

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICIA ANN ZEA; PETER  
ALEXANDER ZEA; AND JENNIFER  
NICHOLE HANSEN,  
Appellants,

vs.

PREMIER TRANSPORTATION &  
WAREHOUSING, INC., AND  
INTERVENOR AMERICAN  
COMMERCE INSURANCE COMPANY,  
Respondents.

No. 47818

**FILED**

DEC 19 2008  
TRACIE L. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment, certified as final under NRCP 54(b), in a personal injury action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

FACTS

The accident

On July 15, 2004, around 7 a.m., Jennifer Hansen (Jennifer) and her mother, Patricia Zea (Patricia)<sup>1</sup> left Idaho in a vehicle driven by Jennifer in order to deliver that vehicle to Jennifer's aunt in California. Around 10 a.m. on the same day, while driving westbound on I-80 in Nevada, Jennifer and Patricia noticed a white vehicle being driven by a female with long hair wearing a pink shirt. At approximately 12:45 p.m. on that day, Jennifer and Patricia passed through a construction zone on I-80 near Fernley, Nevada.

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<sup>1</sup>The appellants, Patricia Ann Zea, Peter Alexander Zea, and Jennifer Nichole Hansen will collectively be referred to as Zea unless otherwise noted.

As the construction zone ended and the speed of traffic began to increase, Jennifer and Patricia approached a convoy of trucks and merged into the left lane of traffic. After safely passing three other trucks, Jennifer attempted to pass a white truck that was behind a tractor-trailer. When Jennifer was about halfway past the white truck, the truck began to merge into the left lane. In an attempt to avoid a collision, Jennifer slowly veered her car to the left, but was unable to brake at the same time because there were other cars behind her.

While Jennifer was veering to the left, her vehicle drove onto gravel. Upon all four of the vehicle's tires hitting the gravel, the vehicle began to fishtail. Eventually, one of the vehicle's tires came into contact with the pavement again, causing the vehicle to roll over. Jennifer and Patricia were not able to get a good look at the driver of the truck, but both believed that the truck was similar to the one they had seen earlier, and the two women relayed this information to the Nevada Highway Patrol (NHP).

The NHP began stopping tractor-trailers on I-80 with the information they obtained from Jennifer and Patricia. The NHP eventually stopped Kimberly Salvo (Salvo) who was driving a white pickup truck, acting as a pilot car for a tractor-trailer owned and operated by respondent Premier Transportation & Warehousing, Inc. (Premier). The NHP officers took pictures of the tractor-trailer and the white pickup Salvo was driving. Patricia was shown these pictures three weeks later, and testified at her deposition that the white pickup truck depicted in the photograph was the same pickup that caused the accident and that she recognized the tractor-trailer because of the big load tarp over the flatbed.

### Premier's business procedures and claims

Max Burgess (Burgess), Premier's safety manager, stated in an affidavit that when Premier is hired to move an oversized load, one of its company dispatchers contact a broker in Chicago. Burgess alleged that the broker in Chicago then coordinates an independent contractor to drive a pilot car because Premier does not own any pilot cars and does not employ any pilot car drivers.

Burgess also asserted that Premier is not permitted to choose the specific person assigned to drive the pilot vehicle. Further, Burgess indicated that Premier does not control the manner in which the pilot driver does the work or drives the vehicle.

Burgess explained that Premier does not pay for the insurance on the pilot vehicle, and it does not pay income taxes or social security taxes for the pilot driver. Instead, Burgess indicated that the driver of the pilot vehicle submits a bill for services provided when the job has been completed. Premier then pays the bill to the driver.

Salvo was hired by Premier, through a broker, to act as the driver of the pilot vehicle for a tractor-trailer. Premier did not pay insurance for Salvo's vehicle, did not pay her income taxes or social security taxes, and did not provide her with health insurance or other benefits. Premier did, however, receive a bill from Salvo for the services she provided in July of 2004, which Premier paid. Premier contends that it did not agree to share in the profits and losses with Salvo.

### Procedural posture

Zea filed a civil complaint in district court on February 7, 2005. Premier thereafter filed a motion for summary judgment on February 2, 2006. Zea opposed the motion contending that a genuine issue of material fact existed with respect to an agency relationship

between Premier and Salvo. The district court entered an order granting Premier's motion for summary judgment, and denying Zea's request for a continuance for discovery on July 5, 2006. In its order, the district court acknowledged that Premier moved for summary judgment on three grounds: 1) Zea cannot prove that Premier or Salvo were involved in the automobile accident; 2) Salvo was an independent contractor, and thus Premier is not vicariously liable for her actions; and 3) Premier was not involved in a joint venture with Salvo. The district court granted summary judgment as to the second and third grounds and found no need to address the issue of whether Premier or Salvo actually caused the accident. This appeal followed.

#### DISCUSSION

Zea argues that the district court erred in granting summary judgment because it presented sufficient evidence that an agency relationship existed between Premier and Salvo to create a genuine issue of material fact. We agree that summary judgment was not appropriate and conclude that the district court's order granting summary judgment to Premier must be reversed because there is a genuine issue of material fact with respect to whether an agency relationship existed between Premier and Salvo.

#### Standard of review

This court reviews orders granting summary judgment de novo.<sup>2</sup> Summary judgment is proper only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of

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<sup>2</sup>Yeager v. Harrah's Club, Inc., 111 Nev. 830, 833, 897 P.2d 1093, 1094 (1995).

law.<sup>3</sup> This court reviews motions for summary judgment, the evidence, and all reasonable inferences drawn from it in a light most favorable to the nonmoving party. Whether a factual dispute is material and will preclude summary judgment is controlled by substantive law.<sup>4</sup>

A genuine factual dispute exists when a rational trier of fact could return a verdict for the nonmoving party based on the presented evidence.<sup>5</sup> This court has held that, “[w]hen a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue.”<sup>6</sup>

The district court erred by granting Premier’s motion for summary judgment

Here, a genuine issue of material fact exists with regards to whether there was an agency relationship between Premier and Salvo. “An agency relationship is formed when one who hires another retains a contractual right to control the other’s manner of performance.”<sup>7</sup> As a general rule, the existence or non-existence of an agency relationship is a

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<sup>3</sup>NRCP 56(c); see Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

<sup>4</sup>Id.

<sup>5</sup>Id.

<sup>6</sup>Id. at 731, 121 P.3d at 1030-31 (quoting Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002)).

<sup>7</sup>Grand Hotel Gift Shop v. Granite State Insurance, 108 Nev. 811, 815, 839 P.2d 599, 602 (1992).

question of fact for the jury.<sup>8</sup> However, if a fact regarding the existence or non-existence of an agency relationship is clearly proven and not a material dispute, it is not error for the district court to take the consideration away from the jury.<sup>9</sup>

In this case, summary judgment was improper. The district court granted Premier's motion for summary judgment without reviewing the contract between Premier and Salvo. The terms of this contract are essential to determining if an agency relationship existed between Premier and Salvo. The written contract was especially important because contentions made by Burgess in his affidavit are disputed by Zea. Discovery was not completed when the district court granted Premier's motion for summary judgment, just over a year after the complaint was filed. Additional facts to support Zea's contention that an agency relationship existed between Premier and Salvo may be revealed during discovery. Absent a copy of the written contract establishing the terms of the relationship, which Zea was not given the chance to discover because of the timing of the district court's granting of summary judgment, the degree of control that Premier retained over Salvo's performance remains an issue of fact.<sup>10</sup> Therefore, the district court erred in granting Premier's motion for summary judgment since a genuine issue of material facts

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<sup>8</sup>Northern Nevada Mobile Home v. Penrod, 96 Nev. 394, 397, 610 P.2d 724, 726 (1980).

<sup>9</sup>Id.

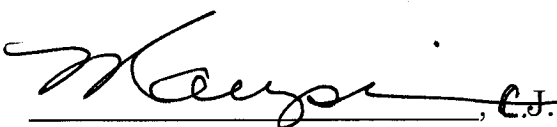
<sup>10</sup>See Grand Hotel Gift Shop at 815, 839 P.2d at 602.

exists with respect to whether Premier retained the contractual right to control Salvo's manner of performance.<sup>11</sup>

Conclusion

The district court erred in granting Premier's motion for summary judgment since there is a genuine issue of material fact concerning whether an agency relationship existed between Premier and Salvo. The order of the district court therefore must be reversed. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_ C.J.

Maupin

  
\_\_\_\_\_ J.

Cherry

  
\_\_\_\_\_ J.

Saitta

cc: Hon. Brent T. Adams, District Judge  
Paul F. Hamilton, Settlement Judge  
Jonathan H. King  
Kenneth R. Bick  
Rands, South, Gardner & Hetey  
Washoe District Court Clerk

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<sup>11</sup>Id.