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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

MARIA AYALA et al., Plaintiffs and Appellants, v. ANTELOPE VALLEY NEWSPAPERS, INC., Defendant and Respondent.	B235484 (Los Angeles County Super. Ct. No. BC403405)

APPEAL from an order of the Superior Court for Los Angeles County, Carl J. West, Judge. Reversed in part and affirmed in part.

Callahan & Blaine, Daniel J. Callahan, Jill A. Thomas, Michael J. Sachs, Kathleen L. Dunham and Scott D. Nelson for Plaintiffs and Appellants.

Perkins Coie, William C. Rava and Sue J. Scott for Defendant and Respondent.

Plaintiffs Maria Ayala, Rosa Duran, and Osman Nuñez appeal from an order denying their motion for class certification. Plaintiffs sought to certify a class of newspaper home delivery carriers in a lawsuit against defendant Antelope Valley Newspapers, Inc. (AVP), alleging that AVP improperly classified the carriers as independent contractors rather than employees and violated California labor laws. The trial court found there were numerous variations in how the carriers performed their jobs, and therefore common issues did not predominate. We conclude, however, that those variations do not present individual issues that preclude class certification. Instead, because all of the carriers perform the same job under virtually identical contracts, those variations simply constitute common evidence that tends to show AVP's lack of control over certain aspects of the carriers' work. Similarly, the so-called "secondary factors" that must be considered when determining the primary issue in this case -- whether AVP improperly classified the carriers as independent contractors rather than employees -- also may be established for the most part through common proof, since almost all of those factors relate to the type of work involved, which is common to the class. Therefore, we hold the trial court erred in finding that the independent contractor-employee issue is not amenable to class treatment.

Our holding that the independent contractor-employee issue may be determined on a class wide basis through common proof does not entirely resolve the class certification question as to all of the causes of action plaintiffs allege. The trial court also found that plaintiffs' claims of overtime and meal/rest period violations (Lab. Code, §§ 1194, 226.7, 512) were not amenable to class treatment because of wide variation in the amount of time each carrier spent performing the required work, and their varied use of helpers or substitutes. Therefore, the trial court found that individual inquiries would have to be made to determine AVP's liability as to each carrier (assuming, of course, the carriers were found to be

employees). We agree, and affirm the trial court's denial of class certification as to the first, second, and third causes of action. We reverse the order denying certification as to the remaining causes of action because the court's denial as to those claims was based solely upon its determination that the independent contractor-employee issue is not suitable for class treatment. Unless the trial court determines, on remand, that the remaining causes of action present predominately individual issues as to liability (as opposed to damages), the court shall certify the class for the fourth through eighth causes of action.

BACKGROUND

Plaintiffs, who are (or were) newspaper carriers for AVP, filed a lawsuit on behalf of themselves and a putative class of carriers who signed an "Independent Contractor Distribution Agreement" with AVP, alleging claims for (1) failure to pay overtime wages (Lab. Code, § 1194); (2) failure to provide meal periods or compensation in lieu thereof (Lab. Code, §§ 226.7, 512); (3) failure to provide rest periods or compensation in lieu thereof (Lab. Code, § 226.7); (4) failure to reimburse for reasonable business expenses (Lab. Code, § 2802); (5) unlawful deductions from wages (Lab. Code, §§ 221, 223); (6) failure to provide itemized wage statements (Lab. Code, §§ 226, 226.3); (7) failure to keep accurate payroll records (Lab. Code, § 1174); and (8) violation of Business and Professions Code section 17200 (based upon the alleged violations of the Labor Code).

The complaint alleges that AVP publishes the Antelope Valley Press, a general circulation newspaper that is distributed under the auspices of AVP. Most of AVP's customers receive home delivery of the newspaper on a daily basis. The members of the putative class are engaged by AVP to assemble inserts, sections, pre-prints, samples, bags, and supplements and deliver the newspapers as directed by AVP to AVP's customers. The complaint alleges that, even though class

members signed agreements that categorize them as independent contractors, AVP maintains the right to control the performance of their work, and therefore their relationship with AVP is that of employees rather than independent contractors. Thus, the complaint alleges, AVP violated various provisions of California labor laws by failing to pay overtime wages, failing to provide meal and/or rest breaks, failing to reimburse carriers for their reasonable business expenses (such as automobile expenses), making illegal deductions from their wages (for customer complaints or supplies, or by requiring carriers to pay the cost of workers' compensation insurance), failing to provide itemized wage statements, and failing to keep accurate payroll records showing the hours worked by the carriers.

Plaintiffs moved to certify the class. They argued that "[t]he central issue to liability is whether or not the putative class members . . . are 'independent contractors' or 'employees,'" and that this issue can be decided based upon common proof. Noting that the principal test to determine whether a worker is an employee or an independent contractor is whether the principal has the right to control the manner and means by which the worker accomplishes the work, plaintiffs contended they could establish this right to control through the standardized distribution agreements AVP uses, as well as other common evidence.

AVP opposed the motion to certify. Although AVP agreed that the independent contractor/employee issue was a threshold issue and that the primary factor in determining that issue is whether the principal has the right to control the manner and means of accomplishing the work, it argued that determination of that issue was not subject to common proof because the manner and means by which the carriers accomplish their work varies widely. AVP also argued that, even if the independent contractor/employee issue could be determined through common proof, plaintiffs failed to address whether common issues predominate as to each

of the causes of action; it contended that the other elements of those claims require individual proof and therefore class treatment was not appropriate.

In a lengthy and detailed ruling, the trial court denied the motion for certification, finding that "heavily individualized inquiries are required to conduct the 'control test'" to determine whether the carriers are independent contractors or employees, and that the overtime and meal/rest break claims require individualized inquiries due to the wide variation in hours and days worked by the carriers. Plaintiffs timely filed a notice of appeal from the order denying class certification.

DISCUSSION

A. *Standard of Review of a Class Certification Order*

Code of Civil Procedure section 382 authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Code Civ. Proc., § 382.) "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."' [Citations.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

The only element of class certification at issue in this appeal is that of predominance. "The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the

maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.]" (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) "To assess predominance, a court 'must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.' [Citation.] It must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." (*Id.* at p. 1024.)

Whether the claims plaintiffs seek to assert as a class action have merit is not ordinarily a concern at the class certification stage. (*Brinker*, *supra*, 53 Cal.4th at p. 1023 ["'The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious"'"].) The class action mechanism is simply a tool to resolve the asserted claims for all parties, including absent class members, in a single action. Thus, a class may be certified even if it is likely that the defendant will prevail on the merits. Certification in such a case would allow the defendant to obtain a judgment in its favor that would be binding on all members of the class (except those who elect to opt out of the class in a timely fashion). (See *id.* at p. 1034 ["It is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, and thus permit defendants who prevail on those merits, equally with those who lose on the merits, to obtain the preclusive benefits of such victories against an entire class and not just a named plaintiff"].)

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: '. . . A certification order

generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions.'" (*Brinker*, *supra*, 53 Cal.4th at p. 1022.)

B. *Law Governing the Independent Contractor/Employee Distinction*

All of plaintiffs' claims are based upon their allegation that AVP misclassified the carriers as independent contractors when they are, in fact, employees. In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), the Supreme Court discussed the test courts have used to determine independent contractor or employee status. The Court explained: "Following common law tradition, California decisions . . . uniformly declare that '[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. . . .' [Citations.] [¶] However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*Id.* at p. 350.) Those secondary indicia include the right to discharge at will, without cause, as well as other factors "derived principally from the Restatement Second of Agency." (*Id.* at pp. 350-351.) Those factors include: "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e)

the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Id.* at p. 351.)

In addition to the Restatement factors, the Supreme Court noted with approval a six-factor test developed by other jurisdictions. In that test, "[b]esides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business." (*Borello, supra*, 48 Cal.3d at pp. 354-355.) The Court cautioned that the individual factors – from the Restatement as well as the six-factor test – "'cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.'" (*Id.* at p. 351.)

C. *Evidence and Argument Related to Independent Contractor/Employee Issue*

In moving for class certification, plaintiffs argued that common proof of AVP's right to control the carriers' work can be found in the standard form agreements AVP requires all carriers to sign, as well as other AVP documents and testimony by AVP managers and plaintiffs' declarations. In opposition, AVP argued that, although it does specify in detail the results it demands of the carriers – the timely delivery of its newspapers in a dry, readable condition -- it does not have a right to and does not control the means and manner of accomplishing that delivery. It contended that many of the facts that plaintiffs pointed to as evidence of control were irrelevant to show control over the means and manner by which the

carriers accomplish the desired result, but it argued that, in any event, there were so many variations in the way in which the carriers did their work that the issue of control is not amenable to class treatment.[1]

1. *Form Agreements as Evidence of Right to Control*

In relying upon the form agreements -- the "Independent Contractor Distribution Agreement," which AVP stipulated were the standard contracts it used during the class period -- as common evidence of AVP's purported right to control, plaintiffs argued that only a "handful of terms" are not pre-printed, and even with respect to those terms, there is no "real negotiation."[2]

The agreements set forth the requirements for what is to be delivered. They require the carriers to deliver the newspapers (and other products that AVP provides),[3] in a safe and dry condition. They prohibit the carriers from delivering any part of the newspaper (such as advertising inserts or coupons) separately, or from inserting into, attaching to, or stamping upon the newspaper any additional matter. They also prohibit the carriers from inserting the newspapers into any imprinted wrapping, covering, or container that has not been approved by AVP, and require carriers to use certain types or colors of bags for certain products.

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[1] We note that AVP does not concede that *any* of the carriers are employees, and instead maintains they are all independent contractors.

[2] Plaintiffs did acknowledge, however, that three or four carriers did negotiate at least one of the terms, and obtained different piece rates than other carriers obtained.

[3] In addition to the daily newspaper AVP publishes, the agreements require carriers to deliver a weekly publication, the Antelope Valley Express. AVP also requires carriers to include certain items, such as advertising inserts or coupons, with the newspapers they deliver.

The agreements also set forth requirements related to when the newspapers are to be delivered. Some of them require the carrier to pick up their newspapers by a certain deadline each day, and all of them require the carrier to complete delivery by a certain time.

Under the agreements, the carrier is required to furnish the carrier's own vehicle and provide AVP with copies of the carrier's driver's license, social security number, and proof of automobile and workers' compensation insurance. The agreements also state that the carrier has no right, title, interest, or property right to subscriber information, may not disclose to third parties the subscriber list or route records, and must return all records to AVP upon termination of the contract. In addition, the carrier must give AVP an accurate updated subscriber delivery list when requested by AVP, and must cooperate with auditors for the Verified Audit of Circulations or the Audit Bureau of Circulation when requested.

According to plaintiffs, all of these terms evidence AVP's right to control. In its opposition to plaintiffs' motion, AVP did not dispute the existence of the terms (although it did dispute plaintiffs' assertion that there was no real negotiation), but instead argued that the terms are irrelevant to determining whether AVP has the right to control the manner and means of accomplishing the desired result. It contended that the terms setting forth the requirements of what is to be delivered and when it is to be delivered merely define the results for which AVP is contracting, and the remaining terms have no connection to how the delivery is to be accomplished. Moreover, AVP argued that, since the form agreements expressly disclaim any right to control the means and manner in which the carriers accomplish the result (i.e., timely delivery of newspapers in a dry, readable condition), the factfinder will have to look beyond the agreements, at the actual conduct of delivery operations, to determine AVP's control. To that end,

AVP submitted the declarations of 15 carriers[4] and its home delivery manager, as well as deposition testimony from plaintiffs and AVP's circulation operations manager, to show the variations among the carriers in the manner in which they do their work, and argued that because of these variations there is no commonality on the right to control issue.

2. *Other Documents Related to Right to Control*

In addition to relying upon the form agreements to establish AVP's alleged control, plaintiffs pointed to documents known as "bundle tops" or "carrier mail," which typically are prepared by AVP and provided to all carriers each day.[5] The bundle tops inform the carrier about customers' requests regarding the placement of their papers and whether to start or stop delivery to certain customers, and provide instructions about inserts to the newspaper and/or use of colored bags on that day. Similarly, plaintiffs contended that route lists that AVP provides to all carriers show the control AVP exercises, because the lists contain instructions about customer preferences or requests regarding how the newspapers are delivered.[6] Plaintiffs also asserted that "suggestion sheets" and "success sheets" that AVP provides to some (although not all) carriers constitute evidence of AVP's

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[4] Although AVP collected declarations from more than 50 of its current and former carriers, the trial court limited its submission to 15 carrier declarations.

[5] Plaintiffs submitted several examples of bundle tops, which AVP stipulated were representative of the bundle tops it provided to carriers on a daily basis.

[6] Plaintiffs submitted examples of route lists, which AVP stipulated were representative of route lists it provided to all carriers.

right to control because they give step-by-step instructions about how to complete their jobs.[7]

Although AVP conceded that the bundle tops and route lists it provides to all the carriers include delivery instructions that include directions on how to drive to subscribers' addresses, it submitted testimony from carriers (including plaintiffs) that they are not required to, and many do not, follow those directions. Acknowledging that one of the named plaintiffs testified that she was required to comply with special customer requests, AVP noted that she was the only carrier who so testified, and it submitted testimony from other carriers that there was no such requirement.

3. *Evidence of Conduct Related to Right to Control*

In addition to documentary evidence, plaintiffs pointed to evidence of AVP's conduct to show AVP's control over the carriers.

First, they argued that AVP controls the carriers' performance through its use of customer complaints. Noting that the form agreements allow AVP to impose financial penalties for customer complaints (such as wet, damaged, or missing papers), plaintiffs submitted their declarations attesting to the fact that AVP made deductions from their pay for customer complaints. They also submitted invoices (which AVP stipulated were representative of invoices they provided to all carriers) that reflect those deductions. In addition, they submitted evidence showing that AVP keeps track of customer complaints against each

[7] Plaintiffs submitted examples of suggestion sheets and success sheets that AVP stipulated were representative of such sheets that it provided to some, although not all, carriers. We note that all three sheets in the record are virtually identical, all three state at the top "This is your business," and two out of the three also state "The following are merely suggestions."

carrier, informs the carriers of complaints from their customers, and that AVP's home delivery manager would talk to a carrier if he believed the number of complaints the carrier received was too high.

In its opposition, AVP noted that the way customer complaints are treated can weigh in favor of or against a finding of independent contractor status, and argued that commonality is lacking because, although the form agreements provide for a charge against the carrier for customer complaints (which would tend to indicate an independent contractor relationship), the practices have varied among carriers and over time. It presented evidence that some carriers have not always been charged for customer complaints while others have always been charged, that some carriers have negotiated with subscribers regarding their complaints (which would indicate an independent contractor relationship), and that under one of the two form agreements carriers have the option to re-deliver newspapers to resolve customer complaints (which also would indicate an independent contractor relationship).

Second, plaintiffs argued that AVP's monitoring of carriers' work evidenced its control. They submitted evidence that AVP conducts routine field inspections to verify deliveries of complementary newspapers and the weekly newspaper (the Antelope Valley Express), and occasionally conducts field inspections to see if advertisements were properly placed on newspapers that had been delivered. AVP did not dispute that it conducts field inspections. Instead, it contended that monitoring to ensure the desired result is being accomplished does not evidence control over the manner and means of delivery, but that if it does, it is not subject to common proof because the frequency and circumstances of inspections vary from carrier to carrier.

Third, plaintiffs submitted evidence that AVP provides training to some of the carriers, which it contends shows its control. AVP argued that this issue was

not subject to common proof, based upon evidence it provided showing that some carriers had a drive-along with AVP and some did not, and some carriers received training and/or documents on how to make deliveries while others did not. AVP provided evidence, however, that carriers were not required to follow any instructions that were given. Moreover, although two of the named plaintiffs testified that they were instructed on how to fold the newspapers and were required to fold them as instructed, AVP's home delivery manager testified that AVP does not require carriers to fold or throw the newspapers in any particular way.

Finally, plaintiffs argued that AVP's control is demonstrated by evidence that it requires carriers to pick up their newspapers for delivery by a certain deadline, and controls the order in which carriers pick up their newspapers by giving carriers numbers in the order of their arrival at the loading dock. AVP disputed plaintiffs' assertion that its specification is evidence of a right to control, but submitted evidence to show that, even if it could show control, not every carrier signed contracts that included a deadline and some carriers testified that they were free to decide when to pick up their newspapers and/or were not fined or disciplined if they picked them up after the stated deadline. In addition, some of the carriers testified that they could choose whether to arrive early to pick up their newspapers and receive a pick-up number, and that even if they did choose to do so, they were free to leave the area after receiving their pick-up numbers and could do whatever they wish while waiting for their number to be called.

In addition to addressing the evidence that plaintiffs asserted demonstrated AVP's control, AVP presented additional evidence that it contended was relevant to the control issue, but required individual inquiries. For example, AVP submitted evidence showing that carriers are allowed to use helpers or substitutes, that some of them do use helpers or substitutes, and that those carriers decide, in their sole discretion, whom they use, when and how they use them, and what they

pay them. It also contended that to the extent frequency of contact between carriers and AVP employees may evidence control, individual inquiries would be required because the evidence it presented showed that the frequency varied among carriers. It submitted evidence, however, that carriers were not required to check in with AVP or report on their delivery status or to attend meetings.

4. *Evidence Related to Secondary Factors*

Addressing the secondary factors used to determine independent contractor or employee status, plaintiffs contended that many of those factors are subject to common proof.

They submitted evidence that carriers get supplies such as rubber bands and plastic bags from AVP, as well as the newspapers and advertisements the carriers deliver. They also submitted evidence that carriers use AVP's facilities to pick up materials needed for their work, that AVP provides carts that carriers can use to carry the newspapers to their vehicles, and that AVP will, if requested, provide maps of the carriers' routes. They argued that this evidence shows that AVP supplies the instrumentalities, tools, and the place of work for the person doing the work.

Plaintiffs provided evidence that AVP controls the overall newspaper business operations, that delivery of the newspapers is an integral part of its business, and that it holds itself out to the public as the entity responsible for delivery of the newspapers. They also pointed to provisions of the common agreements to show that AVP has the right to terminate carriers at will (on 30 days notice), and that carriers are engaged in prolonged service to AVP. Finally, plaintiffs argued that the carriers' work did not require any specialized skill, relying upon a finding in a case, *Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839 (*Poizner*), in which Division Three of this District affirmed a

decision of an administrative law judge that carriers are employees for purposes of worker's compensation insurance.

In its opposition, AVP argued there was no commonality with regard to several of the factors, based upon evidence it submitted showing that: (1) some carriers delivered other publications (such as the Los Angeles Daily News or the Los Angeles Times) at the same time they delivered for AVP; (2) some carriers have set up formal business entities to conduct their delivery business, or consider their delivery work to be an independent business; (3) some carriers provide their contact information to subscribers and/or deal directly with subscribers regarding complaints or special requests; (4) some carriers have other jobs in addition to their delivery work; (5) some carriers choose to use AVP's facilities to assemble and fold their newspapers while others do not; (6) some carriers purchase supplies from AVP but others choose not to; (7) some carriers take advantage of opportunities to increase their compensation by generating new subscribers, taking on additional routes, using substitutes or helpers efficiently, or avoiding customer complaint charges by re-delivering; (8) some carriers delivered for as little as one day while others delivered for many years; and (9) many contractors, unlike the named plaintiffs, understood they were independent contractors and intended to be independent contractors.

5. *Evidence Related to Other Elements of Plaintiffs' Claims*

Plaintiffs in their moving papers did not address commonality with respect to any issue other than the independent contractor/employee issue, except to argue that once employee status is determined, individual damages may be determined through "efficient and easily managed procedures."

In its opposition, AVP noted that plaintiffs failed to address other elements of their causes of action, and argued that common issues do not predominate as to

some of those elements. It contended that plaintiffs' overtime and meal/rest period claims are not suitable for class treatment, based upon evidence it presented showing that the number of hours and days each carrier worked varied widely. Thus, it argued that individual inquiry would be required to determine if each carrier worked sufficient hours to be entitled to meal or rest breaks or overtime pay. Because this issue goes to AVP's liability in the first instance (i.e., whether there were damages at all) rather than the amount of damages, AVP contended class certification was not appropriate for those causes of action. In addition, AVP contended that plaintiffs' reimbursement claim was not suitable for class treatment because reimbursement is required (assuming employee status) only for expenses that are necessarily incurred, and individual inquiries must be made to determine whether each expenditure was "necessary."[8]

D. *Analysis of the Independent Contractor/Employee Issue*

In denying class certification, the trial court agreed with AVP that no commonality exists regarding AVP's right to control because individualized questions predominate as to who performs the services, when and where they perform the services, and how they perform the services. Many of the court's observations (and AVP's arguments), however, actually point to conflicts in the evidence regarding AVP's right to control rather than individualized questions. For example, the court noted that AVP's home delivery manager declared that AVP does not have a policy or practice to instruct or direct carriers on how to fold

[8] At the hearing on the certification motion, counsel for plaintiffs argued that at the very least class members would be entitled to expenses related to the use of their vehicles, which counsel represented constituted 80 percent of the damages related to the reimbursement claim, and which could be computed based upon maps of the routes and rates set under the Internal Revenue Service mileage formula.

and deliver their papers, and some carriers testified that they were never so instructed, but two of the plaintiffs testified that AVP had rules on folding the papers and how to deliver them. Similarly, the court noted that the home delivery manager and some carriers testified that AVP does not require carriers to bag or rubber band the newspapers, but one of the plaintiffs testified that carriers were required to bag them.

Simply put, much of AVP's evidence, upon which the trial court relied, merely contradicts plaintiffs' allegations that AVP had policies or requirements about how carriers must do their jobs. The parties do not argue that some carriers operating under the form agreements are employees while others are not. Both sides argue that AVP has policies that apply to *all* carriers. The difference between the parties is the content of those policies. Plaintiffs argue that the policies are ones that control the way in which the carriers accomplish their work; AVP argues the policies impose certain requirements about the result of the work but allow the carriers to determine manner and means used to accomplish that result. While there may be conflicts in the evidence regarding whether the policies plaintiffs assert exist, the issue itself is common to the class. Similarly, whether the policies that exist are ones that merely control the result, rather than control the manner and means used to accomplish that result, is an issue that is common to the class.[9]

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[9] Both sides cite to published cases involving newspaper carriers or persons engaged in similar work in which classes were or were not certified. (See, e.g., *Soleto v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639; *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286; *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333; *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72; *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1; *Dalton v. Lee Publications, Inc.* (S.D.Cal. 2010) 270 F.R.D. 555.) Those cases, each of which involve facts and positions unique to the parties, are not of much assistance in this case.

Just as AVP's evidence that the way that the carriers accomplished their work varied widely is evidence of its lack of control over the carriers as a class, much of its evidence regarding the secondary factors -- e.g., that some carriers choose to operate as independent businesses, delivering papers for multiple publishers, that other carriers work at other jobs in addition to delivering for AVP, that some carriers choose to deal directly with subscribers, that some carriers choose to take advantage of opportunities to increase their compensation, and that some carriers choose not to use AVP's facilities to assemble their newspapers or choose not to purchase supplies from AVP -- is evidence that the type of work involved often is done by independent contractors. To be sure, some carriers choose *not* to deliver for multiple publishers, or work at other jobs, or deal directly with subscribers, or take advantage of opportunities to increase their compensation, or they choose to assemble the newspapers at AVP's facilities or to purchase supplies from AVP. But a carrier's employee status cannot be based upon the individual choices the carrier makes, if other choices are available. Rather, the focus of the secondary factors is mostly on the job itself, and whether it involves the kind of work that may be done by an independent contractor, or generally is done by an employee. All of the factors may be determined based upon common proof.

Before we leave this issue, we need to address the *Poizner* case, upon which plaintiffs heavily rely. In their reply brief on appeal, plaintiffs criticize the trial court for failing to address this case, arguing that all of the facts that led the court in *Poizner* to conclude that the carriers were employees are present in this case. *Poizner*, however, was not a class action. It was a review of a decision by the Insurance Commissioner, adopting the proposed decision of an administrative law judge, who concluded that AVP's carriers were employees for purposes of worker's compensation insurance. (*Poizner*, *supra*, 162 Cal.App.4th at p. 842.)

While it *might* be relevant to the merits of plaintiffs' case,[10] the decision has little relevance to whether, on the record before the trial court, plaintiffs' causes of action were amenable to class treatment.

E. *Plaintiffs' Causes of Action*

As noted, plaintiffs did not in their moving papers address commonality as to any issues related to their causes of action other than the independent contractor/employee issue applicable to all of their claims. AVP, on the other hand, submitted evidence showing that the number of hours and days each carrier worked varied significantly, with some of the carriers working fewer than four hours a day and/or seven days a week. The trial court found, based upon this evidence, that individual assessments would have to be made as to each carrier to determine whether, assuming they are found to be employees, they were entitled to meal or rest breaks or overtime pay. Therefore, the court found that those claims are not amenable to class treatment. We agree.

As the Supreme Court has instructed, in assessing whether common or individual issues predominate, the trial court "must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may

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[10] Because the case involved an administrative mandamus proceeding, review by the trial and appellate courts of the Commissioner's decision was under the substantial evidence test. (*Poizner*, *supra*, 162 Cal.App.4th at pp. 849-850.) Under that test, "courts do not reweigh the evidence. They determine whether there is any evidence (or any reasonable inferences which can be deduced from the evidence), whether contradicted or uncontradicted, which, when viewed in the light most favorable to an administrative order or decision or a court's judgment, will support the administrative or judicial findings of fact." (*Id.* at p. 849, fn. 11.) In contrast, in this case, the trial court is not presented with an administrative decision that it must affirm if supported by substantial evidence. It must decide the issues in the first instance, based upon the record before it.

require individualized evidence." (*Brinker*, *supra*, 53 Cal.4th at p. 1024.) To establish liability for failure to provide meal or rest breaks or overtime pay, plaintiffs must establish that they worked sufficient hours or days to be entitled to such breaks or pay. (See, e.g., Cal. Code Regs., tit. 8, §§ 11010(11)(A) ["No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes"], 11010(12) ["a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours"]; 11010(3)(A)(1) [overtime pay required for "[e]mployment beyond eight (8) hours in any workday or more than six (6) days in any workweek"].) In light of AVP's evidence, it is clear that plaintiffs cannot establish that element of its meal/rest period and overtime claims through common proof.[11] Nor did plaintiffs show how proof of that element could be effectively managed to make class treatment superior to individual actions. Therefore, we conclude the trial court did not abuse its discretion by denying plaintiffs' motion to certify with respect to those claims.

With respect to the remaining claims, the trial court denied certification based solely upon its determination that the independent contractor/employee issue was not amendable to class treatment. In light of our conclusion that the trial court erred in that determination, we must reverse the court's order as to those claims. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 [order denying class certification must be reversed if based upon improper criteria or incorrect legal assumptions even if there may be substantial evidence to support the court's

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[11] This is not, as plaintiffs argue, a question of individual determinations of damages. While plaintiffs are correct that the need for individual determinations of damages does not preclude class certification (see, e.g., *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 332-333), the issue here is the need for individual determination of each carrier's *entitlement* to damages, which is a proper ground for denying class certification (see, e.g., *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 756).

order]; *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 829 ["In other words, we review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial"].)

DISPOSITION

The order denying class certification is affirmed as to the first, second, and third causes of action, and reversed as to the remaining claims. On remand, the trial court shall certify the class as to the fourth through eighth causes of action unless it determines that individual issues predominate as to some or all of them, or that class treatment is not appropriate for other reasons. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.