Maciel v. Simac Construction

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

INTRODUCTION

Plaintiff Raymond Maciel (plaintiff) was working for a concrete subcontractor pouring and finishing a slab at a commercial construction project when he fell partially through a hole in the metal sub floor of the structure and sustained injuries. He sued the general contractor on the project, defendant SIMAC Construction, Inc. (SIMAC), and the structural steel subcontractor, defendant Structural Steel Fabricators, Inc. (Structural Steel), for negligence and premises liability. SIMAC and Structural Steel filed separate motions for summary judgment, and the trial court granted them, resulting in separate judgments in favor of each defendant.

In these consolidated appeals[1] from the separate judgments entered against him, plaintiff challenges the trial court's rulings granting summary judgment as to each defendant. On the appeal from the judgment in favor of SIMAC, plaintiff contends that the trial court erred when it concluded that SIMAC did not exercise its retained power to control the performance of the work so as to contribute affirmatively to plaintiff's injuries. On the appeal from the judgment in favor of Structural Steel, plaintiff contends that the trial court erred in granting summary judgment because there were triable issues of fact concerning whether Structural Steel complied with safety regulations and because his claims against Structural Steel were not barred by the primary assumption of the risk doctrine.

As to the judgment in favor of SIMAC, we hold that the trial court correctly concluded that SIMAC did not affirmatively contribute to plaintiff's injuries and, therefore, affirm the judgment in its favor. As to the judgment in favor of Structural Steel, we hold that there are triable issues of fact concerning whether Structural Steel complied with applicable safety regulations, thereby contributing to plaintiff's injuries, and that his claims against Structural Steel are not barred by the primary assumption of the risk doctrine. We therefore reverse the judgment in favor of Structural Steel.

FACTUAL AND PROCEDURAL BACKGROUND

A. SIMAC's Motion for Summary Judgment[2]

1. The Undisputed Facts

SIMAC's separate statement of undisputed facts, which was not disputed by plaintiff, sets forth the facts essentially as follows. On October 30, 2002, SIMAC, as the general contractor, and Structural Steel, as a subcontractor, entered into a "Subcontract Agreement" (Structural Steel Subcontract) to perform the structural steel work on a CVS pharmacy that was being constructed in Downey, California (CVS Project). On November 6, 2002, SIMAC, as general contractor, and Alfaro Company (Alfaro), as subcontractor, entered into a subcontract to perform certain cement work on the CVS Project (Cement Subcontract). Both the Structural Steel Subcontract and the Cement Subcontract contained an identical paragraph 20 that provided, "SUBCONTRACTOR [Structural Steel or Alfaro] and CONTRACTOR [SIMAC] shall agree that job safety should be of prime importance during the performance of the work. SUBCONTRACTOR agrees that it must adequately supervise the safety conditions of his [sic] work and that CONTRACTOR should not be required to do so. SUBCONTRACTOR therefore agrees to be solely responsible for compliance with all safety regulations in connection with its work. . . . SUBCONTRACTOR also agrees that the CONTRACTOR may correct or order to be corrected, any unsafe conditions created by the SUBCONTRACTOR and that the SUBCONTRACTOR does agree to pay for any costs incurred for such correction."

In the course of performing the structural steel work on the CVS Project, Structural Steel cut four heating, ventilation, and air conditioning (HVAC) openings (which measured approximately two feet by four feet) in the corrugated metal sub floor of the mezzanine level. Structural Steel, as the subcontractor that created the HVAC openings, was responsible for ensuring that those openings were always covered by plywood or some other protective covering that would prevent someone from stepping into or falling through them.

On the few days that the HVAC openings were in existence prior to the pouring of the concrete slab on the mezzanine sub floor, SIMAC's job superintendent, James Bonham, observed on several occasions that plywood covers had been placed over the openings. SIMAC never ordered anyone to remove the protective plywood coverings over the HVAC openings. Similarly, SIMAC never ordered anyone to work in proximity to any uncovered HVAC openings in the CVS Project's mezzanine sub floor. Although SIMAC retained a general oversight role on the CVS Project, and would tell subcontractors to correct a dangerous condition if one was observed, SIMAC never assumed responsibility for placing plywood or other protective coverings over the HVAC openings in the CVS Project's mezzanine sub floor.

As noted above, SIMAC had retained Alfaro as its concrete subcontractor on the CVS Project. Approximately one week before the incident, however, Alfaro's principal, Sal Alfaro, called Ruben Correa, Sr., principal of Correa Concrete, Inc. (Correa), and entered into an oral agreement for Correa

to perform the pouring and finishing of the mezzanine slab, a one-day job.

On January 28, 2003, plaintiff was employed by Correa, and was operating the "bull float" and "Fresno" devices to smooth the concrete as Correa poured the entire mezzanine slab over the corrugated metal sub floor that had previously been installed by Structural Steel. While performing his work on the concrete pour, plaintiff stepped back and fell partially through one of the uncovered HVAC openings in the mezzanine sub floor.

2. Plaintiff's Additional Facts

As noted, plaintiff did not dispute the foregoing facts,[3] but did submit additional facts in opposition to the motion which appeared to contradict certain of the facts on which SIMAC's motion was based. For example, SIMAC's undisputed fact numbers six and nine asserted that Structural Steel was responsible for covering the openings in the mezzanine sub floor, and that SIMAC never assumed that responsibility. Plaintiff's additional undisputed fact numbers four through ten asserted that SIMAC (i) was responsible for covering the openings; (ii) provided Structural Steel with the plywood to cover them; (iii) had been notified that the HVAC openings had been uncovered prior to the incident in question; and (iv) represented to Structural Steel on January 28, 2003 (the date of the incident) that it would speak to the cement subcontractor about re-covering the exposed openings.

3. SIMAC's Motion for Summary Judgment

Plaintiff's complaint against SIMAC asserted two causes of action for "general negligence" and "premises liability." The charging allegations for each cause of action were substantially similar. According to plaintiff, "defendants, and each of them, so negligently entrusted, managed, maintained, operated, and controlled said premises in a dangerous manner so as to cause an uncovered opening to exist so as to cause the plaintiff to step into the hole and fall. The defendants and each of them, failed to warn plaintiff of said dangerous, and unsafe condition, although they knew, or in the exercise of ordinary care should have known of the condition of said premises."

SIMAC filed its motion for summary judgment or, in the alternative, summary adjudication, asserting three grounds in support of the motion. The first ground was that plaintiff's claims were precluded under the doctrine set forth in Privette v. Superior Court (1993) 5 Cal.4th 689 (Privette) because SIMAC had not affirmatively contributed to plaintiff's accident. The second ground was that plaintiff's claims were barred under the primary assumption of the risk doctrine. The third ground was that plaintiff's written discovery responses were "factually-devoid" and established that his causes of action lacked merit and were duplicative.

Plaintiff's opposing papers argued that SIMAC's contentions based on Privette, supra, 5 Cal.4th 689, were irrelevant because plaintiff was not basing his negligence claims on a vicarious liability theory, but rather on the direct negligence of SIMAC. Plaintiff also asserted that primary assumption of the

risk did not apply and that his alleged knowledge of the risk was merely a factual issue concerning the defense of contributory negligence.

SIMAC filed a joint reply to plaintiff's opposition and the opposition filed by co-defendant Structural Steel.[4] SIMAC argued that the evidence of plaintiff's actual knowledge of the dangerous condition barred his claims under the primary assumption of the risk doctrine. SIMAC also argued that, under Hooker v. Department of Transportation (2002) 27 Cal.4th 198 (Hooker), plaintiff was required to show that SIMAC affirmatively contributed to his injury, a showing that SIMAC contended plaintiff had failed to make.

4. The Trial Court's Ruling on SIMAC's Motion

On April 1, 2005, the trial court held a hearing on SIMAC's motion and took the matter under submission. The trial court subsequently entered a minute order granting SIMAC's motion.[5] The trial court began its analysis by noting that SIMAC had entered into agreements with its subcontractors specifically charging them with responsibility for compliance with all safety regulations. It then observed that "[g]enerally, hirers of independent contractors are not liable to the employees of the independent contractor. Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253; Privette v. Superior Court (1993) 5 Cal.4th 689. However, the property owner/hirer can be held liable where it exercises control in a manner that affirmatively contributes to plaintiff's injuries. [Citation.]" (Id.) The trial court then found that SIMAC's evidence established that it lacked the requisite control to hold it liable for negligence or premises liability. (Ibid.) Citing Browne v. Turner Construction Co. (2005) 127 Cal.App.4th 1334 (Browne), the trial court determined the evidence did not establish that SIMAC affirmatively promised to undertake a particular remedial measure. (Id. at p. 3.) The trial court also concluded that it did not need to reach the issue of assumption of the risk. (Ibid.) On May 11, 2005, the trial court entered a judgment on its order granting summary judgment in favor of SIMAC.

A. Structural Steel's Motion for Summary Judgment

1. The Undisputed Facts

The following facts are undisputed with respect to Structural Steel's motion for summary judgment. On October 30, 2002, a subcontract agreement was entered into between SIMAC and Structural Steel. On November 6, 2002, a subcontract agreement was entered into between SIMAC and Alfaro, the concrete subcontractor. Although SIMAC had retained Alfaro to act as the concrete subcontractor on the CVS Project, Alfaro subcontracted the pouring and finishing of the mezzanine slab to plaintiff's employer, Correa.

During the course of its work, Structural Steel cut four to six HVAC openings (approximately 30 inches by 20 inches in diameter) in the corrugated metal sub flooring of the CVS Project's mezzanine

level several days prior to January 28, 2003. After completing the structural steel work on the mezzanine level, Structural Steel covered the HVAC openings in the mezzanine's sub floor "in compliance with safety requirements." SIMAC's job superintendent, James Bonham, inspected the covers installed by Structural Steel over the HVAC openings in the sub floor, after Structural Steel had completed its work, and found them to be acceptable. Upon completion of its work on the mezzanine level, and after installing the HVAC opening covers, Structural Steel left the work site on the mezzanine level and did not return at any time prior to the incident. SIMAC's job superintendent, James Bonham, inspected the mezzanine level again after Structural Steel left that site, and before the date of the incident, and found the covers installed by Structural Steel to be acceptable.

On the day of the incident, plaintiff was operating the "bull float" and "Fresno" devices to smooth the concrete as Correa poured the entire slab over the mezzanine sub floor. When he arrived at work on the day of the incident, plaintiff saw four square holes cut in the mezzanine sub floor, with two inch angle iron surrounding each of them. Before he began working, plaintiff told his foreman that "the cutouts were supposed to be covered, [and] that they were dangerous." The foreman responded, "I can't do [anything] about it. We have to pour the floor." Plaintiff replied, "O.K.," and began to work.

2. The Disputed Facts

In response to Structural Steel's motion for summary judgment, plaintiff disputed only the following facts. Structural Steel contended that the covers it installed over the HVAC openings were in compliance with safety requirements, but plaintiff's expert[6] opined that they were not. Structural Steel also contended that the concrete subcontractor would have removed the covers installed by Structural Steel in order to complete the concrete pour, but plaintiff contended that any of the subcontractors working on the CVS Project could have removed the covers. Structural Steel further contended that it was the concrete subcontractor's responsibility to replace the covers and maintain a safe work area, whereas plaintiff contended it was Structural Steel's responsibility.

3. Structural Steel's Motion for Summary Judgment

In addition to naming SIMAC, the complaint described above also named "Does 1 through 20." Structural Steel answered the complaint as "Doe 1." Among others, Structural Steel asserted an affirmative defense alleging that plaintiff voluntarily exposed himself "to all said risks of harm and thus assume[ed] said risks of danger and other loss . . . ."

Structural Steel filed a motion for summary judgment "on the grounds that: 1) STRUCTURAL STEEL properly covered the HVAC duct openings on the mezzanine Level of the CVS building through one of which Plaintiff partially fell during the construction of that building and STRUCTURAL STEEL did not leave that duct opening exposed, or otherwise negligently contribute

to the Plaintiff's accident; and 2) Plaintiff was made aware of the existence of the HVAC openings in the floor on which he was working before his incident and chose to work in that environment anyway, so that his action is barred by the doctrine of Primary Assumption of the Risk." The motion, which was filed with exhibits A through I attached, was filed concurrently with a separate statement of undisputed facts setting forth 19 facts that Structural Steel contended were undisputed.[7]

Plaintiff's opposition to the motion was, as noted, supported by the expert declaration of Robert Gallucci. The opposition was filed concurrently with a response to Structural Steel's separate statement of undisputed facts that disputed only four of the 19 facts asserted by Structural Steel in support of the motion.

Structural Steel filed its reply brief and objections to the declaration of Mr. Gallucci. It objected to four portions of that declaration, but did not object to Mr. Gallucci's qualifications to testify as an expert.[8]

4. The Trial Court's Ruling on Structural Steel's Motion

At the July 13, 2005, hearing on Structural Steel's motion for summary judgment, both parties appeared and submitted on the court's tentative ruling.[9] The trial court's tentative ruling was made the final ruling of the court. On August 15, 2005, the trial court entered an "Order re Motion for Summary Judgment" prepared by Structural Steel's attorney that incorporated the tentative ruling and provided that "[p]laintiff was aware of the holes and thereby assumed the risk of injury. Additionally, the moving Defendant's work was completed prior to the injury. It had no control over the subsequent placing or removal of the coverings." The order also ruled on the first three objections to Mr. Gallucci's declaration, sustaining the first two, but overruling the third. There is no mention in the order of the fourth objection to Mr. Gallucci's declaration. On August 15, 2005, the trial court entered judgment on the order granting Structural Steel's motion for summary judgment.

DISCUSSION

A. Standard of Review

"We review the grant of summary judgment de novo. (Szadolci v. Hollywood Park Operating Co. (1993) 14 Cal.App.4th 16, 19 [17 Cal.Rptr.2d 356].) We make `an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' (Iverson v. Muroc Unified School Dist. (1995) 32 Cal.App.4th 218, 222 [38 Cal.Rptr.2d 35].) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts back to

the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 849, 853 [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (Moser v. Ratinoff (2003) 105 Cal.App.4th 1211, 1216-1217.)

A. The Undisputed Facts Show That SIMAC Did Not Affirmatively Contribute to Plaintiff's Injuries and Therefore Is Not Legally Responsible

Plaintiff correctly states that under the recent decisions of Hooker, supra, 27 Cal.4th 198 and Browne, supra, 127 Cal.App.4th 1334, the hirer of an independent contractor may be liable to an injured employee of the independent contractor if the hirer affirmatively contributed to the employee's injury. Plaintiff contends that this rule is not based on a vicarious liability theory, but rather on the direct negligence of the hirer. As plaintiff interprets Browne, one who voluntarily undertakes a particular safety measure, and then fails to perform that undertaking can be liable to an independent contractor's employee if that failure to perform causes injury to the employee.

According to plaintiff, his evidence raised a triable issue concerning whether SIMAC voluntarily accepted responsibility to remedy the safety hazard posed by the uncovered HVAC openings in the mezzanine sub floor. In support of his assertion, he cites to the testimony of Structural Steel's foreman, Mike Tully, who purportedly stated that SIMAC's superintendent, Jim Bonham, agreed "to remedy the unsafe condition."

In response, SIMAC argues that Hooker, supra, 27 Cal.4th 198, and Browne, supra, 127 Cal.App.4th 1334, support the trial court's judgment because those cases confirm that a hirer's mere failure to exercise its retained control over safety precautions is insufficient to establish liability. According to SIMAC, plaintiff's evidence, at best, shows only that SIMAC failed to require Correa to remedy the safety hazard posed by the uncovered openings in the mezzanine sub floor.

In Hooker, supra, 27 Cal.4th 198, our Supreme Court, relying on a line of decisions limiting the liability of a hirer of an independent contractor for injuries to one of the contractor's employees,[10] resolved the issue of whether a hirer of an independent contractor could be liable for negligent exercise of a retained power to control the performance of the work. (Id. at pp. 200-201.) The court held that "a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control affirmatively contributed to the employee's injuries." (Id. at p. 202.)

The plaintiff in Hooker, supra, 27 Cal.4th 198 was the wife of an employee of a general contractor hired by defendant Caltrans to construct an overpass. (Id. at pp. 202-203.) The employee was killed while operating a crane on the overpass. (Ibid.) "The overpass was 25 feet wide, and the crane with the outriggers extended was 18 feet wide, so [the employee] would retract the outriggers to allow other construction vehicles or Caltrans vehicles to pass. Shortly before the fatal accident, [the

employee] retracted the outriggers and left the crane. When [the employee] returned, he attempted, without first reextending the outriggers, to swing the boom. Because the outriggers were retracted, the weight of the boom caused the crane to tip over. [The employee] was thrown to the pavement and killed." (Ibid.) The widow of the deceased employee sued Caltrans on the theory that Caltrans had negligently exercised the control it retained over safety conditions on the job site. (Hooker, supra, 27 Cal.4th at p. 203.)

In affirming a summary judgment in favor of Caltrans, the court stated, "Accordingly, under the standard we announce today, summary judgment was appropriate here. Plaintiff raised triable issues of material fact as to whether defendant retained control over safety conditions at the worksite. However, plaintiff failed to raise triable issues of material fact as to whether defendant actually exercised the retained control so as to affirmatively contribute to the death of plaintiff's husband. While the evidence suggests that the crane tipped over because the crane operator swung the boom while the outriggers were retracted, and that the crane operator had a practice of retracting the outriggers to permit construction traffic to pass the crane on the overpass, there was no evidence Caltrans's exercise of retained control over safety conditions at the worksite affirmatively contributed to the adoption of that practice by the crane operator. There was, at most, evidence that Caltrans's safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it." (Hooker, supra, 27 Cal.4th at p. 215; see also Kinsman v. Unocal Corp. (2005) 37 Cal.4th 659, 669-671.)

Based on the undisputed facts in the record on Structural Steel's motion, the holding in Hooker, supra, 27 Cal.4th 198, is controlling. As in Hooker, plaintiff's evidence showed that SIMAC retained some degree of control over safety conditions, and was arguably made aware of the hazard that ultimately caused plaintiff's injury. That evidence also suggested that SIMAC's superintendent may have told Structural Steel's foreman that he would speak to the cement contractor, Correa, about the hazard. Nevertheless, plaintiff's evidence stopped short of establishing the required affirmative conduct by SIMAC that contributed to plaintiff's injury or was relied upon by plaintiff. Like the situation in Hooker, plaintiff's evidence, at best, showed that SIMAC was aware of the hazard and failed to exercise its retained power to correct it. Such evidence, however, is insufficient to satisfy the standard articulated in Hooker requiring affirmative conduct that directly contributes to the plaintiff employee's injury.

Contrary to plaintiff's assertion, the recent decision in Browne, supra, 127 Cal.App.4th 1334, does not compel a different result. In Browne, the plaintiff, an employee of a fire sprinkler subcontractor, was injured when he fell from a ladder while performing certain overhead work on a construction project. (Id. at p. 1337) He sued Intel Corporation (Intel), the owner of the project, and Turner Construction Company (Turner), the general contractor, alleging that Intel had required Turner to remove hydraulic lifts from the part of the project on which plaintiff was working, causing him to use a ladder to perform the work. (Id. at p. 1338.) He further asserted that his injuries resulted from each defendant's "negligently retained control of the subject jobsite." (Ibid.)

The defendants moved for summary judgment. (Browne, supra, 127 Cal.App.4th at p. 1338.) In opposition, the plaintiff introduced evidence that the defendants had removed the scissors lifts from the floor on which he was working and also had removed a "fall protection system" that they had previously installed to prevent falls. (Ibid.) The trial court granted summary judgment based on Hooker, supra, 27 Cal.4th 198.

The court of appeal reversed, holding that there were triable issues of fact concerning whether the defendants had voluntarily undertaken to provide services for the protection of plaintiff and, if so, whether they had negligently failed to discharge that voluntarily undertaken duty. (Browne, supra, 127 Cal.App.4th at p. 1348.) "Here plaintiff asserted without dispute that defendants provided two systems, at least one of which was manifestly intended for, and both of which had the effect of, protecting plaintiff and other workers from injuries due to falling. Whether defendants furnished these systems gratuitously or out of obligation, once they did so they assumed a duty not to increase the risk of harm to plaintiff either by acting negligently or by inducing reliance which increased the harm." (Id. at p. 1347.)

Plaintiff argues that this case is similar to Browne, supra, 127 Cal.App.4th 1334, because SIMAC's superintendent told Structural Steel's foreman that "he would take care of it and would talk to the concrete foreman." ~(CT 103)~ According to plaintiff, that brief conversation constituted a voluntary undertaking to protect plaintiff from the risk posed by the uncovered HVAC openings, and imposed upon SIMAC a duty of care towards plaintiff similar to that found in Browne. Under that theory, "`one "who, having no initial duty to do so, undertakes to come to the aid of another-the `good Samaritan'-has "a duty to exercise due care in performance and is liable if (a) his failure to exercise care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." [Citations.]'" (Id. at 1346.)

The facts in this case are not similar to those at issue in Browne, supra, 127 Cal.App.4th 1334. There, the evidence showed that the defendants had voluntarily undertaken to provide two safety systems to prevent the precise type of injury that the plaintiff sustained, and that they then removed those systems increasing the risk of such an injury. Here, SIMAC did nothing to increase the hazard, nor did it act in any way that would have induced plaintiff to rely upon it to protect him from the type of injury he sustained. At most, SIMAC's superintendent told Structural Steel's foreman that he would speak to Correa about the removal of the plywood covers from the HVAC openings in the mezzanine sub floor. But there is no evidence that plaintiff was made aware of that discussion and relied upon it to his detriment. Thus, assuming, arguendo, that SIMAC's superintendent failed to speak to Correa about the issue, that conduct amounts to nothing more than negligent exercise of retained control, without affirmatively contributing to plaintiff's injury. Such inaction falls short of the type of affirmative contribution to plaintiff's injury required under the standard articulated in Hooker, supra, 27 Cal.4th 198, and that was present in Browne.

C. There Are Triable Issues of Material Fact with Regard to the Claims Against Structural Steel

1. As Augmented, the Record on Appeal Is Adequate

Structural Steel's initial argument is that because the record on appeal is inadequate, and plaintiff failed to remedy that inadequacy when alerted to it by this court, the judgment in its favor should be affirmed. Its argument is based on the fact that neither the separate statement of undisputed facts in support of its summary judgment motion, nor the exhibits to that motion, were included in the record. Structural Steel further contends that, even after this court issued its February 1, 2005, order requesting briefing on the inadequacy issue, plaintiff failed to augment the record.

Structural Steel is correct that the absence of its separate statement and the exhibits in support of its motion rendered the record inadequate. But that inadequacy does not mandate an affirmance of the judgment without further review. Under California Rules of Court, rule 12, this court may, at any time, order on its own motion that the record be augmented to include any document filed or lodged in the case in the superior court. Accordingly, on our own motion, we augmented the record with a complete copy of Structural Steel's motion with exhibits and a complete copy of its separate statement.[11] As a result, the record is now adequate for purposes of our review of the merits of plaintiff's appeal.

2. There Is a Triable Issue of Fact Concerning Whether Structural Steel Complied with Applicable Safety Standards and Regulations

Structural Steel asserts that its moving papers and exhibits "clearly established it had installed coverings over the HVAC openings on the Mezzanine Level in compliance with applicable safety requirements prior to the incident . . . ." That assertion is apparently based on its undisputed fact number nine, which is supported by an excerpt from the deposition testimony of James Peterson, SIMAC's job superintendent. In that excerpt, Mr. Peterson testified that he recalled "at a time prior to [the] date of this incident that they [the HVAC openings in the sub floor] were covered and that they were in compliance with the . . . safety requirements." He did not, however, identify "the safety requirements" to which he was referring or how the coverings complied with those requirements.

In response to Structural Steel's motion, plaintiff submitted the expert declaration testimony of Robert Gallucci, who testified, inter alia, that Cal-OSHA standards required that "any hole, where a danger of employees or material falling through exists, shall be guarded by a standard railing and toeboard or covers. Covering shall be secured in places to prevent accidental removal or displacement and shall bear a pressure sensitized, painted, or stenciled sign saying `Opening, Do Not Remove.' Markings of chalk or keel shall not be used." Mr. Gallucci then cited to the deposition testimony of Structural Steel's job foreman, Michael Tully,[12] in which Mr. Tully purportedly stated that the covers were laid on top of the openings, but not fastened, and marked with the words "Do Not Step" in red marking crayon (keel). Mr. Gallucci concluded that "the subject covers [were not in] compliance with industry standards and the above referenced Cal/OSHA regulations."

As noted above, Structural Steel objected to certain portions of Mr. Gallucci's declaration. The trial court sustained the objection to that portion of Mr. Gallucci's declaration that purported to recite Mr. Tully's deposition testimony, but overruled the objection to Mr. Gallucci's ultimate opinion that the coverings installed by Structural Steel fell below the standard of care in the industry by not complying with Cal-OSHA regulations in constructing the plywood covers.

In reviewing a ruling on a summary judgment motion, the reviewing court is required to construe the moving party's evidence strictly, while construing the opposing party's evidence liberally. (D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 20.) The court must consider not only the direct evidence presented, but also reasonable inferences to be drawn therefrom. (Mann v. Cracchiolo (1985) 38 Cal.3d 18, 36.) Such inferences must be "reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork." (Waschek v. Department of Motor Vehicles (1997) 59 Cal.App.4th 640, 647.)

The declaration testimony of Mr. Gallucci raised a reasonable inference that Structural Steel may not have installed coverings for the HVAC openings that were in compliance with industry and Cal-OSHA requirements. Mr. Peterson's conclusory testimony to the contrary therefore, at best, raises a disputed factual issue. Moreover, Mr. Peterson's testimony is partially contradicted by Mr. Tully's admission that the coverings were not fastened in place. And, Structural Steel presented no competent evidence, beyond Mr. Peterson's unsubstantiated conclusion, that the coverings were in compliance with the applicable safety provisions. In particular, its evidence in support of the motion is silent on the issue of whether the coverings were marked with the required "Opening, Do Not Remove" warning. Having asserted in its separate statement that the coverings complied with safety requirements, it was incumbent upon Structural Steel to submit competent evidence to support that assertion. Its failure to do so, when coupled with plaintiff's evidence as to what those safety requirements were, raises a reasonable inference that the coverings violated legal requirements, and that such violations may have contributed to plaintiff's injuries.[13]

Structural Steel's contention that Mr. Gallucci's testimony is speculative, and otherwise insufficient to raise a triable issue of fact, is unpersuasive. As noted, no objection was raised to Mr. Gallucci's qualifications to testify as an expert, nor was there any objection to his testimony concerning the applicable Cal-OSHA regulations. Contrary to Structural Steel's assertions, those regulations were precisely "matters of the type experts reasonably rely on" when forming opinions. (See Kelley v. Trunk (1998) 66 Cal.App.4th 519, 523-524.) And, although the trial court sustained the objection to that portion of Mr. Gallucci's declaration which purported to recite specific excerpts from Mr. Tully's deposition, it overruled the objection to that portion of Mr. Gallucci's declaration wherein he stated that he reviewed and relied upon Mr. Tully's deposition in forming his opinion.[14] The trial court also overruled the objection to Mr. Gallucci's ultimate opinion concerning Structural Steel's failure to comply with industry standards and Cal-OSHA regulations. As a result, there is sufficient evidence in the record to support a finding of a triable issue of fact concerning whether Structural Steel complied with applicable safety standards and regulations. As our Supreme Court has recently

confirmed, the violation of such safety standards and regulations constitutes negligence per se. (Elsner v. Uveges (2004) 34 Cal.4th 915, 927-928 [proof of violation of safety standards and regulations, including Cal-OSHA provisions, can be used to create a presumption of negligence in specified circumstances].)

Based on the foregoing, Structural Steel's argument that it did not proximately cause plaintiff's injury misses the point. That argument is premised on the undisputed fact that Structural Steel did not remove the coverings from the HVAC openings. But plaintiff does not contend that Structural Steel was the sole or direct cause of his injury because it removed the coverings. Plaintiff contends that Structural Steel contributed to his injury by failing to fasten and label the coverings it had installed in accordance with industry standards and regulations. And it is the evidence of that failure by Structural Steel that gives rise to a triable issue of fact.

3. Plaintiff's Claims Against Structural Steel Are Not Barred by the Primary Assumption of the Risk Doctrine

Structural Steel asserts in the alternative that plaintiff's claims are barred by the primary assumption of the risk doctrine because plaintiff admitted he was aware of the uncovered HVAC openings, cognizant of the risk they posed, and proceeded nevertheless to perform his work in light of the risk. According to Structural Steel, those factual admissions concerning plaintiff's subjective awareness and appreciation of the risk of injury bar his claims against it as a matter of law.

In the seminal case of Li v. Yellow Cab Co. (1975) 13 Cal.3d 804, our Supreme Court abrogated the common law "all-or-nothing" rule of contributory negligence in favor of a more equitable system of comparative fault. (Id. at pp. 812-813.) Thereafter, however, consistent application of the assumption of the risk doctrine proved difficult. (Knight v. Jewett (1992) 3 Cal.4th 296, 306-307 (Knight).) In Knight, a plurality of our Supreme Court clarified the doctrine by distinguishing "between (1) those instances in which the assumption of risk doctrine embodies a legal conclusion that there is `no duty' on the part of the defendant to protect the plaintiff from a particular risk-the category of assumption of risk that the legal commentators generally refer to as `primary assumption of risk'-and (2) those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty-what most commentators have termed `secondary assumption of risk.'" (Id. at p. 308.)

Determining whether a defendant owes a duty of care to protect the plaintiff from a particular risk depends on the nature of the activity undertaken and the relationship of the parties to that activity an analysis that is independent of whether the plaintiff acted reasonably while confronting the particular risk. (Knight, supra, 3 Cal.4th at p. 309.) As one court has stated, Knight makes it clear . . . that a plaintiff s subjective knowledge or appreciation of the nature or magnitude of the potential risk is no longer a relevant inquiry. Rather the focus is whether, in light of the nature of the sport or activity involved, it can be said that defendant breached a legal duty of care to plaintiff." (Cohen v.

McIntyre (1993) 16 Cal.App.4th 650, 655.) A majority of our Supreme Court has since embraced the analytical approach to primary assumption of the risk articulated in Knight. (Avila v. Citrus Community College Dist. (2006) 38 Cal.4th 148, 161, citng Kahn v. East Side Union High School Dist. (2003) 31 Cal.4th 990, 1004-1005 and Cheong v. Antablin (1997) 16 Cal.4th 1063, 1067-1068.)

The foregoing authorities confirm that plaintiff's knowledge and appreciation of the risk of injury are irrelevant to the determination of whether his claims are barred under the primary assumption of the risk doctrine. Instead, the proper focus is on the nature of the activity involved and the parties' relationship to that activity. Here, the activity involved was the construction of the CVS Project and, in particular, the fabrication of the mezzanine sub floor and the pouring of the concrete slab over that sub floor. The relationship of the parties was that of a subcontractor and an employee of another subcontractor, both performing work on the same job site. Subsequent to Knight, supra, 3 Cal.4th 296, the courts have applied primary assumption of the risk principles to activities other than sporting or recreational activities, including workplace activities. (See Milwaukee Electric Tool Corp. v. Superior Court (1993) 15 Cal.App.4th 547, 559-565 (Milwaukee Tool) [primary assumption of the risk did not bar construction worker from suing tool manufacturer for workplace injuries caused by tool]; Cohen v. McIntyre, supra, 16 Cal.App.4th 650, 655-656 [primary assumption of risk barred veterinarian from suing owner of dog for dog bite injury in the workplace]; Herrle v. Estate of Marshal (1996) 45 Cal.App.4th 1761, 1765-1771 [nurse's aid's suit based on an assault at her workplace by a senile patient barred under primary assumption of risk doctrine].)

The application of the primary assumption of the risk doctrine to the facts of this case is governed by our Supreme Court's decision in Neighbarger v. Irwin Industries, Inc. (1994) 8 Cal.4th 532 (Neighbarger). In that case, the plaintiffs were employees of an oil company who were specially trained as safety supervisors to respond to toxic spills and petroleum fires. (Id. at p. 535.) The defendant, Irwin Industries, Inc. (Irwin), provided maintenance services for the oil company pursuant to a contract. (Ibid.) On the day of the incident in which plaintiffs were injured, two employees of Irwin were removing piping and installing a valve flange. (Neighbarger, supra, 8 Cal.4th at p. 535.) While attempting to clear a blockage in the valve in an unsafe manner, one of those Irwin employees caused the release of a flammable petroleum product. (Ibid.) Plaintiffs were working nearby and responded to the release, but the liquid petroleum product ignited burning them both. (Ibid.)

The plaintiffs sued Irwin for injuries allegedly caused by the negligence of its employees. (Neighbarger, supra, 8 Cal.4th at p. 535.) Irwin responded with a motion for summary judgment arguing that the so- called "firefighter's rule"[15] barred plaintiffs' claims. (Ibid.) The trial court granted Irwin's motion, and the Court of Appeal affirmed that ruling. (Id. at pp. 535-536.)

On review, our Supreme Court characterized the issue as follows: "The central question to be answered in this case is whether [Irwin] and its employees owed a duty of care to plaintiffs." (Neighbarger, supra, 8 Cal.4th at p. 536.) The court concluded that, under the general duty rule, Irwin and its employees owed plaintiffs a duty of care, unless some recognized statutory or public policy

created an exception. (Id. at p. 537.)

Irwin asserted that the public policy expressed in the primary assumption of the risk doctrine and the firefighter's rule created such an exception to the general duty rule. (Neighbarger, supra, 8 Cal.4th at p. 537.) But, after an extensive analysis of the primary assumption of the risk doctrine and the firefighter's rule, the court concluded that because Irwin had not employed the plaintiffs to confront the risk that resulted in their injuries, the firefighter's rule did not apply. (Id. at 542-548.) The court reasoned that in the case of firefighters or other public safety officers, the public has paid them to confront a specific risk, such as fires. (Id. at pp. 542-543.) "In effect, the public has purchased exoneration from the duty of care and should not have to pay twice, through taxation and through individual liability, for that service. [Citations.] But when a safety employee is privately employed, a third party [such as Irwin] lacks the relationship that justifies exonerating him or her from the usual duty of care. The third party, unlike the public with its police and fire departments, has not provided the services of the private safety employee. Nor has the third party paid in any way to be relieved of the duty of care toward such a private employee. Having no relationship with the employee, and not having contracted for his or her services, it would not be unfair to charge the third party with the usual duty of care towards the private safety employee." (Ibid.)

In this case, as in Neighbarger, supra, 8 Cal.4th 532, Structural Steel did not employ or pay plaintiff to confront the risk which resulted in his injury. The only party that arguably had such a relationship with plaintiff was his employer, Correa. Structural Steel, as a third party to that relationship, cannot be exonerated from its general duty of care towards plaintiff because it did not pay in any way to be relieved of that duty of care. As a result, the public policy considerations which underlie the primary assumption of the risk doctrine and the firefighter's rule do not apply to the relationship of the parties here. Therefore, neither that doctrine nor that rule operates as a bar to plaintiff's claims against Structural Steel.

Moreover, even assuming, arguendo, Structural Steel could overcome the foregoing defect in its primary assumption of the risk defense, there is a further problem with that theory. In Milwaukee Tool, supra, 15 Cal.App.4th 547, the plaintiff construction worker sued the manufacturer of a power tool he was using to perform his work, alleging a defect in the tool caused him to fall from a ladder. (Id. at pp. 551- 552) In rejecting the tool manufacturer's argument that injury from the tool was a risk inherent in the construction worker's job, the court held that "we do not find that an injury claimed to have been caused by a dangerously defective power tool is `a risk that is inherent' in a worker's job. [Citation.] In the relationship of the defendant and the plaintiff to that activity, the use of the tool, it cannot be said that the plaintiff user undertook to act as a product tester or guinea pig. In other words, those defendants in primary assumption of the risk cases who have been found not to owe any duty to an injured plaintiff (for example, a negligent person who started a fire or an owner of a dangerous dog) are in a different position than is a manufacturer of a tool which ultimately causes injury to its user, because the user was not necessarily a professional employed to confront the very danger posed by the injury-causing agent." (Id. at pp. 562-563)

In this case, plaintiff was not a professional employed to confront the very danger posed by the injury-causing agent. He was employed to pour and finish a concrete slab. Under these circumstances, it cannot be said that he was paid to work in an inherently unsafe environment. Falling through an uncovered HVAC opening that by industry standard and regulation should have been covered, fastened in place, and labeled with a warning was not a risk he was specifically employed to confront.

To hold otherwise would mean that every foreseeable injury to a construction worker, such as plaintiff, is a risk inherent in his or her job for which no one could be held accountable. Such an expansive interpretation of the narrow exception created by the primary assumption of the risk doctrine would swallow the general duty rule. (See Neighbarger, supra, 8 Cal.4th at p. 545, fn. 4 ["It is certainly not the case, as the Court of Appeal suggested in Holland [v. Crumb (1994) 26 Cal.App.4th 1844], that private employees assume all the foreseeable risks of their employment. As we have explained above, Knight, supra, 3 Cal.4th 296, requires a closer analysis focusing not on the foreseeability of the hazard or the plaintiff's subjective awareness of the risk, but on the defendant's duty of care and the relationship of the parties"].) Accordingly, because plaintiff was not employed to confront the specific hazard that he encountered, there is no policy rationale for relieving Structural Steel of its general duty of care towards plaintiff. Thus, relying on the evidence in the record on Structural Steel's motion, we hold that plaintiff's claims against Structural Steel are not barred by the primary assumption of the risk doctrine.

This does not mean, however, that plaintiff's own allegedly negligent conduct with respect to the risk posed by the uncovered HVAC openings is completely irrelevant to the ultimate disposition of this case. "According to Knight [supra, 3 Cal.4th 296], once it is found that a defendant owes a duty to a particular plaintiff, secondary assumption of the risk theory is merged into comparative fault. [¶] . . . [¶] Accordingly, where the defendant . . . does owe a duty of care to the plaintiff, `but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty' (Knight, supra, 3 Cal.4th at p. 315), assumption of the risk is merged into the comparative fault scheme so that a trier of fact may consider the relative responsibility of the parties in apportioning the loss and damage resulting from the injury." (Milwaukee Tool, supra, 15 Cal.App.4th at p. 565.)

Based on the undisputed facts in the record, Structural Steel failed to establish that plaintiff's claims against it were barred as a matter of law under the primary assumption of the risk doctrine. Therefore, the trial court erred in granting Structural Steel's motion for summary judgment based on that doctrine.

DISPOSITION

The judgment in favor of SIMAC is affirmed, and costs of appeal as to that judgment are awarded to SIMAC. The judgment in favor of Structural Steel is reversed, and costs on appeal as to that judgment are awarded to plaintiff.

We concur: TURNER, P. J., ARMSTRONG, J.

1. By order dated June 6, 2006, we consolidated appeal numbers B184481 and B186509.

2. The facts and procedural discussion in this section relate to SIMAC's motion for summary judgment. The facts and procedural discussion relating to Structural Steel's motion for summary judgment are set forth in a separate section below. Because we must set forth and review the facts that were before the trial court on each motion, and because the facts in support of each motion were similar, there is some unavoidable redundancy in the respective factual and procedural discussions relating to each motion.

3. Plaintiff did not dispute any of the 20 undisputed facts upon which SIMAC's motion was based, although he did contend that undisputed fact number six (Structural Steel was responsible for covering openings in mezzanine sub floor) was "incomplete."

4. SIMAC's motion was not asserted against Structural Steel, and did not seek any form of relief against Structural Steel. Structural Steel did not file a cross- complaint against SIMAC for indemnity. Structural Steel has not appealed from the trial court's order granting summary judgment in favor of SIMAC. Therefore, we have not considered Structural Steel's opposition to SIMAC's motion in reviewing plaintiff's appeal from the judgment in favor of SIMAC.

5. The trial court's April 12, 2005, minute order was incorporated into an attorney order entered May 11, 2005, which is substantially identical to the minute order.

6. The only evidence that plaintiff submitted in support of his opposition was the declaration of his expert, Robert Gallucci. According to that expert, applicable safety regulations required that Structural Steel should have fastened the covers it installed over the openings in the mezzanine sub floor. He also opined, based on the deposition testimony of Structural Steel's person most knowledgeable, that any of the trades working on the mezzanine level at the time of the incident could have removed the covers because they were unfastened. He further opined that the concrete subcontractor could have poured the concrete with the covers in place by lifting each one slightly while facing the openings. Finally, plaintiff's expert concluded that Structural Steel's conduct with respect to the installation of the covers fell below the standard of care in the industry.

7. The original record on appeal did not include either the exhibits in support of Structural Steel's motion or its separate statement of undisputed facts. Also, the record did not contain the reporter's transcript of the hearing on Structural Steel's motion for summary judgment. On February 1, 2006, this court issued an "Order Re: Briefing" directing the parties to brief the issue of the effect of the inadequacies in the record on the appeal. Both parties briefed the issue, which is discussed below.

8. The first objection was directed at that portion of paragraph 7 of the declaration wherein Mr. Gallucci opined that Structural Steel's foreman was responsible for covering the opening in a safe manner, but did not do so. The second objection was directed at that portion of paragraph 8 of the declaration wherein Mr. Gallucci opined that it was not clear how the covers were removed and that any of the trade workers could have accidentally displaced the covers because they

were not properly fastened. The third objection was directed at that portion of paragraph 9 in which Mr. Gallucci opined that "Structural Steel Fabricators fell below the Standard of Care by not complying with Cal- OSHA standards in constructing the plywood covers. The fourth objection was directed at that portion of paragraph 9 of the declaration wherein Mr. Gallucci opined that the "fall in this case appears to have resulted at least in part upon the subject covers not being in compliance with industry standards and the above referenced Cal OSHA regulations. Structural Steel's objections were on the grounds that Mr. Gallucci's testimony was based on speculation and conjecture.

9. The parties' agreement to stipulate to the trial court's tentative ruling, as reflected in its July 13, 2005, minute order, explains the absence in the record of a reporter's transcript for the hearing on Structural Steel's motion for summary judgment.

10. The Hooker court reviewed and relied upon Privette, supra, 5 Cal.4th 689; Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253; and Camargo v. Tjaarda Dairy (2001) 25 Cal.4th 1235.

11. In addition, on July 27, 2006, we notified the parties that the record had been further augmented to include the trial court's July 13, 2005, minute order on Structural Steel's motion for summary judgment.

12. Although plaintiff specified the page and line citations to the portions of Mr. Tully's testimony upon which Mr. Gallucci relied, he did not submit that testimony in support of his opposition to the motion. In support of its motion, however, Structural Steel submitted an excerpt from Mr. Tully's testimony in which he confirmed that the coverings Structural Steel placed over the HVAC openings were not fastened in place.

13. For example, it is reasonable to infer that, if the coverings had been fastened in place and properly labeled with the required "Do Not Remove" warning, the party responsible for removing them may not have done so without first seeking permission from either SIMAC or Structural Steel. Contrary to Structural Steel's assertion, that inference is not based on pure speculation, but rather the regulations themselves. Unless one assumes that the fastening in place and warning requirements were intended to serve no practical purpose, the logical inference to be drawn from their promulgation is that they were intended to deter the unauthorized removal of the covers, which is precisely what is alleged occurred here.

14. Neither party challenges on appeal the trial court's rulings on Structural Steel's objections to Mr. Gallucci's testimony.

15. "In addition to the sports setting, the primary assumption of risk doctrine also comes into play in the category of cases often described as involving the `firefighter's rule.' [Citation.] In its most classic form, the firefighter's rule involves the question whether a person who negligently has started a fire is liable for an injury sustained by a firefighter who is summoned to fight a fire; the rule provides that the person who started the fire is not liable under such circumstances." (Knight, supra, 3 Cal.4th at p. 309, fn.5.) "The appellation `firefighter's rule' can be misleading because its application is not limited to situations involving fires or firefighting. [Citation.] Additionally, what has been labeled the `veterinarian's rule' is just another application of the firefighter's rule in a different context. [Citation.]" (Farnam v. State of California (2000) 84 Cal.App.4th 1448, 1451- 1452.)