Supreme Court Copy

No. S181627

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

APR 29 2010

Frederick K. Ohlrich Clerk

Deputy

DAWN DIAZ,

Plaintiff and Respondent,

v.

JOSE CARCAMO and
SUGAR TRANSPORT OF THE NORTHWEST, LLC,

Defendants, Appellants, and Petitioners.

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

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

In the petition for review, appellants demonstrate that the Court of Appeal's opinion in this case contravenes binding precedent in *Armenta v. Churchill* (1954) 42 Cal.2d 448 (*Armenta*) by purporting to restrict the rule established in *Armenta* to negligent entrustment actions only, not actions for negligent hiring or retention. Under *Armenta*, once an employer admits respondeat superior liability for an employee driver's negligence in causing an accident, the plaintiff cannot pursue alternative theories of employer liability that would allow the plaintiff to introduce evidence of the employee's prior accidents, poor driving record, or poor character. (*Id.* at pp. 456-458.) Appellants also showed that the opinion in this case directly conflicts with *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853 (*Jeld-Wen*) on whether Proposition 51 has undermined the *Armenta* rule.

Respondent does not even try to defend the Court of Appeal's purported distinction between negligent entrustment and negligent hiring or retention. Respondent implicitly concedes the Court of Appeal was incorrect on this point, which makes up the majority of the opinion. Instead, respondent admits that the *Armenta* rule applies but argues instead that appellants waived the issue by not raising it early enough in the proceeding. Respondent argues that this point distinguishes *Armenta* and *Jeld-Wen.* The most immediately apparent problem with respondent's procedural argument is that the Court of Appeal did not rely on (or even address) it. (See Opn. at p. 12, fn. 8 ["Because we resolve the issue on the merits, we need not address the procedural arguments made by the parties."].) An issue that the court explicitly did *not* consider provides no basis to distinguish its holding. Moreover, even if waiver were relevant, appellants, in fact, timely raised and preserved the *Armenta* issue.

Respondent's attempt to resolve the conflict between the opinion in this case and *Jeld-Wen* also fails. Respondent asserts that, unlike here, *Jeld-Wen* did not involve a defendant-employer who sought to reduce its percentage of liability by "asserting a Prop. 51 defense" based on the liability of another negligent driver. (E.g., Answer at pp. 5-6.) This purported distinction appears nowhere in *Jeld-Wen*, which holds without reservation that "[t]here is nothing in *Armenta* that is adversely affected by the development of these comparative negligence principles . . . ." (131 Cal.App.4th at p. 871.) Moreover, *Jeld-Wen* shows that the defendants *did* seek to reduce their comparative liability based on the negligent driving of the decedent (*id.* at p. 859, fn. 3), and that Proposition 51 *would* apply "[i]f and when there is an award of noneconomic damages" (*id.* at p. 871). The purported distinction also does not appear in the *Jeld-Wen* brief on which respondent relies. In that brief, the defendants argued (as appellants argue here) that Proposition 51 was inapplicable *to the apportionment of liability between the employer and employee* once respondeat superior was admitted, because any such liability would be coextensive. (2005 WL 2901428, at pp. *21-*23.) Finally, Proposition 51 is not a "defense" that a party "asserts."

Respondent's two bases for distinguishing *Armenta* and *Jeld-Wen* fail, and the answer confirms that review by this Court is necessary to resolve an important and recurring issue on which Court of Appeal decisions are in conflict.

ARGUMENT

I. RESPONDENT'S PROCEDURAL ARGUMENTS ARE IRRELEVANT AND INCORRECT

Respondent makes no attempt to defend the Court of Appeal's holding that "neither *Armenta* nor *Jeld-Wen* is controlling or persuasive" because "[b]oth cases involve negligent entrustment but do not discuss negligent hiring and retention" and "[a] case is not authority for an issue not considered." (Opn. at p. 5.) This distinction consumes at least six pages of the Court of Appeal's opinion and is the first ground for review identified in appellants' petition, but is nowhere mentioned in respondent's answer. Instead, respondent appears to concede that the *Armenta* rule *does* apply in negligent hiring and retention actions and simply pretends the contrary holding in the Court of Appeal's opinion does not exist. (Answer at p. 29 ["*Armenta* is left undisturbed by the Court of Appeal's Opinion as to any 'alternate theory of liability' . . ."].)[1] For the reasons discussed in the petition for review, however, the Court of Appeal's holding contravenes *Armenta* and conflicts with *Jeld-Wen*, and review by this Court is necessary to prevent problems in current and future cases.

Unable to defend the Court of Appeal's holding on the scope of the *Armenta* rule, respondent raises various procedural points in an attempt to show that appellants did not timely raise or properly preserve the *Armenta* issue. As discussed below, respondent is incorrect on each of these points.

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[1] Respondent also pretends the conflict between *Jeld-Wen* and *Syah v. Johnson* (1966) 247 Cal.App.2d 534 does not exist. Respondent emphasizes how old and unusual the *Syah* decision is but completely ignores the extended criticism and rejection of *Syah* in *Jeld-Wen*. (Answer at pp. 27-28.) Moreover, respondent's current position conflicts with the position it took before the Court of Appeal, where respondent argued that *Jeld-Wen* was "at odds" with *Syah*. (See Respondent's Brief at p. 23, fn. 4.)

Even if respondent were correct, however, none of these procedural issues diminish the need for review for the simple reason that the Court of Appeal explicitly *did not rely on them or even address them.* (See Opn. at p. 12, fn. 8 ["Because we resolve the issue on the merits, we need not address the procedural arguments made by the parties."].) Procedural contentions that the Court of Appeal explicitly did *not* address can provide no basis for distinguishing its holdings on when the *Armenta* rule applies and does not apply.[2]

Moreover, respondent's rendition of the facts underlying her procedural arguments distorts the record. She asserts that Sugar Transport did not concede respondeat superior until "the middle of the trial." (Answer at pp. 4, 18-23.) In fact, Sugar Transport admitted the facts establishing respondeat superior liability long before trial, in its form interrogatory responses. (4 CT 878:22-24.) These responses were verified under penalty of perjury (4 CT 880) and are directly analogous to, and equally as binding as, the pretrial admissions in *Jeld-Wen*, which were made in discovery and in a sworn declaration in support of the employer's summary adjudication motion (131 Cal.App.4th at p. 859). At trial, respondent's counsel expressly conceded what he could not deny: Sugar Transport's admission of respondeat superior had "never" been an issue in the case. (2 RT 434:7-8.) Although respondent characterizes Sugar Transport's formal stipulation as coming "in the middle of trial," it was

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[2] One procedural issue *is* relevant to the issues presented in this petition—the fact that respondent alleged negligent *entrustment*, not negligent hiring or retention, in her complaint and never moved to amend it to conform to proof. (See Petition at pp. 16, 23.) This procedural issue stands in direct contradiction to the Court of Appeal's holding here that negligent entrustment is a distinctly different basis for relief than negligent retention or negligent hiring. (Opn. at pp. 5-8). Respondent does not address this issue in her answer.

actually made on the second day of trial testimony, when respondent called her expert on negligent hiring to the stand. (2 RT 432:8-21.) The seven witnesses who testified before then were asked nothing relevant to the claims for negligent hiring and retention.[3]

Respondent also incorrectly asserts that Sugar Transport did not raise the *Armenta* issue until near the end of trial, and at one point suggests this was "while the jury was deliberating." (Answer at pp. 1-2, 23-24.) In actuality, before any evidence of negligent hiring or retention was introduced, Sugar Transport objected to the evidence and cited *Jeld-Wen* to the trial court, including a full case citation. (2 RT 430:15-432:7, 434:16-437:13, 443:2-9; 451:4-16.) Sugar Transport fully briefed the issue before the witness testimony ended and before the trial court instructed the jury. (1 CT 212-219.)

Finally, respondent suggests that Sugar Transport should have "moved to bifurcate the case." (Answer at p. 7.) Nothing in *Armenta* or *Jeld-Wen* indicates that bifurcation is an alternative to application of the *Armenta* rule. Moreover, bifurcation would not adequately protect defendants from the type of prejudicial evidence the rule prohibits. For one thing, the decision to bifurcate is wholly discretionary with the trial court. (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 503-

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

504.) Even when such a motion is granted, and the liability of the employee for negligent driving is determined before the jury hears character evidence relevant to the negligent hiring claims against the employer, the jury would still have to hear that evidence before awarding damages and apportioning fault. The only situation in which bifurcation would avoid prejudice is when the jury finds the employee not negligent, which would effectively end the case with respect to the employee and the employer on all claims. Thus, notwithstanding bifurcation, in any case where the jury reaches the apportionment stage, it will have heard the prejudicial character evidence that *Armenta* and *Jeld-Wen* prohibit.

In the end, the Court of Appeal's decision in this case directly contravenes *Armenta* and conflicts with *Jeld-Wen* on the scope of the evidentiary rule at issue, and only this Court can remedy the confusion this will create in the lower courts. The purported procedural issues respondent raises are meritless and, more importantly, do not affect the need for this Court's review.

II. RESPONDENT'S ATTEMPT TO DISTINGUISH *JELD-WEN* IS GROUNDLESS

In addition to the procedural arguments, respondent argues that "*Armenta* and *Jeld-Wen* are distinguishable because they did not involve a defendant/employer seeking to reduce its percentage of liability by asserting a Prop. 51 defense based on the comparative fault of a second negligent driver . . . ." (Answer at p. 5.) This argument, which consumes close to 15 pages of the answer, is factually and legally baseless. First, *Jeld-Wen* rejected the distinction respondent tries to draw. Second, the *Jeld-Wen* opinion shows that the comparative liability of a second negligent driver was very much at issue. Third, the defendant employer in *Jeld-Wen* did not "eschew[] the potential Prop. 51 reduction," as respondent asserts.

(Answer, at p. 9.) Finally, Proposition 51 is not a "defense" that a party may choose not to assert. It is a law that governs the apportionment of noneconomic damages.

The *Jeld-Wen* opinion contains no reference to respondent's purported distinction. To the contrary, the Court of Appeal in that case held without reservation that "[t]here is nothing in *Armenta* that is adversely affected by the development of these comparative negligence principles." (131 Cal.App.4th at p. 871.) Moreover, the *Jeld-Wen* opinion shows the defendants *did* seek to reduce their comparative liability based on the negligent driving of the decedent. (*Id.* at p. 859, fn. 3; see *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 285 ["[P]rinciples of comparative fault and equitable indemnification support an apportionment of liability among those responsible for the loss, including the decedent . . ."].) The court was reviewing a denial of summary adjudication and specifically held that Civil Code section 1431.2 *would* apply "[i]f and when there is an award of noneconomic damages." (*Jeld-Wen*, 131 Cal.App.4th at p. 871).

Respondent nevertheless asserts that Proposition 51 was not at issue in *Jeld-Wen* on the basis of a brief filed by the defendant-employer in which it argued that Proposition 51 was "inapplicable." (Answer at p. 6, citing 2005 WL 2901428; see also, e.g., Answer at pp. 4-5, 8-10, 15, fn. 10.) Yet, the brief provides no support for the notion that the employer failed to "assert" a Proposition 51 defense. The employer argued Proposition 51 was inapplicable because there, as here, *the employer's admission of respondeat superior made its liability coextensive with that of its employee*. (2005 WL 2901428, at pp. *21-*23.) The *Jeld-Wen* court even quoted an article explaining that in most jurisdictions, comparative fault does not affect the *Armenta* rule, and this "suggests that 'comparative

fault as it applies to the plaintiff *should end with the parties to the accident.*' . . . [Citation.]" (131 Cal.App.4th at p. 871, italics added.)

Any doubt as to whether the employer-defendant in *Jeld-Wen* asserted and pursued a comparative fault defense that resulted in the reduction of its damages is eliminated by this Court's recent description of the verdict form used in the subsequent trial in *Jeld-Wen:*

> Question 7 asked, "Was Scott Keener negligent?" Question 8 asked, "Was Scott Keener's negligence a substantial factor in causing his death?" Question 9 asked, "What percentage of responsibility do you assign to: [¶] Hector Solis ___ % [¶] Scott Keener ___ % . . . ." The verdict form further revealed that the jury had found both parties were negligent, the negligence of each was a substantial factor in causing Keener's death, and the plaintiffs suffered economic and noneconomic damages totaling $4,940,000. Finally, the jury found that defendant Solis bore 80 percent of the responsibility for the death, and Keener bore 20 percent of the responsibility for his own death.

(*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 251.) Thus, the jury reached a verdict as to the comparative liability of the parties to the accident, and Solis's employer was liable for 80% of the damages through its admission of respondeat superior, with no evidence of negligent entrustment admitted at trial.

On the basis of respondent's mischaracterization of what happened in *Jeld-Wen*, respondent repeatedly blames Sugar Transport for the fact that the trial was marred by prejudicial character evidence. Respondent asserts that Sugar Transport could have avoided this result by not "asserting a Prop. 51 defense." (Answer at pp. 5-6, 8, 10-11, 13-15, 17-18.) According to respondent, Sugar Transport "made a choice—a choice it must now live

with" (*id.* at p. 14) and characterizes Sugar Transport as wanting to "have [its] cake and eat it too" by seeking application of the *Armenta* rule while at the same time asserting the comparative negligence of Karen Tagliaferri, the other driver involved in the collision (*id.* at pp. 11, 14, 18).

Despite its prominence in respondent's answer, this argument makes no sense. The "defense" at issue is not Proposition 51, but comparative fault. Proposition 51 did not create the comparative fault defense or the principles of equitable indemnity; it simply modified the old rule of joint and several liability, as it applies to noneconomic damages. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1196-1199.) Proposition 51 is not an affirmative defense that can be "waived"—it is the law of the State as adopted by the voters. (Civ. Code, § 1431.2.) The only way Proposition 51 would not apply in a case with multiple defendants is if each defendant (here, Tagliaferri, Carcamo, and Sugar Transport) waives a defense based on comparative fault and refuses to assert that other defendants have responsibility for the accident. According to respondent, this would be the only circumstance in which the *Armenta* rule applies. Such a result would make the *Armenta* rule a dead letter and undermine the entire purpose of Proposition 51—to allocate fault to the persons who were actually responsible for causing the plaintiff's damages, rather than the defendant with the deepest pockets. (See Civ. Code, § 1431.1 [Prop. 51 findings and declarations of purpose].)

In sum, no basis exists to distinguish the *Jeld-Wen* decision, which directly conflicts with the Court of Appeal's opinion in this case on the effect of Proposition 51.

III. RESPONDENT'S OTHER ARGUMENTS ARE IRRELEVANT AND INCORRECT

In addition to its unsuccessful attempts to distinguish *Armenta* and *Jeld-Wen*, respondent makes several arguments as to why the Court of Appeal's opinion is correct. Although these arguments are more relevant to merits briefing, appellants will briefly address them here in case the Court wishes to consider them.

A. Proposition 51 Has Not Undermined the *Armenta* Rule

Respondent argues that without evidence of negligent hiring and retention, the required apportionment of fault would have been "mathematically impossible." (Answer at pp. 7-8, 12.) Yet this is precisely what happened in *Jeld-Wen*, and the approach a majority of other jurisdictions have taken who have analyzed the impact of comparative liability principles on the *Armenta* rule. (E.g., *Gant v. L.U. Transport, Inc.* (Ill.Ct.App. 2002) 770 N.E.2d 1155, 1159; *McHaffie v. Bunch* (Mo. 1995) 891 S.W.2d 822, 826; see Powell, *Submitting Theories of Respondeat Superior and Negligent Entrustment/Hiring* (1996) 61 Mo. L.Rev. 155, 163 & fn. 55.)

What respondent overlooks is that *Armenta* is a rule of evidence, one whose policies are not affected by the enactment of Proposition 51. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 871.) *Armenta* holds that once the employer admits respondeat superior liability for any negligence of its employee, the plaintiff may not proceed under alternative theories of direct liability. This is not to say the employer might not be found liable under such a direct theory. Although the admission of respondeat superior is "not directly responsive to plaintiffs' added allegations of fact . . . relating to [the employer's] personal negligence," the employer's negligence is wholly derivative of that of its employee. (*Armenta*, *supra*, 42 Cal.2d at p. 457.)

That is, the only proper purpose of the alternate theory of direct liability is "to impose upon [the employer] the same legal liability as might be imposed upon [the employee driver] in the event the latter was found to be liable." (*Ibid.*) The rule thus serves the important purpose of preventing the admission of prejudicial character evidence and keeping the jury focused on the facts of the accident at issue.

These policies are not overcome by the requirement in Proposition 51 that liability for noneconomic damages be apportioned among defendants according to their comparative fault. Once an employer admits respondeat superior, it is liable for all damages, if any, caused by its employee driver's negligence in causing an accident. No need exists to allocate damages between the employer and employee, because they are for all intents and purposes one entity. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 871; see also *Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1196 [for purposes of comparative fault, "vicariously liable defendants are viewed, for policy reasons, as a single entity"].) Other drivers involved in the accident are responsible for their comparative-fault share of noneconomic damages. The focus of the accident remains on the parties to the accident, and their respective shares of fault, which furthers the policies behind the *Armenta* rule and Proposition 51.

The risk of the jury coming to an unreliable verdict based on prejudicial character evidence is great, whereas the need to separately allocate fault to the employer is minimal if not nonexistent. In a negligent hiring and retention action, any negligence by the employer, although direct, is derivative of the employee's negligence. If Carcamo had not been negligent, Sugar Transport could not have had any liability, as respondent's counsel admitted at trial. (2 CT 270-271 [jury instruction on negligent hiring]; 2 RT 434:10-15 [admission by respondent's counsel that Sugar

Transport's liability was dependent on Carcamo having driven negligently].) By the same measure, Sugar Transport's apportionment of damages could not exceed the harm caused by Carcamo in the accident. As one court has explained:

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

(*Gant v. L.U. Transport, Inc.*, *supra*, 770 N.E.2d at p. 1159; accord *McHaffie v. Bunch*, *supra*, 891 S.W.2d at p. 826.)

Thus, both the doctrine of respondeat superior and the doctrine of negligent hiring make Sugar Transport liable for all or part of the harm Carcamo caused. In no circumstances could Sugar Transport be liable for the harm caused by *Karen Tagliaferri's* negligence. The jury's verdict in this case, which purports to assign Sugar Transport a separate and *greater* percentage of fault than its driver (2 CT 334) is therefore "plainly illogical." (*McHaffie v. Bunch*, *supra*, 891 S.W.2d at 827; see also *Gant v. L.U. Transport, Inc.*, *supra*, 770 N.E.2d at p. 1160.)

B. *Bayer-Bel v. Litovsky* Is Inapposite

Respondent points to *Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396 to show that Proposition 51 requires apportionment of noneconomic damages between negligent entrustors and negligent entrustees. (Answer at pp. 16-17.) That Proposition 51 requires apportionment of non-economic damages is beyond dispute. That negligent entrustment is a direct cause of action is also beyond dispute, or at least it was until the Court of Appeal's opinion below. (See Opn. at pp. 5-9.) The question in this case is whether a plaintiff is allowed to admit evidence of negligent hiring or entrustment *once an employer concedes liability under the doctrine of respondeat superior*, thus making itself liable for any and all harm caused by its employee. *Armenta* and *Jeld-Wen* answer this question in the negative, and *Bayer-Bel* does not address this issue. (*Bayer-Bel v. Litovsky*, *supra*, at pp. 400-401.) Indeed, if *Bayer-Bel* suggested that Proposition 51 overrides the *Armenta* rule, it would only deepen the conflict in the Court of Appeal and heighten the need for review by this Court.

C. Admission of the Character Evidence Was Plainly Prejudicial

Respondent also argues that, despite the admission of inflammatory character evidence, appellants were adequately protected from undue prejudice because the trial court held a hearing on admissibility and instructed the jury that the evidence was relevant only to the negligent hiring claim. (Answer at pp. 5-6.) The hearing provided no protection. As explained in the petition for review, Evidence Code sections 352 and 1104 will rarely if ever prevent the admission of prejudicial character evidence in these circumstances, because such evidence is almost always the most probative evidence of negligent hiring and entrustment. (See Petition at p. 24.) This is precisely why the *Armenta* rule is needed in the first place.

Also, having admitted extensive evidence of Carcamo's character in contravention of *Armenta*, the trial court's curative jury instruction could not undo the plainly prejudicial impact on then jury. Indeed, the instruction only addressed Carcamo's prior accidents—it made no mention of the other types of prejudicial character evidence regarding Carcamo, or the extensive evidence regarding Sugar Transport's hiring and retention practices. (2 CT 274; 10 RT 1666:9-13.)

IV. THE PETITION PRESENTS AN IMPORTANT ISSUE

Finally, respondent suggests that the issue presented in the petition for review is not serious, but instead is "rather insular." (Answer at p. 1.) As respondent's purported distinctions of *Armenta* and *Jeld-Wen* are completely untenable, however, it is undeniable that this issue potentially arises in thousands of motor vehicle accident cases filed each year. (See Answer at p. 11, fn. 8.) Also, respondent offers no meaningful response to the concerns raised in the petition regarding the effects the Court of Appeal's decision will have in current and future cases. Respondent simply points to Carcamo's driving record and argues that employers should not be "immunized" for their hiring decisions. (Answer at p. 27.) Rather than immunizing employers, however, the *Armenta* rule applies only when an employer has admitted full liability for any negligence of its employee. Given the public policy concerns raised in the petition, as well as in the amicus curiae letters filed in support,[4] the importance of the issue presented in the petition for review is plain.

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[4] To date, letters urging a grant of review have been submitted by (1) the City of Santa Monica; (2) Foster Farms, the Association of California Insurance Companies, and the American Insurance Association; (3) the County of Yolo, City of Woodland, City of Davis, City of West Sacramento, City of Esparto, and California State Association of Counties–Excess Insurance Authority; and (4) the California Trucking Association.

CONCLUSION

Rather than defending the Court of Appeal's decision not to follow *Armenta*, respondent relies on purported procedural failures that the court expressly did not consider. Lacking any viable ground to distinguish *Jeld-Wen*, respondent mischaracterizes the basis of that decision. The petition for review presents an important issue on which Court of Appeal decisions are in direct conflict. For the foregoing reasons, this Court should grant review.

Dated: April 29, 2010

Respectfully submitted,

JONES DAY

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies, pursuant to Rule 8.504(d) of the California Rules of Court, that the enclosed brief was produced using 13-point type, including footnotes, and contains 4,193 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 29, 2010

Respectfully submitted,

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SFI-639704v2

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

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

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

On **April 29, 2010**, I served the foregoing **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

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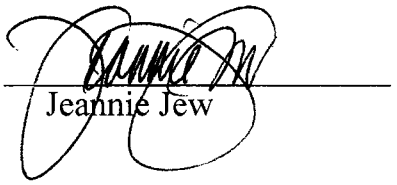

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