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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

JUSTIN MORGENTHALER et al., Plaintiffs and Appellants, v. PACIFIC WORLD CORPORATION et al., Defendants and Respondents.	B321975 (Los Angeles County Super. Ct. No. BC685348)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed.

McCune Law Group, David C. Wright, Steven A. Haskins, Andrew W. Van Ligten; Taxman, Pollock, Murray & Bekkerman, Marc Taxman, Gerald Bekkerman; The Komyatte Law Firm, Paul Komyatte and David Mason for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Tracy D. Forbath, Daniel R. Velladao, Jeffrey B. Stoltz and Shawn A. Toliver for Defendant and Respondent Pacific World Corporation.

Horvitz & Levy, Dean A. Bochner, Christopher D. Hu, Lisa Perrochet; Harrington, Foxx, Dubrow & Canter and Michael E. Jenkins for Defendant and Respondent Zircon Corporation.

Plaintiffs and appellants Justin Morgenthaler, Sarah Morgenthaler, and Sawyer Morgenthaler[1] appeal from the judgment entered after the trial court granted the motions for summary judgment filed by defendants and respondents Pacific World Corporation (PWC) and Zircon Corporation (Zircon).

We affirm.

BACKGROUND

I. *Facts*

A. The accident

On May 25, 2017, a tractor-trailer combination owned by Turbo Express, Inc. (Turbo), or one of its entities,[2] and driven by Turbo employee Juan Antonio Haromartinez (Haromartinez), rear-ended a vehicle occupied by plaintiffs. Justin suffered a

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[1] Because they share the same last name, for clarity we refer to Justin, Sarah, and Sawyer, individually, by their first names. No disrespect is intended. We refer to them, collectively, as plaintiffs.

[2] The parties agree that, for the purpose of this appeal, distinctions between Turbo and its related entities are immaterial.

catastrophic spinal cord injury, rendering him quadriplegic. Justin's wife, Sarah, and son, Sawyer, were physically uninjured.

At the time of the accident, Turbo's tractor-trailer was transporting PWC's freight and was on the way to pick up Zircon's freight.

B. Turbo's relationships with PWC and Zircon

PWC distributes beauty tools and nail care cosmetics. Zircon designs and manufactures tools such as stud finders, metal detectors, and electrical scanners. Turbo is a motor carrier registered with the United States Department of Transportation (USDOT) that, at the time of the accident, had been in business for nearly 30 years. Turbo carried a $1 million commercial auto insurance policy for each of its trucks.

When the accident occurred in May 2017, PWC and Zircon had been hiring Turbo to transport freight for well over a decade without incident. Neither PWC nor Zircon conducted a further investigation into Turbo's safety record, and neither was aware of any vehicular accidents involving Turbo or its drivers or that Turbo's USDOT motor carrier registration had been twice revoked.

Neither PWC nor Zircon had an ownership interest in or profit-sharing arrangement with Turbo. When Turbo transported PWC's and Zircon's freight, it did so under documents known as bills of lading. PWC and Zircon sometimes requested a specific driver or that a particular type of truck be used.

II. *Procedural history*

A. First amended complaint

Plaintiffs filed a lawsuit seeking damages arising from the accident against numerous parties, including PWC and Zircon.[3] In the operative first amended complaint, plaintiffs asserted a cause of action for negligence against PWC and Zircon, based on the theory that they negligently selected Turbo to transport their freight or, in the alternative, the theory that Turbo and Haromartinez were the agents of PWC and Zircon. Plaintiffs also asserted claims for negligent infliction of emotional distress and Sarah's loss of consortium.[4]

B. Motions for summary judgment

PWC and Zircon filed separate, but nearly identical, motions for summary judgment or, in the alternative, summary adjudication. Both argued that they could not be held liable for the negligence of an independent contractor. Plaintiffs opposed the motions.

C. Order granting summary judgment

The trial court granted the motions for summary judgment.

As to negligent selection, the trial court found, "as a matter of both law and common sense, that a hirer of a trucking company should be entitled to rely on the fact that the company is licensed, registered, and bonded to determine that it can hire

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[3] The other named defendants included Turbo and Haromartinez. None are parties to this appeal.

[4] The first amended complaint also included a cause of action for joint venture liability against PWC and Zircon, as well as a "peculiar risk[]" theory of negligence. Plaintiffs later expressly abandoned the joint venture cause of action and the peculiar risk theory. Accordingly, neither is at issue in this appeal.

the company and use it to transport goods." The court considered this to be "especially true where, as here, the hirer uses the trucking company without incident for many years."

The trial court also rejected plaintiffs' agency theory. The court reasoned: "If [p]laintiffs' theory were accepted, any company that consistently hires the same trucking company to transport its goods would be liable under an agency theory for an accident that occurred during transport." Such an outcome would "def[y] common sense . . . ."

D. Judgment; appeal

The trial court subsequently entered judgment in favor of PWC and Zircon, and plaintiffs timely appealed.[5]

DISCUSSION

I. *Summary judgment principles*

Summary judgment is properly granted where "all the papers submitted show that there is no triable issue as to any material fact and that 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 bears the burden of showing that at least one element of a cause of action "cannot be established, or that there is a complete defense to the cause of action." (*Id.*, § 437c, subd. (p)(2).) If the defendant meets this initial burden, the burden shifts to the plaintiff "to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid.*)

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[5] Pursuant to a stipulation, further proceedings in the trial court between plaintiffs and other defendants have been stayed pending resolution of this appeal.

II. *Standard of review*

We review the trial court's order granting summary judgment de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in that party's favor. (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 39.) "[W]e may affirm on any basis supported by the record and the law. [Citation.]" (*Vulk v. State Farm General Ins. Co.* (2021) 69 Cal.App.5th 243, 254.)

III. *The trial court properly granted the motions for summary judgment*

California recognizes "the common law rule that an individual who hires an independent contractor generally is not liable for injuries to others caused by the contractor's negligence in performing the hired work." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 258.) After all, "[w]hen a person or organization hires an independent contractor, the hirer presumptively delegates to the contractor the responsibility to do the work safely. [Citations.]" (*Sandoval v. Qualcomm Incorporated* (2021) 12 Cal.5th 256, 269 (*Sandoval*).)

The general rule of no hirer liability, however, is subject to robust exceptions. (See *Sandoval*, *supra*, 12 Cal.5th at p. 269 ["Lest the victim be limited to suing an insolvent contractor, courts have extended various theories of direct and vicarious liability so the injured third party can recover from the hirer"]; *Privette v. Superior Court* (1993) 5 Cal.4th 689, 693.)

Here, plaintiffs advance two theories to depart from the common law rule and subject PWC and Zircon to negligence liability: (1) PWC and Zircon negligently selected Turbo as an independent contractor; and (2) Turbo was acting as an agent of

PWC and Zircon.[6] We reject both theories as a matter of law and conclude that the trial court properly granted summary judgment.[7]

A. Negligent selection

1. *Relevant law*

A defendant "'who negligently fails to employ a competent and careful *contractor* may be liable for injuries caused by the contractor's failure to exercise due care.' [Citation.]" (*McKenna v. Beesley* (2021) 67 Cal.App.5th 552, 566, fn. 16.) Known as negligent selection or negligent hiring, the theory is set forth in section 411 of the Restatement Second of Torts.[8] (*Hooker v.*

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[6] Plaintiffs' briefs make no arguments pertaining, specifically, to their causes of action for loss of consortium and negligent infliction of emotional distress. Because these causes of action are derivative of the negligence cause of action (see *Hacala v. Bird Rides, Inc.* (2023) 90 Cal.App.5th 292, 310, fn. 4), they necessarily fail for the same reasons.

[7] Plaintiffs have forfeited their contention that the trial court erred by failing to sustain their objections to the declarations of Ronald Bourque (Zircon's president, chief operating officer, and chief financial officer) and James Gilstrap (PWC's general manager). The opening brief does not identify where in the record these purported objections appear. (See *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1406 ["The court is not required to make an independent search of the record and may disregard any claims when no reference is furnished"].) Moreover, plaintiffs concede that they did not file separate evidentiary objections to the declarations in the trial court, as required by California Rules of Court, rule 3.1354(b).

[8] All further section references are to the Restatement Second of Torts unless otherwise indicated.

Department of Transportation (2002) 27 Cal.4th 198, 201 (*Hooker*); see also *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1241; *Skelton v. Fekete* (1953) 120 Cal.App.2d 401, 415 [referring to the text of section 411 as "well settled"].)

"Under section 411, a hirer is liable for physical harm to third persons caused by the hirer's failure to exercise reasonable care to employ a competent contractor to perform work which will involve a risk of physical harm unless it is skillfully and carefully done, or to perform any duty which the hirer owes to third persons." (*Hooker*, *supra*, 27 Cal.4th at p. 201.)

The comments to section 411 provide that, in determining the amount of care to be exercised in selecting an independent contractor, "[c]ertain factors are important: (1) the danger to which others will be exposed if the contractor's work is not properly done; (2) the character of the work to be done—whether the work lies within the competence of the average man or is work which can be properly done only by persons possessing special skill and training; and (3) the existence of a relation between the parties which imposes upon the one a peculiar duty of protecting the other." (§ 411, com. c.)

The comments further explain that a hirer "is entitled to assume that a carpenter or plumber of good reputation is competent to do" carpentry or plumbing "safely"; the hirer has "no duty to make an elaborate investigation as to the competence of the carpenter or plumber" and "no duty to take any great pains to ascertain whether his reputation is or is not good." (§ 411, com. c.) This is because "[t]he fact that he is a carpenter or plumber *is sufficient*, unless the employer knows that the contractor's reputation is bad or knows of facts which should lead him to realize that the contractor is not competent. On the other

hand, if the work is such as will be highly dangerous unless properly done and is of a sort which requires peculiar competence and skill for its successful accomplishment, one who employs a contractor to do such work may well be required to go to considerable pains to investigate the reputation of the contractor . . . ." (*Ibid.*, italics added.)

2. *Analysis*

Assuming that transporting freight "involve[s] a risk of physical harm unless it is skillfully and carefully done," PWC and Zircon owed a duty to third parties "to exercise reasonable care to employ a competent and careful contractor" to perform that task. (§ 411.) In satisfaction of this duty, PWC and Zircon hired Turbo, an independent motor carrier with almost 30 years of experience that was properly registered with the USDOT. Turbo carried $1,000,000 in liability insurance per truck—significantly more than the amount required by statute. (See Veh. Code, § 34631.5, subd. (a)(1) [requiring motor carriers of property to have a minimum $750,000 in liability insurance].) And, at the time of the accident, PWC and Zircon had been contracting with Turbo for many years without incident.

Thus, plaintiffs' negligent selection theory is dependent upon PWC and Zircon having a duty to conduct *additional* investigations into Turbo's safety record *for other customers* despite having no reason to believe that Turbo was an incompetent carrier. As a matter of law, no such duty existed. (See *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477 ["The existence and scope of duty are legal questions for the court"].) Summary judgment was properly granted on this basis. (See *Clarke v. Hoek* (1985) 174 Cal.App.3d 208, 213–214 ["Since the existence of a duty of care is an essential element in any

assessment of liability for negligence [citations], entry of summary judgment in favor of the defendant in a negligence action is proper where the plaintiff is unable to show that the defendant owed such a duty of care"].)[9]

Resisting this conclusion, plaintiffs argue that merely hiring a licensed trucking company was not sufficient to discharge PWC's and Zircon's duty of care. While relying on licensure may be sufficient when hiring an independent contractor like a carpenter or a plumber (see § 411, com. c [a hirer has "no duty to make an elaborate investigation as to the competence of the carpenter or plumber" because "[t]he fact that he is a carpenter or plumber is sufficient"]), plaintiffs contend that "[t]he heightened dangers inherent in over-the-road trucking (as opposed to most carpentry and plumbing projects) require[] a commensurately greater duty of care and a more extensive inquiry" into a trucking contractor.

Even if we were to agree that trucking is more dangerous to third parties than carpentry or plumbing, we cannot say the work contracted for here was such that it would "be highly dangerous unless properly done *and* [wa]s of a sort which require[d] peculiar competence and skill for its successful accomplishment" such that PWC and Zircon were "required to go to considerable pains to investigate the reputation of the contractor . . . ." (§ 411, com. c, italics added.) Nothing in the record suggests that Turbo was performing anything other than a routine shipping job for PWC and Zircon.

Further, plaintiffs' assertion that PWC and Zircon did not know about troubling aspects of Turbo's safety record because

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[9] Accordingly, we need not reach the parties' arguments regarding causation.

they failed to investigate Turbo *at all* is inaccurate. Both PWC and Zircon had years of experience hiring Turbo, during which no accidents occurred and no other safety concerns came to their attention. Thus, PWC and Zircon possessed years' worth of data points regarding Turbo's safety record upon which they could base their respective decisions to continue hiring Turbo. As Zircon, joined by PWC, argues, "that experience is itself an investigation of competence." Under these circumstances, coupled with Turbo's possession of a USDOT registration and statutorily adequate liability insurance, PWC and Zircon had no duty to launch an *additional* investigation.

Finally, the various non-California cases relied upon by plaintiffs do not compel a different result. These cases are not controlling (see *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 19 ["cases from other states are not binding on us"], disapproved of on another ground by *Hoffmann v. Young* (2022) 13 Cal.5th 1257, 1270, fn. 13; *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1318 ["federal opinions . . . do not constitute binding interpretations of state law"]), and are also factually distinct. Unlike here, these cases involved the hiring of inexperienced or unpermitted contractors (*Gilley v. C.H. Robinson Worldwide, Inc.* (S.D.W.Va., Aug. 26, 2021, No. 1:18-00536) 2021 U.S. Dist. LEXIS 161786, at p. *23; *Scott v. Milosevic* (N.D. Iowa 2019) 372 F.Supp.3d 758, 768–769; *Beavers v. Victorian* (W.D. Okla. 2014) 38 F.Supp.3d 1260, 1273; *Hudgens v. Cook Industries, Inc.* (Okla. 1973) 521 P.2d 813, 814) and/or hirers who were themselves motor carriers or motor carrier brokers (*Gilley*, at pp. *3, *31; *Scott*, at p. 762; *Beavers*, at p. 1263; *Jones v. C.H. Robinson Worldwide, Inc.* (W.D. Va. 2008) 558 F.Supp.2d

630, 634; *Schramm v. Foster* (D. Md. 2004) 341 F.Supp.2d 536, 541).[10]

B. Agency

1. *Relevant law*

"[A] principal who personally engages in no misconduct may be vicariously liable for the tortious act committed by an agent within the course and scope of the agency. [Citations.]" (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 691–692.)

Independent contractorship and agency are not mutually exclusive categories; thus, an independent contractor may simultaneously be an agent. (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1184.) But an agency relationship is not presumed, and "the party asserting that an independent contractor is also an agent bears the burden of proving the existence of an agency relationship. [Citation.]" (*Olson v. La Jolla Neurological Associates* (2022) 85 Cal.App.5th 723, 738 (*Olson*).)

"The most important factor in distinguishing an agent from an independent contractor is whether the principal has a right to control the manner and means by which the work is to be performed. [Citation.] 'The right to control *the result* is inherent in both independent contractor relationships and principal-agency relationships; it is the right to control the means and

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[10] *Talbott v. Roswell Hospital Corp.* (N.M. Ct. App. 2008) 144 N.M. 753—cited in plaintiffs' reply brief—is also distinguishable. It involved the hiring of an independent contractor to perform air ambulance services (*id.* at p. 757), work requiring a far greater level of skill to perform safely than a routine trucking job.

manner in which the result is achieved that is significant in determining whether a principal-agency relationship exists.' [Citation.] If control may be exercised only as to the result of the work, and not the means by which it is accomplished, the relationship is an independent contractor relationship rather than an agency. [Citation.]" (*Olson*, *supra*, 85 Cal.App.5th at pp. 737–738.) Further, "[f]or an agency relationship to exist, the asserted principal must have a sufficient right to control the relevant aspect of the purported agent's day-to-day operations. [Citations.]" (*Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 85 (*Barenborg*).)

"When the essential facts are not in conflict and the evidence is susceptible to a single inference, the agency determination is a matter of law for the court. [Citation.]" (*Emery v. Visa Internat. Service Assn.* (2002) 95 Cal.App.4th 952, 960.)

2. *Analysis*

Plaintiffs argue that the record contains sufficient evidence that PWC and Zircon retained and exercised "extensive rights to direct and control Turbo's performance" to preclude summary judgment. We disagree.

PWC and Zircon did not have an ownership interest in or profit-sharing arrangement with Turbo. There is no evidence that they controlled Turbo's hiring, training, or safety practices, or any of its "day-to-day operations" (*Barenborg*, *supra*, 33 Cal.App.5th at p. 85). Rather, the control exercised by PWC and Zircon boils down to directing what freight to pick up, where and when to pick it up, and where and when to deliver it.[11] As

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[11] The record does not appear to support several of the purported "indicia of control" that plaintiffs identify. For

the trial court observed, "All of these are necessary whenever freight is being transported." And, all of these go to the right to control the *result* of the work and not the means and manner of it. (See *Olson*, *supra*, 85 Cal.App.5th at pp. 737–738.) That PWC and Zircon may have on occasion requested a specific driver or that a particular type of truck be used is insufficient to show that they *controlled* how Turbo conducted its shipping business.

In short, no reasonable factfinder could conclude that Turbo went beyond being an independent contractor and was the agent of PWC or Zircon.

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example, plaintiffs claim that PWC and Zircon "instructed Turbo on specific routes it should take to fulfill their deliveries, travelling south on I-110 toward San Diego." The pages of the record cited by plaintiffs contain no indication that Turbo was directed to use a specific highway. Plaintiffs also state that PWC and Zircon "retained the right to require Turbo to transport their freight in trailers rather than on open flatbeds[.]" Again, the record does not substantiate this. A Zircon witness merely testified that he did not know if he would have expected Turbo to say something if it started using open flatbeds.

Further, plaintiffs cite to their own separate statements of material facts submitted in opposition to the motions for summary judgment without citing to where the evidence supporting the purported facts can be located. This is improper because "[t]he separate statement is not itself evidence of anything. It is mere assertion." (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1024, disapproved of on another ground by *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 634, fn. 7.)

DISPOSITION

The judgment is affirmed. PWC and Zircon are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT