



Avis Rent A Car System

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NOT TO BE PUBLISHED

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Real party in interest Karen Sanders sued petitioner Avis Rent A Car System, Inc. (Avis), alleging she suffered injuries when she fell while stepping down from an Avis bus. The respondent superior court granted Avis's motion for summary judgment because the undisputed evidence showed Sanders did not ask for additional help when she stepped off the bus, and thus Avis did not breach its ordinary duty of care toward Sanders. However, the respondent court later granted Sanders's motion for reconsideration based on Sanders's claim that she had recently remembered that she had in fact asked the Avis bus driver for help. We shall conclude the respondent court abused its discretion in granting reconsideration given that Sanders's newly-remembered facts contradict her prior deposition testimony.

FACTS

In May 2001, Sanders filed her first amended complaint against Avis, alleging that on October 4, 2000, she suffered injuries when she fell while disembarking from an Avis rental car shuttle bus at the Philadelphia, Pennsylvania International Airport. Sanders alleged Avis negligently maintained, controlled, and operated the rental car operation, failed to deliver her safely to the rental car area, and required her to disembark without assistance in an unsafe area of the parking lot.¹

Avis's Motion for Summary Judgment

Avis moved for summary judgment or adjudication, arguing the undisputed facts show Avis fulfilled its ordinary duty of care by transporting Sanders safely to her destination, the rental car lot. Sanders opposed the motion, asserting: "The issue in the present case is not whether [Avis] breached its duty of due care by failing to drop [Sanders] off at an unsafe [sic] location. Rather, the issue is whether or not [Avis] breached its duty of due care by failing to assist [Sanders] as [she] was exiting the bus with several pieces of luggage." Sanders argued that Avis's duty to assist its passengers with their luggage arises from Civil Code section 2103², and from Avis's training manual and practice of training its bus drivers to assist passengers with their luggage.



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The parties agreed the material facts are undisputed. Sanders arrived at the Philadelphia Airport on October 4, 2000, and boarded an Avis rental car shuttle bus at about 9:30 a.m. in order to ride to the Avis lot to pick up her rental car. Sanders entered the bus through its middle double doors. Sanders's luggage consisted of a small rolling suitcase, a folding garment travel bag, a small canvas tote bag, a small camcorder, and her purse.

Sanders did not know anyone on the bus, and did not speak to anyone during her short trip to the Avis rental car parking lot. Sanders testified in her October 14, 2002, deposition, that during the ride to the parking lot she did not "have any conversation" with the Avis bus driver; Sanders said, "I think he may have asked my name, but that's -- I don't -- I really don't recollect having any conversation at all."³

The Avis bus stopped just inside the gate of the Avis parking lot, where a number of passengers got off through the middle double doors. Sanders did not notice that any of the passengers asked the bus driver for assistance or had difficulty getting off the bus. The bus then moved a short distance before stopping across the parking lot from the rental car office, where four or five more passengers stepped off the bus through the double doors; again, Sanders did not notice these passengers having difficulty getting off the bus or asking the bus driver for help.⁴

At this time, a man entered the bus through the front door and engaged the bus driver in a conversation. Sanders waited about one or two minutes, and then yelled to the bus driver, asking whether he was going to drop them off directly in front of the rental office. As Sanders testified in her deposition, she said to the bus driver, "Are we going around to the terminal? Is this as far as we're going?" The bus driver glanced at her but did not respond, so she called out to him again, "We're not going around to the main terminal or the main office?" Sanders thought the bus driver heard her as she spoke in a "fairly loud" voice the first time and shouted "even louder" the second time, and she had no trouble making herself heard.

When the bus driver again failed to respond, Sanders and two remaining bus passengers began to gather their luggage. Sanders did not approach the driver or ask him for assistance or to proceed to the rental office. Sanders testified in her deposition that she did not ask the bus driver to assist her in getting off the bus, and she did not call to him, "A little help over here," or something like that.

Sanders tossed her heavy garment bag onto the ground outside of the bus and placed her rolling bag and tote bag on the far right side of the wide bottom step of the middle double door exit. With her purse and small camcorder bag over her shoulder, Sanders proceeded down the left side of the steps, one at a time, turning her body slightly sideways to the right, placing her left foot down first, followed by her right foot on each step. Sanders could see each step as she walked down the stairs. The surface of the stairs had no defects. As she approached the bottom step, Sanders was aware that the last step was steeper than the previous steps. Sanders then stepped straight down, and immediately upon placing her foot on the ground toppled over and onto the pavement.



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Neither the parking lot nor the bus played a role in Sanders's fall. The surface of the parking lot was free from significant irregularities or defects. The bus steps were marked with white stripes; a handrail pole rose from the second or middle step of the double door area; and the corners of the doors that swung open served as handrails. No evidence exists of any similar incidents involving an individual falling while disembarking from or boarding an Avis shuttle bus.

Although Sanders did not set out any additional facts in her separate statement of facts, Sanders submitted to the respondent court additional evidence attached to her attorney's declaration. Sanders provided a portion of Avis's "Rent A Car Administration Manual," which instructs its shuttle bus drivers to "[a]ssist customers who are having difficulty with loading, unloading or storing their luggage." And Sanders provided portions of the deposition testimony of the district manager at Avis's Philadelphia Airport facility that Avis trains its drivers to assist customers who need help loading or unloading their luggage.⁵

The respondent superior court granted Avis's motion for summary judgment. The court noted that Sanders framed the issue as whether Avis breached its duty of care by failing to comply with its company manual requiring drivers to assist customers having difficulty loading or unloading luggage. The court reasoned that Sanders failed to present evidence that she either asked the bus driver for assistance or exhibited any difficulty in handling her luggage. Finally, the court reasoned that even if the bus driver failed to give Sanders "a reasonable degree of attention," as required by section 2103, Sanders presented no facts to show "any causal connection between a supposed lack of attentiveness by the bus driver and her injury."

Sanders's Motion for Reconsideration

Sanders then moved for reconsideration, pointing out the respondent court (implicitly) concluded Avis has a duty to assist passengers who ask for help with their luggage or exhibit difficulty with their luggage, and arguing that new evidence contained in Sanders's declaration creates a triable issue as to whether Avis breached that duty. Sanders argued the respondent court should consider the new evidence because the motion for summary judgment focused on the issues of duty and breach of duty, but the respondent court "changed the focus to the legal issue of proximate cause," and the new facts are relevant to the issue of proximate cause.

In support of the motion for reconsideration, Sanders submitted her July 16, 2004, declaration, which provides, as relevant: When Sanders first tried to board the Avis bus, she "yelled in to the driver to inform him that [she] had multiple bags to load and that [she] needed help loading the bags," but the driver ignored her. After the bus stopped in the Avis parking lot, and the driver began a conversation with a co-worker, Sanders "said loudly words to the effect that 'it looks like we are not going to get any help here.'" Sanders "encountered a great deal of difficulty managing the bags" and "made a great deal of noise collecting [her] bags." The bus driver looked up and saw that Sanders was experiencing great difficulty with her bags, but offered no assistance. After Sanders tossed her



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garment bag onto the parking lot and set another bag on the step, Sanders began side- stepping down the bus steps left foot first, and the driver again looked up and saw that she was still encountering difficulty disembarking, but did not offer or provide assistance. Sanders declared that at the time of her deposition she did not recall commenting to the bus driver that she was "not going to get any help," and further declared that she partially discussed the other facts in her deposition.

The respondent court granted Sanders's motion for reconsideration, and denied Avis's motion for summary judgment or adjudication. The court first rejected Sanders's contention that the court had changed the focus of the summary judgment motion from breach of duty to proximate cause, pointing out that the court had concluded that Avis did not breach its duty to assist Sanders with her luggage because the undisputed evidence showed Sanders did not demonstrate a need for assistance.

However, the respondent court then concluded that Sanders's declaration presents new evidence creating a triable issue whether Avis breached its duty of care by not assisting Sanders in exiting the bus. The court reasoned that later-discovered facts may provide a basis for reconsideration of a summary judgment ruling, and concluded that a jury must decide whether Sanders actually forgot her statements allegedly made to the bus driver. The court further reasoned that Sanders's declaration explains why she did not give her new testimony earlier, and that her declaration does not contradict her deposition testimony but rather augments it.

Avis filed a petition for writ of mandate challenging the respondent court's order granting reconsideration and denying summary judgment. We notified the parties we were considering issuing a peremptory writ of mandate in the first instance, and requested opposition to the petition, pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171. Having received Sanders's opposition, we shall issue a peremptory writ.

DISCUSSION

Avis contends the respondent superior court abused its discretion in granting reconsideration because Sanders's forgetfulness about the facts is an unsatisfactory explanation for her not producing those facts earlier, and because the facts presented by her are not new and contradict her prior deposition testimony. We agree the respondent court abused its discretion in granting reconsideration based on new facts that contradict Sanders's earlier deposition testimony.

Any party affected by an adverse order may move the trial court to reconsider the order "based upon new or different facts, circumstances, or law." (Code Civ. Proc., § 1008, subd. (a).) We review an order on a motion for reconsideration for abuse of discretion. (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.)

In moving for reconsideration based upon new facts, a party must provide a "satisfactory explanation" for the party's failure to have presented the new evidence at the original hearing.



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(Garcia v. Hejmadi (1997) 58 Cal.App.4th 674, 688-689.) This "strict requirement of diligence" (id. at p. 690) serves the legislative goals of reducing the number of reconsideration motions and providing an incentive for parties to efficiently marshal their evidence. (Id. at pp. 688-689.)

The Court of Appeal has enforced this strict requirement of diligence. For example, the court held a party who submitted a declaration regarding facts that were obviously in his possession earlier and who failed to explain the delay in presenting the facts was not entitled to reconsideration, as a matter of law. (Garcia v. Hejmadi, supra, 58 Cal.App.4th at p. 690.) The court held a party's failure to present evidence in opposition to a summary judgment motion because the party "did not think the evidence was necessary" was a "patently insufficient" excuse. (Foothills Townhome Assn. v. Christiansen (1998) 65 Cal.App.4th 688, 692-693, fn. 6.) And the court held the trial court abused its discretion in granting reconsideration where a party blamed its failure to present legal authority at the time of a motion on its attorney's failure to find the authority earlier. (Baldwin v. Home Savings of America (1997) 59 Cal.App.4th 1192, 1199- 1201.)

The courts have long held that a party may not oppose summary judgment with a declaration that directly contradicts prior deposition testimony or other discovery responses. (D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 21-22; Barton v. Elecsys Internat., Inc. (1998) 62 Cal.App.4th 1182, 1191-1192 [declaration that directly contradicts deposition testimony must be disregarded]; Visueta v. General Motors Corp. (1991) 234 Cal.App.3d 1609, 1613 ["Admissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment"].) It follows that, in general, a party has no satisfactory explanation for submitting a declaration in support of a motion for reconsideration of a summary judgment ruling when the declaration directly contradicts the party's prior deposition testimony.

Throughout the proceedings, the parties have focused on Avis's duty of care as a private carrier for hire, and have assumed Avis does not have the more exacting duty of care of a common carrier. "A common carrier under section 2168 is one who offers to the general public to carry goods or persons, and is bound to accept anyone who tenders the price of carriage. [Citation.] A private carrier, on the other hand, is bound only to accept carriage pursuant to special agreement." (Webster v. Ebright (1992) 3 Cal.App.4th 784, 787.) "The measure of duty of the common carrier is `to exercise for the safety of his passengers while upon his conveyance the highest or utmost degree of care and diligence which human prudence and foresight will suggest in view of the character and mode of conveyance employed' [citation], while that of the private carrier for hire `is what is known as ordinary diligence, and for the lack of this, he will be held liable.' [Citation.]" (Id. at p. 788.)

Sanders has not taken the position that Avis owed her the higher duty of care of a common carrier. Thus, Sanders did not allege in her first amended complaint that Avis is a common carrier. Avis argued in moving for summary judgment that, as a private carrier for hire, it owed Sanders only an ordinary duty of care. Sanders did not argue in opposition to summary judgment that Avis is a common carrier. In granting summary judgment, the respondent court concluded Avis owed Sanders



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only an ordinary duty of care. Sanders has not taken issue with that conclusion.

Moreover, the respondent court concluded that Avis's duty of care required its driver to help plaintiff with her luggage if she asked for help or exhibited difficulty loading or unloading her luggage. Again, Sanders did not take issue with that finding. To the contrary, Sanders's motion for reconsideration was premised on her claim that her declaration sets forth new facts showing she asked the bus driver for help with her luggage and acted in a manner from which the driver should have realized she needed help with her luggage. Finally, Sanders has not argued in this court that Avis is a common carrier, or that Avis owed a duty of care beyond helping her with her luggage if she asked for help or exhibited difficulty in handling her luggage.⁶

The question on summary judgment was simply whether there were facts suggesting that Sanders asked the Avis bus driver for help or exhibited difficulty with her luggage. The respondent court correctly answered that question, concluding that there were not.

The questions on reconsideration were whether Sanders presented new facts suggesting she asked the Avis driver for help or exhibited difficulty with her luggage, and, if so, whether she provided a satisfactory explanation for failing to present those facts earlier. The respondent superior court incorrectly answered that question because the court failed to recognize that Sanders's new facts directly contradict her deposition testimony.

Thus, in her declaration, Sanders asserted that when she "first attempted to board the subject Avis bus, [she] yelled in to the driver to inform him that [she] had multiple bags to load and that [she] needed help loading the bags," and that, when the driver failed to assist her, other passengers helped her with her bags. However, in her deposition, Sanders testified that when she got on the Avis bus a couple of passengers helped her lift her luggage on board, and that she had no conversation with the bus driver from the time she got on the bus until the bus arrived on the Avis property, although she thinks the driver might have asked her name. Because Sanders's declaration about asking the bus driver for help with her luggage directly contradicts her deposition testimony, the respondent court abused its discretion in considering this new evidence as a basis for granting reconsideration.

Next, Sanders declared that after the bus driver stopped in the Avis lot and began a conversation with a co-worker, Sanders "said loudly words to the effect that 'it looks like we are not going to get any help here,'" and that she simply had failed to recall at the time of her deposition that she had made the statement about "not going to get any help." However, in her deposition, Sanders testified that when she yelled to the driver, asking if he was going to drive around to the main office, she did not ask him if he would give her some assistance getting off the bus, and she did not "call to him, 'A little help over here,' or something like that." Again, because Sanders's declaration about asking the bus driver for help directly contradicts her deposition testimony, the respondent court abused its discretion in considering this new evidence as a basis for granting reconsideration.



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Finally, Sanders declared that as she prepared to get off the bus she "encountered a great deal of difficulty managing [her] bags" and "made a great deal of noise collecting [her] bags," and the bus driver observed she was experiencing difficulty with her bags and saw her sidestepping down the steps. However, in her deposition, Sanders testified that because she saw it would not be easy to get down the bus's stairs with all of her luggage, she threw her heavy garment bag onto the ground, used her rolling bag's telescoping arm to place it on the right side of the bottom stair step, and then side-stepped down the steps with her purse and camcorder over her shoulder. Sanders said nothing in her deposition about exhibiting difficulty in carrying her luggage off the bus; indeed, Sanders admitted she was carrying only her purse and camcorder when she stepped from the bus and fell. Nor did Sanders testify in her deposition that the bus driver noticed she was having difficulty. Sanders's declaration is at least inconsistent, if not in direct contradiction, with her deposition testimony.

But even if this new evidence regarding exhibiting difficulty in handling her luggage does not directly contradict her deposition testimony, the respondent court abused its discretion in considering this new evidence as a basis for granting reconsideration. Sanders offered no excuse for failing to present these facts in opposition to the summary judgment motion. Although Sanders's attorney asserted he thought these new facts were not relevant to the summary judgment motion, this assertion is "patently insufficient" given that Sanders placed these facts at issue by opposing summary judgment on the ground that Avis's manual and driver training required drivers to help passengers who exhibited difficulty loading or unloading their baggage. (Cf. *Foothills Townhome Assn. v. Christiansen*, supra, 65 Cal.App.4th at p. 693, fn. 6.)

Lastly, Sanders's and the respondent court's reliance on *Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, is simply misplaced. In *Mink*, the defendant moved for summary judgment on the ground that the statute of limitations expired three days before the plaintiffs filed suit. However, the defendant failed to recognize that the last day of the limitations period was a Saturday, that the following Monday was a court holiday, and that, accordingly, the time to file the plaintiffs' complaint was extended until Tuesday, the day the complaint was filed. The parties and the trial court focused on the event that triggered the running of the statute of limitations period, and consequently proceeded under the false assumption that the last day of the statute of limitations period was a court day. (Id. at pp. 1341-1343.) After the plaintiffs unsuccessfully moved for reconsideration, the Court of Appeal issued a writ, concluding the plaintiffs had an adequate excuse for not earlier discovering the "new facts," i.e., that the limitations period was extended until the day the complaint was filed. (Id. at p. 1343.) Here, Sanders did not premise her motion for reconsideration on a mistake made by her counsel, and this is not a case where both parties operated under a mutual mistake about the facts.

DISPOSITION

Let a peremptory writ of mandate issue directing the respondent superior court to vacate its order of December 15, 2004, granting Sanders's motion for reconsideration and denying Avis's motion for summary judgment or adjudication, and to enter a new order granting Avis's motion for summary



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judgment. Costs are awarded to petitioner Avis. (Cal. Rules of Court, rule 56(l).)

We concur: BUTZ, J., CANTIL-SAKAUYE, J.

1. The first amended complaint also contains a cause of action for loss of consortium on the part of Sanders's husband, real party in interest William Sanders. As William Sanders's cause of action rises or falls with Karen Sanders's cause of action (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067), we shall refer throughout this opinion to Karen Sanders only.
2. Undesignated statutory references are to the Civil Code.
3. Avis provided portions of Sanders's deposition testimony in support of its statement of undisputed facts.
4. Avis has a practice of dropping off customers in the rental car parking lot. Customers with "[p]referred" status are dropped off in the parking lot area near their cars, while non- preferred customers are usually taken to the office location to arrange for their rental vehicles, but sometimes also exit at various locations in the lot.
5. Avis objected to the respondent court's consideration of this additional evidence. Although the respondent court, in its summary judgment order, purported to sustain Avis's objections, the court inconsistently considered the Avis Rent A Car Administration Manual in ruling on the summary judgment motion. Moreover, the court considered both the manual and the district manager's deposition testimony in ruling on Sanders's motion for reconsideration. Because Avis does not renew its objections to this evidence here, and does not claim the respondent court erred in considering this evidence, any claim that this evidence should not be considered has been waived. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014- 1015.)
6. In opposition to summary judgment, Sanders argued that Avis, as a "carrier for reward," owed Sanders a duty to help her as she got off the bus with her luggage, as determined by section 2103, Avis's training of its drivers, and Avis's training manual. Section 2103 requires a carrier for reward to give passengers usual and reasonable accommodations, to treat them with civility, and to "give them a reasonable degree of attention." We need not determine whether section 2103 applies to private carriers for hire (but see *Webster v. Ebright*, supra, 3 Cal.App.4th at pp. 787- 788 [section 2100 codifies the common law duty of care owed by a common carrier, not a private carrier for hire]), given that Sanders's position in her motion for reconsideration implicitly concedes that the statutory duty of "attentiveness" is no more than the duty to help passengers who ask for help with their luggage or exhibit difficulty in handling their luggage. As near as we can tell, Sanders does not contend that the statutory duty of "attentiveness" requires a private carrier for hire to assist passengers who do not ask for help, or exhibit difficulty, with their luggage. Nor would we find such a contention persuasive as it would require a private carrier for hire personally to assist every passenger getting on or off the carrier's conveyance.

