences of a failure to plead and/or amend to conform to proof. (OBM, p. 24, fn 11). But the discussion never goes any place. Is STN arguing the trial court should have granted a nonsuit STN never made? The argument is just left hanging. More importantly, Petitioner never quoted the actual allegations of the operative complaint. Plaintiff alleged: "that each of the named defendants … is legally responsible in some manner for the events and happenings (cont'd)

VI.

PETITIONER'S FACTUAL CLAIM OF REVERSIBLE PREJUDICE CANNOT SURVIVE A READING OF THE SPECIAL VERDICT.

Petitioner acknowledges it must not only demonstrate error—but (outcome-changing) prejudice. It cites the Court to: 1) the size of the fault percentage allocated to STN's own direct negligence, i.e., 35%; and 2) the size of the compensatory damages. Neither claim withstands scrutiny.

Petitioner intentionally hired and retained a proven, unsafe truck driver because they "needed to have bodies to work." That may be fine for the hiring of advertising copy writers, day laborers, librarians or gardeners—but not for commercial truck drivers. The safety of the

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herein referred to, and caused injury and damage to the plaintiff ... through defendants' own negligence ...." (1 CT, p. 2, ¶6). STN never brought a demurrer or a motion on the pleadings or a nonsuit or a motion for new trial on these grounds, or any grounds related to insufficiency of the pleadings. Again, the argument STN advances at this point simply goes nowhere. Nor could it go anywhere. See *Hahn v. Mirda*, (2007) 147 Cal.App.4th 740, 747 ["Negligence may be alleged in general terms; that is, it is sufficient to allege an act was negligently done without stating the particular omission which rendered it negligent."] So, why the discussion of the fact that plaintiff, while (sufficiently) pleading negligence generally used the word "entrusted" elsewhere? Is it Petitioner's attempt to drive home an argument that there is no "functional" (i.e., for the present purposes) distinction between entrustment and hiring/retention? If so, Petitioner can stop arguing. Respondent concedes (and has *never* disputed) the point. It is, indeed, a dispute which lives on only in Petitioner's imagination—born of its reading of that portion of the Opinion which rejected Petitioner's then position that negligent hiring/retention (as with negligent entrustment) was "essentially vicarious" and acknowledged that which Petitioner now acknowledges, i.e., that negligent hiring/retention (as with negligent entrustment) is *not* vicarious but is direct liability.

motoring public is at stake—that is why commercial trucking, at both the state and federal levels is such a highly regulated industry. (See e.g., Commercial Motor Vehicle Safety Program, California Vehicle Code section 15200-15325 and the Federal Commercial Motor Vehicle Operation Act, 49 USCA sections 31301-31317). The 35% of fault allocated to STN by the jury reflects reserved and dispassionate decision-making.

Next, Petitioner argues that, "it is reasonably probable that the jury's award included a punitive element ...." (OBM p. 48) Where? Petitioner decided not to present a single witness on damages and the jury proved itself to be downright frugal and coldly unemotional by awarding brain-damaged and destroyed Dawn Diaz *$45,000 a year for a lifetime of general damages* (i.e., $2 million over 44 years). The verdict can only be considered to have been a product of (dis)passion and (lack of) prejudice.

Or, was it the 20% of total fault attributed to the employee/driver's negligent driving? The ampleness of that evidence (including STN's destruction of the "tattletale," "silent witness" tachograph chart) is detailed in our Factual Statement above. The jury acted reasonably and reservedly.

VII.

PETITIONER, MULTIPLY AND PREJUDICIALLY (i.e., UNFAIRLY) FAILED TO PRESERVE THE *ARMENTA* ISSUE AND FORFEITED ITS RIGHT TO RAISE IT. [10]

A. STN NEVER MADE THE REQUISITE *PRE-TRIAL* BINDING ADMISSION OF RESPONDEAT SUPERIOR LIABILITY

1. The Binding Pretrial Stipulation Requirement.[11]

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[10] The two arguments Respondent Diaz advances in this section (i.e, 1. STN never made the requisite pre-trial admission; and 2. STN waived, or is estopped from asserting, the *Armenta/Jeld-Wen* issue by not raising it until the middle of trial) were extensively briefed by the parties before the Court of Appeal. However, the Court of Appeal *never reached the issue* because it elected to decide the appeal on the merits: "Because we resolve the issue on the merits, we need not address the procedural arguments made by the parties." (Slip Opinion, p. 18, ftn 8)

If this Court resolves the issue on the merits differently than did the trial court and the Court of Appeal, then the case should be remanded to the Court of Appeal to resolve these two "procedural arguments" in the first instance. California Rules of Court, Rule 8.528(c) provides:

> "**(c) Remand for decision on remaining issues.**
> "If it decides fewer than all the issues presented by the case, the Supreme Court may remand the cause to a Court of Appeal for decision on any remaining issues."

See *Snukal v. Flightways Mfg., Inc.*, (2000) 23 Cal.4th 754, 77, ["[T]his court in granting a petition for review frequently has accorded review of selected issues, remanding other unresolved issues to the Court of Appeal for decision."]; and *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518 (at 110 Cal.Rptr.3d 672), ["[T]he Court of Appeal did not address other issues raised on plaintiff's appeal from the trial court's grant of summary judgment for defendant general contractor, notably whether defendant could be held *directly* liable on a theory that it retained control over safety conditions at the jobsite. We therefore remand this matter to the Court of Appeal for consideration of those remaining issues." (Emphasis is the Court's).]

The *Jeld-Wen* court based its ruling on the following:

> "*Once an employer has admitted* ***before trial*** *to vicarious liability for its employee's negligence*, ... the exclusionary rule of Evidence Code section 1104 operates to protect the employer from being exposed to prejudicial...." (*Jeld-Wen* at 131 Cal.App.4th 870; emphasis added.)

The defendant employer in *Jeld-Wen* admitted course and scope in a declaration and then moved for summary adjudication. The court of appeal repeatedly referred to the fact that the binding admission came "pretrial" (See 131 Cal.App.4th at 870 and 871). In *Armenta*, the "defendants admitted in their answer the agency and scope of employment of [the employee]." (*Armenta* at 42 Cal.2d 456.)

Here, Petitioner STN did neither.

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

Prior to trial, defendant STN did not admit respondeat superior liability in its answer (as in *Armenta*) and did not stipulate to it by declaration (as in *Jeld-Wen*). The parties answered ready for trial (CT-I, 44), filed motions in limine on negligent hiring (*id.*, 45-50), argued the motions (*id.*, 68, 86), briefed the 402 hearing on negligent hiring (*id.*, 71-87), participated in the 402 hearing on negligent hiring (RT-1, 77 et seq.), filed trial briefs (CT-I, 96-108), picked a jury and gave opening statements

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

(RT-1, 77-163), examined and cross-examined seven witnesses (RT-1, 164–RT-2, 345)—*all without a stipulation from defendant regarding respondeat superior liability.*

While Plaintiff was examining her eighth trial witness, a trucking practices expert on the issue of negligent hiring, defendant STN finally offered to stipulate to vicarious liability—not on its own initiative but only when prompted to do so by the Court (RT-2, 432:8-21). In no way, shape or form can this be construed as a "*pretrial admission*" as required by *Armenta* or *Jeld-Wen*. Petitioner STN waited until the jury had heard extensive voir dire, opening statements, eight witnesses and testimony and had seen documents regarding negligent entrustment until it finally agreed to the stipulation. As counsel for codefendant Tagliaferri observed at the time (and eight days before STN ever mentioned *Jeld-Wen*), "*at this point in time, we are so far down the road, there's no turning back.*" (RT-2, 435:20-24; emphasis added.)

3. Petitioner Stands The Discovery Act On Its Head By Claiming That Its Answer To The Form Interrogatory Regarding Permissive Use Constitutes A Binding Admission Of Respondeat Superior Liability.

In answering Form Interrogatory 20.2, as to the identity of the truck driver, occupants, owner and whether the driver had permission (CT-IV, 868-869), Petitioner STN offered this bit of snit: "This information is equally available to plaintiff through the traffic collision report.

Mr. Carcamo was given permission to operate the Sugar Transport truck by Sugar Transport of the Northwest LLC, as it was his job to operate that truck." (CT-IV, 878.)

Petitioner now attempts to characterize this answer to the form permissive use interrogatory as a *binding admission* of respondeat superior liability. It can only do so by: 1) ignoring the wording of the interrogatory; and 2) grossly distorting the Discovery Act.

STN's answer to the form interrogatory regarding permissive use (i.e., that the driver was a permissive user and that the driver's job was to drive the truck) is a far cry from a binding, irrevocable formal stipulation, or "admit[ting] in their answer to agency and course and scope of [the driver]" (*Armenta* at 42 Cal.2d 456) or "before trial . . . admit[ting] vicarious liability for the acts of its employee" (*Jeld-Wen* at 131 Cal.App.4th 857). The issue of respondeat superior liability is not removed from the case by an answer to interrogatory saying the driver permissibly drove the vehicle and that it was his job to do so. Moreover, and more critically, *answers to interrogatories are not binding admissions or stipulations.* (See *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 672 ["While a party may be precluded from introducing evidence based on a response to a request for admission (citation), depositions and interrogatories do not perform the same function as request for admissions, issue preclusion .... 'Most of the other discovery

procedures are aimed primarily at assisting counsel to prepare for trial. Requests for admission, on the other hand, are primarily aimed at setting at rest a triable issue so that it will not have to be tried.' (citation)"].)

Responses to requests for admissions are binding—answers to interrogatories are not. It is the *binding* nature of the pretrial admissions in both *Armenta* and *Jeld-Wen* that allowed the argument to be made.

B. THE *ARMENTA* ISSUE WAS NOT PRESERVED; PETITIONER PREJUDICIALLY AND INEXPLICABLY DELAYED RAISING IT UNTIL THE MIDDLE OF TRIAL.

1. Procedural History

As with the stipulation, *Armenta/Jeld-Wen* came late in the day. Two weeks into the trial (the Court's minute order of 2/20/08 reflects it being the eleventh day of trial, CT-I, 1-136) and after motions in limine, the all-day 402 hearing, mini opening statements, jury selection and full opening statements—during all of which plaintiff's attorney extensively discussed with the jury the evidence as to negligent hiring and retention—and during the second day of plaintiff's examination of her eighth witness (a negligent hiring expert), the Court asked defendant if it had "a case on–directly on point." (RT-2, 438:14-15.) Defendant responded–not with a *Jeld-Wen* argument–but by directing the Court back to "the brief that we filed, you know, I think 2 months ago. This *goes back to the whole nexus argument*. The cases that say that you've got to be proving *the relationship between the accident and the claim*." (RT-2, 438:16-21; emphasis added.)

Later that day, defendant offered the Court a citation to "*Jen-Weld*" [sic] but with no discussion or follow-up (RT-2, 451:6-14). Defendant did not offer the Court any brief even mentioning *Jeld-Wen until the day before all parties rested*, and only did so as an objection, not to evidence, but as "Defendant's Brief Contra Plaintiff's Proposed Jury Instructions On Negligent Hiring" (CT-I, 1-212).

2. Defendant's Unexcused and Prejudicial Delay Runs Afoul of *Las Palmas*.

In *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, a cross-defendant accused of liability for punitive damages waited until the middle of trial to invoke its right to exclude evidence of wealth under Civil Code section 3295(a). The trial court refused and the Court of Appeal agreed:

> "As the facts of this case clearly illustrate, a statute written in mandatory language must nonetheless come within the trial court's discretion when a party delays seeking its rights to the detriment of the opposition. . . . [¶] In our view, it is manifest that a party may be estopped from claiming a statutory right if untimely asserted. (235 Cal.App.3d at 1240)

Here, STN waited significantly longer. Striking, and ordering the jury to disregard, *at such a late date*, all of the evidence of negligent hiring—all previously promised and presented by plaintiff—*would have been a death knell to plaintiff's counsel's credibility in front of the jury.* What was STN's excuse for this seemingly-inexplicable sloth? To this (very late) day, it is yet to offer one.

3. Petitioner STN Is Precluded From Seeking A New Trial Because Of Its Failure To Comply With Evidence Code Section 353.

Before and during trial, STN argued that the issue of its negligent hiring/retention should not go to the jury *because there was an insufficient "nexus"* between the negligent hiring and the negligent driving—*not* because an admission of vicarious liability, pursuant to *Armenta* and *Jeld-Wen*, causes negligent hiring to become subsumed into respondeat superior liability. Evidence Code section 353(a) precludes a new trial where "an objection ... [is not] *so stated as to make clear the specific ground of the objection or motion*; ...."

Here, defendant STN constantly, consistently and relentlessly objected to evidence of negligent hiring—but on the "stated ... specific ground" *that there was no evidentiary "nexus"* between the negligent hiring and the negligent driving. This is not the objection that is now being advanced to gain reversal and a new trial. (See: CT-I, 46; RT-1, 35:23-26; RT-1, 36:17-18; RT-1, 38:3-14; RT-1, 75:3-5; RT-1, 76:5-6; RT-1, 77:2-3; RT-2, 243:1-5; RT-2, 382:23; RT-2, 431:103; RT-2, 438:14-21; RT-9, 1366:16-19; and RT-10, 1549:13-15.)

4. By Not Requesting Bifurcation Of The Claim For Negligent Driving, Defendant STN Is Estopped From Asserting Any Argument It Might Have Had On Negligent Hiring/Retention.

It was within STN's power to have entirely eliminated even a potential of prejudice by moving for an order bifurcating, and trying first,

the negligent driving claim. For whatever reasons, STN chose not to do so and elected, instead, to have all issues tried at the same time. See *Las Palmas Associates v. Las Palmas Center Associates, supra*, 235 Cal.App.3d 1220, 1242 ["This litigation, we think, aptly demonstrates that the mandatory effect of section 3295, subdivision (d) [i.e., bifurcation of punitive damages], like many other rights, may be lost by a defendant who fails to act promptly to preserve its protection."]

VIII.

OTHER JURISDICTIONS

A. A CAUTIONARY NOTE AND AT LEAST SOME LEVEL OF INSIGHT

Looking to other states for help in resolving the present issue proves unsatisfying for at least four reasons: (1) each state has its own system of comparative negligence (if it has one and most do); (2) most states have their own view of whether negligent entrustment/hiring/retention is direct, vicarious or something in between; (3) the issue is somewhat on the esoteric periphery of current debates and simply has not garnered much appellate/high court attention or resolution; and (4) such paucity of authority becomes even more rarified when additional factors such as are present here (a negligent employer seeking to reduce its liability through a Prop. 51-like mechanism) are blended into the mix.

With that cautionary preface, perhaps the most non-California insight comes from decisions which discuss the procedural and evidentiary

precautions and protections which are available when courts are so confronted:

> "While the evidence to prove the claims is different, the Alabama Supreme Court [in *Bruck v. Jim Walter Corp.* (Ala. 1985) 470 So.2d 1141] did not choose to solve this problem by merging the negligent entrustment claim into the respondeat superior theory of liability. Rather, the court *advised that courts must take the necessary measures to prevent prejudice caused by evidence of one claim in relation to the other.* [¶] Further addressing the Alabama approach to the issues of allowing the separate claims, the Alabama Rules of Evidence provide guidance as to how the Alabama state courts should treat such evidentiary issues. The Advisory Committee's Note for Rule 105, *Limited Admissibility*, address the situation where evidence may be admissible for some limited purpose in the case and not admissible for other purposes. ... Additionally, in the present case, the court will consider a motion to *bifurcate the trial* on the separate issues if the evidence in support of the negligent entrustment claim is prejudicial to the negligence claim." *Poplin v. Bestway Express* (M.D. Ala. 2003) 286 F. Supp.2d 1316, 1319-1320 (Emphasis added.)

B. WHAT IS OUT THERE SUBSTANTIVELY

In a footnote, Petitioner collects 15 states which follow *Armenta*[12] and "have adopted some form of comparative fault." (OBM p. 27, fn 13) So what? That says nothing about the issue here, i.e., how *Armenta* works when a negligent employer seeks to reduce its liability by the percentage of negligence attributable to a second driver. Merely adopting both *Armenta* and "some form of comparative fault" does not help—until the two come into conflict in a scenario such as here.

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[12] As noted earlier, Respondent Diaz has no quarrel with *Armenta*.

Then, Petitioner relies on a law review article (Powell, *Submitting Theories of Respondeat Superior and Negligent Entrustment/Hiring* (1996) 61 Mo. L. Rev. 155). But the author there *criticized* the decision Petitioner relies on, *McHaffie v. Bunch* (Mo. 1995) 891 S.W. 2d 822 because:

> "The court failed to recognize the independent consistent nature of a negligent entrustment claim as it relates to a claim resting on respondeat superior. Other methods to preclude the prejudicial evidence were not considered ... With these failings in mind, the court may want to take another look at the decision and reevaluate its findings." (*Powell*, at 168)[13]

Petitioner next relies on passages from two out-of-state cases. The first is a federal district court judge's opinion in *Cook v. Greyhound Lines, Inc.* (D. Minn 1994) 847 F. Supp. 725, 733 (OBM p. 28). However, the judge there never discussed the interplay between an *Armenta* problem and a defendant seeking a comparative reduction in liability. Moreover, the "exhaustive survey" which the judge conducted and which failed to reveal cases imposing negligent hiring liability where there was respondeat superior liability is of no help here because the *Cook* judge was not looking at cases where the employer was seeking a Prop. 51-like reduction.

The second is *Gant v. L.U. Transport, Inc.* (Ill.Ct.App. 2002) 331 Ill.App.3d 924, 770 N.E.2d 1155 at 1159) (OBM 36-37). Again, *Gant* did not involve a negligent employer seeking a comparative reduction in

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[13] *McHaffie* disagreed with contrary rulings in *Bruck v. Jim Walter Corp.*, (Ala. 1985) 470 So.2d 1141; *Perin v. Peuler* (Mich. 1964) 373 Mich. 531, 130 N.W.2d 4; and *Clark v. Stewart* (1933) 126 Ohio St. 263, 185 N.E. 71.

liability due to the apportionable fault of a second, negligent driver. Even the logic of *Gant* was rejected in another Illinois case, *Lorio v. Cartwright* (N.D. Ill., 1991) 768 F.Supp. 658, where the court noted that the Illinois decision which agreed with *Armenta*, *Neff v. Davenport Packing Co.* (1971) 131 Ill.App.2d 791, 268 N.E.2d 574, needed to be re-examined in light of the subsequent adoption of comparative fault:

> "The reasoning for the rule of *Neff* loses much of its force, however, under comparative negligence. Under comparative negligence, it is *necessary for a trier of fact to determine percentages of fault* for a plaintiff's injuries attributable to the negligence of plaintiff, the negligence of each defendant, and the negligence of other non-parties." (*Id.* at 660; emphasis added.)

And, then, echoing the Court of Appeal here:

> "It would not be possible for a finder of fact to make the necessary determination of degrees of fault without having before it the evidence of the entrustor-principal's negligence in entrusting the vehicle to the entrustee-agent." (*Id.* at 661.)[14]

Again, without a negligent employer seeking a Prop. 51-type reduction in liability, these few—mostly lower court rulings—from jurisdictions with varying systems of comparative fault or responsibility and varying views on negligent hiring/retention and direct-versus-vicarious liability—do not seem to be very helpful.

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[14] While a discussion of these two cases may (once again) be interesting, it is probably (once again) not that helpful in that neither the Illinois nor Minnesota supreme courts have elected to resolve the issue.

Finally, as we pointed out above (at Sec. II A, p. 23, fn 5), a leading California treatise explicitly recognizes the rule adopted subsequently by the Court of Appeal here.

CONCLUSION

Armenta ("no negligent hiring evidence if such liability is identical and coextensive with respondeat superior liability") should be put into effect here. But so should *Li*, *American Motorcycle* and *DaFonte* ("the jury must consider the entire universe of tortious conduct"). But how can we accommodate both? We do so by telling trial judges to do what this trial judge did and what trial judges do every day, i.e., to do whatever it takes to accommodate both concerns and ensure that both sides get a fair trial. After all, it is the trial judge who is on the front lines and in the best position to figure out what procedurally and substantively needs to be done to strike the appropriate accommodation and then to determine if overall fairness eventually prevailed. We expect the courts of appeal to act as an effective check on trial court discretion. And we put our faith into juries to do what the judge tells them to do—which juries have been doing for centuries. The system works. There is no need to either "overrule" *Armenta* or "jettison" comparative fault.

Respectfully submitted,

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, ROLAND WRINKLE, declare:

According to the word count of the computer program used to prepare the foregoing brief, the number of words in the brief is 13,341.

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

Executed this 9th day of August, 2010, at Woodland Hills, California.

ROLAND WRINKLE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES) ss.

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

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ESTHER MATSUDA