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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SALVADOR G. PRECIADO, JR., et al., Plaintiffs and Appellants, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B269007 (Los Angeles County Super. Ct. No. BC500265)

APPEAL from a judgment of the Superior Court of Los Angeles County, Huey P. Cotton, Judge. Affirmed.

Law Offices of Donald A. Hilland and Donald A. Hilland; Law Offices of Armando Galvan and Armando Galvan for Plaintiffs and Appellants.

Vanderford & Ruiz and Rodolfo F. Ruiz for Defendant and Respondent.

INTRODUCTION

Salvador G. Preciado, Jr., a senior and former football player at Panorama High School (PHS), died after attending a private, off-campus party. He and his successors-in-interest, his parents Irma Guevara and Salvador Preciado, Sr., brought the instant wrongful death action against, among others, the Los Angeles Unified School District (LAUSD or the school district). The trial court entered summary judgment in favor of LAUSD concluding as a matter of law that the school district was not vicariously liable for the actions of the unpaid PHS football-team volunteer who gave decedent a ride home before he died. Plaintiffs appeal. We hold that plaintiffs have not demonstrated a dispute of operative facts with the result that the question is one of law to which *Munoz v. City of Palmdale* (1999) 75 Cal.App.4th 367 (*Munoz*) applies. *Munoz* held that an unpaid volunteer of a public agency was neither an employee nor a servant of the agency for respondeat superior purposes. Following *Munoz*, we conclude that the unpaid volunteer coach was not an employee or servant of LAUSD and so the school district is not vicariously liable for his actions. Accordingly, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Viewing the evidence according to the usual rules of appellate review, they show the following undisputed facts: On Saturday night, March 3, 2012, decedent consumed alcohol during a private, off-campus party at the residence of the Lomibao family,[1] and became severely intoxicated. His friend called defendant Brian Molina, a volunteer PHS football coach, for a ride. Molina drove decedent and his friend to the friend's residence, where decedent died during the night.

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[1] The Lomibaos, who were named as defendants in this lawsuit, are not parties to this appeal.

The party was not a district-sponsored event and no PHS teachers or staff were present or aware of the party. The PHS football season was over and decedent was not on the football team at the time of his death. Finally, none of Molina's actions on March 3, 2012 fell within the scope of authorized conduct for individuals who have contact with LAUSD students.

Plaintiffs brought their complaint against LAUSD seeking damages for wrongful death and negligence. LAUSD moved for summary judgment. Noting that the sole basis on which plaintiffs sought liability against it was the school district's vicarious responsibility for the actions of Molina, LAUSD argued it was not liable for Molina's conduct for three alternative reasons: (1) Molina was not employed by the school district; (2) Molina acted outside the scope of any school-district coaching responsibilities; and (3) the school district is immune from liability under Education Code section 44808.

In support of its motion, LAUSD asserted that Molina was a volunteer football coach, not an employee of LAUSD, and that the school district did not pay Molina for his services. Also, at no time during the weekend of March 3, 2012 had Molina acted as an employee or agent of the school district. LAUSD relied on Molina's deposition testimony, in which he stated he was a volunteer coach at PHS and had never held a position with, been employed by, or had any relationship with LAUSD. LAUSD also cited the declaration of PHS Athletic Director, Salvador Garcia, incorporating LAUSD's Code of Conduct with Students. The Code of Conduct required adults working with PHS students to avoid, among other things, "[t]ransporting student(s) in a personal vehicle without proper written administrator and parent authorization forms on file in advance;" "[t]aking or accompanying student(s) off campus for activities other than a District-approved school journey or field trip[s];" or "[m]eeting with or being in the company of student(s) off campus, except in school-authorized and/or approved activities."

Plaintiffs' opposition disputed that Molina was a volunteer and not an employee. They claimed that the following evidence demonstrated a triable issue: Molina listed PHS as an employer between May 2009 and December 2011 on his application for employment with Burbank Unified School District and once received a check written by LAUSD sometime before 2011, although he could not recall the circumstances of the payment. Plaintiffs also presented declarations from decedent's former girlfriend and mother indicating that decedent raised funds by selling candy bars and gift cards, which money he turned over to the PHS Athletic Director. Plaintiffs did not further explain where the raised funds went.

Plaintiffs also argued as a matter of law, that Molina " 'assumed responsibility' " by transporting decedent to his friend's house where he left decedent without adult supervision and without seeking medical attention.

The trial court granted LAUSD's summary judgment motion. The court ruled that there was no triable issue of fact that Molina was an unpaid volunteer football coach with the result, as a matter of law under *Munoz*, he was not an employee of LAUSD, and so the school district was not liable for his actions. Plaintiffs filed their timely appeal.

CONTENTIONS

Plaintiffs contend that a triable issue of fact existed about whether Molina was an "employee or servant," as defined by Government Code section 810.2. Plaintiffs also contend that the trial court's denial of their request for a continuance of the hearing on the summary judgment motion was error.

DISCUSSION

I. Summary Judgment

A. *Standard of review*

A court may grant a summary judgment only if "there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (*Id*., subd. (p)(2).) If the defendant meets its burden, the burden then shifts to the plaintiff to present evidence showing a triable issue of material fact. (*Ibid*.)

" 'We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. [Citation.]' [Citation.]" (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 914.) We consider the facts in the record that were before the trial court when it ruled on that motion, except the evidence to which the trial court sustained objections. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037.) However, "[t]he trial court's stated reasons for granting summary judgment are not binding on the reviewing court, 'which reviews the trial court's ruling, not its rationale.' [Citation.]" (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 446.)

B. *Munoz applies*.

"Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).) However, "[a] public entity *is* liable for injury proximately caused by an act or omission of an *employee* of the public entity *within the scope of his* [*or her*] *employment* if the act or omission would, apart from this

section, have given rise to a cause of action against that employee or his [or her] personal representative." (Gov. Code, § 815.2, subd. (a), italics added.) Government Code section 810.2 defines "employee" to include "employee, or servant, *whether or not compensated*, but does not include an independent contractor."[2] (Italics added.)

Munoz, *supra*, 75 Cal.App.4th 367, held that an unpaid volunteer at a municipal senior-center function was not an employee of the municipality, with the result the latter was not vicariously liable for injuries sustained by Munoz from spilled coffee when the coffee pot, which had been placed on a serving shelf by the volunteer, fell. (*Id*. at p. 369.) The *Munoz* court explained, although the term "employee" is defined by Government Code section 810.2 to include "employee, or servant, whether or not compensated," that Labor Code section 3352, former subdivision (i) excludes from the definition of "employee," "[a] person performing voluntary service for a public agency or a private, nonprofit organization who does not receive remuneration for the services, other than meals, transportation, lodging, or reimbursement for incidental expenses."[3] (Lab. Code,

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[2] Government Code section 810.2 reads in full: " 'Employee' includes an officer, judicial officer as defined in Section 327 of the Elections Code, employee, or servant, whether or not compensated, but does not include an independent contractor."

[3] At the time *Munoz* was decided, the so-called "volunteer exception" was located in Labor Code section 3352, subdivision (i). Since then, section 3352 has been amended and renumbered so that the "volunteer exception" is now located in subdivision (a)(9) of section 3352. With only a nonsubstantive adjustment, that statute now reads in relevant part: "(a) Employee excludes the following: [¶] . . . [¶] (9) A person performing voluntary service for a public agency or a private, nonprofit organization who does not receive remuneration for the services, other than meals, transportation, lodging, or reimbursement for incidental expenses."

§ 3352, subd. (a)(9); *Munoz*, at pp. 369-370 & 372.) *Munoz* applied the Labor Code volunteer exclusion to hold that Helmer, the unpaid volunteer who placed the coffee pot on the shelf, was not acting as a municipal employee or servant (Gov. Code, § 810.2), with the result that the defendant city was not vicariously liable for Munoz's injuries. (*Id*. at p. 372, review den.)

To avoid the impact of *Munoz*, plaintiffs first contend that "right of control" remains a relevant factor for differentiating between employee and independent contractor in Government Code section 810.2. Plaintiffs argue, as did the appellant in *Munoz*, that when the Legislature enacted section 810.2 with the word "servant," it was aware of *Chavez v. Sprague* (1962) 209 Cal.App.2d 101, in which the right of control was the primary factor in determining whether a surgeon, working without pay at a county charity hospital, was an employee within the meaning of the Government Tort Claims Act. By including the word "servant" in the Government Code section 810.2's definition of "employee," plaintiffs argue, the Legislature intended to retain right of control as a factor in determining a person's status as "employee."

However, as *Munoz* noted, *Chavez* was decided 15 years before the Legislature enacted the volunteer exclusion in section 3352 of the Labor Code. (*Munoz*, *supra*, 75 Cal.App.4th at p. 370.) In rejecting the identical "right of control" argument, *Munoz* explained, "[a]lthough *Chavez* viewed the existence of the right of control to be the primary factor in differentiating between employees and independent contractors, the Legislature intentionally omitted right of control as a component of the volunteer exclusion in section 3352, [former] subdivision (i). Instead, the Legislature drew a bright line between unpaid volunteers at public agencies and private, nonprofit organizations on the one hand, and unpaid volunteers at private, profit-making organizations on the other." (*Ibid*.) *Munoz* continued, " '[t]he Legislature is deemed to know of existing laws when it enacts

new statutes. [Citation.]' [Citation.] As such, had the Legislature wished to utilize the right of control as a factor in the volunteer exclusion, it would have done so. Given the omission of such language from the statute, we are confident the Legislature intended for the exclusion to apply to uncompensated volunteers like Helmer without regard to the right of control." (*Id.* at p. 372.) Thus, as *Munoz* explained, right of control is simply not a consideration in the volunteer exclusion from employment with a public agency, such as LAUSD.

Plaintiffs' next statutory interpretation argument is that the importation of the Labor Code's volunteer exclusion into the Government Code definition of "employee" constitutes an impermissible judicial revision of the Government Code.

Townsend v. State of California (1987) 191 Cal.App.3d 1530 (*Townsend*), relied on by *Munoz*, imported into the definition of "employee" the exclusion contained in Labor Code section 3352, former subdivision (k) for uncompensated student-athletes who participate in amateur sporting events sponsored by public agencies or public or private nonprofit universities or schools. *Townsend* applied this student-athlete exclusion to hold that a state university's basketball player who had injured an opponent during a varsity game was not an employee of the state for purposes of respondeat superior. *Townsend* justified importing the Labor Code exclusion into the Government Code section 810.2 definition of "employee" by reasoning "one of the most significant modern adjuncts of the employer-employee relationship is the workers compensation scheme," and "the Legislature's definition of 'employee' in that area is of great significance." (*Townsend*, at p. 1535.) *Townsend* also articulated the public-policy justification: "exposing those institutions to vicarious liability for torts committed in athletic competition would create a severe financial drain on the State's precious educational resources. We have no doubt that this was one of the considerations which led to the amendment of Labor Code section 3352 and that that

amendment evidenced an intent on the part of the Legislature to prevent the student-athlete from being considered an employee of an educational institution for any purpose which could result in financial liability on the part of the university." (*Id.* at p. 1537.) *Munoz* recited this conclusion from *Townsend*. (*Munoz*, *supra*, 75 Cal.App.4th at p. 371.) Thus, the Labor Code exclusion is discrete and limited, and does not "repeal" the phrase, "servant, whether or not compensated," in Government Code section 810.2, plaintiffs' contention to the contrary notwithstanding. Instead as *Townsend* and *Munoz* explain, the distinction the Legislature already utilized in the workers' compensation sphere applies in the area of public-agency employment.

Plaintiffs then contend that we should simply disregard *Munoz*.[4] We are unpersuaded. Although plaintiffs are correct that there is no horizontal stare decisis in California appellate courts (*Sarti v. Salt Creek Ltd*. (2008) 167 Cal.App.4th 1187, 1193), we will follow the decisions of other appellate districts unless there is " 'good reason to disagree.' " (*The Mega Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529.) At least two cases have applied the exclusions of Labor Code section 3352 from the definition of "employee" in Government Code section 810.2, *Munoz* and *Townsend*. We see no basis for departing from their holdings as they are factually parallel to this case, and their analyses are well-reasoned and well-justified. The Supreme Court denied review of *Munoz*. The Legislature, presumed to be aware of both cases (*Estate of Castiglioni* (1995) 40 Cal.App.4th 367, 381-382), did not abrogate either opinion the four times it amended Labor Code section 3352 since *Munoz* was issued, including passage of the Human Resources Reorganization Plan (2011 Gov. Reorg. Plan No. 1,

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[4] Plaintiffs do not succeed in distinguishing *Munoz* by discussing, without citation to authority, the blending of private, public, and for-profit charter schools, or by mentioning "false advertising."

§ 198). Plaintiffs have not persuaded us why we should disregard *Munoz*'s holding that an unpaid volunteer is not an employee or servant under Government Code section 810.2 for respondeat superior liability purposes.

C. *There are no triable issues of material fact with the result that the question before us is one of law*.

Plaintiffs cite the following evidence as creating triable issues about whether Molina was an employee of LAUSD for respondeat superior purposes: (1) Molina was still "working" at PHS in March 2012; (2) he listed LAUSD as his employer on an application for employment with Burbank Unified School District; (3) he received at least one check from LAUSD; and (4) volunteer coaches were paid from fundraising efforts by students who sold candy bars and gift cards, and charged admission to football games. The trial court determined that these facts were insufficient to shift the burden to defendant. We agree. First, simply stating that Molina was "working" at PHS in March 2012 does not create a dispute as to whether he was an *employee* as opposed to a volunteer. Second, although Molina's application with Burbank Unified School District listed PHS under the column for "employer," the application form required him to list his "U.S. military, self-employment, and *volunteer experience*" and contained columns for dates, duties, and "Employer" only, giving Molina no place to clarify his volunteer status. (Italics added.) Third, Molina received only one check from LAUSD, but it was not during the 2011-2012 academic year, and he explained it occurred when the employee coaches agreed to share what they were paid with the volunteer coaches. Finally, the declarations about fundraising efforts of students indicates that the money was turned over to the PHS athletic director. Neither of the declarations remotely suggest that the raised funds were given to the volunteer coaches at all, let alone as compensation rather than for "meals, transportation, lodging, or reimbursement for incidental expenses." A volunteer may

receive payment for the quoted expenses and still fall within the exclusion. (Lab. Code, § 3352, subd. (a)(9).) In short, the trial court correctly determined, without weighing the evidence, that these facts do not demonstrate a dispute. None of these facts creates a *triable* issue or even remotely demonstrates that Molina was an employee of LAUSD at any time.[5]

Accordingly, the undisputed facts show that the relationship between Molina and LAUSD is even more attenuated than the relationship between the municipality and the non-employee, non-servant volunteer in *Munoz*. Molina was not an employee or servant of LAUSD (Gov. Code, § 810.2; Lab. Code, § 3352, subd. (a)(9)). Nor was he acting in the scope of any position for LAUSD when he came out on a weekend night, at the behest of decedent's friend, to transport decedent from a private, off-campus party to the friend's home. Indeed, he was precluded by the LAUSD Code of Conduct from transporting or being in the company of students off campus without prior school authorization. Therefore, as a matter of law, LAUSD is not vicariously liable for Molina's conduct. (Gov. Code, § 815.2, subd. (a).)

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[5] Plaintiffs correctly observe that the trial court found triable issues about the Education Code section 44808 immunity barred summary judgment on that ground. However, the existence of factual disputes on this alternative ground cannot defeat summary judgment here because LAUSD has negated an essential element of plaintiffs' claim that LAUSD was vicariously liable for another reason, namely that Molina was not an employee of LAUSD. (*Shively v. Dye Creek Cattle Co.* (1994) 29 Cal.App.4th 1620, 1627 ["summary judgment may be appropriate even if there are disputed factual issues; if the defendant's showing negates an essential element of the plaintiff's case, no amount of factual conflict upon other aspects of the case will preclude summary judgment"].)

II. Continuance

A. *The denial of plaintiffs' request to continue the summary judgment hearing was not an abuse of the trial court's discretion.*

At the scheduled oral argument on LAUSD's summary judgment motion, plaintiffs' attorney requested a continuance under Code of Civil Procedure section 437c, subdivision (h) on the ground that LAUSD had never produced a copy of the sole check the school district wrote to Molina, despite subpoenas and requests for production. Nor had LAUSD produced PHS's Principal's file on Molina. Plaintiffs' counsel Donald A. Hilland acknowledged that he never filed a motion to compel production of this evidence because, he explained, he only "came into this case" to replace Attorney Paul Ottosi who was paralyzed. The trial court effectively denied the continuance request. On appeal, plaintiffs argue that the trial court erred in denying their "emergency continuance" request because they made the requisite showing under subdivision (h) of Code of Civil Procedure section 437c.

Code of Civil Procedure section 437c, subdivision (h) provides: "If it appears from the *affidavits submitted in opposition to a motion for summary judgment* or summary adjudication, or both, that facts *essential* to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due." (Italics added.)

This statute "mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit

is submitted or when the submitted affidavit fails to make the necessary showing under section 437c, subdivision (h). [Citations.] Thus, *in the absence of an affidavit that requires a continuance under section 437c, subdivision (h)*, we review the trial court's denial of [plaintiffs'] request for a continuance for abuse of discretion. [Citation.]" (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254, italics added.)

Plaintiffs did not make the requisite showing to justify a continuance. Plaintiffs did not submit an affidavit, let alone one in a timely manner. (Code Civ. Proc., § 437c, subd. (h).) Nor did they explain how there was, in plaintiffs' words, an "emergency," despite Attorney Ottosi's paralysis. Attorney Hilland was actively involved in this case on plaintiffs' behalf for six months before the October 2015 hearing on the summary judgment motion. Hilland filed the March 2015 opposition to LAUSD's motion to quash Molina's second deposition. Hilland authored plaintiffs' opposition to LAUSD's summary judgment motion and submitted his own declaration authenticating the evidence and stating he had attended Molina's second deposition in July 2015. Nonetheless, during this six-month period, although he repeatedly requested the unproduced evidence from LAUSD, Hilland never sought to compel production of that evidence. Finally, plaintiffs have not demonstrated that the facts they sought in the continuance were "essential to justify opposition." (§ 437c, subd. (h).) Plaintiffs acknowledge that Molina received only *one* check from LAUSD, and it was not during the 2011-2012 academic year. They have not explained what was in the Principal's file on Molina. Stated otherwise, even had LAUSD or Molina produced that evidence, it would not have disputed that Molina was not an employee of the school district. The court did not abuse its discretion in denying the continuance request.

DISPOSITION

The judgment is affirmed. Respondent to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

WE CONCUR:

EDMON, P. J.

EGERTON, J.

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