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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THUY V. CHU et al., Plaintiffs and Appellants, v. ABC DEVELOPMENT ENTERPRISES et al., Defendants and Respondents; MT. HAWLEY INSURANCE COMPANY, Intervener and Respondent.	B236627 (Los Angeles County Super. Ct. No. GC038945)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. DeVanon, Jr., Judge. Affirmed.

Acker & Whipple, Stephen Acker, Anthony H. Whipple, Leslie Anne Burnet; The NT Law Group and Julie N. Nong for Plaintiffs and Appellants.

Law Offices of Linda M. Libertucci, Charles A. Palmer and Daniel Y. Chang for Defendants and Respondents.

Bistline, Cohoon & Luymes and Gregory D. Bistline for Intervener and Respondent.

Plaintiff and appellant Thuy Chu, on behalf of herself and as guardian ad litem for her minor son, appeals from a judgment following a jury trial in favor of defendants and respondents ABC Development Enterprises, DSC Laser and Skin Care Center, Inc., and Mt. Hawley Insurance Company, in this action arising out of the death of her husband Phi Nong. Chu contends: 1) the trial court erred by granting summary adjudication of a premises liability cause of action in favor of ABC and DSC; 2) the trial court erred in permitting Mt. Hawley Insurance Company to appear for Pinewave; 3) the trial court should have granted a motion for judgment on the pleadings on Mt. Hawley's complaint-in-intervention; 4) the trial court erred by admitting the declaration of Mark Sanders; 5) the trial court erred by excluding evidence of Cal-OSHA regulations (see Lab. Code, § 6300 et seq. [Cal. Occupational Safety & Health Act of 1973 (Cal–OSHA)]), economic damages, and settlement payees; 6) the trial court erred by denying her requested instructions on direct liability in special risk cases, nondelegable duty, and negligence per se; and 7) there is no substantial evidence to support the findings that Pinewave, ABC, and DSC were not negligent.

We conclude the record is inadequate to review Chu's contention concerning the summary adjudication ruling without a reporter's transcript of the hearing. The trial court did not abuse its discretion in permitting Mt. Hawley to intervene and appear in the name of its insured at trial. We find no prejudicial evidentiary or instructional errors, and there is substantial evidence to support the judgment. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

I. Glass Delivery to Construction Site

ABC hired Pinewave to remodel the interior of a commercial building. DSC had agreed to rent space in the building after the work was completed. Pinewave had a general liability insurance policy issued by Mt. Hawley. Pinewave ordered plate glass from David Truong's company. Although construction at the site took place during the week, they agreed that Truong would deliver the glass on a weekend. Truong delivered the glass to the site on Saturday, May 7, 2005, but he did not call anyone to let them know he would be making the delivery that day. His roommate Nong rode along with him. Truong parked his truck on the street. He chose where to unload the glass and did not put out any safety cones. When he removed a plate of glass from the rack on his truck to carry it inside, he did not put stakes in place that would have held the remaining glass securely. Each glass plate weighed about 150 pounds. He told Nong to get some snacks and watch that no one interfered with the truck. Nong was standing on the sidewalk while Truong and his workers transported glass from the truck to the site. Glass fell off the rack and killed Nong.

II. Wrongful Death Complaint

On May 4, 2007, Chu filed a wrongful death action against the manufacturer of the glass rack used on the truck based on product liability and general negligence theories. The manufacturer cross-complained against Truong. Truong entered into a settlement with Chu. Truong's motion for a determination of good faith settlement with Chu was heard on June 18, 2008. The trial court granted Truong's motion only as to parties who were in the case prior to the filing of the motion.

The manufacturer of the glass rack filed a motion for summary judgment. In opposition, Chu submitted the declaration of expert Mark Sanders that the glass rack was

defective. The trial court denied the motion for summary judgment. Chu negotiated settlements with the manufacturing defendants.

On May 21, 2009, Chu substituted ABC as a Doe defendant. The complaint against ABC was served after the trial court granted the manufacturing defendants' requests for good faith determination of settlements. On July 28, 2009, the court granted leave to file an amended complaint which added new negligence allegations and a cause of action for premises liability.

On September 17, 2009, Chu substituted Pinewave as a Doe defendant. Pinewave's corporate status had been suspended by the California Franchise Tax Board and the Secretary of State, and therefore, it lacked capacity to defend itself in the lawsuit. The parties stipulated to allow Mt. Hawley to file a complaint in intervention on behalf of its suspended insured Pinewave without a noticed motion, and the trial court granted Mt. Hawley leave to intervene based on the stipulation. On December 2, 2009, Mt. Hawley filed a complaint in intervention on behalf of Pinewave.

On May 4, 2010, Chu substituted DSC as a Doe defendant. Mt. Hawley filed a declaratory relief action against Pinewave, ABC, DSC, and Chu, seeking a declaration that it had no duty to defend Pinewave or ABC. Mt. Hawley obtained an entry of default against Pinewave and requested entry of a default judgment. On November 18, 2010, the trial court found that the wrongful death action and the declaratory relief action were related and assigned them to the same department for all purposes.

ABC and DSC had each filed motions for summary adjudication of the issues. They argued that they were not liable for a product defect or for the negligence of an independent contractor, and they did not own or control the sidewalk or create a dangerous condition.

Chu opposed the motions on the grounds that ABC and DSC were liable for creating a condition that rendered the sidewalk dangerous and liable under the peculiar risk exception for the negligence of an independent contractor who was performing inherently dangerous work. In support of the opposition, Chu submitted the declaration of engineer Brad P. Avrit. Avrit opined in his declaration that Pinewave failed to ensure

materials were delivered and received safely. He further declared that the area where the work took place should have been marked by cones, designated as a safety zone, and the glass should have been restrained.

The hearing on the summary adjudication motion was not reported and no settled statement under California Rules of Court, rule 8.137 has been made part of the record on appeal. After taking the matter under submission, on January 19, 2011, the trial court denied summary adjudication of the negligence cause of action, finding triable issues of fact as to whether DSC hired and paid Pinewave for work on the project, whether glass delivery constituted a peculiar risk, and whether ABC, DSC, or their contractor failed to take proper safety measures, such as designating a safety zone. The court granted summary adjudication of the premises liability causes of action, because Chu had not identified a dangerous condition of ABC's property and neither ABC nor DSC owned or modified the street or sidewalk where the accident occurred. The court also granted summary adjudication of the product liability cause of action as to both ABC and DSC.

On February 7, 2011, Mt. Hawley filed a motion to appear at trial under the name of Pinewave pursuant to Evidence Code section 1155. Chu opposed the motion on the ground that Mt. Hawley denied coverage and sought a declaration that it had no duty to defend, and therefore, the insurer had no direct and immediate interest in the litigation. Mt. Hawley replied that the declaratory relief action did not diminish its interest in the instant action.

On February 16, 2011, the trial court entered a default judgment against Pinewave in Mt. Hawley's declaratory relief action. The court declared that Mt. Hawley had no duty to defend and indemnify Pinewave in the wrongful death litigation, because Pinewave had not complied with policy provisions regarding subcontractors.

Chu filed a motion for judgment on the pleadings to have Mt. Hawley's complaint in intervention stricken on the ground that the insurer did not have a direct and immediate interest to warrant intervention. Mt. Hawley opposed the motion by arguing that it had not refused to defend Pinewave. Chu filed a reply.

Mt. Hawley filed a motion for summary adjudication against Chu in its declaratory relief action seeking declarations that it had no duty to defend or indemnify Pinewave.

III. Trial

A. Preliminary Trial Rulings

The first day of trial was held on May 10, 2011. The trial court noted that the motion for judgment on the pleadings to have Mt. Hawley's complaint in intervention stricken had never been properly calendared. The court continued the hearing on the motion and eventually denied it. The court granted Mt. Hawley's request to appear in the case as Pinewave.

Mt. Hawley had filed a motion in limine to preclude reference to Cal-OSHA statutes or violations, because Cal-OSHA governed protections for employees. Chu argued that the Building Code incorporates Cal-OSHA standards and they were the basis for a negligence per se instruction. The trial court excluded testimony concerning Cal-OSHA standards, because they were not applicable.

ABC and DSC had filed a similar motion in limine seeking to preclude Chu's liability expert Avrit from offering legal opinions on the application of any statute or regulation. In particular, ABC and DSC sought to prevent Avrit from testifying that ABC and DSC had particular duties that were imposed by the Building Code and Cal-OSHA regulations. ABC and DSC noted that the only basis for their liability was vicarious and only if there was a peculiar risk. Chu opposed the motion on the ground that Avrit's basis for his opinion of the standard of care in the industry was his understanding of the Building Codes that must be followed. The trial court ruled that Avrit could testify as to building practices, what a safe construction site looks like, and similar opinions without expressing what the law is or what the law requires. The court later clarified that Avrit could state that the Building Code contains certain provisions, as long as he did not opine that a particular fact situation was a violation of the Building Code provisions.

B. Relevant Testimony at Trial

Truong testified about his extensive experience working with glass. He was taught safety procedures for handling glass when he worked at a previous company. He decided where to park and how to deliver the glass.

Pinewave employee Kenny Szeto testified that deliveries were usually made on weekdays. He would usually be present at the site when there was a delivery of glass and would control the site. He had used Truong's services on other jobs and did not remember whether he ever inspected Truong's equipment. He did not remember giving Truong any instructions about the glass delivery for this job or if he knew Truong planned to deliver the glass on a Saturday. Szeto usually opened the door in the morning. There was a lock box, which provided entry to the job site, but Szeto did not remember whether he gave the number to Truong. Szeto went to the job site on the day of the accident, but much later, and found the doors open. Szeto did not tell ABC or the building owners that glass was being delivered. It was part of Pinewave's work schedule and there was no need to tell the client. Szeto's supervisor also testified that he would not expect ABC to be present at the time the glass was delivered.

Chu testified that she settled with Truong and the manufacturer of the glass rack. No party asked about the amounts of the settlements.

ABC's construction expert Scott Paul Vivian testified. In his opinion, Truong was a specialist with experience in transporting glass and all activity with respect the material was his responsibility until Pinewave took possession of the material. Vivian noted that if the stakes had been replaced, the accident would not have happened. It was a judgment call by Truong that the stakes were not required for the amount of time it would take to return for another plate of glass. Vivian explained that the general contractor has control of the construction site during construction hours. In his opinion, on a weekend when there is no contractor at the site and no notice of the delivery, the subcontractor has responsibility for the delivery of materials. Also, he does not allow a project manager to take control of materials until the subcontractor has moved them to

the construction area, because he needs the subcontractor to have liability for breakage or other accidents. The subcontractor has the entire responsibility for the material from any location outside the construction area until it is in the construction area, at which point there is a shared responsibility for the material inside the construction area. In his opinion, none of the responsibility for the accident in this case is attributable to the general contractor, the property owner, or the tenant.

In Vivian's opinion, under the facts and circumstances of this case, there was no need for a safety zone around the truck out of cones and safety tape. Vivian explained that a safety zone is typically designated to protect members of the public who are not knowledgeable about construction from walking into a potentially hazardous situation. In this case, material was being removed from a stationary truck and taken immediately into the building. There was no pedestrian traffic on the sidewalk that day on that street. The speed with which the material in this case was being removed from a stationary truck and taken past the public sidewalk in a matter of seconds, along with the number of people involved in transporting the object, would have made a safety zone unduly burdensome for the workers. Two workers would have to stand holding the glass while the third worker reconfigures the safety zone each time they pass by. The standard in the industry, as a practical matter, is that a safety zone is not going to be constructed and deconstructed while moving the glass, because there is no real construction activity taking place.

Even if Pinewave's project manager had been present, Vivian stated that he was not required to establish a safety zone. Pinewave should not interfere in the subcontractor's transportation of the material because they are specialists, and they are in control of the material. The standard in the industry would be for the project manager not to interfere with the subcontractor's delivery of the material.

In addition, Vivian opined that even if a safety zone had been established, it would not have made a difference in this case. Nong was with the glass subcontractor and had a right to access the truck, move around the truck, and be near the truck. He was instructed to keep an eye on the glass. A safety zone would not have made a difference, because Nong would have been within the zone.

Vivian agreed that the safety standards applied and the general contractor had to take the same safety measures at all times, with no exceptions on weekends. He also agreed that if there is significant construction activity near a public way in general use for pedestrian travel, the public needs to be protected. However, in his opinion, there was no necessity for pedestrian protection at the time and place of the incident in this case. He explained that he had supervised a project that used glass plates weighing from 800 to 2,300 pounds each and they made a plan in advance for deliveries. He stated that the general contractor needs to provide a clear path through the construction site and a safe staging area for the materials. He agreed that unrestrained glass on a truck presents a potential hazard and workers may drop the materials, causing tempered glass to shatter into chunks. However, he also explained that glass racks are designed with a tilt in order to hold glass without stakes and not place people in jeopardy. In his view, the accident occurred in the street as a result of glass located on the truck in the subcontractor's sole possession and which had not yet been delivered.

Mt. Hawley's construction expert Joseph Callanan also testified that Truong was the party who was ultimately responsible for the mechanics of transporting, unloading, and delivering the glass to the construction site. Truong made the decisions as to how to position his truck, how to unload the glass and transport it into the building, and whether to secure the remaining glass between deliveries. Callanan opined that the accident occurred as a direct result of the glass not being secured to the rack.

He explained that the general contractor does not supervise the detailed mechanics of the work being performed by subcontractors. The general contractor supervises and coordinates the project as a whole. Specifically with respect to safety, the general contractor maintains site conditions and project scheduling to prevent conflicting work by subcontractors that will cause safety issues, but does not become involved in the detailed mechanics of executing the work. There were no site conditions or project operations controlled by Pinewave that contributed to the accident in this case.

Callanan testified that according to the custom and practice in the industry, a glass vendor is responsible for transporting the material to the job site and making it available

for unloading or unloading it, depending on the parties' agreement. Callanan had no criticism of Pinewave for hiring Truong. Truong had been in the glass business for decades and Pinewave had worked with him previously without incident. Callanan also testified that it was not uncommon in the industry for vendors or subcontractors to be given access to a construction site without the general contractor being present. It is common for work to be performed on Saturdays and for delivery of materials after hours.

He opined that building materials can cause serious injury if mishandled. Plate glass is no more dangerous to deliver than any other building materials. He would expect some provisions would be made specific to handling glass, but he did not consider it especially hazardous.

In Callanan's opinion, a safety zone of cones with tape around it was not needed for the delivery in this case. He did not believe that unloading glass by hand from a truck at the sidewalk's curb warrants any special arrangements like a safety zone. Moreover, he did not believe a safety zone would have prevented the accident in this case. The people unloading the truck would have entered the safety zone and approached the unsecured material. Nong was brought to the site by Truong and was part of that operation.

Callahan agreed that if there were pedestrian traffic that may be affected by the work being executed, the person executing the work should be aware of it and take some steps to make safety features available. He also agreed that in accordance with industry standards, when construction work is performed on a building adjacent to a public way, provision should be made to protect the public engaged in pedestrian travel. He stated that the industry safety practices specific to each trade were the responsibility of the subcontractor. He stated that the primary source for safety practices for the job site would be OSHA regulations. However, the only injury and illness prevention program that he is aware of is a portion of the Cal-OSHA regulations that governs the employer-employee relationship and not protection of the general public. He would not expect Pinewood to provide safety information to subcontractors or tradesmen coming onto the job site.

C. Verdict and Proceedings After Trial

On May 19, 2011, the jury returned its special verdict. The first question on the verdict form simply asked whether Pinewave was negligent. The jury answered no. The form instructed the jurors, under those circumstances to stop, answer no further questions, and sign, date, and return the form. The trial court entered judgment in favor of Mt. Hawley, ABC, and DSC on July 5, 2011. Chu filed a timely notice of appeal.

DISCUSSION

I. Summary Adjudication of Premises Liability Cause of Action

On appeal, Chu contends the trial court erred by granting summary adjudication of a premises liability cause of action in favor of ABC and DSC. However, the hearing on the summary adjudication motion was not reported. Chu's election to proceed without a suitable substitute for a reporter's transcript of the hearing raises the question of whether the record on appeal is adequate for review of this issue.

"[W]e review the grant of summary judgment de novo. [Citation.] In performing our independent review, we conduct the same procedure used by the trial court. We examine (1) the pleadings to determine the elements of the claim for which the party seeks relief; (2) the summary judgment motion to determine if movant established facts justifying judgment in its favor; and (3) the opposition to the motion—assuming movant met its initial burden—to 'decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]' [Citations.]" (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 354.)

However, "a party challenging a judgment has the burden of showing reversible error by an adequate record." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) " 'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent . . . .'

(Orig. italics.) [Citation.]" (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) In the absence of a proper record on appeal, the judgment is presumed correct and must be affirmed. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

California Rules of Court, rule 8.120(b) provides: "If an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court, the record on appeal must include a record of these oral proceedings . . . ." If the proceedings were not recorded, California Rules of Court, rule 8.137 contains procedures for filing a settled statement.

Without a reporter's transcript of the hearing or a suitable substitute, which would reveal the parties' arguments to the court and any concessions concerning the facts, issues and evidence, Chu cannot meet her burden of showing reversible error. In the absence of an adequate record, we must indulge all inferences to support the order challenged on appeal and presume the trial court properly concluded that no triable issues of material facts exist as to the premises liability cause of action.

II. Mt. Hawley's Intervention and Appearance as Pinewave

Chu contends the trial court erred by permitting Mt. Hawley to intervene in the case, denying Chu's motion for judgment on the pleadings seeking to strike Mt. Hawley's complaint in intervention, and allowing Mt. Hawley to appear as Pinewave at trial. We find no abuse of discretion.

"We review a trial court's order granting intervention for an abuse of discretion. [Citation.] 'When the proper procedures are followed, the trial court has the discretion to permit a nonparty to intervene in litigation pending between others, provided that (1) the nonparty has a direct and immediate interest in the action; (2) the intervention will not enlarge the issues in the litigation; and (3) the reasons for intervention outweigh any opposition by the parties presently in the action.' [Citation.]" (*Gray v. Begley* (2010) 182 Cal.App.4th 1509, 1521 (*Gray*).)

"It is undisputed that if the insurer admits coverage, the insurer clearly has a direct and immediate interest in the outcome of the action against its insured, and therefore may intervene. 'An insurer's right to intervene in an action against the insured, for personal injury or property damage, arises as a result of Insurance Code section 11580. Section 11580 provides that a judgment creditor may proceed directly against any liability insurance covering the defendant, and obtain satisfaction of the judgment up to the amount of the policy limits. [Citation.] Thus, where the insurer may be subject to a direct action under Insurance Code section 11580 by a judgment creditor who has or will obtain a default judgment in a third party action against the insured, intervention is appropriate. [Citation.]' [Citation.]" (*Gray, supra*, 84 Cal.App.4th at p. 1522.)

"It is also undisputed that if the insurer denies coverage *and* refuses to provide a defense, the insurer 'does not have a direct interest in the litigation between the plaintiff and the insured to warrant intervention. The rationale behind this rule is that by its denial, the insurer has lost its right to control the litigation.' [Citation.] When an insurer refuses to defend, it may be bound by a default judgment against its insured [citation] . . . . (*Gray, supra*, 84 Cal.App.4th at pp. 1522-1523.)

"[T]he key factor in determining whether an insurer is bound by a settlement reached without the insurer's participation is whether the insurer provided the insured with a defense, not whether the insurer denied coverage. (See *Safeco Ins. Co. v. Superior Court* (1999) 71 Cal.App.4th 782, 785, 787 [holding that an insurer that defended under a reservation of rights was not bound by a settlement reached without its consent].) It therefore follows that an insurer providing a defense, even though subject to a reservation of rights, may intervene in the action when the insured attempts to settle the case to the potential detriment of the insurer. In contrast to the insurer that refuses to defend, an insurer providing a defense under a reservation of rights has not 'lost its right to control the litigation' [citation], and therefore retains a direct interest in the case. (See also *Jade K. v. Viguri* [(1989)] 210 Cal.App.3d [1459,] 1468 [upholding intervention, and right to vacate a default judgment, by an insurer that tendered a defense under a reservation of rights].)" (*Gray, supra*, 84 Cal.App.4th at pp. 1523-1524.)

Similarly, in this case, the trial court did not abuse its discretion by finding Mt. Hawley had a direct interest in the litigation between its insured and Chu. Although Mt. Hawley denied coverage, it provided a defense of Pinewave's interests in the instant action through its intervention. Had Chu been successful in her litigation against Pinewave, she could have proceeded directly against the insurance company under Insurance Code section 11580. Intervention was appropriate, since Mt. Hawley would have been subject to a direct action under Insurance Code section 11580 if Chu had obtained a default judgment in her third party action against Pinewave. Mt. Hawley's default judgment against Pinewave on the issue of coverage would not have prevented Chu from litigating the coverage issue.

There was no abuse of discretion in the trial court's ruling permitting Mt. Hawley to appear at trial as Pinewave. Evidence Code section 1155 provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing." Case law acknowledges the substantial risk of prejudice to a defendant from the introduction of evidence the defendant is insured for the harm he or she allegedly caused: "[a]ny such evidence would have an obvious potential to prejudice the jury's determination of the insured's liability." (*Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 311; see also *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1270-1271.) In this case, the trial court allowed Mt. Hawley to appear at trial in the name of its insured, because the court correctly perceived that bringing that information before the jurors would be highly prejudicial and misleading under Evidence Code sections 1155 and 352.

III. Evidentiary Issues

A. Standard of Review

"Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) That standard also applies to rulings excluding expert opinion evidence. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1599.) A party challenging a trial court's evidentiary rulings must demonstrate both an abuse of discretion and a consequent miscarriage of justice. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.)

The trial court has broad discretion in ruling under Evidence Code section 352 on the admissibility of evidence and acts within its discretion when excluding cumulative and time consuming evidence. The section 352 weighing process depends on the court's consideration of the facts and issues of the case before it rather than on mechanical, automatic rules. (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1038.)

Evidence Code section 353 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

Evidence Code section 354 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice

and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination."

A miscarriage of justice should be declared only when the appellate court, after an examination of the entire cause (including the evidence), is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. Exclusion of Testimony About Cal-OSHA Statutes

Chu contends the trial court abused its discretion by excluding evidence of Cal-OSHA regulations to establish a standard of care. We conclude there was no error, but if there were, any error was harmless.

"A plaintiff can rely on statutory law to show that a defendant owed the plaintiff a duty of care. (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 927 & fn. 8.)" (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 596 (*SeaBright*).) "Not only are Cal-OSHA violations punishable by civil and/or criminal penalties ([Lab. Code,] § 6423 et seq.), but the Act specifies that '[s]ections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation.' ([Lab. Code,] § 6304.5.) This means that 'Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions.' (*Elsner v. Uveges*[, *supra*, at p.] 928.)" (*Cortez v. Abich* (2011) 51 Cal.4th 285, 292.)

The *SeaBright* court recently explained, "[u]nder current law, a plaintiff may rely on Cal–OSHA requirements, in the same manner that it can rely on other statutes and regulations, in an attempt to show that a defendant owed the plaintiff a duty of care ([Lab.

Code,] § 6304.5), but the law now defines 'employer' more narrowly than it did before 1971. . . . [We] have never held *under the present law* that a specific Cal-OSHA requirement creates a duty of care to a party that is not the defendant's own employee." (*SeaBright, supra,* 52 Cal.4th at pp. 596-597.)

The *SeaBright* court concluded, "an independent contractor's hirer implicitly delegates to that contractor its tort law duty, if any, to provide the employees of that contractor a safe workplace." (*SeaBright, supra,* 52 Cal.4th at p. 597, fn. omitted.) In other words, "the tort law duty, if any, that a hirer owes under Cal-OSHA and its regulations to the employees of an independent contractor" is delegable. (*Id*. at p. 601.) However, an employer cannot delegate its own preexisting duty to its own employees to provide a safe workplace, such that the employer could avoid liability for an injury to its own employee. (*Ibid*.)

In this case, there was no evidence or argument that Pinewave breached a duty to its own employees to provide a safe workplace. The trial court did not abuse its discretion by excluding evidence of Cal-OSHA regulations. Even if the regulations should have been admitted, any error was harmless, because the jury found Pinewave was not negligent. Chu has not shown that the jury's verdict would have been any different if evidence of Cal-OSHA regulations governing the employer-employee relationship had been presented.

C. Exclusion of Testimony About Economic Damages

Chu contends the trial court erred by excluding evidence of economic damages.

ABC and DSC had filed a motion in limine to exclude evidence of economic damages on the ground that the release of one settling tortfeasor barred recovery of economic damages from ABC and DSC. After several days of trial, the court found the common law rules applied and granted the motion to bar Chu from presenting evidence of economic damages. The court noted that at the time of the settlement and good faith determination, Chu was aware of all the factual circumstances and the existence of

potential defendants ABC, DSC and Pinewave, who were subsequently brought into the case. Therefore, the court found Chu's complaints about the effect of the common law rule were not justified. The court found there were no recoverable economic damages.

Any abuse of discretion in this instance was harmless, because the jury found Pinewave was not negligent and never reached the issue of damages.

D. Exclusion of Certain Evidence of Settlement

Chu contends the trial court should not have excluded the amounts of individual settlements. We find no abuse of discretion in the trial court's ruling.

Chu had filed a motion in limine prior to trial to exclude evidence of payments from collateral sources. ABC and DSC opposed the motion to the extent it excluded evidence of prior settlements, which they argued were not covered by the collateral source rule. They intended to present evidence that other tortfeasors had settled and the amounts of the settlements. Chu objected that evidence of the amounts of settlements would be prejudicial. The trial court ruled that witnesses could testify about the existence of settlements but not the amounts. On the second day of testimony, the court modified its ruling to allow evidence of the amounts of settlements for the limited purpose of showing bias. In discussing jury instructions, Mt. Hawley requested the court instruct the jury to disregard evidence of prior settlements in determining the amount of an award. When the court noted that no evidence of settlement had been presented, Mt. Hawley's attorney stated that he intended to ask Chu the following day whether she had settled with certain parties, although not the amounts of the settlements. Chu changed position and sought to disclose the amounts of prior settlements to rebut any inference she had been adequately compensated. The court agreed to allow Chu to testify to the total amount of settlement, but not the amount as to each settling party. The court was concerned that the jury would view Truong's settlement as inadequate compensation and play on their sympathies with respect to the remaining parties. Chu's attorney asked if the settlement amount could be broken up, but the court refused.

We find no abuse of discretion in the trial court's ruling to exclude the individual amounts paid in settlements with Chu. The court allowed Chu's attorney to elicit testimony about the total amount of the settlements, which was sufficient to rebut any inference that Chu had been adequately compensated. Chu has not shown that evidence of the individual amounts was necessary for any purpose, nor did Chu argue at trial that evidence of the individual amounts was necessary, and the court correctly concluded that the evidence could be more prejudicial than probative.

E. Admission of Expert Mark Sanders's Declaration

In opposition to a motion for summary judgment brought by the manufacturing defendants, Chu submitted the declaration of expert Mark Sanders. Sanders declared that the glass rack was defective for failing to provide adequate warning labels to people near the rack. ABC characterized the declaration as a judicial admission and sought to read it to the jury. Chu objected that it was an out of court statement that was more prejudicial than probative and was likely to confuse the jury. Moreover, Sanders was available to testify at trial. The trial court overruled the objection, finding the evidence was not more prejudicial than probative. The declaration was read to the jury, including Sanders's opinion that the glass transport rack has an inherent hazard in its product design and should be accompanied by warnings to people in the zone of danger that unrestrained glass may fall from the rack.

We conclude there was no abuse of discretion in the trial court's admission of the declaration. The statement was an adoptive admission under Evidence Code section 1221, as well as an authorized admission under Evidence Code section 1222 made by a party that Chu authorized to make a statement for her as to whether the glass rack was defective.

IV. Jury Instructions

A. Standard of Review

"Each party is entitled to have his theory of the case submitted to the jury in accordance with the pleadings and proof [citation], and it is incumbent upon the trial court to instruct on all vital issues involved [citation]." (*Sills v. Los Angeles Transit Lines* (1953) 40 Cal.2d 630, 633.) "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." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) For that reason, a trial court's refusal to give a proffered special instruction may constitute error. (*Id.* at p. 573.) However, "the duty of the court is fully discharged if the instructions given by the court embrace all the points of the law arising in the case." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335.)

To warrant reversal for demonstrated instructional error, the complaining party also must prove actual prejudice. (*Soule, supra*, 8 Cal.4th at p. 574.) There is "no presumption that error is prejudicial, or that injury was done if error is shown." (Code Civ. Proc., § 475.) "A judgment may not be reversed on appeal, even for error involving 'misdirection of the jury,' unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Soule, supra*, at p. 574.)

B. Special Instruction on Direct Liability for Special Risk

Chu contends the trial court erred by denying her proposed special instruction on direct liability in special risk cases when the employer fails to provide in the contract for the independent contractor to take special precautions. Chu contends the instruction was warranted because ABC and DSC failed to provide for special precautions in their

contract with Pinewave. We conclude that any error in failing to give the instruction was harmless.

The trial court provided the following instruction to the jury with respect to Chu's claim that ABC was responsible for Pinewave's conduct because the work involved a peculiar risk of harm: "A special risk of harm is a recognizable danger that arises out of the nature of the work or the place it is to be done and requires a specific safety measure appropriate to that danger. . . . A special risk of harm does not include a risk that is unusual, abnormal, or not related to the normal or special risk associated with the work. [¶] To establish this claim, [Chu] must prove each of the following: [1.] That the work was likely to involve a special risk of harm to others; [2.] That [ABC] knew or should have known that the work was likely to involve this risk; [3.] That [ABC] failed to use reasonable care to take specific safety measures appropriate to the danger to avoid this risk; and [4.] That [ABC's] failure was a cause of harm to [Chu]."

The trial court denied Chu's request to also give a special instruction on direct liability when the work involved a special risk and the contract with the independent contractor failed to require special precautions. The special instruction that Chu requested stated: "One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer [¶] (a) fails to provide in the contract that the contractor shall take such precautions, or [¶] (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions. This is a rule of 'direct liability.' [Citations.]" The trial court concluded that the requested special instruction was adequately covered in the peculiar risk instruction provided to the jury.

Even if it were error to have refused to give the special instruction, any error was harmless. As discussed further below, the jury's finding that Pinewave was not negligent, either directly or vicariously, is supported by substantial evidence. Pinewave was not required to take any additional safety measures and was not liable for any

negligence by Truong under the special risk doctrine. Therefore, ABC and DSC could not have been found negligent under Chu's special instruction. ABC employed Pinewave to perform certain work and the jury found Pinewave was not negligent. Since Pinewave took all the safety measures required of it under the circumstances, ABC could not have been negligent for not undertaking additional precautions.

C. Instruction on Nondelegable Duty

Chu also contends the trial court erred by denying her request to instruct the jury on nondelegable duty based on California Building Code section 3303.1. We disagree.

Chu requested the jury be instructed as follows: "[ABC] has a duty that cannot be delegated to another person arising from California Building Code section 3303.1. Under this duty, 'no person shall perform any work on any building or structure adjacent to a public way in general use by the public for pedestrian[] travel unless the pedestrians are protected.' [¶] [Chu] claims that she was harmed by the conduct of [Pinewave] and that [ABC] is responsible for this harm. To establish this claim, [Chu] must prove all of the following: [¶] 1. That [ABC] hired [Pinewave] to perform an interior remodeling that required plate glass to be delivered to its building by transporting and carrying it across a public sidewalk without proper precaution; [¶] 2. That [Pinewave] breached its duty and did not comply with this law. [¶] 3. That [Chu] was harmed; and [¶] 4. That [Pinewave's] conduct was a substantial factor in causing [Chu's] harm." Chu requested a separate instruction that was identical except for that Chu claimed DSC was responsible for Pinewave's conduct, and another in which Chu claimed Pinewave was responsible for Truong's conduct. The trial court denied the requested instructions on nondelegable duty, finding that the jury had already received sufficient instruction on the issue of duty and the requirements of the parties under that duty, specifically as it related to peculiar risk.

The requested instruction is incomplete and misleading. California Building Code section 3303.1 provides in pertinent part: "No person shall perform any work on any

building or structure adjacent to a public way in general use by the public for pedestrian travel unless the pedestrians are protected as specified in this chapter." The chapter sets forth specific provisions concerning storage of equipment, mixing of mortar, protection of utilities, maintenance of a walkway on the sidewalk in front of the building during construction, and railings, fences, and canopies. The instruction requested does not identify any protective measure set forth in the chapter which Chu claims the defendants violated. The trial court correctly declined to instruct the jury as provided.

D. Negligence Per Se for Building Code Violations

Chu contends that the trial court should have instructed the jury on negligence per se based on certain Building Code provisions, but it is unclear from the briefs which instructions Chu contends the trial court improperly omitted.

Chu's opening brief cites the trial court's ruling denying the following instruction on negligence per se: "California Building Code section 3303.1 states: [¶] 'No person shall perform any work on any building or structure adjacent to a public way in general use by the public for pedestrian travel unless the pedestrians are protected.' [¶] If you decide [¶] 1. That [Pinewave] violated this law and [¶] 2. That the violation was a substantial factor in bringing about the harm, [¶] Then you must find that [Pinewave] was negligent. [¶] If you find that [Pinewave] did not violate this law or that the violation was not a substantial factor in bringing about the harm, then you must still decide whether [Pinewave] was negligent in light of other instructions." The requested instruction was restated as to ABC and DSC as well. The trial court found the negligence per se instruction was not applicable.

The trial court properly rejected this instruction on negligence per se, as it suffers from the same defect as the nondelegable duty instruction discussed above. The requested instruction fails to specify a violation of Building Code chapter 33 which Chu claims resulted in harm to her. The instruction was incomplete and misleading, and the trial court properly declined to instruct the jury in the language suggested.

Chu appears to contend in her opening brief that the trial court also erred by refusing to give three special instructions on negligence per se. The first special instruction was based on Building Code Section 3303.1 and states: "No person shall perform any work on any building or structure adjacent to a public way in general use by the public for pedestrian travel unless the pedestrian[s] are protected." The second instruction was based on Building Code section 3303.6 and states: "A walkway not less than 4 feet (1219 mm) wide shall be maintained on the sidewalk in front of the building site during construction, alteration or demolition. Adequate signs and railings shall be provided to direct pedestrian traffic." The third instruction was based on Building Code section 3303.7.1 and states: "Pedestrian traffic shall be protected by a railing on the street side when the walkway extends into the roadway." Chu provides no citation to any ruling in the record by the court on the three special instructions and we have not discovered such a ruling. In Chu's reply brief under the heading concerning the negligence per se instruction, she in fact discusses the nondelegable duty instruction and the court's ruling on that instruction. We conclude that any issue with respect to the three special instructions on negligence per se has been waived for failure to obtain a ruling in the trial court.

E. Pinewave's Special Instructions on Equipment

In Chu's opening brief, one of the contentions listed is that the trial court erred in instructing the jury on the use of defective equipment and misuse of equipment. However, she did not state this point under a separate heading or subheading or provide any argument or citation of authority with respect to this contention, in violation of California Rules of Court, rule 8.204(a)(1)(B). None of the respondents addressed the issue. Chu provides argument and citation for her contention for the first time in her reply brief. "'Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.' [Citation.] 'Obvious reasons of fairness militate against

consideration of an issue raised initially in the reply brief of an appellant.' [Citation.] '"Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before."'" (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764; see also *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1 ["an appellate court has the discretion to deem an alleged error to have been waived if asserted only in the reply brief and not the opening brief"].) The contention concerning equipment instructions was waived for failure to address it properly in the opening brief.

V. Sufficiency of the Evidence

A. Standard of Review

"When a party contends insufficient evidence supports a jury verdict, we apply the substantial evidence standard of review. [Citations.] '"[T]he power of [the] appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the [verdict]." [Citations.]' [Citation.]" (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188 (*County of Orange*).) "Substantial evidence" is evidence that is reasonable, credible, and of solid value. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164.) "[T]he testimony of a single witness, even the party himself may be sufficient." (*Chodos v. Insurance Co. of North America* (1981) 126 Cal.App.3d 86, 97 (*Chodos*).)

"We must 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .' [Citation.]" (*County of Orange, supra,* 169 Cal.App.4th at p. 1188.) Thus, "we

defer to the trier of fact on issues of credibility. [Citation.] '[N]either conflicts in the evidence nor "'testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" [Citations.] Testimony may be rejected only when it is inherently improbable or incredible, i.e., "'unbelievable *per se*,'" physically impossible or "'wholly unacceptable to reasonable minds.'" [Citations.]' [Citation.]" (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) "Needless to say, a party 'raising a claim of insufficiency of the evidence assumes a "daunting burden"' [citation] . . . ." (*County of Orange, supra,* at p. 1188.)

B. Pinewave

Chu contends there is no substantial evidence to support the jury's finding that Pinewave was not negligent, either directly or vicariously for the negligence of Truong. We conclude that there is substantial evidence to support the verdict.

The trial court instructed the jury that in order for Chu to establish her claim that she was harmed by Pinewave's negligence, Chu must first show that Pinewave was negligent. The court instructed the jury as follows in pertinent part: "Negligence is the failure to use reasonable care to prevent harm to oneself or others, and a person can be negligent by acting or by failing to act. [¶] . . . A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. [¶] You must decide how a reasonably careful person would have acted in Pinewave Construction's situation."

The trial court further instructed that to establish Chu was harmed as a result of the way Pinewave managed the property, she had to prove Pinewave controlled that property and was negligent in the use or maintenance of the property.

In addition, the trial court instructed the jury on Chu's claim that Pinewave was responsible for Truong's conduct because the work involved a special risk of harm. "A special risk of harm is a recognizable danger that arises out of the nature of the work or the place it is to be done and requires a specific safety measure appropriate to that danger. A special risk of harm does not include a risk that is unusual, abnormal, or not related to the normal or special risk associated with the work. [¶] To establish this claim, [Chu] must prove each of the following: [1.] That the work was likely to involve a special risk of harm to others; [2.] That Pinewave Construction . . . knew or should have known that the work was likely to involve this risk; [3.] That Pinewave Construction . . . failed to use reasonable care to take specific safety measures appropriate to the danger to avoid this risk; and [4.] That Pinewave Construction's . . . failure was a cause of harm to [Chu]."

There was substantial evidence to support the jury's verdict that Pinewave was not negligent, either directly or as a result of vicarious liability for negligence by Truong. Both Vivian and Callanan testified that Pinewave was not required to take any additional safety measures under the circumstances of this case. The general contractor is not responsible for material until it enters the construction area. Truong was the party responsible for the mechanics of transporting, unloading and delivering the glass to the construction site. All activity with respect to the glass was Truong's responsibility until Pinewave took possession of the material. Callanan opined that the site conditions and other project operations controlled by Pinewave did not contribute to the accident.

Vivian and Callanan both opined that there was no need for Truong or Pinewave to construct a safety zone around the truck with cones and tape for the delivery in this case. There was no pedestrian traffic. Each delivery to the building was made quickly, in a matter of seconds, from a stationary truck. In Callanan's opinion, unloading glass by hand from a truck at the sidewalk's curb did not warrant any special arrangements, such as a safety zone. Vivian and Callanan also concluded that even if a safety zone had been utilized, it would not have prevented the accident in this case. Workers unloading the truck would have entered the safety zone and approached the unsecured material. Nong

was brought to the site by Truong and was part of the operation within the safety zone. Nong had a right to access the truck, move around it, and be near it. Truong asked him to watch the truck. This evidence showed industry safety standards did not require Truong or Pinewave to take any additional safety measures for a delivery of this type when no significant construction activity was taking place.

The evidence also showed that Pinewave acted reasonably in hiring Truong, based on Truong's many years of experience in the glass business and the fact that Pinewave had worked with him previously without incident. Callanan testified that Pinewood was not required to provide safety information to subcontractors or tradesmen coming onto the job site. The industry safety practices specific to each trade were the responsibility of the subcontractor. It was also within the standard of care in the industry for Pinewave to allow Truong access to the site on the weekend without them being present to accept the delivery. Callanan testified that it is common for materials to be delivered after hours and not uncommon for deliveries to take place without the general contractor being present.

Substantial evidence also supports the jury's finding that Pinewave was not vicariously liable for any negligence by Truong based on the special risk doctrine. In Callanan's opinion, the delivery of plate glass in this case did not present a special risk. Callanan testified that plate glass is no more dangerous to deliver than any other building material, and although he would expect some conduct specific to handling glass, he did not consider glass to be especially hazardous.

DISPOSITION

The judgment is affirmed. Respondents ABC Development Enterprises, DSC Laser and Skin Care Center, Inc., and Mt. Hawley Insurance Company are awarded their costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

KUMAR, J.*

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