

**No. S197134**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

---

CHELA ST. JOHN-PARISIAN,  
*Respondent* (Plaintiff, Respondent and Cross-Appellant below),

v.

FOSTER POULTRY FARMS, INC., et al.,  
*Petitioners* (Defendants, Appellants and Cross-Respondents below).

---

After a Decision by the Court of Appeal for the  
Second District, Division Six, Case No. B221595

Santa Barbara County Superior Court  
Hon. Denise de Bellefeuille, Case No. 1245594

---

**REPLY IN SUPPORT OF PETITION FOR REVIEW**

---

ELIZABETH G. OYER (SBN 237941)  
MAYER BROWN LLP  
1999 K Street, NW  
Washington, D.C. 20006  
Telephone: (202) 263-3000  
Facsimile: (202) 263-3300

DONALD M. FALK (SBN 150256)  
MAYER BROWN LLP  
Two Palo Alto Square  
3000 El Camino Real, Suite 2-300  
Palo Alto, CA 94306-2112  
Telephone: (650) 331-2000  
Facsimile: (650) 331-2060

*Attorneys for Petitioners Foster Poultry Farms, Inc. and Jesus Sepulveda*

**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION .....	1
REASONS WHY REVIEW SHOULD BE GRANTED .....	3
I.    The Court Should Grant Review To Resolve The Confusion Over The Standard For Instructing On Comparative Negligence.....	3
A.    This Case Squarely Presents The Instructional Question. ....	3
B.    The Answer Underscores The Confusion Over The Legal Standard.....	7
II.   Review Is Warranted To Clarify The Admissibility Of Evidence Demonstrating the Preexisting Mental Affliction Of A Plaintiff Seeking Damages For Emotional Distress.....	8
III.  Parisian’s “Additional Issues” Should Not Deter This Court From Granting Review Of The Issues Raised In The Petition.....	10
CONCLUSION .....	14

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>21st Century Ins. Co. v. Superior Court</i> (2009) 47 Cal.4th 511 .....	13
<i>Bonebrake v. McCormick</i> (1950) 35 Cal.2d 16 .....	6
<i>Brooks v. Am. Broad. Co.</i> (1986) 179 Cal.App.3d 500 .....	12
<i>Burke v. Superior Court</i> (1969) 71 Cal.2d 276 .....	11
<i>Cavazos v. Smith</i> (U.S. Oct. 31, 2011) No. 10-1115 .....	3
<i>Cembrook v. Superior Court</i> (1961) 56 Cal.2d 423 .....	11
<i>Girdner v. Union Oil Co. of Cal.</i> (1932) 216 Cal. 197 .....	7
<i>Guyton v. City of L.A.</i> (1959) 174 Cal.App.2d 354 .....	7
<i>Haseltine v. Haseltine</i> (1962) 203 Cal.App.2d 48.....	11
<i>Hasson v. Ford Motor Co.</i> (1977) 19 Cal.3d 530.....	7, 8
<i>Herman v. L.A. Cnty. Metro. Trans. Auth.</i> (1999) 71 Cal.App.4th 819 .....	12
<i>Horn v. Bradco Int’l, Ltd.</i> (1991) 232 Cal.App.3d 653 .....	4
<i>In re Estate of Manuel</i> (2010) 187 Cal.App.4th 400.....	12
<i>In re Lifschutz</i> (1970) 2 Cal.3d 415 .....	10
<i>Laabs v. City of Victorville</i> (2008) 163 Cal.App.4th 1242 .....	11
<i>Lindsey v. Normet</i> (U.S. 1972) 405 U.S. 56 .....	9
<i>Louis &amp; Diederich, Inc. v. Cambridge European Imports</i> (1987) 189 Cal.App.3d 1574.....	4
<i>Metro. Water Dist. of S. Cal. v. Campus Crusaders for Christ, Inc.</i> (2007) 41 Cal.4th 954.....	3
<i>People v. Heffington</i> (1973) 32 Cal.App.3d 1 .....	5
<i>Phillips v. G. L. Truman Excavation Co.</i> (1961) 55 Cal.2d 801.....	7, 8

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>Trope v. Katz</i> (1995) 11 Cal.4th 274.....	13
<i>Wimberly v. Derby Cycle Corp.</i> (1997) 56 Cal.App.4th 618.....	12, 13
 <b>Constitutions, Statutes and Rules</b>	
Cal. Code of Civil Procedure § 2032.320 .....	10
Cal. Code of Civil Procedure § 2033.290(a) .....	13
Cal. Code of Civil Procedure § 2033.420 .....	10
Cal. Code of Civil Procedure § 2033.420(b)(3) .....	12
Cal. Code of Civil Procedure § 2033.430 .....	12
Cal. Const., art I, § 16.....	11
 <b>Other Authorities</b>	
Cal. Civil Discovery Practice (Cont. Ed. Bar. 4th ed. 2009).....	13
Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2010).....	13
Witkin, Cal. Evidence (4th ed. 2000).....	6

## INTRODUCTION

Parisian does not seriously dispute that the two legal issues raised in the Petition are sufficiently important to warrant review. Nor could she reasonably deny the recurring importance of either (i) the standard for instructing on comparative negligence or (ii) the admissibility of evidence of ongoing treatment for pre-existing depression to rebut a claim that introversion and other forms of mental and emotional harm were caused by a car accident. And she does not meaningfully dispute that the rulings on these points were prejudicial if they were wrongly decided below.

Instead, Parisian contends that these questions were not presented on this record, and that their resolution did not stray from California law. Neither assertion is correct.

To enable that argument, Parisian—like the courts below—takes on the mantle of the jury when discussing comparative negligence, resolving every dispute and drawing every inference in her own favor. But that approach has it backward on this issue never presented for jury consideration. Foster Farms was entitled to a comparative negligence instruction if a finding to that effect would have been supported by the evidence with all disputes resolved and inferences drawn in favor of the *defendants*.

Under that standard, the important issue raised here unquestionably was presented. Parisian's story evolved from deposition testimony that she braked only after contact with the trailer to trial testimony that she could not remember if she braked before or after impact. The jury would have been entitled to conclude both that she failed to brake when she observed the trailer coming into her lane and that her inaction meant that she made no reasonable effort to avoid the accident, particularly in light of (1) the absence of skid marks where the vehicles collided, (2) Parisian's

inconsistent and equivocating accounts of the accident, and (3) wrongly excluded expert evidence on the effect of timely braking.

As to the admissibility of her continuing treatment for depression, Parisian changes the facts and ignores the jury instructions as she defends the withholding of critical causation evidence from the jury. Parisian asserts that evidence of mental illness that is *remote in time* is routinely excluded from evidence, but there was nothing remote about the evidence excluded here. Foster Farms proffered evidence that Parisian's treatment *continued* through the time of the accident. Indeed, her continuing prescription for antidepressants came into evidence when her own physician testified about her post-accident medical treatment, but the jury never learned that the underlying diagnosis and treatment began 15 years *before* the accident. And Parisian asserts that the jury was not entitled to decide whether Parisian's evidence that she was no longer gregarious and outgoing personality reflected a continuing condition, as the excluded evidence suggests, or a genuine change resulting from her physical injuries, as she maintains. Just because Parisian claimed that all of her "mental suffering, loss of enjoyment of life, ... anxiety, [and] emotional distress" resulted from her physical injuries does not mean that the trial court lawfully could take that assertion as conclusively proved, and bar the jury from hearing evidence that at least some of her distress resulted from causes for which Foster Farms could not be responsible.

Hoping to deter review by proposing mundane additional questions, Parisian conditionally cross-petitions for review of the lower courts' refusal to transform the cost-of-proof statute into a means for awarding attorneys' fees to every litigant who wins a jury trial on an issue that was the subject of a request for admission (RFA). We agree that the question whether the relevant sections of the Code of Civil Procedure impose a "loser pays" rule by stealth might be important—but only because affirming that

uncontroversial ruling below might cut off the incipient trend of filing abusive cost-of-proof motions on issues fiercely contested at trial.

The Supreme Court of the United States—ruling on a case decided by a California jury—recently reiterated the fundamental importance of allowing juries to decide jury-triable issues. (*Cavazos v. Smith* (U.S. Oct. 31, 2011) No. 10-1115, slip op. 1.) This Court has made the same point. *Metro. Water Dist. of S. Cal. v. Campus Crusaders for Christ, Inc.* (2007) 41 Cal.4th 954, 966-974. The decision below demonstrates that this message has become obscured in the lower courts in the two important contexts presented here. Review is therefore warranted.

### **REASONS WHY REVIEW SHOULD BE GRANTED**

#### **I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFUSION OVER THE STANDARD FOR INSTRUCTING ON COMPARATIVE NEGLIGENCE.**

Parisian does not dispute the recurring importance of the question when an instruction on comparative negligence is required. She instead claims the issue is not presented here if every dispute and inference goes her way. Yet the record must be viewed in the light most favorable to the *defendants* when the propriety of a comparative negligence instruction is at issue. Under that standard, the evidence of comparative negligence was substantial enough to permit a jury to allocate fault to Parisian—if only the jury had been given the chance to do its job.

##### **A. This Case Squarely Presents The Instructional Question.**

Parisian recounts the evidence that might have supported a jury finding of no comparative negligence. But the question is not whether the evidence *compelled* the jury to find Parisian comparatively negligent, but whether the evidence *permitted* that finding and thus required an instruction to that effect. Parisian dissects each piece of evidence in isolation, but that

evidence, taken together, was sufficiently substantial to support a finding of comparative negligence.

1. To begin with, Parisian tries to backtrack from her own deposition testimony that she did not brake until after she “had contact with the Foster Farms truck.” (4 RT 884.) She points to her testimony that she braked only *upon* or immediately *after* contact—“it was like hit and brakes” (*ibid.*)—as if that undercuts her clear answer that she did not brake *before* contact (see 4 RT 872). And she then points to testimony that she did not “know if it was like one second before or one second after.” (4 RT 906.) But the jury was entitled to infer that her first, clear version was accurate despite her later hedging. And it certainly was entitled to disbelieve her well-prepared equivocation at trial.

Parisian claims that this evidence of a changing story is no evidence at all. But the standard she proposes would make it impossible to prove a failure to take action unless the relevant party admitted her failure consistently and unequivocally: a jury could never infer the omission of an act from the lack of affirmative testimony that the act occurred. Whatever the limits on inferences from an absence of evidence, a witness’s inability or unwillingness to testify that she took a particular action, when she testifies in detail about surrounding events, is ample basis to infer that she did not do what she doesn’t remember doing.

Parisian asserts (Ans. 14) that her inability to remember taking an action is not evidence that she didn’t take it, but the authorities she cites do not support her. In two cases, the witnesses called *by the proponent* of a fact’s nonoccurrence could not recall whether the fact occurred. (See *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1591; *Horn v. Bradco Int’l, Ltd.* (1991) 232 Cal.App.3d 653, 664 n.13.) Here, by contrast, it is the party *opposing* a conclusion that she did not brake who is unwilling or unable to recall whether she braked,

even though she testified to other details about the accident. The jury could treat this gap in memory as evidence that she did not do what she did not remember doing. Otherwise, a plaintiff—often the only person who can testify—could routinely evade comparative fault simply by standing on a failure to recall. Of still less pertinence is *People v. Heffington* (1973) 32 Cal.App.3d 1, which concerns the entirely different question whether inability to remember can be evidence of unconsciousness.

2. Parisian concedes that the “absence” of skid marks at the accident scene “is *relevant* to whether braking occurred.” (Ans. 14.) She responds only that “careful application of brakes doesn’t leave skids marks [*sic*].” (*Ibid.*)

The jury was entitled to disbelieve Parisian’s later-developed story that she “carefully decelerated”—yet forgot about that careful conscious action—or to reconcile it with her testimony that she braked (and thus decelerated) only *after* impact. In particular, her claim to this Court that upon seeing the tractor start veering left she “carefully decelerated” from the mid-point of the trailer to its rear axle cannot be reconciled with her trial testimony that the accident occurred so quickly she doesn’t know when she braked. The inconsistency in her testimony was enough to permit the jury to choose the no-brake side of her story.

3. The trial court compounded this problem by prohibiting defendants’ expert from explaining whether Parisian “could have avoided a collision if she ‘had braked her car significantly when she saw the front tractor tires start to move into her lane.’” (Typed Opn. 7.) As we pointed out in raising this subsidiary issue on the sufficiency of the evidence to support a comparative negligence instruction (see Pet. 5, 7, 11-12), the Court of Appeal affirmed this exclusion because the testimony “would have been speculative and constituted an improper hypothetical.” (Typed Opn. 8.) That cannot be correct, since “questioning the expert on the basis of

*assumed facts, i.e.*, eliciting an opinion by means of hypothetical questions, is a proper and traditional means of conducting expert witness examination.” (1 Witkin, Cal. Evidence (4th ed. 2000) Opinion § 27; see generally 3 *id.*, Presentation at Trial § 194.)

Having concluded that the jury did not need to consider whether Parisian failed to brake, the Court of Appeal appears to have concluded that there was no basis for expert testimony that the outcome would have been different if she *had* braked. But this misunderstands the significance of that testimony in establishing Parisian’s failure to brake. The excluded evidence that braking would have prevented a collision necessarily implies that Parisian failed to brake. The expert testimony *itself* would have been affirmative evidence of comparative negligence.

Parisian’s Answer avoids this question by mistakenly looking to a *different* part of the opinion that rejected the admissibility of the expert’s accident reconstruction DVDs. (Typed Opn. 11-12.) That ruling is not before the Court. Yet the straightforward question whether Parisian could have avoided a collision by braking falls well within the heartland of permissible expert testimony, and the exclusion of that testimony was prejudicially erroneous.

4. Parisian argues that, even if she failed to brake, her actions were reasonable as a matter of law because she took some *other* “reasonable avoidance action” (Ans. 10)—but she never states what that action was. It cannot be that she changed lanes; she testified that she did not—because “there was a car sitting solidly right next to me in the number one lane.” (4 RT 846; see Typed Opn. 2.) On the record here, the jury would have been entitled to find both that Parisian neither braked nor took any other evasive action, and that the situation required a reasonable person to do more than that. (See, *e.g.*, *Bonebrake v. McCormick* (1950) 35 Cal.2d 16, 19 (failure to avoid child who darted out into the street may be

negligent); *Girdner v. Union Oil Co. of Cal.* (1932) 216 Cal. 197, 203, 204 (failure to avert collision with vehicle that did not yield at intersection); *Guyton v. City of L.A.* (1959) 174 Cal.App.2d 354, 362-363 (ordinary care to avoid collision may include “swerving or altering ... course, in addition to applying ... brakes”).) Accordingly, the failure to instruct on comparative negligence deprived Foster Farms and Sepulveda of a defense that should have gone to the jury.

**B. The Answer Underscores The Confusion Over The Legal Standard.**

Under *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, and *Phillips v. G. L. Truman Excavation Co.* (1961) 55 Cal.2d 801, an instruction on comparative negligence requires ““some evidence of a substantial character” to support a finding that such negligence occurred”—the minimal standard of sufficiency to support a jury verdict. (*Hasson*, 19 Cal.3d at 548 (quoting *Phillips*, 55 Cal.2d at 806-807.) Substantial evidence may be “slight,” “circumstantial,” “entirely inferential,” and even “contradicted by other testimony,” so long as the evidence, taken as a whole, supports the relevant finding or verdict. (*Id.* at 548; *Phillips*, 55 Cal.2d at 808.)

But as the Petition explained, some courts—including the courts below—have taken the reference to “substantial character” as license to substitute their own assessment of the evidence for the jury’s. (Pet. 13-15.) Parisian’s Answer repeats that same mistake, acknowledging that Foster Farms presented some evidence from which one could infer that she failed to brake (*e.g.*, Ans. 14), but insisting that the evidence is not conclusive enough (see Ans. 8-9). The decision to deny a comparative negligence instruction is the same as the decision to grant a directed verdict motion. If the evidence is sufficiently substantial to support a jury verdict of comparative negligence, the instruction must be given. If a court could not disturb such a verdict *post hoc*, it must give the instruction *ex ante*, even if

the court believes that the evidence of comparative negligence was weak or against the great weight of the evidence.

*Hasson* and *Phillips* made clear decades ago that the bar for an instruction is low, but that lesson appears to be fading away in many lower courts. This Court should grant review to reaffirm the fundamental importance of allowing jury-triable issues such as comparative negligence to be decided by the jury.

**II. REVIEW IS WARRANTED TO CLARIFY THE ADMISSIBILITY OF EVIDENCE DEMONSTRATING THE PREEXISTING MENTAL AFFLICTION OF A PLAINTIFF SEEKING DAMAGES FOR EMOTIONAL DISTRESS.**

Parisian does not dispute that the second issue presented is recurring, important, and divides courts throughout the country. Instead, she simply argues that the Court of Appeal was correct on the merits. It was not.

Beginning with her argument heading, Parisian falsely characterizes the evidence of her depression as “remote” in time. To the contrary, defendants proffered evidence that she had been treated for depression *continuously* “[s]ince 1990 *all the way to the present.*” (9 RT 2215 (emphasis added); see also 9 RT 2212 (“She was treated for clinical depression since 1990 ... on a regular basis.”).)

Parisian argues that the evidence nonetheless was irrelevant because (a) she “adduced no testimony of psychological injury apart from the pain and diminished capacity associated with her physical injuries” and (b) the jury was “never asked ... to award damages for any distress distinct from her chronic pain and disability.” (Ans. 17.) Her first assertion answers the very question of causation that was for the jury to decide: whether the changes in personality and loss of enjoyment of life described by Parisian’s witnesses (see Pet. 5-7) arose entirely from her physical injuries or were symptoms of a pre-existing condition. The jury should have been allowed

to decide this central question of causation with the benefit of the evidence of Parisian's pre-existing diagnosis and treatment for depression. Her second assertion is false: the jury was charged that the "noneconomic damages claimed by the plaintiff" included "mental suffering, loss of enjoyment of life, inconvenience, grief, anxiety, [and] emotional distress." (13 RT 2878; see Pet. 7.)

Parisian then protests that she did not *explicitly* "claim[] damages ... for any distress not attendant on her physical injuries" (Ans. 18), having asked the jury only in general terms to consider her "loss of enjoyment of life." But how could the jury tell whether her post-accident reticence and introversion were harms caused by the accident? Once this evidence was before the jury, defendants were entitled to respond. (Cf. *Lindsey v. Normet* (U.S. 1972) 405 U.S. 56, 66 ("Due process requires that there be an opportunity to present every available defense.")) The jury should have heard the full picture so it could fairly consider whether the testimony about Parisian's mental state in fact reflected a change, much less one caused by the accident, or if it simply reflected continuing (though adequately treated) depression.

Parisian further insists that defendants suffered no prejudice because, according to her, they were allowed to tell the jury in their closing argument that her depression was preexisting—albeit without directly supporting evidence. (Ans. 20 (citing 13 RT 2941).) That is false. When defendants' counsel began to note that plaintiff's pain physician had testified "about [Parisian] being on antidepressants" after the accident, the trial sustained Parisian's objection that defense counsel was about to go "beyond the evidence." (13 RT 2941.) Defendants were *never* permitted to tell the jurors that the depression and treatment they heard about from Parisian's witness preceded the accident.

Finally, Parisian argues as a matter of “strong public policy” that defendants should not be allowed to probe a plaintiff’s mental state even when she pins its cause on defendants and recovers millions as a result.<sup>1</sup> (See Ans. 20-21.) But that alleged policy conflicts with “the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings,” which “has been viewed as substantial enough to compel the disclosure of a great variety of confidential material,” as well as into defendants’ right to present every supportable defense “in cases in which the [plaintiff]’s own [legal] action initiates the exposure” of medical treatment. (*In re Lifschutz* (1970) 2 Cal.3d 415, 432-433.) As the Petition explained, other states have struggled with how to address depression and mental state evidence in modern tort suits, where emotional damages often dwarf the rest. This Court should grant review to clarify how such evidence is to be treated in California.

**III. PARISIAN’S “ADDITIONAL ISSUES” SHOULD NOT DETER THIS COURT FROM GRANTING REVIEW OF THE ISSUES RAISED IN THE PETITION.**

Parisian conditionally asks the Court to review the lower courts’ refusal to award her litigation costs, based on defendants’ pretrial denials of Requests for Admission (RFAs) that essentially asked them to admit the ultimate issue of liability. California Code of Civil Procedure § 2033.420 provides under certain circumstances for an award of costs of proof when a party fails to admit in response to an RFA a fact later proven to be true. This application of Section 2033.420 in this case does not warrant review, except to the extent that a clear pronouncement of the Court might reverse

---

<sup>1</sup> Parisian cites as support for this supposed public policy the limitations on a court-ordered “mental evaluation” of a plaintiff in Code of Civil Procedure § 2032.320. But defendants did not seek to subject Parisian to a new and intrusive “mental evaluation,” only to present evidence that the conditions she claimed were caused by the accident in fact long preceded it.

the trend toward seeking costs whenever the losing party refused to concede in discovery questions of liability that were disputed at trial.

The RFAs at issue here asked the defendants to admit facts that they vigorously disputed throughout the litigation and that were the central questions put to the jury at trial. The Court of Appeal had it exactly right when it concluded that “there was good reason for the trial court to deny Parisian’s request” for costs of proof on these issues: “She had asked appellants to admit that Sepulveda was driving the truck, he collided with her and pulled the truck to the freeway shoulder. To admit these RFAs would have conceded liability—the crux of the case. Appellants were entitled to take the matter to trial to see if they could obtain a verdict in their favor.” (Typed Opn. 17-18.) A trial court’s ruling under Section 2033.420 is subject to highly deferential abuse-of-discretion review (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1275-1276)—a standard that Parisian fails to acknowledge. Here, the court acted well within its discretion in declining to award costs of proof.

Parisian cites no decision holding that an award of costs is appropriate whenever a party takes jury-triable issues to trial rather than admitting them. On the contrary, this Court and the Court of Appeal have uniformly held that a party is bound to admit in discovery only those issues that it “does not in good faith intend to contest the issue at trial.” (*Burke v. Superior Court* (1969) 71 Cal.2d 276, 282. Accord, e.g., *Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 430.) Section 2033 is “calculated to compel admissions *as to all things that cannot reasonably be controverted*,” not to provide *post hoc* penalties for pressing issues that were “hotly contested and difficult to resolve.” (*Haseltine v. Haseltine* (1962) 203 Cal.App.2d 48, 61 (emphasis in original).)

Because this provision does not provide a basis for penalizing the exercise of the jury trial right (Cal. Const., art. I, § 16), an award of the

costs of proof is unavailable whenever the responding party “had reasonable ground to believe that [it] would prevail on the matter.” (Code Civ. Proc. § 2033.420(b)(3); see, e.g., *In re Estate of Manuel* (2010) 187 Cal.App.4th 400, 403; *Brooks v. Am. Broad. Co.* (1986) 179 Cal.App.3d 500, 511.) Under this standard, costs may be awarded if the responding party denies the RFA but then fails “to contest the issue at trial. (*Brooks*, 179 Cal.App.3d at 512; *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 636 (party “failed to produce any witness” at trial supporting its denials).) Here, in sharp contrast, Parisian herself has acknowledged “the defense maintained” and “never wavered from” its position “all the way through trial” (14 JA 3984-3985), where it submitted to the jury its defense that Sepulveda was not driving the truck that collided with Parisian’s car. Contrary to Parisian’s claim (Ans. 22-23) that confusion surrounds the requirements for awarding costs of proof under Section 2033.430, no authority supports her contention that an award of costs should hinge on the trial court’s retrospective assessment of the adequacy of the responding party’s factual investigation. This is not surprising, as otherwise every jury trial would spawn a motion for costs of proof that in turn would require a mini-trial on the state of the responding party’s knowledge at the time it answered the RFAs.<sup>2</sup>

---

<sup>2</sup> In any event, as the trial court reasoned, “[Foster Farms] was not required to reject out of hand its driver’s version of events (Mr. Sepulveda denied having been involved in the accident), even though the jury in judging his credibility, and taking into account the totality of evidence presented, found that he was the phantom driver who caused the accident that harmed Ms. St. John-Parisian.” (Typed Opn. 17 (quoting trial court) (alterations in original).) Having diligently sought Sepulveda’s version of events, Foster Farms cannot be taxed with costs on the basis of information that Sepulveda may have known but refused to disclose. (See *Herman v. L.A. Cnty. Metro. Trans. Auth.* (1999) 71 Cal.App.4th 819, 828 n.7 (“uncommunicated knowledge of an agent is not imputed to the principal for the purpose of determining whether he acted in good faith since the principal’s  
(cont’d)

Moreover, awarding Parisian costs under the circumstances here would effectively abrogate the “American rule” that generally requires each party to bear its own litigation expenses. (*21st Century Ins. Co. v. Superior Court* (2009) 47 Cal.4th 511, 528 (Kennard, J., concurring); see also *Trope v. Katz* (1995) 11 Cal.4th 274, 278.) Here, Parisian sought to recover virtually the entire cost of her preparation for and participation in the liability phase of the trial. She asked for over \$440,000, including \$423,000 in attorneys and staff fees, and \$17,000 in travel and other expenses. (14 JA 3982-3983, 3995-3998.) To award these substantial fees, on the ground that the jury ultimately rejected Foster Farms’ defense at trial, would effectively adopt the English, “loser pays” rule.

Finally, Parisian waived any claim of entitlement to costs of proof. When Foster Farms objected to the three RFAs at issue here, she did not move for an order compelling further response on the ground that the objection was “without merit or too general” or the answer was “evasive or incomplete.” (Code Civ. Proc. § 2033.290(a).) Accordingly, she cannot recover costs of proof as to those RFAs. (See *Wimberly*, 56 Cal.App.4th at 636; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2010) § 8:1378; Cal. Civil Discovery Practice (Cont. Ed. Bar. 4th ed. 2009) § 9:87).

In sum, the denial of Parisian’s request for costs of proof reflects no error and no uncertainty among the lower courts. Accordingly, review by this Court is not warranted except to make a clear statement foreclosing future waste of judicial resources through similarly baseless motions.

---

(... cont’d)

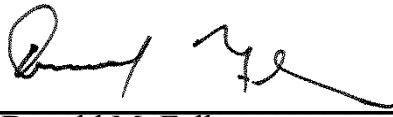
good faith must be determined on the basis of facts of which he had actual knowledge” (internal quotation marks omitted)).)

**CONCLUSION**

The petition for review should be granted and the judgment of the Court of Appeal reversed.

Date: November 10, 2011

Respectfully submitted,  
MAYER BROWN LLP

By:   
Donald M. Falk

ELIZABETH G. OYER (SBN 237941)  
MAYER BROWN LLP  
1999 K Street, NW  
Washington, D.C. 20006  
Telephone: (202) 263-3000  
Facsimile: (202) 263-3300

DONALD M. FALK (SBN 150256)  
MAYER BROWN LLP  
Two Palo Alto Square  
3000 El Camino Real, Suite 2-300  
Palo Alto, CA 94306-2112  
Telephone: (650) 331-2000  
Facsimile: (650) 331-2060

*Of counsel:*

CARMINE ZARLENGA  
SCOTT NOVECK  
MAYER BROWN LLP  
1999 K Street, NW  
Washington, D.C. 20006  
Telephone: (202) 263-3000  
Facsimile: (202) 263-3300

*Attorneys for Petitioners Foster Poultry Farms, Inc. and Jesus Sepulveda*