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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TAMMY DEMETRY et al.,

Plaintiffs and Appellants,

v.

REBECCA LEEDS,

Defendant and Respondent.

G046951

(Super. Ct. No. 30-2011-00463812)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Law Office of Joseph G. Cavallo and Joseph G. Cavallo for Plaintiffs and Appellants.

Musick, Peeler & Garrett, Cheryl A. Orr and Scott L. MacDonald for Defendant and Respondent.

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Plaintiff Tammy Demetry, a clerk for the County of Orange, was taking a walk during her break when she was struck by a car driven by another County employee, Rebecca Leeds, as Leeds was exiting a driveway. Demetry filed a workers' compensation action, which was adjudicated. Demetry and her husband subsequently filed the instant lawsuit against Leeds, alleging negligence and loss of consortium.

Leeds filed a motion for summary judgment pursuant to Code of Civil Procedure, section 437c,<sup>1</sup> arguing that Demetry's cause of action for negligence was barred by the doctrine of workers' compensation exclusivity because both parties had been acting in the course and scope of their employment when the accident occurred. The trial court denied Demetry's request for a continuance and granted Leeds's motion. The court concluded the "required vehicle exception" to the going and coming rule applied, and therefore the claims by Demetry and her husband were barred by the workers' compensation exclusivity doctrine.

On appeal, Demetry argues that Leeds failed to meet her burden of production in a manner warranting summary judgment. We disagree, finding that Leeds met her burden with relevant, admissible and undisputed evidence, while Demetry offered none on her own behalf. We therefore affirm.

## I

### FACTS

We draw the facts primarily from the separate statement of facts submitted in support of Leeds's motion for summary judgment and related evidence. As of the date of the accident, Leeds worked as a deputy county counsel for the County of Orange (the County). Although she usually worked at the office, she routinely worked from home at least once a week. She occasionally used her car to conduct work activities, such as client meetings, depositions and court appearances. She used her own car when traveling

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<sup>1</sup> Unless otherwise indicated, all subsequent statutory references refer to the Code of Civil Procedure.

for work activities, and drove her car to work every day. The County reimbursed Leeds for mileage when she drove for work activities.

On May 24, 2010, the date of the accident, Leeds went to her Santa Ana office in the morning. She left at approximately 10:00 a.m. to pick up her child from his daycare facility after receiving a call that he was ill. She had permission to work from home that day after picking up her child. As she was leaving, Demetry, who was on a break from her job at the County, was walking eastbound on the north side of Santa Ana Boulevard toward Broadway. She crossed the driveway apron to the parking garage where Leeds was exiting, and Leeds struck Demetry with her car.

On November 8, 2010, Demetry filed an application for Adjudication of Claim with the Workers' Compensation Appeals Board. As of September 2011, she was still receiving benefits.

On April 5, 2011, Demetry filed her initial complaint against Leeds. She was the only named plaintiff, and the only cause of action was negligence. Leeds filed an answer.<sup>2</sup>

Months later, on January 6, 2012, Leeds filed the instant motion for summary judgment. The only issue raised was that Demetry's cause of action for negligence was barred by workers' compensation exclusivity. Attached to Leeds's separate statement were her own declaration, the declaration of her supervisor, James Harman, and supporting evidence, including excerpts from Demetry's deposition and excerpts from Demetry's responses to form interrogatories. She also filed a request for judicial notice of Demetry's application for Adjudication of Claim with the Workers' Compensation Appeals Board and the initial complaint. The motion was noticed for hearing on March 22, 2012.

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<sup>2</sup> Leeds claims that her initial answer raised workers' compensation exclusivity as an affirmative defense, but we are unable to find a specific mention of it.

On January 18, a stipulation was filed permitting Demetry to file a first amended complaint, adding her husband Milad Demetry as a plaintiff and alleging a cause of action for loss of consortium. The trial date of April 23 was to remain. The first amended complaint was filed on February 17. Leeds answered, pleading workers' compensation exclusivity as an affirmative defense. In early March, the parties stipulated that Leeds's motion for summary judgment would be deemed to apply to both plaintiffs. Relevant changes to the language of the motion were part of the stipulation.

Meanwhile, on February 24, Demetry<sup>3</sup> served a deposition notice on Leeds. The deposition was set for March 15, a week before the scheduled March 22 hearing on the motion for summary judgment. Demetry also noticed the deposition of James Harman, Leeds's supervisor, for March 23, the day after the hearing.

On March 5, Demetry filed her opposition to Leeds's motion for summary judgment. She argued that questions of material fact existed as to whether Leeds was acting within the course and scope of her employment at the time of the accident, and she also claimed Leeds had not established the "required vehicle" exception to the coming and going rule. She further argued that summary judgment was improper under section 437c, subdivision (h), because facts essential to justify opposition exist but could not be presented at the time of the motion. She noted that the depositions of Leeds and Harman were noticed for March 15 and 23, respectively, and "will be useful in opposing" the motion. Thus, she asked for a continuance to enable her to "complete discovery." Her attorney's attached declaration again stated the scheduled deposition dates, but did not offer any reason as to why the depositions could not have been taken earlier.

Demetry also filed her response to Leeds's separate statement. She did not dispute any of Leeds's material facts, although with respect to several, she stated: "Undisputed, however, this fact does not evidence that the County required Leeds to

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<sup>3</sup> For the sake of simplicity, we shall continue to refer to both husband and wife as "Demetry."

perform work at home or use her vehicle as a condition of her employment.” She did not offer any additional material facts. Leeds subsequently filed her reply, arguing, among other things, the lack of disputed material facts.

On March 22, before the calendar call, both parties advised the clerk that the case had settled. Leeds requested a continuance, and the hearing was continued to April 5. According to Demetry, until just a few days before the continued hearing, “Respondent had led Appellants to believe the matter was settled and it was just a matter of drafting up the documents. Appellants canceled the scheduled depositions of Respondent and her employer. The settlement was not finalized because of an issue Respondent had with her employer, the County of Orange.”

The trial court rejected Demetry’s argument that a continuance was appropriate. The court noted that regardless of what had happened with respect to a settlement, the summary judgment motion was filed on January 6, and Demetry had failed to notice any depositions until mid-February. The trial date was a mere two weeks away, and Demetry had failed to seek any *ex parte* or other relief. The trial court granted the motion for summary judgment on the ground that the “required vehicle exception” to the going and coming rule applied, and therefore, Demetry’s claims were barred by the workers’ compensation exclusivity doctrine. Further, if the negligence claim was barred, the loss of consortium cause of action also failed.

Judgment was entered on April 26, and notice of entry of judgment was served on May 2. Demetry timely appeals.

## II

### DISCUSSION

#### *A. Standard of Review*

Summary judgment “provide[s] courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th

826, 844.) The trial court properly grants a motion for summary judgment if all the papers submitted establish there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.)

“[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Id.* at p. 851.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. [Fn. omitted.]” (*Id.* at p. 850.)

We review the trial court’s decision de novo, considering all evidence the parties offered in connection with the motion and the uncontradicted inferences the evidence reasonably supports. (*Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 148.)

### *B. Leeds’s Initial Burden of Production*

As noted above, the moving party bears the initial burden of production to make a prima facie case demonstrating no material issues of triable fact exist. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) “[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial.” (*Id.* at p. 851.) When the burden of proof at trial would be the civil standard, preponderance of the evidence, “if a defendant moves for summary judgment . . . he must present evidence that

would require a reasonable trier of fact *not* to find any underlying material fact more likely than not . . . .” (*Ibid.*, fn. omitted.)

Because Leeds’s motion was based entirely on workers’ compensation exclusivity, we next explore both the legal underpinnings and the evidence she presented to determine if she adequately met her burden of production.

### *1. Demetry’s Receipt of Workers’ Compensation Benefits*

“Labor Code section 3600, subdivision (a), provides that, subject to certain particular exceptions and conditions, workers’ compensation liability, ‘in lieu of any other liability whatsoever’ will exist ‘against an employer for any injury sustained by his or her employees arising out of and in the course of the employment.’” (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708, fn. omitted.) “[T]his rule of exclusivity is based on the “‘presumed ‘compensation bargain,’ pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.” [Citations.]” (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1001-1002.)

“To prevent employees from circumventing the exclusivity rule by bringing lawsuits for work-related injuries against coemployees, who in turn would seek indemnity from their employers, the Legislature in 1959 provided immunity to coemployees. [Citation.] . . . For conduct committed within the scope of employment, employees, like their employers, should not be held subject to suit. [Citations.]” (*Torres v. Parkhouse Tire Service, Inc., supra*, 26 Cal.4th at p. 1002.) The only exceptions to this rule are those created by statute, specifically willful and unprovoked aggression and

intoxication. (Lab. Code, § 3601, subd. (a); see *Oliva v. Heath* (1995) 35 Cal.App.4th 926, 931-932.)

It is undisputed that both Demetry and Leeds were employees of the County. As to whether Demetry's break was conduct in the scope of employment, "The [Workers' Compensation Appeals Board] and the superior court have concurrent precedential jurisdiction to determine the threshold question of subject matter jurisdiction, namely, whether a cause of action comes within workers' compensation laws, and, thus, within the exclusive jurisdiction of the Board. [Citation.] Where two tribunals have such concurrent jurisdiction to determine jurisdiction, 'the question of which shall have exclusive [subject matter] jurisdiction shall be determined by the tribunal whose jurisdiction was first invoked, and proceedings in the tribunal whose jurisdiction was subsequently sought will, if not voluntarily stayed, be halted by prohibition until final determination of the jurisdictional question where jurisdiction was first laid.' [Citation.] '[W]here several courts have concurrent jurisdiction over a certain type of proceeding, the first one *to assume and exercise* such jurisdiction in a particular case acquires an exclusive jurisdiction.' [Citation.]" (*Yavitch v. Workers' Comp. Appeals Bd.* (1983) 142 Cal.App.3d 64, 70.)

According to Demetry's deposition testimony, she was receiving workers' compensation benefits as of September 2011. This necessarily required a determination that she was acting within the course of her employment at the time of the accident, and she does not argue otherwise. Leeds has met her burden of production on this point.

## 2. *The Going and Coming Rule and the Required Vehicle Exception*

Because the parties are both employed by the County, the question of whether Leeds was acting in the course and scope of her employment at the time of the accident is the crux of the matter. If she was not, workers' compensation exclusivity does not apply. It is undisputed that Leeds was leaving work to pick up her child. "The

going-and-coming doctrine states an employee is outside the scope of his employment while engaged in the ordinary commute to and from his place of work. [Citation.] This rule is based on the principle that the employment relationship is suspended from the time the employee leaves his place of work until he returns. [Citation.]” (*Blackman v. Great American First Savings Bank* (1991) 233 Cal.App.3d 598, 602.)

“A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. [Citation.]’ [Citation.] This exception to the going and coming rule, carved out by this court in *Huntsinger* [*v. Glass Containers Corp.* (1972)] 22 Cal.App.3d 803, has been referred to as the ‘required-vehicle’ exception. [Citation.] The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment [citation], or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has ‘reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.’ [Citation.]” [Fn. omitted.] (*Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 (*Lobo*).)

*Lobo* was a respondeat superior case.<sup>4</sup> A vehicle driven by Luis Duay Del Rosario, an employee of Tamco, struck and killed Daniel Lobo. (*Lobo, supra*, 182 Cal.App.4th at p. 299.) Del Rosario, a metallurgist who had been employed by Tamco for 16 years, was going home on the day of the accident. (*Id.* at pp. 301-302.) One of the requirements of his written job description was, if necessary, to visit customer facilities to answer complaints, obtain information, and maintain customer relations. (*Ibid.*) Del

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<sup>4</sup> “Because benefit to the employer is one of the principal considerations under both the tort rule of respondeat superior and workers’ compensation law, the application of the going and coming rule is similar for both purposes. [Citations.]” (*Lobo, supra*, 182 Cal.App.4th at p. 301, fn.3.)

Rosario testified that if a customer called with quality concerns, he and a sales engineer would go to the site, riding in the sales engineer's car. (*Id.* at p. 302.) On occasion, he would use his own car if no sales engineer was available. He had visited customer sites "very few" times, using his own car less than 10 times. (*Ibid.*) His supervisor testified that Del Rosario was required to use his personal car on the occasions where it was necessary to visit customers, and no company car was provided. (*Ibid.*)

On this evidence, the court concluded the employer derived a benefit from Del Rosario's ability to use his vehicle when customer visits were required.

"[A]pplication of the doctrine turns on whether the employer expressly or implicitly required the employee to make the vehicle available or had reasonably come to expect that the vehicle would be available for work purposes and whether the employer derived a benefit from the availability of the vehicle. [Citations.]" (*Lobo, supra*, 182 Cal.App.4th at p. 303.) The frequency of using the car for business purposes was not determinative. "Here, [the supervisor] testified that Tamco required Del Rosario to make his car available rather than providing him with a company car in part *because* the need arose infrequently. Thus, the availability of Del Rosario's car provided Tamco with both the benefit of insuring that Del Rosario could respond promptly to customer complaints even if no sales engineer was available to drive him to the customer's site and the benefit of not having to provide him with a company car. Based on this evidence, a reasonable trier of fact could find that the 'required-vehicle' exception does apply." (*Ibid.*)

In support of her argument that the County derived a benefit from Leeds's use of her vehicle, she submitted her own declaration, which stated: "[T]he nature of my work as a litigation attorney for the County requires that I attend other work-related activities, including but not limited to, meetings with clients, depositions and court appearances, which frequently require me to travel. [¶] As part of my employment with the County, I use my own car when I am required to travel to a work-related activity. I take my own car to work every day so that if I have a work-related activity to attend, I

can use my car.” She also stated the County reimbursed her for mileage and expenses incurred in attending such activities. Her supervisor, Harman, stated in his declaration: “Rebecca [Leeds] often attends work-related activities such as meetings with clients, depositions and court appearances. In the ordinary course of business, Rebecca regularly uses her own car to go to work-related activities.”

Thus, despite Demetry’s characterization of Leeds’s declaration as “self-serving,” this evidence met the required burden of production. The declaration testimony here is competent and admissible, and no objections to it are present in the record. (Evid. Code, § 702, subd. (b); § 437c, subds. (d), (e).)

Further, Demetry’s claims as to the insufficiency of this evidence are unpersuasive. Leeds provided sufficient evidence of the benefit provided to her employer with her testimony that she used her own vehicle to attend “meetings with clients, depositions and court appearances” as her supervisor verified. The benefit is obvious and capable of ready inference, much as the ability of Del Rosario to travel to client locations in *Lobo* was self-evident.<sup>5</sup> Indeed, the evidence here is sufficient to imply a requirement that Leeds have a vehicle available for work use. (See *Hinojosa v. Workmen’s Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 152-153, 156, 160, 162 [exception can apply if use of a personally owned vehicle while on the job during the workday is express or implied condition of employment].)

Demetry also claims Leeds did not provide evidence “establishing that Respondent’s employer had accepted the responsibility for the risks inherent in Respondent’s travel,” but that is a matter of legal consequence, not a question of evidence. If direct evidence of an employer accepting such responsibility was required, the successful respondeat superior claim would be rare indeed. Demetry’s reliance on *Saala v. McFarland* (1965) 63 Cal.2d 124 on the issue of the course and scope of

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<sup>5</sup> Because we find Leeds’s use of the car sufficient to satisfy the required use exception, we need not consider Demetry’s additional arguments regarding Leeds’s work at home.

employment is also misplaced, both because it has been superseded by amendments to Labor Code section 3601 and because it does not address the required vehicle exception.

To the extent that Demetry argues “There is nothing about the facts submitted by Respondent that rendered her commute *at the time of the accident* within the course and scope of her employment or that invoked an exception to the going and coming rule” (italics added), she misapprehends the relevant standard. The question is not whether Leeds was acting in the course and scope of her employment or for her employer’s benefit at the moment of the accident, but whether, in general, her employer derived sufficient benefit from the use of her vehicle to apply the required vehicle exception to the going and coming rule. In *Lobo*, there was no dispute that Del Rosario was on his way home, and not conducting any business for his employer, at the time of the collision. (*Lobo, supra*, 182 Cal.App.4th at p. 302; see also CACI No. 3275.)

In sum, we conclude that Leeds met her burden of production on the applicability of the required vehicle exception by sufficient and admissible evidence. The burden therefore shifted to Demetry to demonstrate the existence of a triable issue of fact. (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.)

### *C. Demetry’s Burden of Production*

As Demetry admits, she did not submit any evidence demonstrating the presence of a triable issue of fact, instead arguing that a material issue of fact existed as to whether Leeds was acting within the course and scope of her employment. This argument is merely the flip side of her claim that Leeds failed to produce sufficient evidence. Demetry argues she was not required to submit evidence, because Leeds had not met the required burden of production. She would be correct, if we agreed with her on that point, but as discussed above, we do not. The lack of any evidence of a material issue of triable fact is therefore a critical blow to her argument. Given that Leeds met her initial burden and Demetry, when the burden shifted back to her, failed to meet hers, the

trial court properly granted summary judgment on her cause of action for negligence. Because a spouse's claim for loss of consortium is also barred if the underlying claim is barred by workers' compensation exclusivity, summary judgment was also properly granted on Milad's claim. (*LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 284-285; *Gillespie v. Northridge Hosp. Foundation* (1971) 20 Cal.App.3d 867, 869-870.)

#### *D. Continuance*

Demetry alludes to, but does not straightforwardly raise, the issue of whether the court erred by not granting a continuance. Her opening brief discusses, in the statement of facts, requesting a continuance in her opposition before the trial court. She also raises the failed settlement as an explanation for why she did not proceed with the noticed depositions. What Demetry does not do in her opening brief is squarely argue the court erred by failing to grant a continuance. Rule 8.204(a)(1)(B) of the California Rules of Court requires that each point in a brief must be stated under a separate heading or subheading summarizing the point. Further, arguments must be supported by legal authority. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 109.) In her reply brief, she argues that she was not dilatory in conducting discovery, but again fails to argue forthrightly that a continuance should have been granted. Nor, once again, does she cite to any legal authority. Any such argument, accordingly, is waived.<sup>6</sup> (*Ibid.*)

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<sup>6</sup> Had the argument been preserved, it would lack merit. The only relevant declaration in the record is that of Demetry's counsel, submitted in opposition to the motion for summary judgment. It merely stated that two depositions had been noticed, and conclusorily asserted that Demetry had been prejudiced. On its face, this is an insufficient affidavit under section 437c, subdivision (h). (See *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633.) As a discretionary matter, the court must determine whether good cause has been demonstrated to justify a continuance. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.) Given that no depositions were noticed for weeks after the summary judgment motion was filed, Demetry has not established an abuse of discretion.

III  
DISPOSITION

The judgment is affirmed. Leeds is entitled to her costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.