S181627

IN THE

SUPREME COURT OF CALIFORNIA

DAWN RENAE DIAZ,

Plaintiff and Respondent,

vs.

JOSE CARCAMO and SUGAR TRANSPORT OF THE NORTHWEST, LLC,

Defendants and Appellant.

After a Decision by the Court of Appeal
Second Appellate District, Division Six
Case No. B211127
Appeal from a Judgment of the Superior Court of Ventura County,
No. CIV241085, Hon. Frederick Bysshe

AMICUS CURIAE BRIEF OF JELD-WEN, inc. and CALIFORNIA TRUCKING ASSOCIATION IN SUPPORT OF DEFENDANTS AND APPELLANTS

CALIFORNIA RULES OF COURT, RULE 8.520(f)

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I.

INTRODUCTION

This Supreme Court's review of the holding in *Diaz v. Carcamo, et al.* ("*Diaz*") provides the Court with an interesting and important opportunity to investigate the nature of independent tort actions versus theories of vicarious liability in the context of the evidentiary protections of Evidence Code § 1104. ("§ 1104.") Ultimately, this Court will decide whether employers of motor vehicle operators will be afforded the same protections as non-employee motor vehicle operators, or will instead be punished through the introduction of irrelevant, inflammatory evidence whenever an employee operator gets in a motor vehicle accident.

Through decision in *Armenta v. Churchill* (1954) 42 Cal.2d 448 ("*Armenta*"), this Court promotes a fair and equitable approach which was more recently refined and followed in *Jeld-Wen v. Superior Court* (2005) 131 Cal.App.4th 853 ("*Jeld-Wen"*). Respondent and the underlying Court of Appeal craft an exception to this fairness by simply labeling negligent entrustment as negligent hiring/retention ("Neg H/R"). Through this brief, JW and CTA will show that Neg H/R is not a separate tort and cannot be used to circumvent the protections of § 1104 in the context of a motor vehicle accident.

II.

ISSUES PRESENTED FOR REVIEW

Whether Neg H/R provides an opportunity for plaintiffs to circumvent the protections of § 1104 whenever a motor vehicle accident involves an employee driver, and whether Neg H/R is ever an independent tort cause of action requiring separate allocation of comparative negligence.

III.

THE INTERESTS OF JELD-WEN, inc. and CALIFORNIA TRUCKING ASSOCIATION

JELD-WEN, inc. ("JW") manufactures doors and windows in California which are sold throughout the state. JW also operates a warranty and service department which responds to the inquiries and needs of consumers throughout the state. In conducting its business, JW often employs individuals who must travel about the state in company owned or rented vehicles. As an employer, JW seeks fairness in the law and has a vested interest in making certain that employers are not unjustly punished for simply being an employer.

The California Trucking Association ("CTA") is representative of many individual companies that employ people to operate motor vehicles in

the transportation business. The CTA membership also relies on a fair and principled development of the law as it relates to liability exposure for employers of motor vehicle operators in California. The CTA is keenly interested in making certain that employers are not unjustly punished for employing drivers in California.

JW and CTA each wish to advance a rational and logical development of the law that promotes fairness and equity. The *Diaz* decision creates a legal environment where the protections of § 1104 can be easily circumvented when an employee operator gets in a traffic accident. Such a state of the law is unjust and, as will be shown, legally unsupportable.

IV.

LEGAL ARGUMENT

A. AN INVESTIGATION OF THE *Jeld-Wen* AND *Diaz* DECISIONS REVEALS THAT THE DIVERGENT HOLDINGS ARE ENTIRELY THE RESULT OF APPLYING DIFFERENT LABELS TO THE SAME THEORY OF RECOVERY

Through *Jeld-Wen* the Court of Appeal addresses the viability of

negligent entrustment when *respondeat superior* is admitted.[1] During the litigation, defendants and its counsel recognized that plaintiffs continued to pursue evidence precluded by § 1104 even after defendant accepted responsibility for the actions of the driver through *respondeat superior*. It was apparent that plaintiffs wished to introduce inflammatory evidence not for the purpose of establishing liability (which was already admitted), but instead to make it more likely that the jury would find the driver negligent in the first instance. JW and its counsel saw the inherent unfairness in a situation where the prejudicial evidence to prove negligent entrustment could be introduced even when liability for the driver's negligence, if any, was already admitted.

In an effort to protect itself from the inadmissible, irrelevant and inflammatory evidence precluded by § 1104, JW brought a Motion for Summary Adjudication of the negligent entrustment theory of recovery. The trial court denied the Motion and JW sought protection through a Petition for Writ of Mandate.

[1] Counsel for Amici Curiae JW and CTA was counsel for the Petitioners in *Jeld-Wen,* and wrote the briefs and argued the issue at the Court of Appeal. Counsel was also primary counsel in all litigation matters leading up to the Motion for Summary Adjudication at the trial court, the Petition for Writ of Mandate and the eventual decision of the Court of Appeal.

In *Jeld-Wen,* as in *Diaz,* the employee driver is undisputedly operating a motor vehicle in the course and scope of his employment. In *Diaz*, Jose Carcamo "was making a delivery for his employer, Sugar Transport." (*Diaz* at 343.) In *Jeld-Wen*, Mr. Solis was "delivering windows to residential construction development projects." (*Jeld-Wen* at 858.) *Jeld-Wen* notes that the driver held a valid driver's license which enabled him to legally drive the vehicle he operated. (*Id.* at 858.) There is no evidence in *Diaz* which would suggest that Mr. Carcamo was not licensed to operate the delivery truck or was otherwise incapable of safely operating the vehicle.

Jeld-Wen addresses the alternative theory of negligent entrustment when *respondeat superior* liability is admitted. Following the Supreme Court's ruling in *Armenta*, *Jeld-Wen* found that once the employer accepted liability through *respondeat superior*, the employer's responsibility for the acts of the employee was established, and the inflammatory evidence to support negligent entrustment rendered inadmissible through § 1104. (*Jeld-Wen* at 870.)

1. *Diaz* Utilizes Negligent Hiring to Address the Same Situation Labeled as Negligent Entrustment in *Jeld-Wen*

In *Diaz*, plaintiff appears to have carefully circumnavigated the decisions in *Jeld-Wen* and *Armenta*. Recognizing that the theory of negligent entrustment would not survive, plaintiff alleges Neg H/R in the hopes it would survive as an "independent tort," thus allowing evidence otherwise inadmissible by § 1104.

The facts and circumstances of *Diaz* and *Jeld-Wen* are almost identical. Each involves a truck driver in the course and scope of his employment who is involved in a motor vehicle accident. Each driver has limited prior accidents in operating motor vehicles. In *Jeld-Wen*, the plaintiffs chose negligent entrustment to pursue transfer of liability to the employer. In *Diaz* (presumably with the edification of the *Jeld-Wen* decision) the plaintiff chose Neg H/R. The activities that negligent entrustment and Neg H/R are utilized to address are precisely the same.

Diaz is entirely based on applying different labels to the same activity. There can be no mistake that the labeling of the theory of recovery produced the divergent results. In *Diaz*, the Court succinctly states:

> 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. (*Diaz* at 346.)

The *Diaz* opinion dispenses with *Armenta* and *Jeld-Wen* because Neg H/R was not utilized by the cases to label the theory of recovery against the employer. *Diaz* does not even address that these alternative theories of recovery are being utilized to apply liability in the exact same set of circumstances. This shortcoming exposes *Diaz* as results driven, without a thorough analysis of the context of the accident and the legal theories utilized by the plaintiff.

2. Courts Confuse the Labeling of Negligent Hiring/Retention, But its Legal Operation is Identical to Vicarious Liability

California courts have addressed Neg H/R and struggled to define its characteristics. In *Delfino v. Agilent Technologies* (2006) 145 Cal.App.4th 790 ("*Delfino*") the Court refers to Neg H/R as follows:

> 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, supra § 333, p. 906.) (*Delfino* at 815.)

The *Delfino* Court makes this broad statement but finds no Neg H/R liability. *Delfino* does not even discuss whether Neg H/R can be utilized to

attach separate liability to the employer, apart from the actions of the employee. *Delfino* relies in part on the analysis in *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828 ("*Evan F.*") for the "direct liability" statement. *Evan F.* is also uncertain on the characteristics of Neg H/R, and recognizes the inherent difficulty of establishing causation. (*Id.* at 834 - 836.) *Evan F.*, like *Delfino*, is a molestation case. *Evan F.* entertains Neg H/R as a legal theory that transfers the actionable conduct of the employer to the employee. So, although *Evan F.* implies that Neg H/R is an "independent ground" for liability, its impact is nothing more than establishing vicarious liability. (*Id.* at 836 - 837.) There is nothing in *Evan F.* which would suggest that the employer be assigned liability exposure independent and separate from the employee's molestation. Certainly there is no liability for hiring an individual with a high propensity for molestation unless the molestation occurs.[2]

In any event, *Evan F.* found that Neg H/R could not be established. In doing so, the Court states as follows:

> As noted previously, there is quite a legal debate nationwide about whether the concept of negligent hiring constitutes an independent tort at all. Those jurisdictions holding there is no independent action deem it sufficient that the direct tortfeasor

[2] Neg H/R actions are often molestation cases, likely because molestation almost always occurs outside the course and scope of employment, where *respondeat superior* liability is not applicable.

> (the employee) can be held liable. In a sense, this debate supports the conclusion we have reached here. (*Id.* at 837.)

Delfino's statement that liability for Neg H/R "is one of direct liability for negligence, not vicarious liability" does not find much support through *Evan F.* Even *Delfino* does not find facts sufficient to support the cause of action. Both *Delfino* and *Evan F.* concern the employee's unauthorized acts, or acts committed outside the course and scope of employment.[3] It is difficult to imagine an employer admitting *respondeat superior* liability when the wrongful conduct of the employee is clearly outside the course and scope of employment, and not authorized by the employer. These cases do not address the situation presented in *Diaz* where *respondeat superior* is obvious and admitted. They do however, reveal that the operative legal effect of Neg H/R is that of vicarious liability, not an independent tort cause of action.

The California cases referencing Neg H/R as a "direct" cause of action provide no refinement of the nature of Neg H/R, and certainly do not

[3] The other case relied on by *Delfino*, *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, is also a molestation case, undisputedly committed outside the course and scope of employment. *Roman Catholic* is in the context of a motion for summary judgment, and does not address or resolve whether an employer has liability "independent" of the employee. Rather, the language of the case suggests a vicarious liability analysis. (*Id.* at 1564 - 1567.)

impose anything beyond vicarious liability. There is no California case that has allocated liability between an employer and employee based on Neg H/R.[4]

B. NEGLIGENT HIRING/RETENTION, JUST LIKE NEGLIGENT ENTRUSTMENT, IS AN ALTERNATIVE THEORY OF VICARIOUS LIABILITY

Neg H/R has always been utilized to transfer liability of an employee to an employer. Like negligent entrustment, Neg H/R transfers the actionable conduct of one to another.

1. Historical Application of Negligent Hiring/Retention is Consistent with Vicarious Liability

The Theory of Neg H/R appears to have first arisen in the United States in 1870. In the U.S. Supreme Court case of *Holladay v. Kennard* (1870) 79 U.S. 254, the Court held that an employer has a duty to exercise

[4] Despite exhaustive research, these amici curiae have found no California case where an allocation of liability is given to the employer (through negligent entrustment, NEG H/R or *respondeat superior*) apart and separate from the employee as if each is a separate, but joint, tortfeasor. To the contrary, every case applying these theories of recovery does so only to transfer responsibility for the actionable conduct of the employee to the employer. Even *Syah v. Johnson* (1966) 247 Cal.App.2d 534 does not create a joint tortfeasor relationship, but instead transfers all liability to the employer despite the jury finding the employee not negligent. *Syah*'s results driven analysis is not sound for the reasons stated in *Jeld-Wen* at 868 - 870.

"ordinary care or diligence" in selecting his agent. The Court illustrates this principle as follows:

> Ordinary diligence, like most other human qualifications or characteristics, is a relative term, to be judged of by the nature of the subject to which it is directed. It would not be any want of ordinary care or diligence to entrust the shoeing of a horse to a common blacksmith, but it would be gross negligence to entrust to such a person the cleaning or repair of a watch. (*Id.* at 258.)

While *Holladay* appears to be the genesis of the Neg H/R theory in the United States, it does not address whether Neg H/R is an independent tort, a theory of direct liability or an alternative theory of vicarious liability. *Holladay* recognizes that entrusting the "shoeing of a horse to a common blacksmith" is not "want of ordinary care." The case thereby implies that Neg H/R applies only when an employer entrusts an employee with a task for which the employee is incapable or entirely unfit to perform.

Early cases considering the theory of Neg H/R hold that while an employer has a duty to employ competent and qualified employees, the employer's liability is based upon the negligence of the employee, regardless of the employee's competence. (See 8 American Law Reports, Annotated ("ALR") 574.) The ALR summarizes the general rule as follows:

> It seems clear that at least as far as the liability of a master to a third person is concerned, his failure to hire only competent and experienced servants cannot in itself constitute actionable negligence, but that liability, if any, must be predicated upon the wrongful act or omission of the servant at the time of infliction of the injury complained of . . . (8 ALR 574.)

Since Neg H/R is predicated on the employee's wrongful act or omission, the logical conclusion is that the theory of Neg H/R is not an "independent tort" but an alternative theory of vicarious liability.

The ALR also confusingly sets forth the nature of Neg H/R, stating:

> However, it has been broadly held that the hiring of an incompetent servant is itself an action of negligence rendering the master liable to a third person for injuries resulting from a negligent act of the servant, the theory being that the master is liable for the consequences of his negligent act. Thus, in *Wanstall v. Pooley* (1841) 6 Clark & F.911, Note, 7 Eng. Reprint, 940, Note, where shopkeeper hired an incompetent person to deliver goods, and such servant negligently left a truck in the street whereby a traveler was injured by falling over it, it was held that the employment of the incompetent was an act of negligence, since by such employment the master set the whole thing in motion and must therefore answer for the consequences. It is to be observed, however, that the servant was guilty of negligence for which the master would be responsible under the doctrine of *respondeat superior*, regardless of whether he was competent or not. (8 ALR 577.) (Underline added.)

This language reveals that even in cases suggesting Neg H/R is an independent tort, or "is itself an action of negligence," the liability is always limited to the "injuries resulting from a negligent act of the

servant." (*Ibid.*) In other words, it doesn't appear to matter which label Neg H/R is given, its legal operation serves only to transfer the liability of the employee to the employer.[5]

The Cumulative Supplement to 8 ALR 574 sets forth cases with a myriad of labels given to Neg H/R. Some cases refer to Neg H/R as "itself an action of negligence." Other cases refer to Neg H/R as a theory of "direct liability," and still other cases refer to Neg H/R as a theory of "vicarious liability." What is consistent with all of these cases is that the employer's liability is always limited to the employee's liability, and separate liability is never applied to the employer. No matter how Neg H/R is labeled, it does not operate to transform the employer into an independent joint tortfeasor, but instead provides a legal vehicle through which a third party who has been injured by an employee can attach responsibility to the employer. Accordingly, Neg H/R is a theory of vicarious liability and cannot be considered an independent tort cause of action because it does not give rise to any separate liability.

[5] Despite significant research, counsel for JW and CTA is unable to identify a single case (other than *Diaz*) where the liability of the employer is attached separately from that of the employee, such that the jury is asked to allocate percentage of responsibility between them. It appears that *Diaz* is the first published case in the nation where Neg H/R is utilized to assign separate comparative negligence to the employer. There are no such cases at 8 A.L.R. 574.

2. Negligent Hiring/Retention is Simply an Alternative Theory of Vicarious Liability, Addressing Factual Scenarios Where *Respondeat Superior* and Negligent Entrustment will not Apply

Black's Law Dictionary defines vicarious liability as: "Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two parties." (*Black's Law Dictionary*, Abridged 7th Ed. 2000.) *Respondeat superior* is defined as: "The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Ibid.* *Respondeat superior* is clearly a theory of vicarious liability, and neither Respondent nor Petitioner dispute this conclusion.

a. *Respondeat Superior*

Respondeat superior is given broad application. (*Farmers v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004.) The doctrine of *respondeat superior* imposes vicarious liability on an employer for the torts of an employee acting within the scope of his or her employment. (*Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798, 803.) "[W]here the question is one of vicarious liability, the inquiry should be whether the risk was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer. [Citation omitted] Accordingly, the

employer's liability extends beyond the actual or possible control of the employee to include risks inherent in or created by the enterprise." (*Farmers, supra* at 1003.) "Whether an employee is acting within the course and scope of his or her employment is generally a question of fact, if the facts are undisputed and no conflicting inferences are possible, the question is one of law." (*Munyon v. Ole's, Inc.* (1982) 136 Cal.App.3d 697, 701.)[6]

b. Negligent Entrustment

Although *respondeat superior* is undisputedly a theory or "doctrine" of vicarious liability, it is not the only theory. Negligent entrustment is an alternative theory of vicarious liability that may or may not involve an employee/employer relationship. For instance, if an individual loans his car to someone he or she knows is an unlicensed or unreasonably dangerous driver, the lender may be vicariously liable if an accident occurs. The only relationship required is that one is the lender of a potentially dangerous instrumentality to the other. (See *Allen v. Toledo* (1980) 109 Cal.App.3d 415.)

[6] For a detailed discussion of the scope of *respondeat superior* vicarious liability, see *Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427.

In certain occasions, negligent entrustment may be a viable theory of employer vicarious liability even when *respondeat superior* is not. For instance, an employer loans a company vehicle to an employee for the employee's personal use (perhaps on the weekend to move his or her residence). The employee is not acting in the course and scope of his or her employment when completing this personal task and *respondeat superior* will not apply. However, if it can be shown that the employer had reason to know that the employee lacked the requisite skill, judgment or minimum competency to operate the vehicle, the employer will be held responsible for the employee's actions through negligent entrustment. Once again, the mere act of "wrongfully" entrusting the vehicle is not actionable. The vehicle operator must cause recoverable property damage or personal injury through his or her own actionable conduct before negligent entrustment will operate to transfer liability to the vehicle owner.

Some cases have misconstrued negligent entrustment as an independent tort action, as if it were alone actionable. This appears to be caused by a common urge to punish "negligence," and a lack of recognition that the "negligence" of negligent entrustment *is punished* through the imputed negligence of the driver. A negligence theory is not normally contingent on the actionable conduct of another. This is precisely what this Supreme Court recognized in *Armenta* when the Court held:

> It is true that [the owner] Alece Churchill's admission of vicarious liability as the principal for the tort liability, if any, of her husband [the driver] was not directly responsive to plaintiffs' added allegations of fact contained in the second count [for negligent entrustment] relating to her personal negligence. But the only proper purpose of the allegations of either the first or second count [for negligence of driver and negligent entrustment] with respect to [owner] Alece Churchill was to impose upon her the same legal liability as might be imposed on [driver] Dale Churchill in the event the latter was found to be liable.
>
> Plaintiffs could not have recovered against [the owner] Alece Churchill upon either count [for negligence of the driver or negligent entrustment of owner] in the absence of finding liability upon the part of [the driver] Dale Churchill. (Underline added) (*Id.* at 457.)

Since the driver's negligence is necessary to establish liability, negligent entrustment cannot be considered an "independent tort cause of action." As *Armenta* makes clear, a "count" for negligent entrustment fails as a matter of law unless the driver is found negligent, and the "only proper purpose" of the negligent entrustment theory is to "impose upon [the owner] the same legal liability as might be imposed upon [the driver] in the event [the driver] is liable." (*Id.* at 457.)

In *Vice v. Automobile Club* (1966) 241 Cal.App.2d 759, the Court analyzed negligent entrustment and expressly recognized that liability for negligent entrustment is contingent on the proven negligence of the driver. The *Vice* Court presented and analyzed plaintiff's three theories of liability,

quickly dispensing with the first and third theory. *Vice* at 765-767. The Court then analyzed the remaining theory, negligence in entrusting the vehicle to another, stating:

> Plaintiff's theory, therefore, brings his cause of action within the general area of the second class of cases discussed [negligent entrustment]. It is true that defendant is not charged as the owner of the chattel who negligently entrusts it to a person known to be reckless or incompetent in its use. But we do not see how he can make his case stronger than a complaint against such an owner can be made.
>
> We think that in the second class of cases [negligent entrustment], the intervention of a volitional agency, capable of deciding whether to act or not to act, and having knowledge of the nature of the chattel, although it does not break the chain of causation, does not give rise to a cause of action against the supplier of the chattel unless the user's negligence has caused the injury complained of. If that be so, the negligent use must be alleged.
>
> We believe that to be the rule of (citations omitted) *Rocca v. Steinmetz* (1923) 61 Cal.App. 102 (citations omitted); and *Owens v. Carmichael's U-Drive Autos, Inc.* (1931) 116 Cal.App. 348, 352. It is true that in some of those cases the content of the pleadings was not mentioned; but in all of them there was proof of negligent operation.
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> * * *
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> We conclude that negligent operation of the vehicle by [driver] was a necessary element of the cause of action attempted to be stated. The omission of any allegation of such negligent operation or of facts from which it necessarily followed made the second amended complaint vulnerable to a general demurrer. (*Vice, supra,* 241 Cal.App.2d at 766 - 767.)

Vice thereby recognizes that negligent entrustment is not actionable without the negligence of the operator. As *Armenta* makes clear, the only proper purpose of the negligent entrustment theory is to impose vicarious liability on the owner. (*Id*. at 457.)

Negligent entrustment properly provides a legal vehicle for attaching liability to one who entrusts an instrumentality to another, knowing it is likely to be used in a risky manner. Since tort law is designed to punish "wrongful" conduct, the attachment of liability to the owner sufficiently punishes the entrustor through transfer of liability.

c. Negligent Hiring/Retention

Neg H/R is similar to *respondeat superior* and negligent entrustment because it operates to transfer the liability of one to another. (*Evan F.* at 836 - 837.) In other words, there is no "independent" tort of Neg H/R because it cannot stand alone, it requires the actionable conduct of another.

Neg H/R does cover situations where transfer of liability is appropriate and necessary but cannot be established through *respondeat superior* or negligent entrustment. Through Neg H/R, an employer can be held liable for the actions of its employee even when the employee acts outside the course and scope of his or her employment and is not entrusted

with a dangerous article. For instance, an employer hires a plumber, knowing that the plumber is a convicted felon and has previously been convicted of breaking and entering and stealing property. In fact, the employer knows that the plumber was dismissed from his previous job under suspicion that the plumber stole items from the clients of his previous employer. Employer then assigns plumber to a job at a client's residence. The plumber completes his task, but returns to the residence in the middle of the night to steal items from the client.

Respondeat superior will not attach liability to the employer since the plumber was not acting in the course and scope of his employment when he returned in the middle of the night to steal items. Negligent entrustment will not operate to transfer liability to the employer because the employee was not entrusted with any potentially dangerous article that caused injury to the plaintiff homeowner. However, Neg H/R provides the plaintiff with a legal vehicle to attach liability to the employer if the employer knew or should have known of the propensities of its employee and that the circumstances of employment were likely to result in damage to others.

This situation is similar to the liability established in molestation cases. Generally, the molestation does not occur while the employee is in

the course and scope of his or her employment. Instead, the employment is what gives the employer access to the individuals molested. In the appropriate situation, the employer can be found responsible for the damage caused by the molestation if it can be shown that the employer knew or should have known of the propensities of the employee and allowed the employee to operate in an environment where those propensities could be implemented.

Neg H/R has an appropriate role in the transfer of liability from the employee to the employer. The term "negligence" in Neg H/R should not cause consternation. Certainly the employer must have done something "wrong" for the vicarious liability to apply.[7] Liability is never attached without a reason. The urge to *separately* punish this purported "negligence" is misguided, and mitigated through recognition that the transfer of liability <u>is</u> the punishment.

[7] Perhaps negligent entrustment and negligent hiring/retention are misnomers. If each had been called "wrongful" entrustment and "wrongful" hiring/retention, the urge to identify and punish the purported independent "negligence" might be alleviated.

C. NEITHER NEGLIGENT ENTRUSTMENT NOR NEGLIGENT HIRING/RETENTION CAN BE CONSIDERED AN INDEPENDENT TORT CAUSE OF ACTION BECAUSE OF THE TENUOUS NATURE OF THE CAUSAL CONNECTION

In *Jeld-Wen*, the Court recognizes the peculiar causation predicament of negligent entrustment. The peculiarity of causation is centered on the fact that the cause of action requires the independent actionable conduct of another. The *Jeld-Wen* Court states:

> From this instruction, it appears that negligent operation of the vehicle that was entrusted is a necessary element of the claim of negligent entrustment. A theoretical problem arises regarding the causation element of the negligent entrustment cause of action, because "actionable negligence requires something more than a foreseeable possible consequence; it requires the happening of that consequence (*Id*. at 864.)

In *Evan F*., the Court struggles with causation as it relates to Neg H/R. *Evan F*. recognizes that proximate cause has a component of policy consideration. The Court states:

> That component "asks the larger, more abstract question: *Should* the defendant be held responsible for negligently causing the plaintiff's injury? (Citations omitted)
>
> * * *
>
> Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury. Unlike the fact of causation, with which it is often hopelessly confused, this is primarily a problem of law. (Citations omitted) (*Id.* at 835.)

Evan F. cites to Prosser & Keaton on Torts (5th Ed. 1984) §§ 41 - 42, pp. 264, 272 - 273 for this statement. The treatise is discussing proximate cause, noting first as follows:

> An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage for which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called "proximate cause," or "legal cause."
>
> * * *
>
> "Proximate cause" -- in itself an unfortunate term -- is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. (*Id.* at 263 - 264.)

The treatise then discusses the philosophical nature of causation in "fact," recognizing that the consequences of an act go forward to eternity and the causes of an event go back to the dawn of human events, and beyond. (*Id.* at 264.) Proximate cause, or legal cause, is the boundary set to liability upon the basis of some idea of social justice or policy. The treatise then sets forth the language quoted in *Evan F.*, stating more completely as follows:

> Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury. Unlike the fact of causation, with

> which [proximate cause] is often hopelessly confused, this is primarily a problem of law. It is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. (Underline added.) (*Id.* at § 42, pp. 272 - 273.)

Proximate cause has been utilized to overturn jury verdicts that transferred the liability of an employee to an employer through negligent hiring. (See *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1342.) In *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, the Court utilizes proximate cause to overturn the denial of summary judgment on a negligent hiring cause of action in a molestation case. (*Id.* at 1210 - 1211.) In *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133 the Court utilizes proximate cause to uphold a grant of summary judgment on a negligent hiring cause of action. Courts have applied the same proximate cause analysis for negligent entrustment. (See *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 875 and *Snyder v. Enterprise Rent-A-Car Co.* (2005) 392 F.Supp.2d 1116, 1127 - 1128.)

What is most interesting about these proximate cause cases and the application to Neg H/R, is that they are attempting to determine whether these theories will apply in the first instance, i.e., will *vicarious* liability attach. In the matter presented here, proximate cause must be utilized not for the purpose of determining whether the causal connection is sufficient

to transfer liability from the employee to the employer, but instead to transform the employer into a joint tortfeasor, where a jury must allocate distinct and separate liability through comparative negligence.[8] It is without dispute that the causal connection for the purpose of attaching vicarious liability is itself tenuous. (6 Witkin, Summary 10th (2005) Torts, § 1190.) It is far more difficult to see this tenuous causal connection as sufficient to transform these alternative theories of vicarious liability into independent tort causes of action.

1. Neither Negligent Entrustment Nor Negligent Hiring/Retention is Viable Absent the Actionable Conduct of Another

The tenuous nature of causation in both negligent entrustment and Neg H/R is the achilles heal of any effort to transform these theories into independent tort causes of action. It is beyond dispute that neither

[8] Negligent hiring of a tortfeasor in the context of proximate or legal cause is analyzed at 6 Witkin, Summary 10th (2005) Torts, § 1190. What is of great interest in this analysis, is that the treatise does not even address whether there is sufficient legal cause to transform the employer to an independent tortfeasor. Instead, the treatise focuses entirely on whether or not there is sufficient legal cause to attach liability to the employer for the employee's actionable conduct. This distinction is the most important aspect of analyzing proximate cause in the circumstances of *Diaz*. Respondent must establish sufficient proximate cause to transform Sugar Transport into an independent "joint" tortfeasor with its own employee, Mr. Carcamo. Witkin sees proximate cause difficulties in utilizing Neg H/R to transfer liability from the employee to the employer. Transforming the employer to a joint tortfeasor is not even considered.

negligent entrustment nor Neg H/R is a viable theory unless the employee performs the actionable conduct. To be clear, the purported "negligence" of negligent entrustment is never actionable without the independent negligence of the one entrusted with the vehicle. Similarly, Neg H/R is never actionable unless the employee independently performs the actionable conduct. The undisputed necessity of this contingent causation renders negligent entrustment and Neg H/R dissatisfactory as "independent" torts. There are no independently actionable torts which rely on the actionable conduct of others.

The peculiarity of viewing these theories of recovery as independent tort causes of action is amplified in the context of a comparative negligence system. The conduct of the employer in negligent entrustment or Neg H/R is the same whether or not the employee causes an accident. Certainly the unfortunate circumstance of the occurrence of an accident cannot transform an employer from a party without any liability to a joint tortfeasor requiring a separate allocation of comparative negligence.

The dynamics of negligent entrustment and Neg H/R seem far better suited as theories of vicarious liability. The fact that each contains the unfortunate term "negligence" is not reason enough to treat them as independent tort causes of action. There must be some legal justification

for transferring liability from one to another, and that justification can be the public policy considerations of *respondeat superior* or the "wrongful" conduct of negligent entrustment and Neg H/R. Although courts confuse the nature of these alternative theories of vicarious liability, they have not gone so far as to find the employer and employee joint tortfeasors, requiring separate allocation of comparative negligence.

2. Proximate Cause Policy Considerations Do Not Support Transforming Negligent Hiring/Retention into an Independent Tort Cause of Action

The typical balance of public policy considerations through proximate cause concern whether or not a particular defendant should be legally responsible for the injury. Here, the employer is already legally responsible for the injury through *respondeat superior*. The question presented by this analysis of proximate cause is whether the employer should not only be responsible for the actions of its employee, but also found separately liable for a portion of the same damage. As has been shown, there is no compelling public policy reason to impose this duplicative responsibility on an employer. Here, public policy considerations support limiting negligent entrustment and Neg H/R to alternative theories of vicarious liability, even when *respondeat superior* is not admitted. In the context where *respondeat superior* is admitted, there is

certainly no valid public policy reason to attach separate independent liability.

In an effort to determine the underlying policy considerations in the proximate cause analysis, these amici curiae suggest the Court take the following points into consideration:

1. The exclusionary rule of § 1104 is designed to promote fair trials and just resolution. The evidence excluded by § 1104 is by its very nature inflammatory, since it has the high potential to corrupt the thought process of the jury and cause conclusions not based on the facts and circumstances of the particular occasion. The exclusionary rule of § 1104 will be circumvented if Neg H/R is considered an independent tort cause of action.

2. When an employer admits *respondeat superior* liability, the employer is accepting financial responsibility for the wrongful acts of the employee. In this context, evidence of negligent entrustment or Neg H/R has no purpose other than to circumvent the exclusionary rule of § 1104.

3. If an employer does not admit *respondeat superior* liability, the injured third party can pursue negligent entrustment or Neg H/R. If

either of these theories is proved, the "wrongful" conduct of the employer is punished by the attachment of liability for the actions of the employee. Accordingly, there can be no compelling public policy reason to attach "independent tort" liability because the employer is already being punished for its "wrongful" behavior through the attachment of liability for the actions of the employee.

4. A rule finding sufficient proximate cause for Neg H/R such that it gives rise to independent tort liability generates ludicrous results. A semi-trailer owner/operator will be provided the protection of the exclusionary rule since there is no employee/employer relationship. The same driver, if employed by a trucking company and driving the semi-trailer of another, will be denied the benefits of the exclusionary rule when Neg H/R is pled. This result emphasizes the inequity of the unjust punishment of employers.

5. The State of California, through the Department of Motor Vehicles, regulates the licensure of operators of motor vehicles. The department has the authority to issue the license, suspend a license or revoke a license. (California Vehicle Code § 13100 et seq..) License suspension or revocation can occur when a licensed driver has too many accidents or too many violations. (California Vehicle Code § 13351.)

Allowing Neg H/R as an "independent tort cause of action" imposes upon an employer a duty to critique employee drivers beyond the licensure requirements of the State of California.

6. If Neg H/R has sufficient proximate cause to operate as an independent tort action, the employer will face admission of inflammatory evidence despite the exclusionary rule. Consequently, employers will not only need to make certain that employees are properly licensed and reasonably capable, but must make certain their driving record is "squeaky clean" so that the employer is not exposed to evidence that will make it more likely that the employee, and consequently the employer, is found liable. To find such "squeaky clean drivers," employers may have to resort to less experienced operators whose record has not yet been tainted by an accident.

7. There is no evidence to support a contention that employers of drivers are not already sufficiently motivated to place reasonably safe operators in vehicles. Certainly employers understand that if the employee is involved in an accident, the employer will be liable. This is sufficient incentive for employers to promote safe driving practices by employees. Attaching additional liability is unnecessary, and punitive.

8. Proximate cause is typically analyzed to determine whether or not any liability at all will be attached to the defendant. Here, vicarious liability is a foregone conclusion through admission of *respondeat superior*. The public policy considerations here are in the context of attaching *additional* liability. The question is whether there is sufficient proximate cause to transform Neg H/R into an independent tort cause of action, requiring an allocation of comparative negligence and imposing liability beyond vicarious liability.

9. If negligent entrustment and Neg H/R are considered "independent tort causes of action" there is no incentive for employers to admit *respondeat superior* liability. Since the employer will face inflammatory evidence in any event, there is nothing to be gained by accepting responsibility for the employee's actions. The result will be collateral issues consuming time and distracting the attention of the trier of fact from what actually occurred on the particular occasion. Trials will be longer, settlements less likely, and the purpose of the exclusionary rule entirely defeated.

3. There is No Public Policy Benefit to Punishing Employers for Hiring Motor Vehicle Operators

It is without dispute that plaintiffs generally wish to introduce any and all evidence which would make it more likely that the jury will find

negligence in a particular circumstance. The exclusionary rule of § 1104 is designed to keep collateral issues from confusing or distracting the jury. The comments to § 1104 state:

> The purpose of the rule is to prevent collateral issues from consuming too much time and distracting the attention of the trier of fact from what was actually done on the particular occasion. Here, the slight probative value of the evidence balanced against the danger of confusion of issues, collateral inquiry, prejudice, and the like, warrants a fixed exclusionary rule. [7 Cal. L.Rev.Comm. Reports 1 (1965)]. (Evid. Code § 1104.)

The question presented to this Supreme Court is whether the labeling of the theory of recovery as negligent entrustment or Neg H/R is legally substantive, and operates to void the protection of the exclusionary rule of § 1104. To determine the just result, this Court must investigate the nature of Neg H/R and balance the public policy considerations in the context of an employee motor vehicle operator in the course and scope of employment.

Individual (non-employer) operators of motor vehicles are always afforded the protection of § 1104 should they be involved in a vehicular accident. If negligent entrustment or Neg H/R were construed as an independent tort cause of action, with viability even after *respondeat superior* is admitted, employers will never be given the evidentiary

protections of the exclusionary rule. This will result in nothing less than punishing employers for employing operators of motor vehicles.

The unsoundness of such a policy is even more obvious when one recognizes that employers already have great incentive to limit their vicarious liability for the act of employees. One of the policies of tort law is to encourage safety. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1405.) Employers are already responsible for damage caused by the negligent act of their employees while in the course and scope of their employment. This provides sufficient incentive for employers to hire employees who are reasonably careful and safe.

D. THE PURPOSE OF VICARIOUS LIABILITY IS TO ALLOW PLAINTIFFS TO REACH DEEP POCKET DEFENDANTS

The purpose of establishing vicarious liability is to provide greater assurance of compensation. Employers tend to have more insurance and more resources than employees. Knowing this, plaintiffs seek legal theories to transfer liability to the deep pocket defendant, providing greater assurance that the plaintiff will be compensated if the defendant is found liable. "From the perspective of the plaintiff, imposition of vicarious liability would always serve the policy of giving greater assurance of

compensation to the victim." (*Kephart v. Genuity, Inc.* (2006) 136 Cal.App.4th 280, 297.) One of the reasons for imposing vicarious liability is to provide greater assurance of compensation for the victim. (*John R. v. Oakland Unified School District* (1989) 48 Cal.3d 438, 450 - 451.)

Respondeat superior, negligent entrustment and Neg H/R are alternative theories of vicarious liability. If a plaintiff can show that the defendant was in the course and scope of his employment at the time of the incident, liability will transfer to the better capitalized employer. If the plaintiff can show that the owner of a vehicle (employer or others) knew or should have known that it entrusted the vehicle to an individual incapable and unfit for its safe operation, the plaintiff can transfer liability from the unfit operator to the vehicle owner. If a plaintiff can show that an employer knew or should have known that an employee was unfit or incapable of performing his or her job without injuring others, then liability can be transferred to the better capitalized employer. Negligent entrustment and Neg H/R can be established even when the employee is not in the course and scope of employment at the time of the incident.

Since each of these theories of recovery will accomplish the goal of assigning liability to the better capitalized party, establishing one makes the others superfluous. If an employer admits *respondeat superior* liability

because the employee is in the course and scope of his employment at the time of the incident, there is no legitimate purpose for pursuing the alternative theories. Only when an employer denies course and scope responsibility will negligent entrustment or Neg H/R be relevant.

E. PROPOSITION 51 APPLIES ONLY TO JOINT TORTFEASORS AND NOT TO VICARIOUSLY LIABLE PARTIES

There can be no dispute that through Proposition 51 ("Prop 51"), the people of the State of California intended to limit the liability of deep pocket defendants. (Civil Code § 1431.1(a).) Prop 51 achieved its stated goal by limiting recovery for non-economic damages to a joint tortfeasor's comparative share of liability. (Civil Code § 1431.2) An analysis of Prop 51 must be made in the context of its intent. Prop 51 is designed to limit liability, not expand it.

1. The term "fault" in § 1431.2 Cannot be Utilized to Transform Negligent Hiring/Retention into an Independent Tort Action

Civil Code § 1431.2 refers to "comparative fault." The term "fault" has little meaning in tort law, and is unfortunate terminology. A person can presumably be at "fault" for not being careful. It doesn't follow that a plaintiff will succeed in establishing the requisite elements of a cause of

action to establish him or her as a tortfeasor. Certainly all can agree that Proposition 51 did not intend to relax the requirements of proving a tort action. Comparative "fault" would have been more accurately stated as comparative "negligence" or the more inclusive comparative "liability."

Prop 51 applies to joint tortfeasors. An individual or entity cannot be a "tortfeasor" unless the requisite elements of a cause of action are proved. The requisite elements of negligence are: duty, breach, causation and damages. (*Evan F.*, *surpa* at 834.) "Fault" has no place in tort law, other than as a colloquial reference to the status of a tortfeasor after all of the elements of a cause of action are proved. At such time, and only after proving all of the elements of a given cause of action, one could refer to a tortfeasor as "being legally at fault."

In civil litigation, we do not ask juries to establish whether or not a certain defendant was "at fault." We ask juries whether or not the plaintiff was able to establish each of the elements of a given cause of action such that legal liability is attached to the defendant. In the case of multiple defendants, the plaintiff must prove the elements of a cause of action against each defendant in order for them to become "joint tortfeasors." If proven, these joint tortfeasors are assigned a proportionate percentage of liability as required by California's comparative negligence system. In

accordance with Prop 51, a joint tortfeasor will be jointly and severally liable for the plaintiff's economic damages, but only severally liable for the plaintiff's non-economic damages. (Civil Code § 1431.2.)

Resolution of the Prop 51 issue presented by *Diaz* turns on whether or not the employer can be considered a true "joint tortfeasor" with its employee driver. As previously discussed, the theory of Neg H/R is certainly different than a standard tort cause of action. Negligent entrustment and Neg H/R are legal theories that require the malfeasance or actionable conduct of another. Certainly negligent entrustment and Neg H/R cannot be considered independent tort causes of action because they are not "independent" from the actions of others. Instead they rely on the intervening and superseding actionable conduct of the employee.

Respondents argue that Prop 51 requires that separate "fault" be allocated to the employer for its "negligence" in hiring the employee. This novel contention does not find support in Prop 51 or the applicable law.

An informative case on the analysis of Prop 51 in this context is *Wimberly v. Derby Cycle* (1997) 56 Cal.App.4th 618 ("*Wimberly*"). *Wimberly* first addresses the dubious nature of the term "fault" as used in

§ 1431.2. (*Id.* at 626 - 632.) The Court ultimately determines that a strictly liable defendant in the chain of distribution of a product cannot "reduce or eliminate its responsibility to the plaintiff . . . by shifting blame to other parties in the product's chain of distribution who are ostensibly more at "fault," and therefore may be negligent as well as strictly liable." (*Id.* at 633.) In arriving at this conclusion, *Wimberly* states:

> Nothing in Proposition 51 compels dilution of the strict liability doctrine. To the contrary, the measure disapproves of joint and several liability for plaintiff's non-economic damages only where there are 'independently acting tortfeasors who have some fault to compare' (Citation omitted). The parties in a defective product's chain of distribution are not joint tortfeasors in the traditional sense; rather, as a matter of law their liability to plaintiff is co-extensive with others who may have greater "fault," as in other instances of statutorily or judicially imposed vicarious, imputed or derivative liability. (*Id.* at 633.)

(See also *Bostik v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 89 - 95.) Without stating it outright, *Wimberly* concludes that Prop 51 applies only to joint tortfeasors, and those "in the chain of distribution of a product" are not joint tortfeasors with each other. Since they are not joint tortfeasors with each other, they cannot seek the protection from non-economic damages afforded by § 1431.2.

Wimberly also recognizes that vicarious liability through *respondeat superior* will not protect the employer from the employer's allocation of non-economic damages. (*Id.* at 629 - 632.) In other words, a party that has strict or vicarious liability cannot rely on the dubious "fault" term in § 1431.2 to avoid allocation of non-economic damages.

Logically, the converse argument cannot be allowed. A plaintiff cannot use the "fault" of § 1431.2 to transform those vicariously liable (or those in the chain of distribution of a product) into joint tortfeasors, such that liability can be apportioned between them, giving plaintiff more opportunities to assign comparative liability. The dubious "fault" term in § 1431.2 is not an excuse to transform a theory of vicarious liability into a stand alone tort. If defendants who are vicariously liable cannot utilize the "fault" of § 1431.2 for protection from non-economic damages, it follows that plaintiffs cannot utilize "fault" to transform vicariously liable defendants into joint tortfeasors.

This all leads to one logical and rationale conclusion: There is nothing in Prop 51 which could possibly transform a vicariously liable defendant into an independent joint tortfeasor. Prop 51 was designed to limit liability, not expand it.

It is this reality that exposes Prop 51 as a red herring or a "manufactured" argument by the Respondent. The enactment of Prop 51 has absolutely nothing to do with whether or not negligent entrustment or Neg H/R are independent tort causes of action or alternative theories of vicarious liability. Rather, it is an excuse by Respondents to transform these theories of recovery into independent torts. Respondents argue that Civil Code § 1431.2 requires the "allocation of fault" between and among the defendants, including between the employer and the employee. This contention does not withstand closer scrutiny.

2. Negligent Entrustment and Negligent Hiring Have Never Been Pursued as Independent Tort Actions Since Comparative Negligence was Implemented

If negligent entrustment and Neg H/R were truly independent tort causes of action prior to the enactment of Civil Code § 1431.2, they would have been so alleged and pursued by plaintiffs. But they were not. No matter the label given to these alternative theories of recovery, juries were not asked to provide a separate allocation of liability to the employer. In other words, negligent entrustment and Neg H/R always operated as alternative theories of vicarious liability, no matter how they were labeled. They operated to transfer liability from the employer to the employee.

Respondent argues that Prop 51 requires this transformation to properly apportion "fault." But the motivation to establish negligent entrustment or Neg H/R as independent torts existed prior to Prop 51 at the advent of the comparative negligent system in 1975. (See *Li v. Yellow Cab* (1975) 13 Cal.3d 804.) Had plaintiffs believed negligent entrustment and Neg H/R were not alternative theories of vicarious liability, but instead independent tort causes of action, separate allocation of liability would be pursued within the comparative negligence system regardless of Prop 51.

F. PETITIONER DID NOT RECEIVE A FAIR TRIAL AND THE CASE MUST BE REMANDED FOR RETRIAL

There are two glaring and distinct reasons why Petitioner could not have received a fair trial. First, the exclusionary rule of § 1104 was circumvented, and the inflammatory evidence admitted, causing the jury to focus less on the incident and more on the history of the truck driver and his employer. This would naturally cause the jury to assign more comparative negligence to the truck driver, especially since Ms. Tagliaferri was presumably protected from the same damaging and irrelevant evidence.

Second, the transformation of Neg H/R into an independent tort cause of action allowed the plaintiff to present another tortfeasor (the employer) for allocation of comparative liability. Naturally this would tend

to reduce the amount allocated to Ms. Tagliaferri and increase the amount assigned to the combination of employer and employee.

As a result, Petitioners did not receive a fair trial and the case must be retried.

V.

CONCLUSION

Although negligent hiring/retention has been given many legal labels, it has operated only to transfer the liability of the employee to the employer. There is no case that requires an allocation of comparative liability arising out of negligent hiring/retention.

Proposition 51 is designed to limit the liability of deep pocket joint tortfeasors. Proposition 51 provides no support for transforming a theory of vicarious liability into an independent tort cause of action.

The casual connection for negligent hiring/retention is insufficient to establish an independent tort cause of action. The policy considerations of proximate cause do not favor the establishment of a new tort.

There is no reason for denying employers the benefit of the exclusionary rule of § 1104. Recognizing negligent hiring as an independent tort cause of action will attach additional liability to employers without justification.

For these reasons, these amici curiae urge this Court to grant the Petition, overturn *Diaz* and remand the case for retrial.

Dated: October 15, 2010 HARMEYER LAW GROUP, APC

By: _____
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CERTIFICATE OF WORD COUNT

PURSUANT TO RULE OF COURT 14(c)(1)

I, JEFF G. HARMEYER, declare:

1. I am an attorney at law duly licensed to practice before all Courts of the State of California and a partner of Harmeyer Law Group, APC, attorneys of record for Amici Curiae JELD-WEN, inc. and California Trucking Association.

2. According to my computer, the word count, including footnotes of this Amicus Curiae Brief is 8,631 words..

Executed on the 15th day of October, 2010 at San Diego, California.

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

_____

JEFF G. HARMEYER