IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

EVELYN C. ADA and ISIDRO T. ADA, Plaintiffs, v. SAIPAN SANKO TRANSPORTATION, INC., TOKIO MARINE & FIRE INSURANCE CO., LTD., and YASUDA FIRE & MARINE INSURANCE CO., LTD., Defendants.	Civil Action No. 92-574 **DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT BY DEFENDANTS SAIPAN SANKO AND YASUDA**

The above-captioned automobile personal injury case came before this Court for hearing on August 25, 1993 on motions for summary judgment by two separate Defendants. Defendant Saipan Sanko Transportation, Inc. ("Saipan Sanko") moves for judgment of non-liability on the grounds that its bus driver employee was the borrowed servant of the Plaintiff's employer at the time of the accident. Defendant Yasuda Fire and Marine Insurance Co., Ltd. ("Yasuda") asserts non-liability on the grounds that its insured's employee, a taxi driver, did not have a valid license at the time of the accident.

FOR PUBLICATION

I. FACTS

The accident giving rise to this action occurred on Marpi Road on November 4, 1990, when a southbound sightseeing bus collided head-on with a northbound taxi van. Plaintiff Evelyn C. Ada was a tour guide employed by R & C Tours and was aboard the bus. The bus and its driver, Miguel Taitano, were provided by Defendant Saipan Sanko pursuant to an "Agreement Contract" with R & C Tours executed in early March, 1990. *See* Plaintiff's Exhibit A. The Agreement specifies only that Saipan Sanko would provide "Half day Sightseeing transfer," "Airport transfer round trip," and "Dinner & Shopping transfer." *Id.* The Agreement does not specify whether individual buses and drivers provided would work solely for R & C during the contract period. Nor does it indicate that R & C would pay the drivers' salaries, carry workers' compensation insurance for the drivers, maintain or provide fuel for the buses hired or take on any obligations whatsoever with respect to either the employees or equipment of Saipan Sanko.

The record does indicate that Ms. Ada exercised supervisory control over Mr. Taitano's schedule and itinerary. *See Deposition of Miguel Taitano* at 58. However, the parties dispute the extent to which R & C controlled the manner in which the work was performed. Plaintiffs contend that R & C had the authority to reprimand Mr. Taitano for unsafe driving and to control every aspect of the operation of the bus. Defendant Saipan Sanko contends that R & C's authority extended only to specifying the schedules and itineraries, and that the operation of the bus was within Mr. Taitano's complete control.

The other vehicle involved in the accident was a taxi van operated by Roque Babauta, an employee of Joseph L. Ada. In September 1990, Mr. Ada purchased insurance for his taxi fleet through Defendant Yasuda. The insurance policy specifies "taxi use." *See* Defendant's Exhibit B. It provides, inter alia, that its coverage will not apply "if the insured or any person authorized to drive the automobile does not hold a valid driver's license to drive the automobile." *See* Defendant's Exhibit C at 2. The evidence is undisputed that Mr. Babauta's driver's license had expired prior to the accident, and that he renewed his license two days after the accident.

On May 6, 1991, roughly six months after the accident, Defendant Yasuda's agent corresponded with counsel for Plaintiff. *See* Plaintiff's Exhibits A, B. This letter made no mention of the "unlicensed driver" exclusion, but did represent that it was enclosing copies of "the policy and endorsement." However, the letter's enclosures did not include the page of the policy containing the exclusion. Instead, the letter indicated that the policy carried a maximum benefit of $50,000 and opined that this amount was insufficient to compensate Ms. Ada fully.

On June 18, 1992, Plaintiff filed this action, naming Yasuda as a defendant but neglecting to name Mr. Ada, the insured, or Mr. Babauta, the driver. The statute of limitations in this case tolled on November 4, 1992. There is no evidence in the record to suggest that Yasuda expressed an intent to enforce the policy exclusion prior to the tolling of the statute.

II. ISSUE

The parties raise numerous issues in their memoranda. The Court finds two dispositive of the motions at hand:

1. Was Miguel Taitano either the borrowed servant or "special employee" of R & C Tours at the time of the accident?

2. Is the "valid license" policy exclusion enforceable?

III. ANALYSIS

A. SUMMARY JUDGMENT STANDARD

Summary judgment is entered against a party if, viewing the undisputed facts in the light most favorable to the non-moving party, the Court finds as a matter of law that the moving party is entitled to the relief requested. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176 (1990). In this case, the parties dispute certain factual issues. Accordingly, the Court must establish a minimum threshold of undisputed facts and view that evidentiary threshold in the light most favorable to Plaintiff.

B. BORROWED SERVANT RULE

1. Common Law. At common law, an employee of one employer may be deemed the servant of another employer for the purposes of assigning tort liability. *See Restatement (2d) of Agency*, § 227. Application of the borrowed servant doctrine is "a question of fact in each case." *Id.* at cmt a. Absent evidence to the contrary, the court should infer the continuation of the original service. *Id.* at cmt b. The *Restatement* incorporates by reference a number of factors to be analyzed in applying the rule, the following of which are pertinent here:

a. the extent of the borrowing employer's control over the work done;

b. whether the work is usually done with the borrowing employer's supervision or by a skilled employee without supervision;

c. the length of time for which the employee is employed;

d. how the employee is paid;

e. whether the work is part of the employer's general business;

f. whether the parties believed they were creating an employer-employee relation.

Id., cmt. c, *citing* § 220(2). In addition, the *Restatement* provides the following commentary:

> A continuance of the general employment is also indicated in the operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of considerable value. Normally, the general employer expects the employee to protect his interests in the use of the instrumentality and these may be opposed to the interest of the temporary employer. If the servant is expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire, the original service continues.

Id., § 227 cmt. c.[1/]

Here, the parties agree that R & C Tours supervised Mr. Taitano to the extent of setting his schedules and itineraries.

[1/] Saipan Sanko relies on cases which determine the borrowed servant question solely on the basis of the borrowing employer's degree of control over the employee. *See, e.g., Parker v. Joe Lujan Enterprises, Inc.*, 848 F.2d 118 (9th Cir. 1988). However, this Court looks first to the *Restatement* in determining the rules of common law. 7 CMC § 3401. Moreover, the *Restatement's* multi-factor test is analytically preferable to the single-factor approach of *Parker* because the *Restatement* takes account of the wider context instead of making an employer's liability depend on fine distinctions in the degree of supervision and control.

The evidence is disputed as to whether R & C's control extended further than that. The parties have submitted no evidence as to how often Mr. Taitano drove for R & C, whether he also drove for other tour operators, whether R & C paid his salary, maintained or provided fuel for the bus, or had the authority to have Mr. Taitano fired from his job with Saipan Sanko.

This record is plainly insufficient to support the grant of summary judgment in favor of Defendants. The jury must weigh the conflicting evidence at trial, taking account of the range of factors enunciated in the *Restatement* rather than the narrow evidentiary record offered here.

2. Workers' Compensation Statute. Defendant Saipan Sanko also urges an alternative route to the same result, suggesting that Mr. Taitano must be considered a "special employee"[2/] of R & C. Since Mr. Taitano was R & C's "special employee," Saipan Sanko contends, the exclusivity provision of the Commonwealth's workers' compensation statute (4 CMC § 9305) bars Ms. Ada from recovery.[3/]

The first step of this argument fails for reasons similar to those applicable to the borrowed servant doctrine. The existence of a "special employment" relationship is usually reserved for the trier of fact where the evidence permits conflicting inferences. *Marsh v. Tilley Steel Co., 606 P.2d 355, 359* (Cal. 1980). Again,

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[2/] In the terminology of workers' compensation law, a "special employer" is the one to which the employee is loaned by the "general employer."

[3/] 4 CMC § 9305 provides that worker's compensation, when applicable, constitutes:

> the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of such other employee's employment [....]

courts determine such a relationship on the basis of multiple factors, such as whether the borrowing employer paid the employee, provided his tools, had the authority to hire and fire him, and whether the borrowing employer provided worker's compensation insurance for the employee. *Id.*; *see also Kinne v. Industrial Commission*, 609 P.2d 926, 928 (Utah 1980); *Matkins v. Zero Refrigerated Lines, Inc.*, 602 P.2d 195, 199 (N.M. App. Ct. 1979). The disputed and inadequate record here cannot support judgment as a matter of law on these tests.

The second step of Defendant's argument also fails. Plaintiff correctly notes that California has found the "special employer" doctrine not to immunize from liability a third party employer who loans a tortfeasor employee to the victim's employer. *Marsh, supra,*, 606 P.2d at 361, *citing Campbell v. Harris-Seybold Press Co.*, 141 Cal. Rptr. 55 (Cal. 1977). The policy rationale for this rule is persuasive; an employer is normally insulated from tort liability in exchange for providing workers' compensation insurance for the employee. Such a bargain does not exist between an injured employee and the general employer of her "special" co-worker. As the *Marsh* court stated, allowing immunity to the "general" employer here "would relieve the defendant from its normal respondeat superior liability, while at the same time giving no benefit to the workers' compensation system." 606 P.2d at 361.

Accordingly, Defendant Saipan Sanko's motion for summary judgment is denied.

C. YASUDA'S "VALID LICENSE" POLICY EXCLUSION

The Court next considers Defendant Yasuda's motion for summary judgment. Yasuda seeks to deny liability on the basis of the "valid license" exclusion in the policy its agent sold to Joseph Ada, covering the taxi van operated by Roque Babauta. The material facts are not in dispute; the policy did in fact contain the exclusion recited above, and Mr. Babauta's license was expired at the time of the accident. Yasuda therefore claims immunity from suit as a matter of law. Plaintiff opposes the motion but does not move for summary judgment on her own behalf.

1. Policy Ambiguity. Plaintiff's first argument against this motion is that the "valid license" exclusion in Joseph Ada's automobile liability policy is ambiguous and therefore unenforceable. The argument is meritless.

> Words in an insurance policy are to be interpreted according to the plain meaning which a layman would ordinarily attach to them. Courts do not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.

Reserve Ins. Co. v. Pisciotta, 640 P.2d 764, 767-768 (Cal. 1982). Here, this Court has no difficulty interpreting the policy exclusion as unambiguously denying coverage during any time an authorized driver of the covered automobile lacks a valid, unexpired license. The alternative interpretations advanced by counsel are, at the very least, "strained." *See, e.g., Jack v. Adriatic Ins. Co.*, 420 So.2d 1292, 1293 (La. App. Ct. 1982) (valid license exclusion not ambiguous).

2. Public Policy. Plaintiff also argues that the exclusion is void as contrary to public policy. Both parties have cited to cases either voiding or upholding "valid license" exclusions. The

common thread in these authorities is their deference to the policies underlying the financial responsibility laws in their respective jurisdictions. *See Houck v. Yasuda Fire & Marine Ins. Co.*, No. 88-00011A, slip op. at 3 (D. Guam 1988) ("valid license" exclusion upheld where maintaining auto insurance was not mandatory under territorial law); *Jack, supra*, 420 So.2d at 1293 (exclusion upheld where legislature had expressed no public policy against it); *Royse v. Boldt*, 491 P.2d 644, 646 (Wash. 1971) (where legislature had not enacted compulsory responsibility law, "other driver" exclusion upheld); *compare Newark Ins. Co. v. Concord Ins. Co.*, 278 A.2d 508, 510 (N.J. App. Ct. 1971) (where state required all drivers to carry minimum auto insurance, policy issued to satisfy that requirement could not exclude unlicensed drivers).

Here, the automobile in question was a taxi. Title 1 CMC § 2596(a)(6) direct the Taxicab Bureau Chief to require taxi operators to maintain minimum liability coverage for all taxis. However, this statute was passed on July 31, 1991. *See* Public Law 7-33. Yasuda issued the policy in question on August 17, 1990. Nothing in Public Law 7-33 indicates that the Legislature intended that it be given retroactive effect; to the contrary, 1 CMC § 2596(d) specifies that taxicab operators be given thirty days from the date of passage to comply with the law's provisions.

This Court cannot apply a legislative policy retroactively to impair pre-existing contract rights. *See Jensen v. United States*, 662 F.2d 664, 667 (10th Cir. 1981) (retroactive application of legislative acts is impermissible absent a clear indication of legislative intent). Therefore, the "valid license" exclusion is not void as contrary to public policy.

3. Estoppel. Plaintiff's final argument is that Defendant Yasuda is estopped from denying coverage because of its representations to Plaintiff's counsel in the May 6, 1991 letter.

Estoppel, in the insurance context, arises from the reasonable and prejudicial reliance by a party upon some act, conduct, or inaction of the insurer. Appleman, *Insurance Law and Practice* § 9081. If the facts are such as to put the insurer on inquiry notice that a policy exclusion might apply and the insurer's actions "induce a belief [in the insured] that the company will not assert its rights, upon which belief he relies and is detrimentally affected in some manner, an estoppel will arise." *Id.*

These principles are not uniformly applied. Some jurisdictions hold that estoppel applies only in favor of the insured party and cannot be invoked by an injured third party plaintiff. *Snell v. Stein*, 244 So.2d 647, 650 (La. App. Ct. 1971), *rev'd on other grounds* 259 So.2d 876. Other authority holds that the injured plaintiff stands in the shoes of the insured and can only invoke estoppel if the facts would permit the insured to do so. *Arton Liberty Mutual Ins. Co.*, 302 A.2d 284, 291 (Conn. 1972). Still other authority allows the injured third party to invoke estoppel without consideration of the fact that there is no contractual relation between the insurer and the third party. *Safeguard Ins. Co. v. Trent*, 287 N.Y.S.2d 894 (N.Y. App. Div. 1968).

In weighing this authority, the Court recognizes that the Commonwealth allows direct actions by injured plaintiffs against insurers and does not require joinder of the insured tortfeasor as

party-defendants. 4 CMC § 7502(e). Thus, an insurer's communications with an injured plaintiff prior to filing suit may have serious consequences; the plaintiff may neglect to sue the insured tortfeasor based upon its insurer's acknowledgment that a policy covering the tortfeasor exists. This statutory scheme implicitly places a duty of candor on insurers to tell injured third parties what the terms of their policies are.

Here, the police report of the accident is arguably sufficient to put Yasuda at least on inquiry notice that Roque Babauta lacked a valid license on November 4, 1990. Moreover, Yasuda's agent represented that the enclosures to the May 6, 1991 letter constituted "the policy and endorsement"; and the enclosures did not include the page containing the "valid license" exclusion Yasuda now asserts. Plaintiff asserts that it relied on the statements contained in this letter when it chose not to name Joseph Ada or Roque Babauta as parties to this suit. This reliance resulted in two forms of claimed prejudice: the inability to name the actual tortfeasor now that the statute of limitations has tolled, and the expense of litigating against Yasuda. Viewing these facts in the light most favorable to Plaintiff, the Court finds that a jury question is presented as to whether Yasuda is estopped from enforcing the "valid license" exclusion.

V. CONCLUSION

For the foregoing reasons, the Court DENIES the motion of Defendant Saipan Sanko Transportation Inc. for summary judgment. The Court also DENIES the motion of Yasuda Fire & Marine Insurance

Co., Ltd. for summary judgment. The matters considered here will be submitted for decision at trial.

So ORDERED this 30th day of December, 1993.

Marty W.K. Taylor

MARTY W.K. TAYLOR, Associate Judge