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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LINDA NOVAK, Plaintiff and Appellant, v. JAMES PETER VON ALLMEN etc., Defendant and Respondent.	2d Civil No. B259932 (Super. Ct. No. 56-2013-00440311-CU-PA-VTA) (Ventura County)

Linda Novak appeals from a summary judgment granted in favor of respondent, James Von Allmen, dba AAA Pool Maintenance (Von Allmen) on her complaint for personal injuries. (Code Civ. Proc., § 437c.)[1] Appellant was struck by a pickup owned and operated by Ronald Dusky who worked as an independent contractor cleaning swimming pools. The trial court ruled that Dusky was not an employee of Von Allmen and that Von Allmen was not vicariously liable for Dusky's negligent driving. We affirm.

Procedural History

On the morning of April 11, 2013, Dusky dropped a friend off at an Oak View gas station in his Toyota Tacoma pickup. As Dusky backed up to leave, he struck appellant. Appellant sued for damages, alleging that Dusky was an employee of Von

[1] All statutory references are to the Code of Civil Procedure.

Allmen, dba AAA Pool Maintenance and that Von Allmen negligently entrusted, maintained, and controlled the pickup.

Von Allmen filed a motion for summary judgment on the ground that Dusky was an independent contractor hired to clean pools for AAA Pool Maintenance customers. Dusky testified that he owned, operated, and maintained the Toyota pickup, and worked as an independent contractor for Von Allmen for three years. Dusky paid for his own gasoline, paid all vehicle maintenance and repairs, and used his own equipment to clean swimming pools. Von Allmen provided a list of customers but Dusky determined when he went to work and in what order the pools were cleaned. Von Allmen did not supervise Dusky's work or control the method or manner in which the services were performed. Dusky was required to fill out a job route sheet that Von Allmen used to pay Dusky on a job per job basis. Von Allmen did not withhold payroll or pay benefits but did pay Dusky $100 a month to post an advertisement on Dusky's pickup.

Von Allmen's supporting declaration stated that he hired Dusky and other independent contractors to clean pools for AAA Pool Maintenance customers. Von Allmen did not provide Dusky a vehicle or equipment, did not supervise or instruct Dusky on how or when to perform a job, and declared that Dusky was the one who decided what had to be done when cleaning or repairing a customer's pool. Von Allmen did not withhold payroll taxes nor did he issue Dusky a 1099 form at the end of each tax year.

Appellant opposed the motion for summary judgment based on the theory that Dusky was an uninsured driver and Von Allmen's employee. . On September 2, 2104, the trial court granted summary judgment on the ground there were no material triable facts that Dusky was an employee of Von Allmen or that Von Allmen controlled Dusky's work. After judgment was entered, appellant filed a motion for reconsideration (§ 1008) which was denied because it was untimely and not based on new or different facts.

Discussion

We review the grant of summary judgment de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) A motion for summary judgment provides "courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The trial court must grant the motion if all the papers submitted show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).)

Appellant argues that Van Allmen is vicariously liable because Dusky was his employee and operated the pickup in the course of his employment. The general rule is that the hirer of an independent contractor is not liable to third parties for the contractor's negligence. (*Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 430. (*Millsap*).) " 'An "independent contractor" is generally defined as a person who is employed by another to perform work; who pursues an "independent employment or occupation" in performing it; and who follows the employer's 'desires only as to the results of the work, and not as to the means whereby it is to be accomplished." [Citations.]' " (*Id.*, at p. 431.)

In *Millsap*, an express company (NCE) paid Pence to deliver packages to NCE's customers. Pence used his own vehicle to deliver the packages, paid for gas/oil and car repairs, and furnished his own liability insurance. Pence was paid on a "per route" basis, received no employee benefits, and no taxes were withheld from his paycheck. (*Id.*, at p. 431.) "Other than to say 'be careful' or to give him directions to a particular location, or possibly to tell him to deliver the packages in the order received, NCE did not instruct Pence as to how to make the deliveries or how to drive his car." (*Id.*, at p. 431.)

The Court of Appeal affirmed the summary judgment in favor of NCE on the ground that Pence was an independent contractor and compensated on a piecemeal

basis. (*Id.*, at p. 433.) There were no material triable facts that NCE exercised the requisite control over Pence's work to make him its employee. " 'The most significant factor in determining the existence of an employer-independent contractor relationship is the right to control the manner and means by which the work is to be performed. [Citations.] "If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established." [Citations.]' [Citation.]" (*Id.*, at p. 431; see also *Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143.)

Like *Millsap*, Van Allmen did not retain the right to control the means or manner in which Dusky performed his work. Dusky used his own truck, paid all gas and maintenance costs, provided his own equipment, set his own work hours, and was paid on a job by job basis. "[T]he owner (i.e., Von Allmen) may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract -- including the right to inspect [citation], the right to stop the work [citation], the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation] -- without changing the relationship from that of owner and independent contractor or the duties arising from that relationship." (*McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790.) There are no material triable facts that Dusky was Von Allmen's employee or that Dusky was performing services for Von Allmen when the accident occurred.

Negligent Entrustment

Appellant argues that Von Allmen is liable based on a theory of negligent entrustment and supervision. Here the charging allegations focus on the operation and control of the pickup. The complaint alleges that Von Allmen "did so negligently, carelessly and imprudently entrust, maintain, supervise, manufacture, design, engineer, repair, inspect, insure, operate and control the aforesaid pickup truck," as to cause it to collide and strike appellant. If Dusky owned, maintained, and operated the pickup at his

own expense, Von Allmen did not, as a matter of law, negligently entrust or control the pickup. (See e.g., *Millsap v. Federal Express Corp., supra,* 227 Cal.App.3d at p. 431.) The trial court drew the common sense inference that Von Allmen was not liable on a negligent entrustment or supervision theory. (§ 437c, subd. (c); *Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1615.)

Appellant claims that Dusky's license was suspended the day of the accident but that misstates the record. Dusky testified that he had a valid license and that his driver's license was suspended after the accident for a traffic ticket. The fact that Van Allmen did not know Dusky's license status or require proof of a valid license supports the inference that Dusky worked as an independent contractor for Von Allmen.

Peculiar Risk

Appellant argues that Van Allmen is liable under a non-delegable duty. "Under the doctrine of peculiar risk, a person who hires an independent contractor to do inherently dangerous work can be held liable for tort damages when the contractor causes injury to others by negligently performing the work." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 256.) Appellant cites no authority that driving a pickup or cleaning swimming pools poses a peculiar risk of harm to the public. The complaint is for simple negligence and does not allege that Von Allmen violated any law or regulation. The fact that Von Allmen held a license to operate a pool cleaning business does not mean that he owed a non-delegable duty to members of the public frequenting a gas station.

Going and Coming Rule

Appellant argues that a triable issue of fact exists with respect to the going and coming rule. "Generally, an employer is not responsible for torts committed by an employee who is going to or coming from work. [Citations.]" (*Tryer v. Ojai Valley School* (1992) 9 Cal.App.4th 1476, 1481.) But the "going and coming" rule does not apply where (1) employees must use their cars to drive on company business (*Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803, 810; *Largey v. Intrastate*

Radiotelephone, Inc. (1982) 136 Cal.App.3d 660, 668), (2) the employee is on a special business errand (*Tarasco v. Moyers* (1947) 81 Cal.App.2d 804, 810), or (3) the employer paid the employee for time going to and coming from work for the benefit of the employer (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 962.)

There are no material triable facts that Dusky was Von Allmen's employee, was on a special business errand, or was paid for his time going to and coming from work. When Dusky backed into appellant, he had just dropped a friend off to catch a bus. Dusky was not performing an errand for Von Allmen and had not yet started his route to clean pools.

Continuance

Appellant argues that the trial court abused its discretion in not continuing the summary judgment hearing so that appellant could complete Von Allmen's deposition. This was the subject of a motion for reconsideration (§ 1008) but appellant has not augmented the record on appeal to include the motion or reporter's transcript of the proceeding. If the party moving for reconsideration fails to show new or different facts, circumstances or legal authorities, the court lacks jurisdiction to entertain the request. (*La Francois v. Goel* (2005) 35 Cal.4th 1094, 1098; *Kerns v. CSE Ins. Group.* (2003) 106 Cal.App.4th 368, 391.) Section 437c, subdivision (h) provides that a continuance may not be granted unless "facts essential to justifying opposition may exist but cannot, for reasons stated, then be presented . . . . " (See *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.) Appellant failed to make such a prima facie showing.[2] (See e.g., *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 656.)

[2] Appellant claims that Von Allmen failed to produce documents at his deposition but made no showing that the discovery was essential to appellant's opposition to the motion for summary judgment. (§ 437c, subd. (h).) Appellant argues that the documents show that 50 percent of Dusky's work was commercial, that Dusky reported his work on route sheets maintained by Von Allmen, that Von Allmen gave Dusky instructions on adjusting pH levels in swimming pools, and that vehicle insurance was discussed after the accident. None of this "new evidence" supports the claim that Dusky was Von Allmen's employee or performing services for Von Allmen when the vehicle-pedestrian accident occurred

The trial court did not abuse its discretion in denying appellant's request to continue the summary judgment motion or motion for reconsideration. (*Farmers Inurance Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106.)

The judgment (order granting summary judgment) is affirmed. Von Allmen is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Kent Kellegrew, Judge

Superior Court County of Ventura

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Bloomberg, Benson & Garrett; David K. Garrett and Juliet F. Wohholz, for Appellant.

Gates, O'Doherty, Gonter & Guy; Petert J. Gates and Thomas A. Scutti,, for Respondent.