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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STEVEN PAUL PICAZZO, Plaintiff and Respondent, v. C.W. DRIVER, INC., Defendant and Respondent; LIBERTY INSURANCE CORPORATION, Intervenor and Appellant.	B289070 (Los Angeles County Super. Ct. No. BC531187)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor E. Chavez, Judge. Reversed with directions.

Santa Cruz, Brownwood & Cannon, Sherry Santa Cruz; Greines, Martin, Stein & Richland, Robert Olson, Cindy Tobisman and Eleanor S. Ruth for Intervenor and Appellant.

Robert D. Feighner for Plaintiff and Respondent Steven Paul Picazzo.

LeClairRyan, Robert G. Harrison, Charles H. Horn; Klinedinst and Robert G. Harrison for Defendant and Respondent C.W. Driver, Inc.

Andrews International (Andrews) assigned its employee Steven Paul Picazzo (Picazzo) to work at Loyola Marymount University (LMU). While there, Picazzo was injured. Andrews's workers' compensation carrier, Liberty Insurance Corporation (Liberty), paid benefits to Picazzo. When Picazzo sued alleged third party tortfeasor C.W. Driver, Inc., (Driver), Liberty intervened and asserted a lien. Thus, should Driver, or another third party, be found liable for Picazzo's injuries, then Liberty retained the right to recover the benefits it had paid to Picazzo from that third party. A jury found that Driver and LMU were responsible for Picazzo's injuries. The trial court then made a postverdict finding that LMU was Picazzo's special employer. As such, the workers' compensation benefits were paid also on LMU's behalf, and therefore Liberty could not recover on its lien. The trial court entered judgment against Liberty. Liberty appeals. Because whether LMU specially employed Picazzo was a question for the jury, not the trial court, we reverse the judgment against Liberty on its complaint in intervention.

BACKGROUND

I. Picazzo's injury, workers' compensation benefits, and lawsuit

Andrews employed Picazzo as a security officer. From about 2006 to August 2013, Andrews assigned Picazzo to work at LMU's campus. In August 2013, LMU was erecting a new building on

campus. Driver was the project's general contractor. While on duty, Picazzo suffered a spinal cord injury when he tripped and struck his head against a railing at the construction site. He is now a quadriplegic. At trial, Liberty stipulated that it paid $2,849,209.62 in benefits to Picazzo.

Picazzo sued, among others, the general contractor Driver for negligence and for premises liability.[1] LMU was not a named defendant. Liberty filed a complaint in intervention seeking reimbursement from any third party tortfeasor for benefits Liberty had paid.

The matter was tried by a jury, which found Driver, LMU, Picazzo, and Andrews negligent. However, the jury also found that Andrews's negligence was not a substantial factor in causing harm to Picazzo, and therefore Andrews was not liable for damages. The jury awarded Picazzo total damages of $16,322,950.62 ($2,978,553.62 past economic loss; $3,344,397 future economic loss; $4 million past noneconomic loss; and $6 million future noneconomic loss). The jury allocated responsibility for the harm to Picazzo as follows: 40 percent to Driver, 15 percent to Picazzo, 45 percent to LMU, and zero percent to Andrews.

II. Posttrial motions

After trial, Driver moved to void Liberty's lien on the theory LMU had a special employment relationship with Picazzo. Under this theory, if LMU specially employed Picazzo and the benefits Liberty paid were also paid on LMU's behalf, then Liberty was not entitled to recover, as LMU was 45 percent at fault.

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[1] Picazzo's wife was dismissed from the lawsuit and is not a party to this appeal. Various subcontractors settled with Picazzo.

Liberty opposed the motion on the ground that whether LMU was Picazzo's special employer was not submitted to the jury.

The trial court found against Liberty. Given what the trial court called Liberty's "virtual admission" at trial that LMU was Picazzo's special employer, the trial court found that Liberty's lien should be reduced by the amount of LMU's fault. Thus, the lien was wholly offset by LMU's negligence, and Liberty recovered nothing on its lien from Driver.

Liberty moved to vacate the judgment or for a new trial. It argued that even if it paid benefits on behalf of Andrews *and* LMU then its lien should be reduced at most in proportion to LMU's 45 percent fault. The trial court denied the motion.

DISCUSSION

I. Workers' compensation and special employers

California's workers' compensation system provides an injured employee an exclusive remedy against his or her employer for work-related injuries. (Lab. Code, § 3602, subd. (a).) Even if an employee receives compensation from his or her employer's workers' compensation carrier, the employee may also seek recovery against a negligent third party. (*Id.*, §§ 3850, subd. (b), 3852; *Collins v. Union Pacific Railroad Co.* (2012) 207 Cal.App.4th 867, 880–881.) If a third party is found responsible for the employee's injuries, then the employer or its workers' compensation carrier may seek reimbursement from the third party for any benefits the employer or carrier paid out. (*Duncan v. Walmart Stores, Inc.* (2017) 18 Cal.App.5th 460, 470.) Thus, the carrier may intervene in an employee's action against the third party and assert a lien on any resulting judgment. (*Tate v. Superior Court* (1963) 213 Cal.App.2d 238, 243–244; Lab. Code, § 3853.) However, the employer's

negligence bars it or its workers' compensation carrier from recovering against a third party tortfeasor. (*Witt v. Jackson* (1961) 57 Cal.2d 57, 71–72.) Thus, a workers' compensation carrier is not entitled to reimbursement on a lien where the benefits paid are less than the employer's proportional share of fault. (*Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 829, 842.)

This may also be true where the employee is in a special or dual employment situation. A special or dual employment relationship arises when an employer lends its employee to a borrowing employer and relinquishes to that borrowing employer some right of control over the employee's activities. (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492.) The primary factor relevant to determining whether a special employment relationship exists is whether the special employer has the right to control and direct the employee's activities or the manner and method in how the work is performed, whether exercised or not. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175 (*Kowalski*).) The decision turns on "(1) whether the borrowing employer's control over the employee and the work he is performing extends beyond mere suggestion of details or cooperation; (2) whether the employee is performing the special employer's work; (3) whether there was an agreement, understanding, or meeting of the minds between the original and special employer; (4) whether the employee acquiesced in the new work situation; (5) whether the original employer terminated [its] relationship with the employee; (6) whether the special employer furnished the tools and place for performance; (7) whether the new employment was over a considerable length of time; (8) whether the borrowing employer had the right to fire the employee and (9) whether the borrowing employer had the obligation to pay the

employee." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1250.)

Factors negating the existence of a special employment relationship include where the employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period, and (5) using tools and equipment furnished by the lending employer. (*Marsh v. Tilley Steel Co.*, *supra*, 26 Cal.3d at p. 492.)

Here, whether LMU specially employed Picazzo was not submitted to the jury. Instead, the trial court decided the issue, after the jury rendered its verdict. This, Liberty contends, was reversible error because it involved questions of fact for the jury.

Picazzo and Driver counter that the issue was one for the trial court, not the jury, on which Liberty, not they, had the burden of proof. As Liberty failed to meet its burden, its appeal fails. Finally, Picazzo and Driver contend that any error in failing to submit the issue to the jury is of no moment, because Liberty admitted that LMU was Picazzo's special employer.

We next address these arguments.

II. Special employer status was a jury issue on which the party opposing the lien had the burden of proof

Whether LMU was Picazzo's special employer was not submitted to the jury. Instead, after trial, the trial court found that LMU was Picazzo's special employer. However, whether a special employment relationship exists is generally a question of fact reserved for the trier of fact. (*Kowalski*, *supra*, 23 Cal.3d at p. 175;

Wedeck v. Unocal Corp. (1997) 59 Cal.App.4th 848, 857.)[2] Hence, the jury should have decided the issue.

Driver and Picazzo respond that the special employer issue was not a jury question because it had no bearing on issues relating to Picazzo's complaint, i.e., the amount of his damages and the parties' percentage fault. Instead, the issue bore only on how to compute the workers' compensation lien. Picazzo and Driver thus attempt to distinguish *Kowalski* based on its procedural posture. In that case, Peterson employed Kowalski. (*Kowalski*, *supra*, 23 Cal.3d at p. 171.) Peterson agreed to perform work at a Shell refinery, and sent its employee Kowalski to work there. While at the refinery, Kowalski was injured. He sued Shell, contending that it was his special employer. The issue was submitted to a jury, which found that Shell did not specially employ Kowalski. (*Id.* at p. 174.)

Picazzo and Driver argue that the jury properly decided the special employment issue in *Kowalski* because it went to the merits of the plaintiff's tort claims. Here, however, the special employment issue related to enforcing a worker's compensation lien against a third party judgment, which issue, they assert, the Labor Code envisions will be determined via a posttrial motion by the trial court, not a jury. Specifically, they cite Labor Code section 3856. Labor Code section 3856, subdivision (b) provides that when an

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[2] Driver did not specifically plead this theory in its answer, but its first affirmative defense was that any right Liberty had to payment on its lien should be diminished or extinguished by the negligence of other parties in proportion to the degree of fault attributable to them. We need not decide whether this was sufficient to plead special employment as a defense, because we decide it was a jury question in any event.

employee alone prosecutes an action against a third party tortfeasor that results in a judgment benefitting the employer, the employee's attorney fees and litigation expenses must be paid out of any judgment before any workers' compensation lien held by the employer is satisfied. Labor Code section 3856, subdivision (c) provides how litigation expenses are allocated when an employee and employer prosecute an action together. The section thus merely describes how a court shall allocate payments, which is an equitable issue for the court. If the only issue before the trial court was allocating payments among the parties, then the Labor Code provides that this is properly a function for the trial court once the trier of fact has determined percentage responsibility. However, the Labor Code does not address the validity of a lien and who determines whether someone is an employer or a special employer for that purpose. Nothing in the section reserves determining employer status for the trial court.

Having thus determined that whether LMU specially employed Picazzo was a jury question, we turn to the burden of proof on that issue. Again, we agree with Liberty: the burden was on the party or parties opposing the lien. By its complaint, Liberty asserted a workers' compensation lien against any judgment Picazzo might obtain. Liberty therefore was a plaintiff lien claimant. As such, it had the burden of establishing the validity and amount of its lien. (See *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463, 1470.) To satisfy its burden, Liberty stipulated at trial that it paid over $2 million to Picazzo in workers' compensation benefits.

Picazzo and Driver, however, argue that Liberty had to prove more to satisfy its burden of proof. They argue that Liberty had to prove it did not pay workers' compensation benefits on LMU's

behalf and that LMU did not specially employ Picazzo. We disagree that Liberty had the burden on these issues. They are not elements of the lien claim. Rather, these two issues are in the nature of an affirmative defense, i.e., Liberty paid the benefits on behalf of someone other than or in addition to Andrews and that someone else (LMU) specially employed Picazzo. (See *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd.*, *supra*, 22 Cal.3d at p. 842 [once employer's concurrent negligence arises in judicial forum, third party tortfeasor may plead employer's negligence as defense and trier of fact determines employer's degree of fault].) The party seeking to defeat Liberty's lien had the burden of proof on these issues. (See Evid. Code, § 500.)

Even if the trial court, rather than the jury, properly decided the special employer issue, we still could not uphold the trial court's ruling. That is, the trial court did not make its finding based on evidence that LMU specially employed Picazzo. Rather, the trial court based its finding of special employment on Liberty's supposed "virtual admission" to that fact. However, as we next discuss, there was no such admission.

III. Judicial admissions and invited error

According to Picazzo and Driver, it is ultimately irrelevant whether special employment was a jury question and who had the burden of proof on it, because Liberty admitted that LMU was Picazzo's special employer or otherwise invited error on that issue. We disagree.

A judicial admission is a waiver of proof of a fact by conceding its truth, having the effect of removing the matter from the issues. (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.) "Judicial admissions may be made in a pleading, by stipulation during trial, or by response to request for admission."

(*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.) The doctrine of judicial admissions applies to unequivocal statements of fact; legal conclusions and assertions involving mixed questions of law and fact do not qualify. (*Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 384.)

Here, Picazzo and Driver claim that Liberty is bound by its supposed admissions that LMU specially employed Picazzo. They point to Liberty's opening summation stating that Andrews employed Picazzo, "however, at the time of the accident, he was working full-time" at LMU. Liberty's counsel then said in his opening statement that Picazzo, "while technically employed" by Andrews, worked fulltime at LMU. Counsel explained that LMU trained the security officers: "But they only worked when they were told by [LMU], where they were told, and they only did what they were told by [LMU]. Because they worked at" LMU. "So Andrews . . . provides these people under a contract for a variety of reasons that will not be in evidence, I don't think. And then [LMU] accepts them, treats them very much like other employees, and tells them what to do, when to do it, and how to do it and tells them the particulars of what needed to be done." Then, in closing argument, Liberty pointed out that Andrews's security officers, including Picazzo, worked fulltime at LMU for six to seven years.

As further evidence that Liberty admitted that LMU specially employed Picazzo, Driver and Picazzo point to Liberty's litigation tactics. Liberty objected to Driver's expert offering an opinion about the training Andrews provided regarding security at LMU. Liberty's objection was based on a lack of foundation, as the expert had said at his deposition he did not know what agreement Andrews and LMU had about training Picazzo and as Picazzo had been at LMU for six years. On voir dire of the expert, Liberty

established that Picazzo not only received in-service training at LMU's campus but also received 80 hours of training from Andrews. Otherwise, the expert had no knowledge of a writing establishing who had responsibility for training Picazzo.

From this argument and litigation tactics, Liberty clearly took the position at trial that LMU, and not Andrews, was primarily responsible for training Picazzo and for controlling his duties at LMU. The conclusion being that LMU, not Andrews, was responsible for Picazzo's injuries. However, taking that position does not rise to the level of an unequivocal statement of fact that LMU specially employed Picazzo. True, the same evidence showing that LMU rather than Andrews was negligent and responsible for Picazzo's injuries would tend to show that LMU was Picazzo's special employer. And, it would have been a tight rope for Liberty to walk had it argued that LMU controlled Picazzo to such an extent that LMU was responsible for his injuries but did not control him so much that LMU became his special employer. Even so, negligence and special employment are legally distinct issues: a true finding on negligence does not compel a true finding on special employment.[3] Undoubtedly, there was evidence from which the jury could have found a special employment relationship existed, just as there was evidence to the contrary. Indeed, the record is silent on some factors relevant to determining special employer status, such as whether LMU could have fired Picazzo.

Nor can we agree that Liberty invited any error. Under the doctrine of invited error, where a party, by his or her conduct,

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[3] LMU admitted in the workers' compensation action that it specially employed Picazzo. LMU's admission is not binding on Liberty.

induces an error, the party is estopped from asserting it as grounds for reversal. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685.) Also, an appellant may waive the right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal. (*Ibid.*) An example of invited error is where the error results from a jury instruction or special verdict given at the appellant's request or to which the appellant assented. (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 592–593.)

That is not the case here. Here, Driver argues that Liberty's counsel stipulated LMU specially employed Picazzo. That is why the issue did not go to the jury. According to Driver's attorney, he asked the trial court during an off-the-record discussion to instruct the jury with CACI No. 3706 regarding special employment. He filed a motion to that effect, but it was rendered moot when the parties agreed that Picazzo was the employee of Andrews *and* LMU.[4] According to Liberty's counsel, the parties discussed special employment and CACI No. 3706, but no party submitted a jury instruction or special verdict on that issue. He was never asked to and never stipulated that LMU was Picazzo's special employer. Although the parties raised that dispute as to what happened during the off-the-record discussion, the trial court never resolved it and never found that Liberty's counsel agreed that LMU was Picazzo's special employer.

We cannot resolve the dispute on appeal. We can only look at the record. It shows that, although Driver refers to a motion it filed requesting CACI No. 3706, no such motion is in the record.

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[4] Driver thus took the position in the trial court that special employment was a jury question but takes the opposite position on appeal that it was not a jury question.

Appellant's appendix does contain the jury instructions refused, but CACI No. 3706 is not one of them.[5] Although it appears that the topic was discussed, the record does not contain a stipulation or a record of what, if anything, resulted from the off-the-record discussion. The issue is therefore forfeited.

IV. Workers' compensation benefits

In opposing Liberty's motion for new trial, Picazzo argued that Liberty paid benefits also on LMU's behalf and therefore Liberty's lien should be offset by the amount of LMU's fault. However, even assuming LMU specially employed Picazzo, that does not mean as a matter of law that Liberty, as Andrews's workers' compensation carrier, also insured LMU. Rather, there must be an agreement to that effect or a showing that LMU was a third party beneficiary. (See *InfiNet Marketing Services, Inc. v. American Motorist Ins. Co.* (2007) 150 Cal.App.4th 168, 177–179.)

To make this showing, Picazzo relies on a certificate of insurance showing that LMU was an additional insured on Andrews's policy. However, the certificate states that LMU was an additional insured on Andrews's general liability policy but "only with respect to the negligent acts, errors or omissions" of the named insured Andrews. The jury attributed zero percent of fault to Andrews for Picazzo's damages. Therefore, LMU was not an additional insured for the purpose stated in the certificate.

Picazzo next infers that Liberty must have paid benefits on LMU's behalf because Liberty paid over $2.8 million in workers'

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[5] The record contains a proposed instruction modeled on CACI No. 3706 but it is merely attached to a posttrial motion and appears to have been submitted, if at all, in January 2016, a year and a half before trial began.

compensation benefits when the policy limit was $1 million. These bare facts do not support such a speculative inference. Rather, the $1 million policy limit could just refer to employer's liability insurance. Such insurance "traditionally written in conjunction with workers' compensation policies" "as a 'gap-filler,' providing protection to the employer in those situations where the employee has a right to bring a tort action despite the provisions of the workers' compensation statute or the employee is not subject to the workers' compensation law." (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 916.)

We therefore conclude that there was insufficient evidence Liberty paid benefits on LMU's behalf. And, as we have said, because respondents failed to submit the issue of special employment to the jury and failed to make a record of any stipulation on that issue, Liberty is entitled to recover on its lien. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 531.) We therefore need not reach any other issues raised on appeal, including how to allocate any offset.

DISPOSITION

The judgment is reversed. The trial court is directed to enter a new and different judgment in favor of Liberty Insurance Corporation in the amount of $2,849,209.62. Liberty Insurance Corporation is awarded its costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J. EGERTON, J.