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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DAVID ALLEN JOHNSON, Plaintiff and Appellant, v. PABLO CORNEJO et al, Defendants and Respondents.	A129867 (Alameda County Super. Ct. No. HGO7-322923)
RAMON GARCIA et al, Plaintiffs and Respondents, v. PABLO CORNEJO et al, Defendants and Appellants.	A130028 (Alameda County Super. Ct. No. HGO7-322923)
RAMON GARCIA et al, Plaintiffs and Appellants, v. PABLO CORNEJO et al, Defendants and Appellants.	A131630 (Alameda County Super. Ct. No. HGO7-322923)

In this personal injury action arising from a collision between a tractor trailer truck and two passenger vehicles, Ramon Garcia and his wife, Kamach Ork, along with David Allen Johnson (collectively plaintiffs) sued Pablo Cornejo, the driver of the truck, and his employer, Keep on Trucking Co. (KOT) (collectively defendants). Plaintiffs alleged that Cornejo had driven negligently and that KOT was both vicariously liable for Cornejo's

negligent driving and directly liable for its own negligence in hiring and retaining him. Prior to trial, KOT stipulated that Cornejo was acting in the course and scope of his employment and offered to admit vicarious liability if Cornejo was found negligent. The jury returned a verdict awarding Johnson in excess of \$3.5 million in damages; Garcia and Ork were each awarded \$1,500 in damages.

On appeal, defendants contend that because KOT admitted it was vicariously liable for Cornejo's conduct on a theory of respondeat superior, the trial court erred in permitting plaintiffs to proceed against KOT for its negligent hiring and retention of Cornejo. Defendants contend that the trial court committed reversible error by admitting evidence of Cornejo's employment and driving history. We agree and reverse the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 27, 2005, defendant Cornejo was driving his tractor trailer south on Fremont Boulevard in Fremont. Plaintiffs Johnson and Garcia were also driving southbound on Fremont Boulevard in their respective vehicles. At approximately 5:00 a.m., Cornejo began to make a wide right turn from the left lane of Fremont Boulevard into PJ's Lumber Yard. In that area, Fremont Boulevard has four lanes of traffic, two in each direction, divided by a median. Before each intersection, the median becomes a left-turn lane. Johnson was driving in the lane closest to the median, approaching the left-turn lane, when his car hit Cornejo's truck. Garcia, driving about five car lengths behind Johnson, did not see the tractor trailer until Johnson's car hit it. Garcia slammed on the brakes of his car, but was unable to avoid colliding with Johnson's car. Johnson sustained severe, life-threatening injuries.

Plaintiffs Johnson, Garcia, and Ork sued Cornejo and KOT.¹ They alleged that Cornejo had driven negligently and that KOT was both vicariously liable for employee

¹ Plaintiffs also sued PJ's Lumber Yard; PJ's Lumber Yard is not a party to the instant appeal.

Cornejo's negligent driving and directly liable for its own negligence in hiring and retaining him. In their answer, Cornejo and KOT denied any negligence.

Trial was scheduled to commence on May 24, 2010. On April 12, 2010, the court heard argument on the parties' motions in limine. KOT had filed a series of motions seeking to exclude evidence of Cornejo's personnel records, as well as his past traffic violations and accidents, on the ground that such evidence was irrelevant and highly prejudicial. In bringing these motions, KOT conceded that respondeat superior liability was not being contested. That admission, KOT argued, would bar plaintiffs from further pursuing their claims for negligent hiring and retention. In support, KOT cited *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853 (*Jeld-Wen*), in which the appellate court, applying the California Supreme Court's holding in *Armenta v. Churchill* (1954) 42 Cal.2d 448 (*Armenta*), directed a trial court to dismiss a negligent entrustment claim after the defendant employer's admission of vicarious liability for its employee's driving. In the instant case, the trial court granted defendants' motions, excluding all evidence of Cornejo's personnel records and prior driving history.

Then, on May 14, 2010, plaintiffs Garcia and Ork filed a request for reconsideration of the orders granting defendants' motions to exclude all evidence of Cornejo's prior driving history and personnel records. In support, plaintiffs cited the recent case of *Diaz v. Carcamo* (Feb. 25, 2010, mod. Mar. 29, 2010, B211127) opinion ordered nonpublished June 23, 2010 (*Diaz I*), which purported to provide an exception to the rule enunciated in *Armenta, supra*, 42 Cal.2d 448 and applied in *Jeld-Wen, supra*, 131 Cal.App.4th 853.

Defendants opposed Garcia's and Ork's motion for reconsideration, arguing that, in light of KOT's agreement to admit vicarious liability for Cornejo's actions, they would be prejudiced by the introduction of evidence pertaining to Cornejo's personnel records and driving history. Defendants also argued that *Diaz I, supra*, B211127 was not new law because it was available as of March 29, 2010, and it could have been cited by plaintiffs at the April 12, 2010 hearing on the in limine motions. The trial court deferred ruling on the motion for reconsideration.

Trial commenced on May 25, 2010. At that time, the trial court had not yet ruled on the motion for reconsideration. After a panel of prospective jurors had been sworn in, the trial court read a statement of the case, which provided, in relevant part, as follows: “This lawsuit arises from a motor vehicle incident that occurred on April 27, 2005 [¶] Plaintiffs, David Allen Johnson and Ramon Garcia, were each driving a vehicle that was involved in an accident with defendant Pablo Cornejo, who was driving a tractor trailer truck. Mr. Cornejo was in the course and scope of his employment with defendant, [KOT].”

The next day, May 26, 2010, the court heard argument on plaintiffs’ motion for reconsideration; by this time, Johnson had joined in Garcia’s and Ork’s request. At the hearing, the trial court stated that it had read the *Diaz I* case that morning, and concluded it provided an exception to the *Jeld-Wen* rule, where there is a separate negligent hiring and supervision claim against an employer—as opposed to situations involving negligent entrustment—and where Proposition 51 (Civ. Code, §§ 1431, et seq.)² is applicable. In opposition, KOT argued that the instant case did not involve a Proposition 51 allocation of liability between Cornejo and KOT and that the jury would not be asked to make any such apportionment. KOT further asserted, that in light of its concession of vicarious liability, *Jeld-Wen, supra*, 131 Cal.App.4th 853 was particularly appropriate in the instant case. Relying on *Diaz I, supra*, B211127, the trial court granted the motion for reconsideration, ruling that the challenged evidence would be admissible. Unbeknownst to the parties and the trial court, the California Supreme Court had granted review of the *Diaz I* decision on May 12, 2010—two days before plaintiffs had filed their request for reconsideration.

Following the trial court’s decision to admit the challenged evidence, defendants did not expressly withdraw their admission that KOT would be vicariously liable for

² “The Fair Responsibility Act of 1986 (Civ. Code, § 1431 et seq.), known popularly as Proposition 51, eliminated joint and several liability for noneconomic damages in actions based on ‘comparative fault.’ ” (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 623, fn. 1.)

Cornejo's negligence, but in opening statements counsel told the jury that, at the time of the accident, Cornejo was working "as a subhauler for [KOT] So he wasn't actually an employee of [KOT] in April of 2005." Then, William Wilkes, KOT's head of safety, denied that Cornejo was "employed" by KOT. Rather, Wilkes explained that although Cornejo was "doing work for" KOT at the time of the accident, Cornejo owned his tractor and was not considered a company driver. Wilkes said that Cornejo was a subhauler or an independent contractor.

Outside the jury's presence, Johnson's counsel argued that he had been "blindsided" by Wilkes's testimony regarding Cornejo's status as an independent contractor, given KOT's admission of vicarious liability. Counsel for KOT interjected by stating "that was part of the stipulation, it is no longer in effect." Johnson's counsel, however, maintained that the admission of vicarious liability "was never withdrawn." KOT's counsel countered with the following: "A deal is a deal. [Plaintiffs] broke the deal. I'm not obligated to do squat on that deal because they broke the deal. [¶] The stipulation was that no evidence of negligent entrustment would come in. No prior citations, no nothing. That was their part of the deal. And in exchange for that, . . . [KOT] would admit responsibility for . . . Cornejo [¶] . . . [¶] . . . [T]he idea that they get the benefit of the deal and I don't, I mean, I just think that's amazing. [¶] . . . [¶] . . . I was going on that deal up until the day or so before we started trial and then you rule that . . . because of the new case, the *Diaz* [*I, supra*, B211127] case, that the deal was no longer the deal."

At trial, the jury heard evidence of Cornejo's driving and employment history offered by plaintiffs in support of their negligent hiring and retention claims. The evidence showed two prior accidents involving Cornejo, one in which there was no conclusive determination as to fault, the other, though not Cornejo's fault, occurred the day before the accident with Johnson and Garcia. Other evidence showed that Cornejo had received various Vehicle Code citations, including violating a red light, failing to obey a "traffic control device," as well as impeding traffic and driving with defective brakes.

Plaintiffs' commercial trucking safety expert, V. Paul Herbert, opined that based on his training, experience, and review of thousands of driving records over the years, Cornejo had one of the "worst records" he had ever encountered; Herbert added that Cornejo's driving record was "bad" even under a "teenage driver" or new driver standard, where there has been little time to "develop" skills as a driver. Herbert opined that, based on Cornejo's driving history, KOT should not have hired him to drive a tractor trailer and that KOT's subsequent training of Cornejo was inadequate. Herbert testified that Cornejo was under the control of KOT and, for safety regulation purposes, he was KOT's employee. Thus, he opined that the appropriate standard of care would have been to pull Cornejo off the road and that KOT should have considered terminating his employment.

Plaintiffs' accident reconstruction expert, Robert Lindskog, testified that Cornejo made an unsafe right turn into PJ's Lumber Yard from the left-turn lane. Based on the scuff marks on the curb and on the trailer's tires, Lindskog assumed Cornejo negotiated his right turn from the left lane. Lindskog, however, had no idea as to how or when those scuff marks were made. But a PJ's Lumber Yard employee, Mark Brodi, testified that he had observed an unidentified tractor trailer backing down Fremont Boulevard just prior to the accident.

Following Lindskog's testimony, the trial court gave a limiting instruction, advising the jury that the evidence of Cornejo's prior driving history was admitted for the limited purpose of determining whether KOT was "negligent in the hiring, training and supervision of [] Cornejo, or that [KOT] negligently entrusted the vehicle involved in the . . . incident to [] Cornejo." The jury was further advised that it could not consider this testimony in determining whether or not Cornejo was negligent at the time of the accident.

As to plaintiff Johnson, the jury found that defendant Cornejo had driven negligently, that defendant KOT had been negligent in hiring and retaining Cornejo as a driver, and that retention was a substantial factor in causing harm to Johnson. The jury also concluded that Cornejo was KOT's agent or employee and was acting within the scope of his agency or employment at the time of the accident. The jury further

determined that Johnson and PJ's Lumber Yard were also negligent. The jury allocated fault for the accident as follows: a combined 44 percent to Cornejo and KOT, 12 percent to PJ's Lumber Yard, and 44 percent to Johnson. It awarded Johnson over \$800,000 in economic damages and \$2.75 million in noneconomic damages.

With respect to plaintiffs Garcia and Ork, the jury found that each defendant, as well as Johnson and Garcia, was negligent. The jury allocated fault for the accident as follows: a combined 26 percent to Cornejo and KOT, 8 percent to PJ's Lumber Yard, 26 percent to Johnson, and 40 percent to Garcia. It awarded Garcia and Ork each \$1,500 in noneconomic damages.

Defendants Cornejo and KOT moved for a new trial, claiming the trial court erred in admitting evidence of Cornejo's personnel records and driving history based on *Diaz I, supra*, B211127, because the California Supreme Court had granted review of that case two days before plaintiffs filed their request for reconsideration. They argued that, at the time of the trial court's decision to admit the challenged evidence, *Diaz I* could not be cited or relied upon as legal authority. Thus, *Jeld-Wen, supra*, 131 Cal.App.4th 853 was controlling at the time of the request for reconsideration, and it supported the exclusion of the challenged evidence as being irrelevant, prejudicial, and inflammatory.

In opposition, plaintiffs argued that the challenged evidence was properly admitted because KOT had withdrawn its admission of vicarious liability for Cornejo's conduct, and thus it did not admit that Cornejo was acting within the course and scope of his employment at the time of the accident. Plaintiffs further argued that they did not improperly rely on *Diaz I, supra*, B211127, because the jury was required to apportion fault among the defendants pursuant to Civil Code section 1431.1.

At the hearing on the new trial motion, the trial court recognized its error in relying on *Diaz I, supra*, B211127 but found there was "enough blame to go around on this" issue. The court, after noting that defendants had "conducted the trial on [the] basis" that Cornejo had been an independent contractor and lost, stated that if defendants made a "tactical decision to try the case that way, then the evidence should have come in." Based on defendants' decision "to try the case on a different theory[,]" the court was

not certain that the depublication of *Diaz I* warranted a new trial. The court further noted that KOT “could have admitted vicarious liability, . . . could have objected when that other evidence was being proffered [¶] It’s not quite the invited error doctrine, but it’s similar to it. You try a case on one theory, you lose, and then you say, hey, we could have tried the case on this other theory if the judge had not made an incorrect ruling.”

In its written order denying the motion for new trial, however, the court noted defendants could not be faulted for trying the case in the manner that they did, because “when a party acquiesces to a trial court’s error and then takes ‘defensive’ action to lessen the impact[,]” the waiver doctrine does not apply. Nevertheless, the trial court determined that defendants’ “inaction” in failing to advise the court about the status of the *Diaz I* case prevented the court from avoiding or curing the alleged error. In so ruling, the court noted that defendants, in opposing the motion for reconsideration, “had a clear opportunity” to alert the court that Supreme Court review had been granted in *Diaz I, supra*, B211127. Based on defendants’ purported failure “to bring this [error] to the attention of the Court before . . . trial commenced,” the trial court concluded that defendants were unable to rely on legal error as a ground for a new trial. The trial court further determined that, in light of its limiting instruction to the jury, the admission of the challenged evidence was not prejudicial.

While the instant appeal was pending, the Supreme Court issued its opinion in *Diaz v. Carcamo* (2011) 51 Cal.4th 1163 (*Diaz II*), reversing the appellate court and holding that an employer’s admission of vicarious liability for any negligent driving by its employees renders irrelevant evidence of negligent entrustment, hiring, or retention. (*Id.* at pp. 1152, 1557-1161.)

II. DISCUSSION

A. *Standard of Review*

“[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion.” (*People v. Alvarez* (1996) 14 Cal.4th 155, 203.) However, “even when a decision by the trial court is generally reviewed for abuse of discretion, we must determine at the outset whether the court applied the correct legal

standard to the issue in exercising its discretion, which determination is also a question of law for this court. ‘Of course, “[t]he scope of discretion always resides in the particular law being applied; action that transgresses the confines of the applicable principles of law is outside the scope of discretion” [Citations.]’ (*People v. Parmar* (2001) 86 Cal.App.4th 781, 793.)” (*KB Home v. Superior Court* (2003) 112 Cal.App.4th 1076, 1083.)

Thus, although evidentiary rulings are generally reviewed for abuse of discretion, where, as here, it is claimed that the court abused its discretion in basing its decision on an error of law, we are presented with a legal question, which we review de novo.

(*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 130.)

Defendants raise this issue in the context of the trial court’s denial of their motion for new trial. “A trial court has broad discretion in ruling on a new trial motion and the exercise of the discretion is accorded great deference on review. [Citation.] When the ground for a new trial motion is an error of law under [Code of Civil Procedure] section 657, subdivision 7, the superior court has ‘no discretion to grant a new trial unless its original ruling, as a matter of law, was erroneous.’ [Citation.] The court’s denial of such a motion presents a question of law on appeal. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859-860.)” (*Id.* at p. 130.)

“ “[O]n an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party [citation], including an order denying a new trial. In our review of such order denying a new trial, as distinguished from an order granting a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.” . . . Prejudice is required: “[T]he trial court is bound by the rule of California Constitution, article VI, section 13, that prejudicial error is the basis for a new trial, and there is no discretion to grant a new trial for harmless error.” [Citation.] [Citation.]” (*Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 693-694.)

B. The Trial Court Erred in Admitting Evidence of Cornejo's Personnel Records and Driving History

Defendants contend the trial court erred as a matter of law in admitting evidence of Cornejo's personnel records and driving history. Relying on *Armenta, supra*, 42 Cal.2d 448 and *Jeld-Wen, supra*, 131 Cal.App.4th 853, defendants contend that because KOT had admitted it was liable for Cornejo's conduct this evidence was irrelevant. We agree.

“A person injured by someone driving a car in the course of employment may sue not only the driver but that driver's employer. The employer can be sued on two legal theories based on tort principles: respondeat superior and negligent entrustment. Respondeat superior, a form of vicarious liability, makes an employer liable, irrespective of fault, for negligent driving by its employee in the scope of employment. The theory of negligent entrustment makes an employer liable for its own negligence in choosing an employee to drive a vehicle.” (*Diaz II, supra*, 51 Cal.4th at pp. 1151-1152.)

California, like the majority of jurisdictions, has long prohibited a plaintiff from pursuing a negligent entrustment claim once an employer admits vicarious liability for its employee's negligent driving. (See *Armenta, supra*, 42 Cal.2d at pp. 457-458; *Jeld-Wen, supra*, 131 Cal.App.4th at p. 862.) In 1954, our Supreme Court held in *Armenta, supra*, 42 Cal.2d 448 that an employer's admission of vicarious liability made the negligent entrustment claim irrelevant. (*Id.* at p. 457.) Vicarious liability and negligent entrustment, the court explained, were “alternative theories under which . . . to impose upon [an employer] the same liability as might be imposed upon [an employee].” (*Ibid.*) Thus, the employer's admission of vicarious liability, the court reasoned, had removed “the legal issue of [the employer's] liability from the case” (*ibid.*), leaving “no material issue . . . to which the offered evidence could be legitimately directed.” (*Id.* at p. 458.)

Following *Armenta, supra*, 42 Cal.2d 448, “no evidence of the employer's knowledge of the employee's prior accidents could properly be admitted, in light of the exclusionary rule of prior case law, now codified at Evidence Code section 1104, enacted in 1965. [Citation.] Once the employer admittedly becomes vicariously liable for the

negligent acts of the employee, there is no remaining basis at a future trial to attempt to prove the negligence of the employer itself, such as through knowledge of the employee's prior accidents, because the subject liability has already been adequately and completely established. This represents an effort to promote judicial economy by avoiding unnecessary litigation. It also represents an effort to ensure that prejudicial evidence on negligence is kept out pursuant to the principles of Evidence Code section 1104, because the existence of negligence on a particular occasion should be determined from the nature of the subject act or omission, 'not by defendant's character for care [or lack thereof]' [Citation.]" (*Jeld-Wen, supra*, 131 Cal.App.4th at pp. 866-867.)

In the years following *Armenta, supra*, 42 Cal.2d 448, the legal landscape for imposing tort liability changed significantly with the development of comparative fault rules. (See, e.g., *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808; *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 597; *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 583, 591-598; Civ. Code § 1431.2.) In 2005, the *Jeld-Wen* court addressed what effect, if any, the comparative liability rules had on a damages award against an employer for noneconomic and economic damages. (*Jeld-Wen, supra*, 131 Cal.App.4th at pp. 870-872.) Rejecting the notion that comparative fault affected the principles enunciated in *Armenta, supra*, 42 Cal.2d 448, the court reasoned that negligent entrustment may establish an employer's own fault but, " 'should not impose additional liability' "; rather, " 'the employer's liability cannot exceed the liability of the employee.' " (*Jeld-Wen* at p. 871.) Based on *Armenta* and the evidentiary concerns it identifies, the court noted, if an employer admits vicarious liability for its employee's negligent driving, "the damages attributable to both employer and employee will be coextensive" (*Jeld-Wen* at p. 871.) *Jeld-Wen* further explained that "in the employer-employee context, the negligent entrustment theory may not be separately pursued once the employer admits to vicarious liability for the negligence of the employee, because only the single injury claimed by the plaintiffs should be compensated. There is nothing in *Armenta* that is adversely affected by the development of these comparative negligence principles, because *Armenta* represents a different and

still viable policy rule that is based upon evidentiary concerns about the vicarious liability of an employer for employee negligence.” (*Jeld-Wen, supra*, at p. 871.) Recently, the California Supreme Court, in *Diaz II, supra*, 51 Cal.4th at page 1161, affirmed its holding in *Armenta, supra*, 42 Cal.2d 448, that “an employer’s admission of vicarious liability for an employee’s negligent driving in the course of employment bars a plaintiff from pursuing a claim for negligent entrustment.” As *Diaz II* confirmed, if an employer offers to admit vicarious liability for its employee’s negligent driving, then claims against the employer based on theories of negligent entrustment, hiring, or retention become superfluous. (*Diaz II, supra*, at p. 1161.)

Here, the trial court erred by failing to rely on *Armenta, supra*, 42 Cal.2d 448 and by admitting evidence of Cornejo’s personnel records and driving history. We now consider whether defendants waived this error or invited it by failing to discover that Supreme Court review had been granted in the *Diaz I, supra*, B211127 case at the time the trial court granted plaintiffs’ motion for reconsideration.

C. Defendants Did Not Invite the Error or Otherwise Forfeit Their Claims

“Under the doctrine of waiver”—or more properly, forfeiture—“a party loses the right to appeal an issue caused by affirmative conduct or by failing to take the proper steps at trial to avoid or correct the error.” (*Telles Transport, Inc. v. Workers’ Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167.) “The forfeiture rule generally applies in all civil and criminal proceedings.” (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264.) “The rule is designed to advance efficiency and deter gamesmanship.” (*Ibid.*)

“Similarly, under the doctrine of invited error, a party is estopped from asserting prejudicial error where his own conduct caused or induced the commission of the wrong.” (*Telles Transport, Inc. v. Workers’ Comp. Appeals Bd., supra*, 92 Cal.App.4th at p. 1167; see also, e.g., *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 420 [“plaintiffs are estopped to complain of the trial court’s error because they participated in its commission”].) “At bottom, the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court.” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

Although it is true that defendants in the instant case, like plaintiffs, could have discovered that Supreme Court review had been granted in *Diaz I, supra*, B211127, it cannot be said, however, that defendants *induced* or otherwise caused the trial court to rely on that case. Indeed, plaintiffs were the ones who first brought the *Diaz I* case to the trial court's attention and asserted that it was controlling authority to admit the challenged evidence. In contrast, defendants argued that the trial court should apply *Armenta, supra*, 42 Cal.2d 488 and *Jeld-Wen, supra*, 131 Cal.App.4th 853 to exclude the challenged evidence. The cases cited by defendants, unlike the questionable authority cited by plaintiffs, were binding authority. Thus, if anyone can be faulted for misleading the trial court into relying on *Diaz I* as viable authority—which it was not (Cal. Rules of Court, rule 8.1105(e); see also *People v. Superior Court (Clark)* (1994) 22 Cal.App.4th 1541, 1547-1549 [grant of review means case cannot be relied on as authority]; *People v. Squire* (1993) 15 Cal.App.4th 775, 781, fn. 3 [same])—the blame falls squarely upon plaintiffs.

We are equally unconvinced that defendants forfeited this claim of error by failing to bring it to the trial court's attention. “ ‘An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.’ [Citation.]” (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.) The instant case presents a legal error, viz., reliance on an opinion with no precedential value, which easily could have been avoided not only by defendants, but also by plaintiffs and the trial court. We pause to note that in this digital age of legal research, whether *Diaz I, supra*, B211127 was in fact good law could have been verified in a matter seconds. In any event, prior to their new trial motion, defendants *did* question the validity of *Diaz I*, albeit on the merits and not on the ground

that review had been granted. In a case such as the instant one, where it can be said fairly that *each party*, as well as the trial court, “bears some responsibility for the claimed error” (*City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, 29), we do not find the general rule of forfeiture to be applicable.

We are cognizant of the trial court’s dilemma stemming from the potential complications which could have arisen in the event it granted the new trial motion while *Diaz I, supra*, B211127 was under review, only to have the Supreme Court affirm one or more of *Diaz I*’s holdings. The fact remains, however, that *Diaz I* was superseded by the grant of review from the Supreme Court, and, thus, it had no precedential value at the time the trial court granted the motion for reconsideration to admit the challenged evidence. (See Cal. Rules of Court, rule, 8.1115(a); *People v. Superior Court (Clark)*, *supra*, 22 Cal.App.4th at pp. 1547-1549.) Accordingly, once the trial court was apprised of its error, it was bound to follow *Armenta, supra*, 42 Cal.2d 448, which holds that an employer’s admission of vicarious liability for its employee’s negligence makes claims of negligent entrustment³ irrelevant. (*Id.* at pp. 457-458; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Under these circumstances, it would be unfair to defendants to allow plaintiffs to take advantage of the legal error and to allow the trial court to hedge its bets, so to speak, on whether *Diaz I* would have been affirmed or reversed, either partly or in its entirety.

In sum, the trial court’s reliance on *Diaz I, supra*, B211127 as a matter of law, was erroneous. Therefore, the trial court abused its discretion in denying the new trial motion. (*Westamerica Bank v. MGB Industries, Inc., supra*, 158 Cal.App.4th at p. 130.)

Johnson, however, insists that, in light of KOT’s withdrawal of its admission of vicarious liability, together with the trial court’s limiting instruction, any error in admitting Cornejo’s personnel records and driving history did not prejudice defendants.

³ We note that plaintiffs in the instant case did not actively pursue a negligent entrustment theory at trial. Nevertheless, as confirmed in *Diaz II, supra*, 51 Cal.4th at page 1157, there is no meaningful distinction between negligent hiring and negligent entrustment claims.

We disagree. To establish prejudice, a party must show “a reasonable probability that in the absence of the error, a result more favorable to [it] would have been reached.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) As we shall explain, defendants have demonstrated prejudicial error.

Preliminarily, the parties argue at length about the purported withdrawal of KOT’s admission of vicarious liability (or lack thereof) and whether or not KOT had, in fact, tried the case on the theory that Cornejo was an independent contractor. However, as the trial court recognized, defendants should not be faulted for trying the case in the manner that it did, because it was merely making the best of a bad situation. (*Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at p. 403.) In other words, the trial court’s evidentiary ruling required defendants to adapt their theory of the case to fit with the trial court’s ruling that evidence of Cornejo’s personnel records and driving history was relevant to plaintiffs’ negligent hiring and retention claims against KOT. (*Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1314.) Moreover, whether or not KOT’s counsel later indicated that the stipulation to admit vicarious liability had been withdrawn (due to the trial court’s evidentiary ruling) is immaterial, because once KOT agreed to accept vicarious liability, the trial court was *required* under *Armenta*, *supra*, 42 Cal.2d 448 “to withhold plaintiff[s’] negligent hiring and retention claims from the jury, and to exclude the evidence” (*Diaz II*, *supra*, 51 Cal.4th at p. 1154) plaintiffs offered to support those claims, such as Cornejo’s poor driving record and traffic citations.

Under these circumstances, the trial court’s limiting instruction to the jury that it was entitled to consider the challenged evidence in connection with plaintiffs’ negligent hiring and retention claims did not alleviate the prejudice to defendants, but, in fact, compounded it. “[T]he rule of limited admissibility applies properly only where the evidence is admissible for one purpose but is inadmissible for another purpose. (See Evid. Code, § 355.)” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 888-889.) Here, as shown above, once KOT admitted vicarious liability, plaintiffs’ negligent hiring, retention, and entrustment claims became superfluous (*Diaz II*, *supra*, 51 Cal.4th at

p. 1160), and, thus, evidence of Cornejo’s personnel records and driving history were irrelevant and inadmissible for any purpose.

As *Diaz II, supra*, 51 Cal.4th 1148 recognized, “[e]vidence of an employee’s past accidents . . . is highly prejudicial to the defense of a negligent driving claim against the employee. Such evidence creates a prejudicial risk that the jury will find that the employee drove negligently based *not* on evidence about the accident at issue, but instead on an inference, drawn from the employee’s past accidents, that negligence is a trait of his character. [Citations].” (*Id.* at p. 1162.) Accordingly, had the trial court not made the errors noted above, it is reasonably probable that the jury would have reached a result more favorable to KOT and Cornejo on the question of whether Cornejo drove negligently.⁴

III. DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. Cornejo and KOT shall recover their costs on appeal.

⁴ By reason of this holding, we need not address defendants’ additional claims of prejudicial error raised in the instant appeal. Earlier in the appellate process, on our own motion, we consolidated the related appeal in *Johnson v. Cornejo* (A129867). For good cause appearing, we now consolidate the additional, related appeal in *Garcia v. Cornejo* (A131630) and dismiss both appeals as moot in light of our reversal of the judgment.

Sepulveda, J.*

We concur:

Ruvolo, P.J.

Reardon, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.