NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FLORA LAHIJANI,

Plaintiff and Appellant,

v.

FARDIN HAKAKIAN,

Defendant and Respondent.

B284813

(Los Angeles County Super. Ct. No. BC579400)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul A. Bacigalupo, Judge. Affirmed.

Carpenter, Zuckerman, & Rowley, Stephen K. McElroy and Josh Dowell for Plaintiff and Appellant.

Horvitz & Levy, Barry R. Levy, Daniel J. Gonzalez; Maranga • Morgenstern, Robert A. Morgenstern, Paul A. Elkort and Dennis S. Newitt for Defendant and Respondent.

Flora Lahijani sued Fardin Hakakian, claiming he was negligent after she fell and injured herself while attending a social gathering at Hakakian's home. Lahijani appeals from a judgment after a jury verdict in favor of Hakakian, arguing the trial court committed reversible error when it failed to instruct the jury on her theory of vicarious liability. We affirm the judgment.

BACKGROUND

Hakakian hosted a Shabbat dinner at his home with approximately 20 to 25 guests, including Lahijani and her daughter, Bita Poursalimi. Guests were free to wander the house and to serve themselves tea from the kitchen.

Shortly after Poursalimi arrived, she went into the kitchen to get some tea. She noticed what looked like "water splatters" on the kitchen floor. She pointed the splatters out to Fereshteh Bahri, who was also in the kitchen and wearing what Poursalimi thought looked like a typical waitress uniform. Poursalimi told Bahri, "You should probably wipe that because someone could probably slip on it."

Hakakian hired Bahri to assist that evening. Her responsibilities included assisting in the kitchen, helping set up, serving guests, and cleaning up. Bahri was paid by the hour and in cash. Prior to that evening, Hakakian had hired Bahri on one occasion to cook for a holiday dinner. Bahri said she was unemployed and did not have a full-time job, but implied that she occasionally did similar work for other individuals where she would help set up a tea service.

Poursalimi never told anyone in the Hakakian family or anyone else besides Bahri about the water splatters.

Approximately 15 minutes after seeing the water splatters, Poursalimi saw Lahijani walking out of the kitchen. Lahijani's high-heel platform shoe slid on the kitchen floor, which left a dark mark on the tile. Lahijani fell and was injured.

Lahijani sued Hakakian for premises liability and general negligence. Lahijani alleged Hakakian's floor was an inherently dangerous condition of which Hakakian had actual and constructive notice. Hakakian breached his duty of care to her when he failed to conduct reasonable inspections and failed to supervise, manage, control, repair and maintain the area where she fell. Hakakian knew or should have known of the dangerous condition through the exercise of reasonable care, and should have taken reasonable actions to repair or remedy the dangerous condition.

At trial, the parties disputed whether Lahijani slipped on liquid on the floor or whether, instead, she fell off her high-heel platform shoe and tripped forward. There was also voluminous testimony on whether the floor was unreasonably slippery, whether it should have been treated to make it slip resistant, and whether Lahijani tripped on a transition piece between the kitchen and the breakfast room.

Bahri denied that anyone told her there were splatters on the kitchen floor, but if they had, she would have wiped them up. Hakakian also assumed that Bahri would wipe up liquid spills on the kitchen floor if she became aware of them. However, Hakakian also said he would have expected anyone to wipe up spilled liquid if they noticed it.

Before trial, the parties submitted a joint list of proposed jury instructions which did not include an instruction for vicarious liability. Nor did it include an instruction for premises

liability that would allow the jury to impute Bahri's knowledge of any dangerous condition to Hakakian as an employee to an employer. However, the day before closing arguments and after Bahri had been excused as a witness, Lahijani lodged a new set of proposed jury instructions related to vicarious liability.[1] Lahijani argued the trial court should instruct the jury on vicarious liability because there was evidence that Bahri was Hakakian's employee and, absent such an instruction, Lahijani had no means to prove notice of the dangerous condition to Hakakian. Hakakian objected, arguing that a vicarious liability instruction was inappropriate because Bahri was an independent contractor.

The trial court weighed the relevant factors in determining whether an employer-employee relationship existed, noting Hakakian supplied the place of work; Bahri was paid by the hour; Hakakian was not a business; the work done by Bahri was not part of Hakakian's regular business as a podiatrist; Bahri was not engaged in a distinct occupation or business; Bahri worked under Hakakian's direction, though that could go either way; it was arguable that Bahri's work did not require a specialized skill; and her services were not performed over a long period of time. The trial court also noted that, although Hakakian did not believe Bahri was his employee, it could not determine what Bahri believed because neither party asked that question and she had already been excused as a witness.

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[1] Lahijani's second set of proposed jury instructions is not in the record. However, it is apparent that Lahijani requested instructions on vicarious liability to impute notice from Bahri to Hakakian. The trial court characterized the request as the "3700 series," referring to CACI.

The trial court denied Lahijani's request, finding insufficient evidence to warrant the additional instructions. The jury found Hakakian was not negligent and Lahijani moved for a new trial on the grounds of instructional error.

DISCUSSION

Lahijani argues that the trial court should have instructed on vicarious liability and allowed the jury to determine Bahri's status as an employee or independent contractor. This failure, according to Lahijani, severely prejudiced her as it foreclosed her from establishing notice of the dangerous condition to Hakakian, which is essential to a premises liability claim.

I. Standard of review

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) We review de novo the legal adequacy of jury instructions. (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 24.) We review the record in the light most favorable to the party proposing the instruction to determine whether there was substantial evidence warranting the instruction. (*Soule*, at p. 572.)

We will not reverse a judgment for instructional error in a civil case " 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' " (*Soule*, *supra*, 8 Cal.4th at p. 580.) "Instructional error in a civil

case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' " (*Ibid.*) We evaluate "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Id.* at pp. 580–581.)

II. Vicarious liability

"Under the doctrine of respondeat superior, an employer is vicariously liable for his employee's torts committed within the scope of the employment. This doctrine is based on ' "a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business." ' " (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967.)

The doctrine is not limited to employers running a business, however, and may apply to domestic workers employed by a homeowner. "Although a household employing domestic help is not an enterprise in the business sense, it nonetheless is an employer and its employees' activities in the scope of their employment may create a variety of risks to third parties." (*Miller v. Stouffer* (1992) 9 Cal.App.4th 70, 80.) "[A] household is better equipped than its domestic help to absorb the attendant risks through the purchase of adequate insurance. In addition, in view of the availability, cost and prevalence of such insurance [citation], which is a significant factor in imposing tort liability, there is no reason to exempt domestic employers from vicarious liability for accidents caused by their employees in the scope of their employment." (*Ibid.*)

To establish vicarious liability, a critical determination is whether the individual who created the dangerous condition was

an employee or an independent contractor. Subject to certain exceptions, a person who hired an independent contractor is not liable to third parties for injuries caused by the contractor's negligence in performing the work. (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1107.) Usually, this "is a question for the trier of fact, but can be decided by the court as a matter of law if the evidence supports only one reasonable conclusion." (*Angelotti v. The Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1404.)

The primary test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1178–1179.) "Under this rule, the right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Id.* at p. 1179.)

In addition to the right to control, we also consider secondary factors, including "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of

the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351 (*Borello*).) " '[T]he individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*Ibid.*) "Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case." (*Id.* at p. 354.)

III. Substantial evidence does not support Lahijani's theory that Bahri was Hakakian's employee or agent.

Viewing the record as a whole and in the light most favorable to Lahijani, we find insufficient evidence that Bahri was Hakakian's employee.

As the trial court acknowledged, some of the factors weighed in favor of finding that Bahri was Hakakian's employee. Bahri was paid by the hour, her work did not necessarily require a specialized skill, she could be terminated at any time, and she arguably worked under the direction of Hakakian, who also provided the place of work. While her work was unrelated to Hakakian's business as a podiatrist, this factor is of little value in the context of a relationship between a domestic worker and a homeowner. (See *Miller v. Stouffer*, *supra*, 9 Cal.App.4th at p. 80.)

As stated above, we cannot apply each factor mechanically and the dispositive factors will vary from case to case. (*Borello*, *supra*, 48 Cal.3d at p. 351.) Even if some of the individual factors suggest an employment relationship, a court may find as a matter of law that an individual is an independent contractor after it weighs and considers all the factors as a whole. (*Jackson*

v. AEG Live, LLC, supra, 233 Cal.App.4th at p. 1181.) Moreover, while a party is entitled to an instruction of his or theory of the case that is supported by substantial evidence (*Soule, supra,* 8 Cal.4th at p. 572), this does not mean any evidence (see *DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336). Rather, substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.) It "may consist of inferences," but the "inferences must be 'a product of logic and reason' and 'must rest on the evidence.' " (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) An inference based on "mere speculation or conjecture cannot support a finding" of substantial evidence. (*Ibid.*)

While Bahri was paid by the hour, Hakakian hired Bahri as a server for a single event that lasted only a few hours and she was paid for the number of hours she worked that evening. Hakakian hired Bahri on only two occasions, both of which were special occasions. Bahri indicated she was unemployed and did not have a full-time job, but implied she worked similar jobs where she would set up a tea service. The record also suggests Bahri provided her own work clothes. While neither party asked Bahri what she believed the relationship to be, Hakakian did not consider Bahri his employee. Hakakian presumably could have terminated Bahri at any time during the night, but the power to discharge by itself cannot serve as the basis for changing the relationship to one of an employee. (See *Varisco v. Gateway Science & Engineering, Inc.* (2008) 166 Cal.App.4th 1099, 1107.) While Bahri's work obviously had no relationship to Hakakian's regular business as a podiatrist, her position as a domestic worker also does not weigh in favor of an employer-employee

relationship because she was not, for example, his housekeeper who helped him maintain his home on a daily, weekly, monthly, or even yearly basis.

Most importantly, there is no indication that Hakakian retained control over how Bahri carried out her responsibilities or that he supervised Bahri beyond giving her general directions about assisting that night. Similarly, Hakakian's wife did not give Bahri any specific instructions other than general responsibilities to help clean, set up, and serve guests. Accordingly, we find there was insufficient evidence of an employer-employee relationship such that the jury needed to be instructed on that issue.

Lahijani also argued to the trial court that Bahri was Hakakian's agent. Her briefs do not distinguish between her theories that Bahri was either an employee or agent and she relies on the same evidence to support both contentions.

An agent is one who represents another, called the principal, in dealing with third persons. (Civ. Code, § 2295.) A principal may be held vicariously liable for the torts of its agents. (*Secci v. United Independant Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 855.) "Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370.) There is significant overlap between the factors that determine whether an employer-employee or principal-agent relationship exists. Indeed, the factors are derived from those of agency. (See *Borello*, *supra*, 48 Cal.3d at p. 351.)

Lahijani does not direct us to any other evidence than has already been considered in our independent contractor analysis. Because we are not persuaded that Hakakian had a minimum right to control Bahri as an employee, we are also not persuaded by the identical factors to establish her as an agent. Thus, there was also insufficient evidence to instruct the jury on agency.

Because, as a matter of law, Bahri was not an employee or agent, the trial court had no duty to instruct the jury on Lahijani's theory of vicarious liability. As there was no instructional error, we do not address whether Lahijani was prejudiced.

DISPOSITION

The judgment is affirmed. Fardin Hakakian is awarded his costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EGERTON, Acting P. J.

HANASONO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.