2d Civil No. B207468

COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BARRY A. BOWMAN,

Plaintiff and Respondent,

vs.

TOMMIE WYATT, JR., CITY OF LOS ANGELES, et al.,

Defendants and Appellants.

Appeal from the Superior Court of Los Angeles County
Superior Court Case No. BC329390 (Consolidated with PC038773)
Honorable Holly E. Kendig, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In his respondent's brief, plaintiff urges affirmance of the judgment based largely on his urging alone. Along the way, he misstates the law, relies on cases that do not support his position, disavows positions he took in the trial court, and weaves new theories of liability that he advances for the first time on appeal.

At trial, plaintiff had several different theories of liability by which to hold the City liable for the collision between Wyatt's truck and plaintiff's motorcycle. One theory required a showing that Wyatt was an employee of the City; others required a showing that he was, instead, an independent contractor. As demonstrated in the opening brief and explained further in this brief, fatal legal errors undermine all potential bases for recovery against the City, requiring that the judgment be reversed. The respondent's brief does nothing to attack these challenges head on, and unwittingly demonstrates why reversal is necessary.

LEGAL DISCUSSION

I. PLAINTIFF HAS NOT REFUTED THE CITY'S SHOWING THAT THE JURY WAS ERRONEOUSLY INSTRUCTED AND THAT THE ERRORS WERE PREJUDICIAL.

While the laboring oar on appeal belongs to the appellant, "'there is a corresponding obligation on the part of the respondent to aid the appellate court in sustaining the judgment.'" (*California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7, internal citation omitted.) In this case, plaintiff has not come close to meeting this obligation, as we will show. But what is even more telling is the way plaintiff attempts to change his theories on appeal to fit the evidence and to avoid the problems discussed in the opening brief.

A. The City Has Not Waived Any Error In The Employment Instruction By Failing To Request More Specific Or Different Instructions.

Plaintiff contends that the City has waived its challenge to the jury instruction on Wyatt's status as an employee because it "has failed to show . . . that it laid the groundwork for such challenges in the trial court. . . ." (RB 12.) Specifically, he contends it was up to the City to request a specific proper instruction and argues that the City's failure to do so essentially waives any error in the instructions. (RB 13.)

Plaintiff is mistaken. A party is entitled to "instructions on every theory of the case *advanced by him* which is supported by substantial evidence." (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 572, emphasis added.) Here, plaintiff bore the burden of establishing that Wyatt was an employee of the City for purposes of holding the City vicariously

liable for Wyatt's negligence. Alternatively, it was plaintiff's burden to establish that Wyatt was an independent contractor in order to recover under a theory of peculiar risk or dangerous condition of public property. Since plaintiff bore the burden on both issues, it was plaintiff's burden to propose correct instructions.

The cases on which plaintiff relies are inapposite. (RB 13.) In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 58, for example, the court held that the defendant's failure to request proper instructions on an affirmative defense, for which it bore the burden of proof, amounted to a waiver of the issue on appeal. We are not talking about an affirmative defense in this case.

In *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130-1131, after the jury rejected plaintiff's two theories of liability at trial, plaintiff urged a new theory of liability on appeal. The court held that plaintiff waived any error in failing to instruct the jury on this new theory by failing to bring it up in the trial court. The only one suggesting a new theory on appeal here is plaintiff, not the City.

And in *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532-1534, no one challenged the jury instructions on appeal. The problem there was that the parties did not include the jury instructions in the record on appeal, making it impossible for the court to determine if the jury had properly applied the facts to the law. Obviously, this is not the problem in this case.[1]

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[1] Similarly, plaintiff's reliance on *Merrill v. Buck* (1962) 58 Cal.2d 552, 563, and *State Rubbish Collectors Assoc. v. Siliznoff* (1952) 38 Cal.2d 330, 340, for the proposition that the City was required to submit "a more detailed instruction" is also misplaced since, in both cases, the court summarily dealt with the issue in a few sentences, with no real analysis. (*People v. Harris* (1989) 47 Cal.3d 1047, 1071 [cases do not stand for propositions not considered].)

Plaintiff contends the City had ample opportunity to suggest a proper instruction and that it failed to do so even after the trial court invited both sides to submit instructions on the issue. (RB 15, citing RT X-54-55.) This argument is misleading because it cites to a point in the record where the court asked the parties for sample instructions to be used in the event the words "independent contractor" came into evidence during trial, whether planned or inadvertently. This resulted from the court's initial ban of the phrase "independent contractor" during trial, on the dubious ground that it was an ultimate fact for the jury. (Since the jurors were never instructed on what an independent contractor was, query how they were supposed to make this ultimate determination.) The court later abandoned the ban in light of the fact that both parties felt compelled to deal with the phrase, and making the sample instructions moot. (17 RT 388-391.) This hardly constitutes a request by the court for proper instructions on whether Wyatt was an employee or an independent contractor.

B. Plaintiff Has Not Shown That The Employment Instruction Was Not Improperly Biased Or Skewed Toward A Finding That Wyatt Was An Employee.

As explained in the opening brief, the instruction read to the jury completely left out any reference to an "independent contractor," instead asking the jury to determine whether Wyatt was an employee of the City in the abstract only, and with criteria that were geared toward a particular result – i.e., that Wyatt was an employee. (City's AOB 12-14.) Plaintiff contends there was nothing wrong with the instruction, but his arguments belie his lack of conviction in this contention.

First, plaintiff contends that because the instruction was taken from CACI, it is presumed correct. (RB 18-19.) Not surprisingly, he cites no legal authority for this novel proposition. The fact that the Judicial Council

"makes every effort to ensure" that the instructions are legally accurate (RB 18) does not mean they have succeeded. This would not be the first time an approved, or widely accepted, instruction failed judicial scrutiny. (See, e.g., *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1045 [disapproving BAJI 3.75].)

Second, although plaintiff denies that the instruction "articulate[d] a presumption in favor of employment in so many words" (RB 14), his strained argument on the subject does little to abate the very real, if unarticulated, presumption in favor of employment that pervades every sentence of the instruction. Indeed, the book of CACI instructions admits that the instruction at issue here [CACI No. 3704] is geared toward a finding of employment:

> The factors that may be considered in determining whether an agency exists are drawn from the Restatement Second of Agency, section 220 . . . . [¶] *As phrased in the Restatement, they do not indicate in whose favor each factor weighs. The draft instruction states the factors in a way to suggest whether or not they point toward an employment relationship*.

(Use Note CACI No. 3704 (2009 ed.) Vol. 2, p. 928, emphasis added.)

In support of his argument that the instruction correctly told the jury not to consider secondary factors unless and until it determined that the City had no right to control Wyatt's work, plaintiff cites *Messenger Courier Assn. of Americas v. California Unemployment Ins. Appeals Bd.* (2009) 175 Cal.App.4th 1074 (RB 23), but *Messenger* does not help his cause. *Messenger* expressly recognized that each case "must be evaluated on its facts, and the dispositive circumstances may vary from case to case." (*Id*. at p. 1089.) The court there also expressly rejected "plaintiff's basic premise that the primary or common law test for employment status, regarding the right to control, must operate completely exclusively from the secondary factors that have been identified in other factual contexts as useful for

determining employment status." (*Id*. at p. 1091.) In other words, *Messenger* stands for the proposition that control is not the only factor to be considered, and each case must be decided on its peculiar facts – exactly the opposite of how plaintiff uses it.[2]

In a further attempt to avoid the inevitable, plaintiff argues that the jury was supposed to have *inferred* that any factors that did not weigh in favor of employment *necessarily* weighed in favor of Wyatt being an independent contractor. (RB 25.) Two problems here.

First, the jurors received *no* instructions in this regard, though they were instructed to take the law only from the court. (31 RT 4609 ["You must follow the law exactly as I give to you, even if you disagree with it"].)

Second, it has been long settled in our judicial system that a fact finder may not infer that something is true merely by rejecting evidence that it is not true. (*Eramdjian v. Interstate Bakery Corp*. (1957) 153 Cal.App.2d 590, 602 ["A legal inference cannot flow from the nonexistence of a fact"]; *Casetta v. United States Rubber Co.* (1968) 260 Cal.App.2d 792, 808 ["even if [the evidence] were disbelieved by the jury, such disbelief cannot supply the lack of affirmative proof"]; *Todd v. Southern Pac. Co.* (1960) 184 Cal.App.2d 376, 384 ["'mere doubt as to the credibility of defendant or the accuracy of his [testimony] would not amount to affirmative evidence of any material fact,'" internal citation omitted].)

Plaintiff contends that the City was not entitled to an instruction that "state[s] the same matter in negative terms." (RB 26-27, citing *Sill Properties, Inc. v. CMAG, Inc*. (1963) 219 Cal.App.2d 42, 50.) This is not what the City requested. Rather, the City contends that the instruction should have been stated in a more objective way. The jury should have

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[2] A petition for review in *Messenger* remains pending in the California Supreme Court (No. S175707) as of the date of filing of this reply.

been asked, for example, to determine if Wyatt was the City's employee *or an independent contractor*, considering a list of objective criteria. Alternatively, the jury could have received a second instruction (in addition to the one actually given), but with a focus on factors that would make Wyatt an independent contractor. Either way would more fairly ask the jury to *weigh* the different factors, instead of merely considering whether he was an employee.[3]

Recognizing that the jury was given *no* instructions on what constitutes an independent contractor, plaintiff points to the argument of counsel as making it clear that the jurors had to determine if Wyatt was an employee or an independent contractor. (RB 30.) Again, however, the jury is instructed to take the law from the court and not from counsel. (31 RT 4609 ["You must follow the law exactly as I give to you, even if you disagree with it"].) "While we have no trouble utilizing the argument of counsel to help clear up *ambiguities* in instructions given, there is no authority which permits us to use argument *as a substitute for* instructions that should have been given." (*People v. Miller* (1996) 46 Cal.App.4th 412, 426, fn. 6, emphasis in original, disapproved on other grounds in *People v. Cortez* (1998) 18 Cal.4th 1223, 1239-1240.) Here, the jury was given *no* instructions on how to determine if Wyatt was an independent contractor.

This is an important omission. It is like the difference between asking whether A is like a cat, or whether A is more like a cat than like a

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[3] Plaintiff contends that many of the factors cited by the City as support for the conclusion that Wyatt was an independent contractor were found to be "of little value" in *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, cited in the opening brief. (City's AOB 8-11; RB 24.) Standing alone, each factor by itself, this might be true; but when there are many factors, as there are in this case, a "little value" here and a "little value" there can start to add up. (See, e.g., *Kenworthy v. State of California* (1965) 236 Cal.App.2d 378, 397-398 [noting that many small incidents of misconduct, "no single dose of which was lethal," may still have "an accumulative effect inevitable and realized"].)

dog. These are two entirely different questions and not necessarily opposites. For example, having four legs, fur and a tail would make A like a cat and like a dog, so how you ask the question is critical. If a juror were asked if a list of characteristics made A like a cat, and if four legs, fur and a tail were on that list, the juror would likely answer "yes." However, the answer would likely be the same if the question was whether A was like a dog.

If the question is changed to whether A is more like a cat or more like a dog, the situation is completely different. Now, factors like four legs, fur and a tail could not be dispositive; other characteristics would have to be considered. So, too, here, there is a difference between asking if Wyatt was an employee of the City based on a list of factors, and asking if Wyatt was an employee *or an independent contractor*, which would require the jury to do an entirely different task.

There is simply no way around the fact that the instruction was misleading and unfairly skewed toward a finding of employment and, therefore, the City is entitled to a new trial.[4]

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[4] Plaintiff contends that the City may be held vicariously liable for Wyatt's conduct as the City's "agent," regardless of whether he is an employee or independent contractor. (RB 35-37.) Perhaps the City was unclear in its argument on this issue in the opening brief. Yes, Wyatt may be considered an agent of the City whether he is an employee or an independent contractor, but only to the extent specified in the instructions – i.e., as an independent contractor *only* if the peculiar risk or dangerous condition doctrines apply. Throughout the litigation, the parties, as well as the instructions, have used "employee" and "agent" interchangeably; but the term "agent" has an additional meaning that is *not* applicable here, and this was the meaning the City addressed in the opening brief, out of an abundance of caution. (City's AOB 22-23.) All the City intended to do was to point out that there is no additional ground for finding Wyatt liable as the City's "agent" in any context other than the ones used in the trial court and, therefore, there is no basis for upholding the verdict on a ground not raised before. The City does not believe the parties are at odds with respect to this particular issue.

C. Plaintiff Erroneously Asserts That The Question Of Whether The City Was The Motor Carrier For Wyatt's Truck Was A Matter Of Contract Interpretation For The Court.

Plaintiff contends that it was proper for the court to determine that the City was the motor carrier for Wyatt's truck, as a matter of law. He contends that it is a matter of contract interpretation for the court and that the contract expressly provides that the City is the motor carrier. (RB 32, 34, 35.) Plaintiff is wrong on both counts.

First, plaintiff and the trial court both erroneously assumed that because the contract was for more than four months, the City was necessarily the motor carrier. This is not what the contract says. Rather, the contract provides that the City is the motor carrier *if the City rents* a truck for more than four months. As explained in the opening brief, the evidence was disputed whether the City rented Wyatt's truck at all, and while the contract was *evidence* that it was rented, the City introduced evidence to the contrary.[5] (City's AOB 15-16.)

Second, interpretation of the contract was *not* an issue in this case. No one was seeking enforcement of the agreement. Indeed, plaintiff had no standing to seek enforcement of the agreement, not being a party to it. Rather, the contract between the defendants was merely evidence of the defendants' status vis-à-vis each other for purposes of determining who could be liable in damages to a third party (plaintiff). The trial court erred in taking the question of who was the motor carrier away from the jury.

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[5] If it is plaintiff's contention that the truck was rented because the contract used the word "rent," then it must also be so that Wyatt was an "independent contractor," as a matter of law, because, that, too, is what the contract says.

Furthermore, this was not a small or insignificant error. This was a key issue in the case. Identification of the motor carrier identified who was responsible for upkeep of the truck, which went a long way to establishing Wyatt's status with respect to the City. The court's conclusion that the City was the motor carrier under the contract as a matter of law essentially took the whole case away from the jury.

D. The Instruction That The City Is Liable For The Conduct Of An Independent Contractor "To The Same Extent As A Private Person" Was Improper; And The City's Objection Was Not Waived And The Error Was Not Invited.

Plaintiff argues that the City has no ground to complain about this instruction because the court fully granted the City's request not to use that part of the instruction that was repetitive and that the City supported the truncated version of the instruction suggested by the court. (RB 16.) Plaintiff is, again, wrong on both counts.

The City objected to the entire instruction. While the reason for the objection was that most parts of it were covered by other instructions, that does not mean that the City objected to only part of it. (30 RT 4267.) The decision to shorten the instruction rather than omit it altogether was the court's, and not the City's, idea. The court asked defense counsel if the first part of the instruction was a proper statement of the law in the abstract, and the City even objected to that, saying that the language of the statute was slightly different. (30 RT 4262-4263.) But that is not an admission, or even acquiescence, in the instruction proposed by the court. Indeed, the City also objected to the truncated version of the instruction, pointing out that it was "incomplete," because it failed to explain the circumstances

under which the City, or any private person, could be held vicariously liable for the conduct of an independent contractor. (30 RT 4267.)

Oddly, plaintiff contends the City's objection that the instruction was "incomplete" somehow constitutes "invited error." (RB 18.) Invited error applies "'[w]here a party by his conduct induces the commission of error, [and] he is estopped from asserting it as a ground for reversal' on appeal." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403, internal citation omitted.) The City objected to the giving of the instruction at all. It is hard to see how this could possibly be "invited error."

Plaintiff also contends that the City got what it wanted when it asked the court to place the questionable instruction next to the instructions on peculiar risk. (RB 17.) This misstates the record and the law. The doctrine of invited error "has not been extended to situations wherein a party . . . endeavor[s] to make the best of a bad situation for which [it] was not responsible." (*Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at p. 403, internal citation and quotation marks omitted.) Here, the court refused to hear the City's explanation for the objection, instead indicating that it was giving the instruction as shortened. (30 RT 4267.) The City, faced with a bad situation, attempted to make the best of it by asking for placement in a certain spot. (*Ibid*.) This is not invited error.[6]

What the trial court failed to grasp and refused to allow defense counsel to pursue on the City's behalf was that the City's objection had nothing to do with whether the instruction was a correct statement of the

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[6] And, in any event, the court's placement of the instruction in no way made it any easier to understand. The City wanted it placed with the instructions on non-delegable duty (30 RT 4267); the court instead stuck it in the middle of the causation instructions (32 RT 4833). Plaintiff's contention that the non-delegable duty instructions followed "three pages later" (RB 28) does not support his contention that the City got what it asked for.

law. The trial court, unfortunately, was focused on "proximate cause" or "substantial factor" and which phrase to use. This is why the court put the instruction with the "causation" instructions. (See City's AOB 19.) However, as explained in the opening brief, the City's problem with the instruction lies in its reference to the City being held liable "to the same extent [as] a private person," with absolutely no instructions on "to what extent" a private person would be liable for the conduct of an independent contractor. (City's AOB 19-21; 32 RT 4833.) Plaintiff contends the general rule of no liability for independent contractors has all but been swallowed by its exceptions. (RB 27.) But this reasoning does not justify the instruction as given. The problem here is that regardless of what the rule is, the jury was not properly *instructed* on it.

Given that the jury was expressly instructed on the different grounds pursuant to which the City could possibly be held liable for the conduct of an independent contractor, the erroneous instruction, stated in the abstract as it was, incorrectly suggested there was yet another, alternative ground for holding the City liable for Wyatt's conduct and, therefore, could only have confused the jury.

Plaintiff all but admits this instruction was problematic. He pushed the instruction in the trial court on the dubious ground that it was the *only* instruction that mentioned "independent contractor" (30 RT 4262) – a critical issue at trial. Without instructions on what constitutes an independent contractor, the jury would have no way of determining if Wyatt was an employee *or* an independent contractor. Yet, even this instruction added nothing to the jury's knowledge of independent contractor law. It literally *mentions* an independent contractor, but without giving the term any body or context.

II. PLAINTIFF HAS NOT POINTED TO ANY SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE CONDITION OF THE BRAKES WAS A PROXIMATE CAUSE OF THE ACCIDENT.

In the opening brief, the City demonstrated that there was no substantial evidence to support a finding that the City's alleged failure to inspect or maintain the brakes on the truck was a proximate cause of the accident under either of the two theories advanced by plaintiff in the trial court. (City's AOB 24-30.)

The first theory was that if the City had inspected Wyatt's truck and the brakes before the accident, it would have taken the truck off the road and the accident would not have happened, which is one of the arguments plaintiff's counsel made to the jury. (31 RT 4514 ["If the truck is not on the road, the accident doesn't happen"].) Nevertheless, plaintiff has disavowed this theory on appeal, so it cannot be a basis for affirming the judgment. (RB 38.)

The second theory was that the collision may have occurred because the brakes on the truck failed. As "evidence" that they did, plaintiff initially cites his counsel's closing argument to the jury that *counsel* thought the brakes contributed to the accident and that *counsel* thought witnesses had testified that Wyatt was trying to stop the truck. (RB 38-39.) Of course, it is well-settled that argument of counsel is *not* evidence. (*El Dorado Irrigation Dist. v. Superior Court* (1979) 98 Cal.App.3d 57, 62.)

Next, plaintiff takes exception to the City's use of the word "failed," admitting there was no evidence that the brakes failed completely. (RB 40.) This is semantics. It is the City's position that there is no evidence that the condition of the brakes, whether you contend they failed completely or that they merely had deficiencies, in any way caused the accident.

In this regard, plaintiff argues that deficiencies in the brakes "diminished the truck's braking capacity to an extent that could have contributed to the accident." (RB 40.) This is an interesting, and novel, standard, but not a correct one. It has never been enough for a plaintiff to show that the defendant's conduct *could have* or *may have* caused the injury. Rather, plaintiff bears the burden of proving that the defendant's conduct *more likely than not* caused the injury. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483 [plaintiff "must show that the inferences favorable to her are more reasonable or probable than those against her," emphasis omitted].) Thus, evidence that deficiencies in the brakes *could have* caused the accident would not be enough to give the issue to the jury because it is not enough to sustain a judgment in plaintiff's favor.

In fact, plaintiff has utterly failed to point to substantial evidence to support a finding that any deficiencies in the brakes more likely than not caused the accident. Plaintiff points to testimony that: (1) loss of air pressure causes slight loss of power to the brakes; (2) the air pressure was zero at the accident site, when the truck was stopped; and (3) deficiencies in the brakes make a truck "more difficult to stop." (RB 41-42.) But none of this evidence – or even all of it put together – establishes that it was more likely than not that the accident happened because the brakes on the truck were losing power. Even Wyatt – who had every reason to admit that the brakes failed when he attempted to stop, *if* that was what happened – testified instead that he *did* stop the truck, three times before he entered the intersection and again after the collision with the motorcycle. (28 RT 3626-3627.)

Plaintiff contends the jurors could infer that Wyatt was having difficulty braking because none of the witnesses testified that they saw Wyatt stop at the stop sign. (RB 9.) But review of his citations to the

record reveals a flaw in this argument. One witness testified that she did not know if the truck stopped at the stop sign because by the time she saw anything, the truck was already past the stop sign and in the collision. (20 RT 1262, 1274, 1276.) Another witness testified that the truck was "rolling" and that he (the witness) did not *think* it stopped. (21 RT 1510.) A third witness testified that it looked like the truck was going to stop, but that it did not, and that it looked like he just rolled and did not make a complete stop. (29 RT 3911, 3915.)

None of these statements supports an inference that the truck was *unable* to stop. No witness testified that Wyatt appeared to be stepping on the brakes unsuccessfully, or that he skidded or in any way lost control of the truck. In short, there is only speculation, and no evidence, that the accident may have been caused by a problem with the brakes, let alone that the accident more likely than not was caused by a problem with the brakes, and that is just not enough to support the jury's verdict. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 864 ["Speculation, however, is not evidence"]; *Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 418 ["A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence," internal citation and quotation marks omitted].)

III. PLAINTIFF HAS NOT REFUTED THE CITY'S SHOWING THAT THE TRIAL COURT ERRED IN ALLOWING THE JURY TO FIND THAT WYATT'S DUMP TRUCK, BECAUSE OF ITS WEIGHT, INVOLVED A SPECIAL RISK OF HARM.

The trial court decided to instruct the jury on peculiar risk based on the weight of Wyatt's truck. (15 RT X-14.) The City showed in its opening brief why that ruling was error. (City's AOB 30-38.) Rather than respond

to the City's showing, plaintiff does a complete turnaround and argues a different basis for peculiar risk on grounds he did not raise in the trial court. (RB 44-46.) We explain.

At trial, plaintiff's counsel argued that the weight of Wyatt's truck and its size, which affected visibility, involved a peculiar risk of harm. Counsel cited *Anderson v. L. C. Smith Constr. Co.* (1969) 276 Cal.App.2d 436 and *Castro v. State of California* (1981) 114 Cal.App.3d 503 for support. (2 RT C-62-64.) The judge relied on these cases and ruled that the danger posed by the truck's weight called for the peculiar risk instruction. (2 RT C-64.)

Plaintiff now both accuses the City of misconstruing the cases that he cited as authority for his position and disavows them as bearing on the issue of whether a truck's weight constitutes, or can constitute, a peculiar risk. He argues:

> The City suggests that *Anderson* and *Castro* are authority for the proposition that the weight of a dump truck does not create a peculiar risk [City's AOB 35-36]. The fact is, however, that neither opinion dealt with the issue of weight, and a decision is not authority for a point not considered or resolved therein [citation].

(RB 46-47.) Interestingly, the City never took this position. The City merely distinguished *Anderson* and *Castro* from the instant case because those decisions involved visibility problems that accompanied backing up, a significant fact not present here. (City's AOB 34-35.)

Taking its cue from the trial court record, the City's opening brief attacks the peculiar risk theory that plaintiff asserted at trial. The City argues that the trial court erred in allowing the jury to find that Wyatt's dump truck involved a special risk of harm; the argument is that, as a matter of law, Wyatt's unladen truck did not involve a special risk since it presented no risk not presented by other motor vehicles on the road, and no special precautions could have reduced any risk. (City's AOB 32-36.)

Moreover, the truck's weight was not a substantial factor in the accident. (City's AOB 36-38.)

Plaintiff responds two ways, neither of which entails refuting these arguments. Instead, Plaintiff asserts a newly minted theory of peculiar risk and recasts his defective brakes theory as a peculiar risk theory of liability.

Plaintiff's new theory of peculiar risk is that noncompliance with a safety regulation suffices to create a peculiar risk. He now argues that, by statute, the dump truck's weight qualified its operator as a "motor carrier," operators of "motor carriers" must comply with certain safety regulations, and the regulations are evidence that "motor carriers" create a peculiar risk of harm. (RB 44-46.) Plaintiff relies on *Anderson* for support. But he reads far too much into the case.

The safety regulations in *Anderson* required large dump trucks to use a warning device or a spotter when backing up. (*Anderson v. L. C. Smith Constr. Co.*, *supra*, 276 Cal.App.2d at p. 440.) The dump truck in that case backed up without using a warning device and ran over an engineer. (*Id.* at pp. 438, 440.) The peculiar risk there arose from the operator's limited visibility when backing up. The corresponding special precaution was a warning device or spotter, which would have reduced the risk. In short, there was a close and obvious connection between the violation and the accident.

Plaintiff, on the other hand, alleges that the sheer weight of Wyatt's truck posed a peculiar risk, and that periodic inspections and accurate record-keeping were the special precautions that should have been taken. (RB 44-46.) But whatever risk the truck's weight posed could not have been reduced by inspecting the truck more often or maintaining current records.

By making this argument, plaintiff asks this court to infinitely expand the scope of peculiar risk liability. As the law now stands,

> [a] peculiar risk is a risk which is peculiar to the work to be done and arises out of its character or the place where it is to be done, and against which a reasonable person would recognize the necessity of taking special precautions. [Citations.] It is something other than the ordinary and customary dangers which may arise in the course of the work or of normal human activity.

(*A. Teichert & Son, Inc. v. Superior Court* (1986) 179 Cal.App.3d 657, 661-662, internal quotation marks omitted.) Plaintiff argues, however, that peculiar risk apparently should be imposed for every violation of a regulation, no matter how attenuated the connection between the risk and the violation. This would turn the peculiar risk doctrine on its head. The logical extension of plaintiff's argument would result in peculiar risk liability for any motor vehicle operator whose license lapsed – but an expired license, standing alone, has never even sufficed to constitute proximate cause. (See, e.g., *Strandt v. Cannon* (1938) 29 Cal.App.2d 509, 515, 518 ["whether the operator had a license to operate an automobile under the laws of this state is immaterial unless there is some causal relationship between the injuries and the failure to have a license or the violation of the statute in failing to have one"].) For obvious reasons, neither can every stray legal violation lead to peculiar risk liability.

Plaintiff makes a second argument that merely recasts his defective brakes theory of the case, to which the City has responded in Section II, above. Plaintiff argues that because the dump truck qualified its operator as a "motor carrier," the dump truck was subject to periodic safety inspections, the City failed to comply with these requirements, the failure to comply "could" have led to deficient brakes, and the deficient brakes "could" have caused the accident. (RB 44-46.) He argues that "[t]he lack of a license or motor carrier permit as such may not be evidence of proximate cause, but it can be where, as here, it indicates a failure to take precautions which *could* have prevented the accident." (RB 46, emphasis added.)

In effect, plaintiff bootstraps his peculiar risk theory to his defective brakes theory. The evidence, however, does not support his theory that regular inspections would have prevented the accident or made it less likely. There was no evidence that the truck's weight, hauling mechanisms, or any other feature peculiar to the dump truck interfered with its ability to stop or contributed to the accident. There was evidence that Wyatt failed to stop at the intersection, and undisputed evidence that Wyatt hit plaintiff's motorcycle while attempting a left-hand turn. So any failure to inspect could not have been a substantial factor in this accident. Even if the weight of Wyatt's truck actually created a peculiar risk, inspections would not have reduced the risk of physical harm posed by that characteristic.

For all the reasons stated here and in the City's opening brief, the jury's special finding on peculiar risk must fall.

IV. PLAINTIFF HAS NOT SHOWN THAT THE ERRORS WERE NOT PREJUDICIAL.

Plaintiff contends any error was not prejudicial because he asserted four separate grounds of liability against the City (RB 29), and even if the jury had found Wyatt was an independent contractor, "the verdict form allowed the jurors to make findings supporting the City's liability only on the basis of one of the recognized exceptions to non-liability. As it turned out, they made all such findings favorably to [plaintiff] . . . ." (RB 30-31, citing AA 71-73.)

What plaintiff ignores is that the City has addressed and challenged each of these grounds in the opening brief. It is the City's position that reversal of the judgment is necessary because: (1) there were errors in instructing the jury on Wyatt's status as employee or independent contractor (City's AOB 5-21); and (2) the court erred in applying both the peculiar risk and the dangerous condition of public property doctrines and, in any event,

there was no evidence to support a finding that the accident was caused by either a peculiar risk or dangerous condition (City's AOB 24-36). That the jury found in favor of Plaintiff on all theories, by itself, does not demonstrate the errors asserted by the City were not prejudicial.

CONCLUSION

Ultimately, the verdict supports findings that Wyatt was both an employee and an independent contractor – but he cannot be both. If an employee, then the judgment cannot be upheld on the ground of peculiar risk or dangerous condition of public property since that liability applies only to injury caused by independent contractors. However, since the jury was not properly instructed on what constitutes an independent contractor, the City is entitled to a new trial on plaintiff's negligence claim based on Wyatt's conduct. Alternatively, if Wyatt was not an employee, then the City cannot be held vicariously liable for his negligence; but neither can the City be held liable under the doctrines of peculiar risk of dangerous condition, since plaintiff failed to prove causation under either theory.

Therefore, for all the reasons stated here and in the opening brief, the City is entitled to a reversal with directions on plaintiff's claims of failed brakes, dangerous condition and peculiar risk, and a new trial on the negligence claim, including the question of whether Wyatt was an employee or an independent contractor of the City and whether the City or Wyatt was the motor carrier at the time of the accident.

Dated: October 9, 2009 JOHN P. DeGOMEZ

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, that the **APPELLANT'S REPLY BRIEF** is produced using 13-point Roman type including footnotes and contains approximately **6,228** words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 9, 2009

Carolyn Oill