Filed 8/25/17 Performance Team Freight v. Arthur J. Gallagher & Co. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PERFORMANCE TEAM FREIGHT SYSTEMS, INC., Plaintiff and Appellant, v. ARTHUR J. GALLAGHER & CO., et al., Defendants and Respondents.	B277505 (Los Angeles County Super. Ct. No. BC573955)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Sotelo, Judge. Reversed.

Lytton & Williams, Richard D. Williams and Mina Hakakian for Plaintiff and Appellant.

Anderson, McPharlin & Conners and Kenneth D. Watnick for Defendants and Respondents.

In 2015, Performance Team Freight Systems, Inc. (Performance Team or "the company") sued Arthur J. Gallagher & Co. and Arthur J. Gallagher & Co. Insurance Brokers of California, Inc. (collectively Gallagher or "the broker"). Performance Team alleged Gallagher committed professional negligence and breached a contract by failing to procure for Performance Team full and complete insurance coverage for driver theft. The trial court entered summary judgment in favor of Gallagher. Performance Team challenges the judgment on appeal, contending there were triable issues of fact. We reverse the trial court judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Performance Team is a company that provides transportation and warehousing services, primarily for large retailer or manufacturer clients selling into the retail sector. In 2011, Performance Team used the services of truck drivers who were categorized as employees; "independent" truck drivers with whom the company entered independent contractor agreements; and "leased" drivers it obtained from agencies that provided drivers to trucking firms on an as needed basis. Although Performance Team typically had written contracts with independent contract drivers, in 2011, the company opened a new facility in New Jersey, where it employed the services of some drivers without having written agreements in place.

In around September 2011, Performance Team's clients began to complain about missing merchandise that had been handled at the New Jersey warehouse. Performance Team, working with one of its clients, Neiman Marcus Group (Neiman Marcus), suspected drivers were stealing customer merchandise by picking up the customer goods, opening packages in transit,

removing items from the packages, then resealing the packages before delivery. According to Performance Team's CEO, Craig Kaplan, he personally examined a shipment a driver had picked up for a Neiman Marcus job. Kaplan and a Neiman Marcus representative examined the shipment inside the truck. They discovered a box was open, a pair of shoes had been removed, and the box had been returned to a carton and the carton resealed.

Although Neiman Marcus instituted an investigation that involved surveillance of at least some Performance Team drivers, Performance Team did not directly accuse any of its drivers of theft. There was no large-scale sting of Performance Team drivers. Still, according to Kaplan, surveillance did catch drivers stealing, and "every one of the drivers implicated in the merchandise that they picked up was found at a fencing operation in New Jersey."[1] Performance Team terminated several drivers, but did not inform them that the terminations were due to their theft or dishonesty.

---

[1] However, in his deposition, Kaplan and Gallagher's counsel also had the following colloquy: "Q: Okay. So other than those 1,000 pieces, are you aware of anyone watching drivers deliver pieces—let me withdraw that. Are you aware of any of these drivers delivering pieces to that fencing operation? A: I'm not aware of that, no. Q: Did you receive reports from Performance Team's surveillance personnel that Alfred Leon [one implicated driver] had delivered any product to the fencing operation? A: Not from Performance Team. Q: Did you receive a report from anyone confirming that Alfred Leon had delivered pieces – A: I received reports from the investigative team that they believed all of these drivers were delivering merchandise to a middle person and the middle person was then bringing them to the fencing operation. Q: And—A: So as it relates specifically to a Leon, I did not get something specific to a Leon."

Performance Team's customers, notably Saks & Company (Saks) and Neiman Marcus, sought reimbursement from Performance Team for missing merchandise. According to Performance Team, these client claims exceeded $1 million.

The Demand for Coverage and Litigation Against the Insurance Companies

Performance Team had crime insurance policies with Federal Insurance Company (Federal) and Lexington Insurance Company (Lexington). Performance Team used the services of Gallagher, an insurance broker, in procuring the policies. In 2011, the Federal policy provided $5 million in coverage, subject to a $10,000 deductible, for "direct loss sustained by a Client resulting from Theft or Forgery committed by an Employee not in collusion with such Client's employees."

The policy defined "employee" as "any natural person in the regular service of Insured Organization in the ordinary course of such Insured Organization's business, whom such Insured Organization governs and directs in the performance of such service, including any part-time, seasonal, leased and temporary employees as well as volunteers." An exclusion in Section III(B) of the policy (Section III(B) exclusion) provided no employee theft coverage would be available "for loss caused by any broker, factor, commission merchant, consignee, contractor, independent contractor or other agent or representative of the same general character."

In July 2011, in connection with a renewal of the policy, Gallagher requested that Federal amend the definition of "employee" to include independent contractors. Federal subsequently added an endorsement to the policy. This "Endorsement No. 6" amended the term "employee" to "include

any natural person independent contractor while in the regular service of an Insured Organization in the ordinary course of such Insured Organization's business, pursuant to a written contract between such Insured Organization and such natural person independent contractor for services (a "Contractual Independent Contractor")." The Section III(B) exclusion was also amended to provide that no employee theft coverage would be available for loss caused by any independent contractor *other than* a Contractual Independent Contractor.

In September 2012, Performance Team submitted a proof of loss to Federal and Lexington, seeking coverage for over $900,000 in claims Saks, Neiman Marcus, and a third client, Savino, had asserted against Performance Team. The proof of loss described the loss event as implicating "certain independent owner-operator transport drivers who contracted with Performance Team to perform motor carrier services" on the company's behalf. Four drivers were identified by name and the company indicated there may be others. The insurance companies did not immediately accept coverage. Performance Team's attorney began handling the insurance coverage issue.[2] Over the next year, Performance Team and Federal exchanged communications regarding the claim, but Federal did not accept coverage.

For example, in January 2013, a Federal claims examiner sent Performance Team a letter setting forth the insurance company's "preliminary position as to possible coverage." The letter listed the names of several drivers who picked up product

---

[2] Performance Team's counsel represented the company in pursuing coverage and in the eventual litigation against the insurance companies. He also represents Performance Team in the action against Gallagher, including in the instant appeal.

from Saks vendors. The letter set forth Endorsement No. 6 and the Section III(B) exclusion and asked Performance Team to provide information about the identified drivers. The claims examiner requested information such as whether the drivers were independent contract drivers, whether the drivers were interviewed, whether a driver was the only person involved in picking up product for a vendor, and whether any of the individuals worked for the same trucking service. The claims examiner indicated she did not have a listing of implicated drivers for the Neiman Marcus claims, but, for those claims, she requested that once the drivers were identified, Performance Team provide the same information "with respect to each individual to establish whether or not they qualify as an Employee as that term is defined under the Policy."

The claims examiner also questioned what evidence established that "all pilfering from cartons occurred during the driver pickup process," and posed several questions about the Performance Team procedure for product pickup and delivery. The examiner indicated there was no evidence to suggest the implicated drivers were working in collusion with each other and requested any evidence that established drivers were working together. The letter also informed Performance Team: "To the extent that Performance Team establishes coverage under Insuring Clause (I) for the claimed losses, each single loss will be subject to a separate Deductible Amount applicable."

Federal further requested copies of the individual contractor agreements for the implicated drivers. With respect to one driver for whom Performance Team had provided an independent contractor agreement, Federal noted the effective date of the agreement was after the driver began picking up

products for Performance Team. The letter informed Performance Team it would need to provide evidence the driver was "under contract at the time the alleged losses were sustained, to qualify as an Employee under the Policy pursuant to Endorsement No. 6 cited above."

In February 2013, Performance Team informed Federal the total loss was at that point over $1 million, due to additional claims from its clients. In a letter addressing the claims examiner's questions, Performance Team, through counsel, indicated it would provide independent contractor documents for specific drivers and other additional information regarding potentially implicated drivers. Performance Team noted the claims adjuster questioned whether the theft of client goods occurred during the driver pickup process. The company responded that the evidence established the pilfering could not have occurred in any other way. Although Performance Team acknowledged there was a possibility the thefts occurred at delivery locations after shipping, that would mean the company's clients and/or vendors were submitting fraudulent claims, and there was no reason or basis to conclude its clients or the vendors had done so. The company further challenged the adjuster's assertion that each loss would be subject to a separate deductible unless Performance Team established collusion among the implicated drivers.[3]

---

[3] The implication of the deductible issue was that it would potentially reduce coverage. Documentation supporting the proof of loss suggested that many of the vendor/client claims, when viewed separately, were under $10,000.

In March 2013, Performance Team issued a further response to the Federal claims examiner's January 2013 letter. Performance Team indicated the drivers implicated in the Saks and Neiman Marcus claims were "Independent Contract Drivers" and Performance Team was transmitting relevant contract documents. The March letter further explained why Performance Team believed all pilfering took place during the driver pickup process rather than at the Performance Team warehouse or during delivery. The letter provided additional details regarding the pickup and delivery process and Performance Team's investigation of the shortages.

In July 2013, Performance Team informed Federal it did not believe further documentation regarding the drivers was necessary to establish the policy covered the thefts. In an e-mail, Performance Team's counsel stated it appeared the claims adjuster believed Performance Team was required to produce written contracts for all implicated drivers. Performance Team rejected this view. The company argued the definition of "employee" under the policy was extremely broad and "is inclusive of all Performance Team drivers involved in these loss events irrespective of whether they had individual written contracts or not." Performance Team further argued Endorsement No. 6 did not in fact amend the definition of employee to include natural person independent contractors because such persons were already included in the original policy definition of employee. Performance Team contended the Section III(B) exclusion was a narrow one that did not apply to drivers, who were not of the same "general character" as brokers, merchants, or other agents. Thus, according to Performance Team, all of the implicated drivers qualified as employees for

purposes of crime coverage under the policy and it did not need to further show they were "natural person independent contractors."[4]

In late August 2013, Performance Team filed suit against Federal and Lexington for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. Performance Team alleged the insurance companies breached the policies by failing and refusing to acknowledge liability and pay out insurance benefits. Performance Team alleged it had suffered at least $1,180,627.79 in damages. The complaint further claimed Federal improperly interpreted its policy in two respects: "(a) Federal has improperly concluded that insufficient evidence of theft has been provided by Performance Team. In fact, Performance Team has submitted more than sufficient theft evidence. (b) Federal has improperly interpreted its policy to assert a narrow definition of 'Employee,' when in fact a broad definition of 'Employee' was provided and intended under the Federal Policy."

The complaint asserted Endorsement No. 6 did not limit coverage because it was ambiguous and unintelligible. The complaint further alleged that "to the extent Federal intentionally and willfully purported to amend its 'Employee' definition to 'include' a class of persons that Federal knew and understood was already encompassed within the existing definition, the addition of Endorsement/Rider No. 6 to the policy

---

[4] In late July 2013, Federal sent Performance Team a letter indicating it would not accept the Savino portion of the insurance claim. However, it is undisputed that Lexington paid at least a portion of the Savino claim. Further, Performance Team eventually concluded the Savino claim did not involve a theft of goods and the loss was treated as a mysterious disappearance.

by Federal is a fraud and misrepresentation, and is itself a breach of the implied covenant of good faith and fair dealing that exists in the Federal Policy." The complaint further advanced Performance Team's theory that the Section III(B) exclusion was a narrow one that did not include truck drivers.

During discovery, Performance Team asserted Federal inserted the amended definition of employee included in Endorsement 6 in the policy without Performance Team's knowledge or consent.

In April 2014, Federal and Lexington settled with Performance Team for $700,000. Federal paid $500,000 of the settlement.

The Gallagher Litigation

In February 2015, Performance Team filed suit against Gallagher. According to the complaint, Gallagher incorrectly interpreted the Federal crime policy in advance of the renewal that resulted in the inclusion of Endorsement No. 6.
In Performance Team's view, before the Endorsement No. 6 amendment, the Federal policy already covered theft by any of Performance Team's drivers, including independent contractors. Performance Team alleged Gallagher breached its agreement with Performance Team by failing to procure full and complete crime coverage for the risk of driver theft and by failing to advise Performance Team there was a gap in the company's crime coverage. Performance Team alternatively alleged Gallagher breached the agreement by allowing Federal to include Endorsement No. 6 in the policy, thus reducing the scope of the existing coverage. Based on these facts, Performance Team also asserted a claim for professional negligence. The company alleged that due to Gallagher's actions, it was forced to settle the

action against Federal and Lexington for less than half of its claimed damages of over $1.4 million. The complaint sought damages of $951,427.91.

In the course of discovery, Gallagher served interrogatories on Performance Team, requesting that the company identify the person the company contends stole each item of merchandise subject to a client/vendor claim. Gallagher also demanded that Performance Team state all facts and identify all documents supporting the contention that a specifically identified person stole specific items of merchandise. In response, Performance Team objected to having to prepare a compilation or abstract of documents previously provided. Instead, the company identified thousands of pages of discovery "which identif[ied] drivers and discuss[ed] their roles in the New Jersey loss event," and which also identified missing merchandise. These documents included, for example, "claim adjustment records" that for individual claims "identifie[d] the implicated driver; [set] forth the claim number and claim date; and [also stated] the date of transport by Performance Team; the claim amount; and the merchandise missing."

Gallagher moved for summary judgment of the complaint. The motion contended Performance Team could not show Gallagher's alleged breach of duty or contract caused actual loss or damages to Performance Team. Gallagher argued Performance Team could not identify any person who was not covered under the Federal policy because it did not know which drivers stole which goods. Without this information, Performance Team could not establish the drivers who committed thefts were not "employees" as defined in the policy and

Endorsement No. 6.[5] Gallagher further argued Performance Team did not provide Federal any evidence that drivers colluded to commit theft, such that all of the thefts would be covered so long as at least one of the drivers had a written contract with Performance Team.

Gallagher additionally asserted Performance Team could not prove actual damages resulting from Gallagher's alleged negligence. Gallagher argued Performance Team had no evidence to establish that, but for Gallagher's alleged negligence, it would have recovered more than the $500,000 it received from Federal in settlement of its claims. According to Gallagher, there was undisputed evidence that Federal raised several issues regarding Performance Team's insurance claim, "including Performance Team['s] failure to prove: (a) thefts of specific merchandise by specific individuals, (b) the specific merchandise

---

[5] As Gallagher put it: "Instead of submitting evidence to support its claim [for insurance benefits], Performance Team asserted, during the insurance claim, that it was not required to prove that 'individual thefts by individual drivers needed to be established and tied to individual thieving drivers.' . . . Assuming that Performance Team did not have [to] tie specific thefts to specific drivers, Performance Team cannot show that Gallagher's alleged negligence had any effect on the crime insurance claim. If Performance Team did not have to connect specific thefts to specific employees, it follows that there would be no evidence to show thefts by drivers who were not covered under the Federal Policy. There is no proof that Gallagher failed to assist in securing coverage for any driver who committed the thefts at issue. Alternatively, if Performance Team was required to prove that specific drivers stole specific merchandise, Performance Team submitted no such evidence to Federal. As such, it cannot show that Gallagher's alleged negligence caused Performance Team not to have covered [*sic*] for any dishonest driver."

stolen, or (c) collusion between the different actors." Gallagher further argued Performance Team had no evidence Federal denied coverage for the claim and there was no evidence of a contract between Gallagher and Performance Team.

Performance Team opposed the motion. The company argued Gallagher's breach was in failing to procure coverage that would include theft by *all* independent contract drivers. Performance Team also contended it had established that it was more likely than not that its drivers stole client goods and that was sufficient to show Gallagher's alleged breach of duty and breach of contract caused Performance Team's damages. According to Performance Team, had Gallagher procured sufficient coverage, Federal would have been required to pay for the theft losses in full.

In a tentative ruling, the trial court concluded there were no material triable issues of fact on causation. The court found Performance Team failed to show Endorsement No. 6 was the reason Federal did not accept coverage and the undisputed evidence established there was an "independent reason" Federal did not provide coverage, specifically that Performance Team offered insufficient evidence that the loss was caused by a covered theft. The court also concluded Performance Team failed "to offer substantial evidence showing that Federal would have paid the full amount of Plaintiff's claim had Defendants brokered coverage that includes independent contractors." The court further reasoned: "Plaintiff fails to disclose a genuine dispute of material fact over causation. It does not appear there is any evidence whatsoever that [Federal] refused . . . the other half of Plaintiff's loss claim based on the Crime Policy definition of an independent contractor driver or employee, or both." Following a

hearing and after taking the matter under submission, the trial court granted the motion and entered judgment in favor of Gallagher. This appeal timely followed.

DISCUSSION

On appeal, Performance Team admits that Federal's challenge to the insurance claim had at least three components, only of one which was related to Endorsement No. 6. However, Performance Team contends the trial court erred in granting summary judgment because the company was not required to establish Gallagher's negligence was the sole or exclusive cause of the damage Performance Team suffered. We agree that summary judgment was not warranted in this case.

I. Standard of Review

"Summary judgment is proper where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) To prevail on a summary judgment motion, the moving defendant has the initial burden to show a cause of action has no merit because an element of the claim cannot be established or there is a complete defense to the cause of action. (*Id*. at subd. (o); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) To satisfy this burden, the defendant must present evidence which either conclusively negates an element of the plaintiff's cause of action, or which shows the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855 [*Aguilar*].) Once the defendant has made this showing, the burden shifts to the plaintiff to set forth specific facts which show a triable issue of material fact exists. [Citation.]

"We review the trial court's decision de novo, considering all the evidence presented by the parties (except evidence properly excluded by the trial court) and the uncontradicted inferences reasonably supported by the evidence. [Citation.] The evidence is viewed in the light most favorable to the plaintiff, liberally construing the plaintiff's submissions while strictly scrutinizing the defendant's showing, and resolving any evidentiary doubts or ambiguities in the plaintiff's favor. [Citation.]"[6] (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1581 (*Namikas*).)

II. Gallagher Did Not Present Evidence Conclusively Negating the Element of Causation and Performance Team Established There Are Triable Issues of Material Fact

As explained above, to prevail on a motion for summary judgment, Gallagher was required to present evidence which either conclusively negates an element of Performance Team's causes of action, or which shows Performance Team does not possess, and cannot reasonably obtain, needed evidence.

---

[6] Gallagher filed several objections to Performance Team's evidence offered in opposition to the summary judgment motion. We must presume the objections were overruled. Under Code of Civil Procedure section 437c, subdivision (c), "the trial court must consider *all* evidence unless an objection to it has been raised *and sustained*. . . It follows that the reviewing court must conclude the trial court considered any evidence to which it did not expressly sustain an objection." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526-527.) Gallagher has not raised any issue on appeal regarding the objections. (*Reid,* at p. 534 [presumptively overruled objections can still be raised on appeal, but burden is on the objector to renew the objections in the appellate court].)

Gallagher failed to meet this burden as to one of its theories regarding causation; as to its other theories, Performance Team established there are triable issues of material fact.

A. Causation: applicable legal principles

Performance Team's complaint alleged causes of action for breach of contract and professional negligence. To prove a claim of professional negligence, a plaintiff must show the defendant's breach of duty was "a legal (proximate) cause of the injury. The foundational element of legal cause is cause in fact. It is necessary to show that the conduct contributed in some way to the injury (here the lack of coverage), so that 'but for' the conduct the injury would not have occurred [citations]. If the act or omission was a substantial factor in bringing about the result, it will be regarded as a legal cause of the injury [citations]." (*Greenfield v. Insurance, Inc.* (1971) 19 Cal.App.3d 803, 810-811.) Similarly, to prevail on a claim of breach of contract, the plaintiff must establish a causal connection between the alleged breach and the damages sought. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 541; *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038, 1060-1061.)

B. Performance Team's theory of liability is that the addition of Endorsement No. 6 to the policy created an impediment to coverage that, absent Gallagher's negligence, would not have existed

Gallagher argued Performance Team cannot establish causation because it never provided evidence that the drivers who were presumed to have stolen goods fell outside the scope of Endorsement No. 6's coverage. In other words, Gallagher argues that to prove its alleged negligence with respect to Endorsement

No. 6 caused harm, Performance Team had to specifically identify thieving drivers and show they were not "employees" within the meaning of the amended policy.

This argument misses the mark. Performance Team's complaint was not limited to the theory that Gallagher was negligent in negotiating and agreeing to Endorsement No. 6 because it was too narrow. The complaint *also* alleged Gallagher's breach was in failing to procure "full and complete crime coverage" for the risk of driver theft and by failing to advise Performance Team there was a gap in the company's crime coverage. This theory is that Gallagher breached its duty by failing to ensure that Performance Team's crime coverage would encompass theft by *any* of the independent contractors driving for Performance Team, irrespective of whether the driver was a "natural person" or whether there was a written independent contractor agreement. Under this theory, had Gallagher procured such coverage, it would have been unnecessary for Performance Team to show the insurer anything other than that truck drivers performing services for Performance Team committed the thefts. Endorsement No. 6 gave Federal an opportunity to challenge coverage based on the status of the drivers. Performance Team argues that had Gallagher procured the "full and complete" coverage for driver theft the company wanted, Federal simply could not have argued there was no coverage for the theft losses because of the nature of the drivers' employment, or because of a lack of proof of driver status.

Thus, that Performance Team has not established that specific drivers were not "employees" within the meaning of the policy as amended by Endorsement No. 6, does not conclusively establish Performance Team cannot prove causation. If, under

Performance Team's theory, Gallagher had procured coverage for theft by any driver performing services for Performance Team, it would have been unnecessary for the company to try to show the implicated independent contractor drivers fit into Endorsement No. 6.

We also note Performance Team proffered evidence that it did not have written agreements for all of the independent contractor drivers working with the New Jersey facility. Without such written agreements, an independent contractor driver would arguably not fall under Endorsement 6's amended definition of "employee." Further, the evidence creates an inference that Performance Team was, in fact, unable to show the implicated drivers were "employees" within the meaning of the amended policy because it did not have written contracts with the drivers, or the contracts were not with "natural person" independent contractors. This inference arises from the communications exchanged between Performance Team and Federal on the issue, and Performance Team's eventual position that it was not required to produce any further documentation regarding the status of drivers. At a minimum, Performance Team raised a triable issue of material fact regarding the effect of Endorsement No. 6 on Federal's refusal to accept coverage.

C. Performance Team raised triable issues of material fact regarding whether issues unrelated to Gallagher's alleged negligence impaired the company's claim for coverage

Gallagher also argued Performance Team could not establish that, but for the broker's alleged negligence, Performance Team's claim would have been fully covered, because there were other unresolved issues with the claim.

Gallagher proffered evidence showing that in addition to issues related to Endorsement No. 6, Federal also questioned whether there was sufficient evidence that it was drivers who actually committed thefts.

Gallagher also argued that although evidence of collusion would have allowed Performance Team to demand coverage for all of the thefts, simply by identifying one colluding driver with a written contract, Performance Team had no evidence of collusion and could not identify any specific implicated drivers. Gallagher contended this was a problem with coverage unrelated to Gallagher's negligence, which further established Performance Team could not show that it would have secured a greater recovery from Federal absent Gallagher's negligence.

In support of this argument, Gallagher pointed to evidence that Performance Team's counsel testified the company did not know which driver specifically stole which goods. When asked at his deposition: "Did Performance Team provide proof linking drivers to loss showing specific thefts by specific drivers?," counsel answered: "No." Performance Team's CFO also testified he did not recall seeing in the records that Performance Team informed Federal "driver X took Y good."

Gallagher further offered the undisputed facts that Performance Team did not terminate any driver for dishonesty; it did not advise its customers that it was going to suspend or terminate any driver who was allegedly implicated in the thefts; only one driver was criminally prosecuted for stealing Performance Team customer merchandise; and Performance Team did not interview any of the allegedly implicated drivers and did not obtain any interview reports from any third parties.

This evidence was sufficient to shift the burden to Performance Team to raise a triable issue of material fact. If Performance Team was unable to actually establish truck drivers stole goods, no crime coverage regarding employee or independent contractor theft would have covered the loss, and any negligence on the part of Gallagher would not have been the cause of Performance Team's injuries.

Yet, in opposition to this argument, Performance Team offered evidence that it identified drivers, by name, that it believed committed the thefts and it provided this evidence to Federal. Performance Team's counsel further declared the company gave Federal "detailed supporting documentation which identified each specific item of merchandise that the clients contended was missing from their shipments, and set forth the identity of each Performance Team driver that the clients contended was implicated in the theft/disappearance of the client and/or vendor merchandise." The opposition included exemplars of such documents, which show specific merchandise subject to a vendor/client claim, the driver involved, and other supporting documentation. Performance Team further proffered evidence indicating driver theft was the cause of the losses, such as the CEO's testimony that surveillance caught drivers stealing, and the "common denominator" of the shortages was the drivers.

Performance Team and its witnesses appear to have stopped short of formally accusing drivers of stealing.[7] Still,

---

[7] Performance Team's CEO testified at a deposition that since there was an ongoing law enforcement investigation, and the police did not "lock up" anyone at the time, Performance Time had "concerns . . . with saying, 'You stole this product, and you're fired. . . . At the time, we basically had an agreement that we

construing Performance Team's evidence liberally, as we must, it showed Performance Team had a colorable claim of driver theft that would trigger the employee theft coverage provisions of the Federal policy. At this stage in the proceedings, Performance Team was required only to raise a triable issue of material fact. The evidence that Performance Team did in fact provide Federal with the names of drivers and had other evidence that indicated driver theft was the most plausible explanation for the missing goods—including surveillance that caught drivers stealing—created a triable issue of fact as to whether, even with other infirmities in Performance Team's insurance claim, Gallagher's alleged negligence prevented the company from securing a greater recovery than it received.

Further, with respect to collusion, Gallagher pointed to evidence that Performance Team's CFO testified he did not recall seeing in the claim presentation any communications between two or more drivers showing they were acting together. Performance Team did not dispute that it was unaware of any communications among colluding drivers. However, Performance Team sufficiently disputed the asserted fact that it had no evidence of collusion.

Performance Team's CEO, who participated in investigating the shortages, testified he concluded the only way for pieces of missing merchandise, coming from "all different drivers," to end up in the same place was if "they were all working with one common middleman or one common fence to

---

were just going to dismiss everyone under the premise that there was no work in the event that somebody was going to come back and sue us and say, 'That's wrongful termination or wrongful release of a contract.' "

move the merchandise." Kaplan further testified about facts that led him to believe drivers colluded in the thefts: "The fact that all of the drivers implicated on this were all making pick-ups at the Saks and Neimans locations; that they were all tied to the same internal shortages with the same process of opening the cartons . . . taking out a piece, retaping the cartons and then moving through the same outlet of a fencing operation . . . . Never in the history of my business have I ever seen a group of drivers all simultaneously do something like this and . . . appearingly move product through the same fencing operation and look at it and suggest, 'Wow, that's a coincidence that all these guys figured that out together.' It's my belief that they all knew about it, that it was a ring of guys, and . . . there was common denominator for all of them to be moving the product through the same fence."

As with the issue of whether there was enough evidence of driver theft to trigger crime coverage under the Federal policy, Performance Team has proffered evidence raising a triable issue of fact that it had a valid argument regarding collusion sufficient to challenge a denial or limitation of coverage on that basis.

It is undisputed that Federal raised issues other than Endorsement No. 6 in delaying a coverage decision and challenging coverage. But the validity of those issues, and the extent to which they were detrimental to Performance Team's insurance claim, is disputed, creating triable issues of material fact.

Further, that Federal challenged coverage on multiple bases does not negate Performance Team's assertion that but for Gallagher's negligence, it would have been able to secure a better settlement or recovery against Federal at trial. Performance

Team's evidence in opposition to summary judgment raised a triable material issue that Endorsement No. 6, uncertainty about the employment status of implicated drivers, and Performance Team's inability or refusal to show the drivers were "employees" within the meaning of the endorsement, were significant reasons why Federal did not accept coverage.

For example, the evidence reveals that in the year following Performance Team's initial demand for coverage, Federal repeatedly questioned whether the implicated drivers were natural person independent contractors with written contracts, as required to render them "employees" under the amended policy. The correspondence between Performance Team and Federal suggests that as late as July 2013, one month before the company filed suit, a primary dispute revolved around whether Performance Team could provide written contracts for implicated drivers, as well as the proper interpretation of Endorsement No. 6. Performance Team's suit against Federal challenged the use of Endorsement No. 6 as a basis to deny coverage. Further, a portion of the discovery Federal propounded to Performance addressed the company's contention that the implicated drivers were "employees" within the meaning of the Federal policy. This evidence at least raises a triable issue that throughout Performance Team's dispute with Federal, Endorsement No. 6—and the lack of "full and complete" coverage for independent contractor driver theft—was a substantial impediment to coverage.

Another case considering causation and damages in a suit involving alleged insurance broker negligence is instructive. In *Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311 (*Third Eye Blind*),

the insured sued the insurer for denying coverage, and an insurance broker and a business manager for failing to advise about policy exemptions and failing to obtain additional coverage. (*Id.* at p. 1316.) When the court granted the insured summary judgment against the insurer, the broker filed a motion for judgment on the pleadings. The broker argued the summary judgment ruling established there was coverage under the implicated policy, thus the broker could not be held liable based on an argument that the broker's negligence was responsible for the insured not having relevant coverage. (*Id.* at p. 1317.) The appellate court reversed a trial court order granting judgment on the pleadings.

The court, reading the complaint in context, explained the insured alleged claims against the broker and manager that were not premised on conclusions about the sufficiency of the policy. The complaint included claims that the broker and manager failed to alert the insured that a provision in the policy would give the insurer "a viable basis for refusing coverage under some circumstances and, consequently, failed to recommend that appellants purchase errors and omissions insurance to ensure complete, uncontestable coverage." (*Third Eye Blind, supra*, 127 Cal.App.4th at p. 1318.) The complaint also alleged that if the insureds had known about the provision, they would have obtained additional insurance to cover any potentially excluded claims, including the one they eventually faced. Since they did not have such coverage, they were "forced to assume their own defense, incurring attorney fees, costs and indemnity." (*Id.* at p. 1319.)

Although the complaint alleged the insurer was responsible for the same losses, that was not fatal to the claim against the

broker and manager. "[T]he law recognizes that there may be multiple causes of a plaintiff's injury. ' "It is not essential to a recovery of damages that a defendant's wrongful act be the sole and only cause of the injury; it is sufficient if it be a proximate cause which in the natural course of events produced, either by itself or in conjunction with other causes, the damage. [Citations.]" [Citations.]' [Citations.]" (*Third Eye Blind, supra*, 127 Cal.App.4th at p. 1319.)

Similarly, in this case, the complaint alleged multiple theories of liability. One of those theories is that Performance Team relied on Gallagher to secure "full and complete crime coverage" to address "the risk of driver theft of client goods." The complaint alleges Gallagher breached its duties to Performance Team by failing to "procure full and complete crime coverage for the risk of driver theft as requested and needed by Performance Team" and by failing "to advise Performance Team that there was no insurance coverage for Performance Team for the risk of driver theft, and that a gap in crime coverage existed for the driver theft risk component."

The status of Performance Team's drivers as independent contractors created a basis—valid or not—for Federal to question or challenge coverage for the loss. This is amply reflected in the correspondence between Performance Team and Federal, and the Performance Team litigation against Federal, which repeatedly raised the issue. In July 2013, Performance Team refused to make a "further showing" that the drivers were "natural person independent contractors," and shifted to arguing Endorsement No. 6 simply did not apply. Liberally construing Performance Team's evidence, there is a reasonable inference that at least some of the implicated drivers could not be considered

"employees" under the amended Federal policy and Performance Team had only limited avenues of arguing there was nonetheless coverage. Although Federal advanced other arguments challenging coverage or suggesting reduced coverage because of the applicable deductible, Performance Team has raised a triable issue of material fact as to whether the driver status issue created by Endorsement No. 6 was a substantial factor in causing Federal's failure to accept coverage and in reducing the settlement value of Performance Team's claims.

III. Gallagher Did Not Meet its Burden on Summary Judgment Regarding Performance Team's Actual Damages

Gallagher also argued Performance Team cannot prove actual damages flowing from Gallagher's alleged negligence. Gallagher asserted Performance Team had no evidence Federal would have paid more than $500,000 on the insurance claim absent Gallagher's alleged negligence. Gallagher relies on caselaw explaining that in the professional negligence context of legal malpractice, the plaintiff must establish damages to a legal certainty, rather than merely presenting a "wishlist" of damages, unsupported by any evidence that the plaintiff would have received more than the actual settlement amount.

However, to meet its burden on summary judgment, Gallagher was required to do more than merely assert Performance Team had no evidence to prove this element of its claims. "[A] moving defendant '*must* indeed present "evidence," ' such as ' "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may "be taken." ' *(Aguilar, supra,* 25 Cal.4th at p. 855.)" (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 808.)

Gallagher did not produce any *evidence* establishing Performance Team could not reasonably obtain evidence to show it would have recouped more in settlement or at trial absent Gallagher's negligence. Gallagher offered no evidence such as Performance Team's admissions in pleadings or discovery responses (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749), testimony from Performance Team, Federal, or an expert indicating Performance Team could not establish the damages element of its claims, or factually devoid discovery responses to questions directed at the issue that would create a reasonable inference that Performance Team could produce no evidence to prove the damages element. (*Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 134.) Gallagher did not make the showing necessary to shift the burden to Performance Team on the issue of damages. (*Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891 [defendant must also produce evidence that the plaintiff cannot reasonably obtain evidence to support his or her claim].)

Instead, Gallagher pointed to evidence indicating Federal had multiple reasons for challenging coverage. We have concluded above the presence of these additional reasons did not conclusively negate Performance Team's claims.

Gallagher also contended in the motion: "Performance Team cannot identify a single communication where Federal acknowledged there would be coverage for the claim but for an alleged mistake by Gallagher; it has no evidence that Federal denied coverage for the claim." Yet, the only evidentiary support Gallagher offers for the argument on damages is an undisputed fact that Federal "never issued a denial letter which asserted that there was no coverage for any driver or any thefts of clients

[*sic*] merchandise." This fact did not establish Performance Team does not have or cannot reasonably obtain evidence showing it would have received more in settlement or at trial absent Gallagher's negligence.

Namikas, supra, 225 Cal.App.4th 1574, upon which Gallagher relied in the trial court and on appeal, offers a helpful contrast. In *Namikas*, a legal malpractice case, the plaintiff sued his former counsel, alleging the attorneys were negligent in recommending a settlement in a family law case which, the plaintiff alleged, resulted in him paying excessive spousal support. (*Id.* at pp. 1579-1580.) The attorney defendants sought summary judgment, arguing the plaintiff could not prove the wife would have settled for less than the amount reached by settlement, or that he would have obtained a better outcome at trial. (*Id.* at p. 1580.)

To support the motion, the defendants presented the wife's counsel's declaration stating that he, and by inference the wife, would not have settled the spousal support claim for less than the amount actually reached. (*Namikas, supra,* 225 Cal.App.4th at pp. 1583-1584.) The Court of Appeal concluded this declaration was enough to shift the burden to the plaintiff to produce admissible evidence demonstrating a triable issue of fact. (*Id.* at p. 1584.) The plaintiff failed to do so, which led to the analysis Gallagher cites regarding the requirement that the plaintiff proffer evidence as to what the settlement would have been absent the alleged negligence. (*Id.* at pp. 1584-1586.)

In contrast, here, Gallagher did not make an evidentiary showing sufficient to shift the burden to Performance Team. Gallagher argued Performance Team had no evidence to show it would have secured more in settlement or at trial if Gallagher

had not breached its duty, but it offered no *evidence* to support that argument or to show that Performance Team could not reasonably obtain such evidence.

Other cases Gallagher relies upon do not mandate a contrary result. For example, in *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, the court concluded a grant of nonsuit was proper because the plaintiff did not establish that but for the law firm's negligence, he would have recovered more in settlement or at trial of the underlying litigation. However, at trial, it is the plaintiff's burden to prove the elements of his claims. When a defendant seeks summary judgment, it is the *defendant* who must make an initial showing that the plaintiff cannot prove the elements of its claims, in order to shift the burden to the plaintiff. *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, is also inapt since, in that case, the court concluded even the plaintiff's complaint failed to state facts demonstrating actual damage resulting from the defendants' alleged legal malpractice. Here, Performance Team alleges Gallagher's negligence led to the absence of coverage for all of the losses the company sustained due to driver theft, leading to damages that are the amount of losses, in the form of the customer and vendor claims, in excess of the settlement amount. This is not merely speculative.

Indeed, Performance Team proffered evidence—summaries and exemplars of underlying documentation—detailing the monetary loss it suffered in the form of vendor/client claims, all of which the company alleges Federal should have covered under the policy. The damages alleged in the complaint are the loss not subject to insurance recovery and Performance Team's fees and costs incurred in seeking the insurance recovery. And, as detailed above, Performance Team's evidence indicates the lack of

more inclusive coverage for theft by independent contractor drivers was an ongoing and significant factor in the coverage dispute.

Unlike the authorities Gallagher cites, the broker did not establish Performance Team's claim for damages fails as a matter of law (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528, 1536), or that Performance Team failed to even allege facts establishing that but for the alleged negligence it is more likely than not the company would have obtained a more favorable result (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509), or that Performance has no competent evidence of its alleged damages (*Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1517, 1519).

On this record, there was no basis to grant summary judgment.[8]

---

[8] On appeal, Gallagher argues for the first time in its respondent's brief that collateral and judicial estoppel bar Performance Team from contending its independent contractor drivers could ever be considered employees for any reason, even under the terms of the Federal insurance policy. Gallagher refers to unrelated wage litigation in which an appellate court concluded the truck drivers involved in that suit were independent contractors and did not have contracts of employment within the meaning of the Federal Arbitration Act. (*Performance Team Freight Systems, Inc. v. Aleman* (2015) 241 Cal.App.4th 1233, 1242-1243 (*Aleman*).) Gallagher did not raise this issue in the trial court thus we do not consider it here. (*Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1519.) Even were we to consider Gallagher's argument and accept its representation of what was argued and decided in *Aleman*, we disagree that there could be any possible impact on this case. One of the theories in the complaint is that Gallagher's

DISPOSITION

The trial court judgment is reversed. Appellant to recover its costs on appeal.

SORTINO, J.*

We concur:

FLIER, Acting P.J.

GRIMES, J.

---

negligence caused Performance Team not to have coverage for theft committed by all of its categories of drivers, including, explicitly, certain independent contractor drivers.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.