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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARINA MORALES, Plaintiff and Respondent, v. COUNTY OF LOS ANGELES, Defendant, Cross-complainant and Appellant; NICHOLAS CONSTRUCTION INC., Defendant, Cross-defendant and Respondent; ANTELOPE VALLEY-EAST KERN WATER DISTRICT, Cross-defendant and Respondent.	B247630, B247713) (Los Angeles County Super. Ct. No. MC022261)
MARINA MORALES, Plaintiff and Appellant, v. NICHOLAS CONSTRUCTION INC., Defendant and Respondent.	B249097

APPEALS from judgments of the Superior Court of Los Angeles County, Randolph Rogers, Judge. Reversed.

Hurrell Cantrall LLP, Thomas C. Hurrell and Melinda Cantrall for Defendant, Cross-complainant and Appellant.

R. Rex Parris Law Firm, R. Rex Parris, Jason P. Fowler, Ryan K. Kahl and Sean J. Lowe for Plaintiff and Respondent and for Plaintiff and Appellant.

Barber & Bauermeister, Linda Bauermeister and Robert Kostrenich for Defendant, Cross-defendant and Respondent and for Cross-defendant and Respondent.

INTRODUCTION

In this consolidated appeal, plaintiff Marina Morales (Plaintiff) challenges the summary judgment entered in favor of defendant Nicholas Construction Inc. (Nicholas) and cross-complainant the County of Los Angeles (the County) challenges the summary judgment entered in favor of cross-defendants Nicholas and the Antelope Valley-East Kern Water District (AVEK) on its cross-complaint for indemnification. We reverse both summary judgments.

Plaintiff sued the County and Nicholas for injuries she sustained when her car was struck head-on by a drunk driver on the Sierra Highway in an unincorporated part of Los Angeles County. At the time of the accident, Nicholas was performing construction on the subject stretch of highway under a contract with AVEK. Plaintiff alleges her injuries were caused by the unsafe condition of the highway and construction site, which included a concrete k-rail barrier Nicholas erected to close an adjacent traffic lane. Plaintiff contends the k-rail barrier eliminated a route of escape from the head-on collision and, thus, was a substantial factor in causing her injuries.

In granting summary judgment on Plaintiff's complaint and the County's cross-complaint, the trial court concluded neither Nicholas nor AVEK owed a legal duty to Plaintiff under the negligent undertaking doctrine. That doctrine applies when one

undertakes to render services to another that he or she should recognize as necessary for the protection and safety of third persons. In the context of public works contracts, the doctrine is customarily invoked to determine when a private party that has contracted to remedy a *preexisting* dangerous condition of public property should be charged with liability to a third party for injuries caused by the dangerous condition. As we shall explain, the negligent undertaking doctrine does not apply in this case because Plaintiff does not allege her injuries were caused by a preexisting dangerous condition on the County's property; rather, she alleges Nicholas's placement of the k-rails constituted a dangerous condition that Nicholas *created* in the course of performing its work for AVEK.

Accordingly, we will reverse the summary judgment in favor of Nicholas on Plaintiff's complaint and reverse the summary judgment in favor of Nicholas and AVEK on the County's cross-complaint.

FACTS[1] AND PROCEDURAL BACKGROUND

1. *The Automobile Accident*

On the evening of March 12, 2010, at approximately 11:40 p.m., Elmer Mejia collided head-on with a vehicle carrying Plaintiff. Mejia was driving southbound on the Sierra Highway in an unincorporated part of Los Angeles County; Plaintiff was traveling northbound as a passenger on the same stretch of highway. Mejia, who later admitted to consuming 15 beers before driving that night, had crossed over the solid double yellow lines into Plaintiff's northbound lane when the collision occurred. Mejia was convicted of driving under the influence and sentenced to state prison.

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[1] We draw the facts from the parties' separate statements and the supporting evidence admitted by the trial court. (See, e.g., *Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1480.) In accordance with the applicable standard of review, we state the evidence in the light most favorable to Plaintiff and the County, as the nonmoving parties. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

2. *The Acton Feeder Relocation Project and Excavation Permit*

In 2008, the County approved the Sierra Highway Widening and Re-Alignment Project (Highway Widening Project). Its purpose was to implement roadway improvements, including the addition of shoulders on both sides of the Sierra Highway. The project required certain utility companies to relocate equipment before the County could begin construction. This included one of AVEK's water pipelines located on the eastside of the Sierra Highway.

AVEK's board of directors approved the Acton Feeder Relocation Project (Feeder Relocation Project) to lower the pipeline in advance of the County commencing work on the Highway Widening Project. Because AVEK had prior rights to the land, and would incur costs to lower the pipeline, the County agreed to reimburse AVEK for all costs associated with the Feeder Relocation Project.

AVEK hired Nicholas to be its general contractor for the Feeder Relocation Project. As part of the project, AVEK and Nicholas applied to the County for an excavation permit. Among other things, the permit application and conditions required AVEK to submit a traffic control plan to the County for approval before closing any part of the roadway. On January 10, 2010, the County issued AVEK an excavation permit for the Feeder Relocation Project.

The permit contains the following indemnity provision: "In consideration of granting of this permit, it is agreed by the applicant that the County of Los Angeles and/or the city wherein the permit work is to be performed and any of their officers or employees thereof shall be saved harmless by the applicant from any liability or responsibility for any accident, loss, or damage to persons or property, happening occurring [*sic*] as the proximate result of any of the work undertaken under the terms of this application and the permit or permits which may be granted in response thereto, and that all of said liabilities are hereby assumed by the applicant."

AVEK and Nicholas were in the midst of performing the Feeder Relocation Project when Plaintiff's accident occurred. The County had yet to commence work on the Highway Widening Project.

3. *The Traffic Control Plan*

In the County's and AVEK's view, the safety of both the traveling public and Nicholas's workers required a northbound stretch of the Sierra Highway to be reduced to one lane through the use of concrete k-rails in the Feeder Relocation Project's construction area.[2] Before AVEK could implement the lane closure, its excavation permit required it to submit a traffic control plan to the County for approval.

By the time AVEK was set to begin work on the Feeder Relocation Project, the County had already prepared a draft traffic control plan for its Highway Widening Project that covered the same stretch of highway. In view of this fact, and because the County was reimbursing AVEK for costs associated with the Feeder Relocation Project, it agreed to share its draft traffic control plan with AVEK and to act as AVEK's consultant for finalizing the plan.

In June 2009, the County provided the draft traffic control plan to AVEK and Nicholas. Later that month, AVEK informed the County that it had "some concerns" regarding the traffic control plan's specifications. Between June 2009 and January 2010, AVEK, Nicholas, and the County exchanged several emails concerning the traffic control plan, including some memorializing modifications requested by AVEK and Nicholas. Nicholas also made handwritten revisions to the traffic control plan in the field, some of which concerned the placement of k-rails blocking the Feeder Relocation Project's construction area.

On January 20, 2010, the County approved the revised traffic control plan for the Feeder Relocation Project. This final plan, incorporating AVEK's and Nicholas's modifications, was in effect when Plaintiff's accident occurred.

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[2] Plaintiff disputed this assertion in her opposition to the County's motion for summary judgment. In denying the County's motion, the trial court ruled that the evidence created "a triable issue of material fact as to whether the presence of the K-rails constituted a substantial factor in the occurrence of the accident and the severity of Plaintiff's injuries."

4. *The Pleadings*

On January 20, 2011, Plaintiff filed her complaint against the County, asserting a cause of action for dangerous condition of public property. In addition to allegations concerning the lack of a median barrier, Plaintiff also alleged her injuries were caused by the unsafe construction site, including the lane closure which eliminated an escape route on the subject stretch of highway.

On September 9, 2011, the County filed a cross-complaint against AVEK for implied/equitable indemnity, express indemnity, contribution, comparative fault and declaratory relief. In addition to indemnification, the County sought a declaration that AVEK was obligated to defend the County against Plaintiff's suit under the permit's indemnity clause.

On January 6, 2012, the County filed its operative first amended cross-complaint, adding Nicholas as a cross-defendant on all causes of action. On February 3, 2012, Plaintiff amended her complaint to substitute Nicholas for a doe defendant.

5. *The Summary Judgment Motions*

On July 2, 2012, Nicholas filed a motion for summary judgment on Plaintiff's complaint. The same day, AVEK and Nicholas moved for summary judgment/adjudication on the County's cross-complaint and each cause of action asserted therein. In both motions, AVEK and Nicholas argued they owed no duty of care to Plaintiff with respect to the alleged dangerous condition of public property.

On November 8, 2012, the trial court issued a tentative ruling denying both motions. The court reasoned Plaintiff and the County had raised triable issues concerning AVEK's and Nicholas's responsibility for preparing and revising the traffic control plan that allegedly caused Plaintiff's injuries. However, before entering its order, the trial court granted the parties leave to submit additional evidence and argument concerning the location of the construction zone in relation to the accident.[3]

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[3] Specifically, AVEK and Nicholas requested leave to present color photographs to give the court "perspective" concerning the "separation . . . from the last k-rail to around the curve" where the accident occurred.

At the continued hearing two months later, the trial court departed from its prior tentative and granted the summary judgment motions. The court concluded AVEK and Nicholas owed no duty to Plaintiff because their revisions to the County's draft traffic control plan did nothing to increase Plaintiff's risk of harm. On this basis, the court held Plaintiff could not establish a claim for liability against Nicholas. Likewise, the court reasoned AVEK and Nicholas could not be charged with an obligation to indemnify the County because, absent a legal duty, they could not be held comparatively at fault for Plaintiff's injuries.

DISCUSSION

1. *Standard of Review*

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We " 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar, supra*, 25 Cal.4th at p. 843.) 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.)

A defendant is entitled to summary judgment upon a showing that the plaintiff's action has no merit. (Code Civ. Proc., § 437c, subd. (a).) The defendant meets this burden with respect to each cause of action by establishing undisputed facts that negate one or more elements of the claim or state a complete defense to the cause of action. (*Id.*, subd. (p)(2); *Romano v. Rockwell Internat., Inc.* (1996)14 Cal.4th 479, 487.) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to the cause of action or defense. (*Aguilar, supra*, 25 Cal.4th at pp. 849, 853.) "[F]rom commencement to conclusion, the party moving for

summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id.* at p. 850.)

2. *AVEK and Nicholas Owed Plaintiff a Legal Duty to Use Reasonable Care in Performing the Acton Feeder Relocation Project, Including With Respect to the Project's Traffic Control Plan*

A threshold issue for both Plaintiff's and the County's appeals is whether Nicholas and AVEK owed Plaintiff a legal duty with respect to the work they performed on the Feeder Relocation Project. The trial court concluded neither entity owed a duty of care to Plaintiff and, on that basis, granted them summary judgment on Plaintiff's complaint and the County's cross-complaint for indemnity. In reaching this conclusion, the trial court applied principles applicable to a negligent undertaking claim, as articulated by our Supreme Court in *Paz v. State of California* (2000) 22 Cal.4th 550 (*Paz*). As we shall explain, because Plaintiff was allegedly harmed by a dangerous condition that Nicholas and AVEK created in performing the Feeder Relocation Project, and not solely by a preexisting condition on public property, the negligent undertaking doctrine does not apply.[4] Rather, the subject claims are controlled by general negligence principles, under which AVEK and Nicholas owed Plaintiff a legal duty to use reasonable care in performing their work on the project.

"A fundamental element of any cause of action for negligence is the existence of a legal duty of care running from the defendant to the plaintiff." (*Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564, 593.) "Given undisputed facts, whether a duty of care exists is a question of law." (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 45 (*National Union Fire*).) However, "if the record can support competing inferences [citation], or if the facts are not yet sufficiently developed [citation], ' "an ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits" '

[4] We say "solely" because Plaintiff alleges the County's failure to install a median barrier on the subject stretch of highway also constituted a substantial factor in causing her harm. This claim is not implicated in these appeals.

[citation], and summary judgment is precluded." (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 615.)

The general rule for legal duty is codified in Civil Code section 1714, under which " '[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . .' " (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 (*Cabral*), quoting Civ. Code, § 1714, subd. (a).) This means "each person has a duty to use ordinary care and 'is liable for injuries caused by his failure to exercise reasonable care in the circumstances . . . .' " (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472, quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland*); see also *National Union Fire, supra,* 171 Cal.App.4th at p. 45 ["A duty may arise through statute, contract, or the relationship of the parties."].) "[I]n the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.' " (*Cabral,* at p. 771; *Rowland,* at p. 112.)[5]

In *Paz*, our Supreme Court addressed the "negligent undertaking" theory of liability and the circumstances under which private contractors owe a duty to the general public when they undertake work that might affect an alleged dangerous condition of

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[5] In *Rowland*, our Supreme Court "identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.' " (*Cabral, supra,* 51 Cal.4th at p. 771, quoting *Rowland, supra,* 69 Cal.2d at p. 113.) Because the trial court relied exclusively upon the negligent undertaking principles articulated in *Paz* when it granted summary judgment, we will not engage in an exhaustive analysis of the *Rowland* factors. We note, however, that in moving for summary judgment Nicholas focused principally on the foreseeability factor, arguing it could not have foreseen the harm allegedly caused by its placement of the k-rails because it simply followed the traffic control plan initially provided and approved by the County. We address this argument in the body of our discussion, and reject it.

public property. The plaintiff in *Paz* was injured in a traffic accident at an intersection controlled by a single stop sign when his motorcycle collided with an automobile completing a left turn. (*Paz, supra,* 22 Cal.4th at pp. 553-554.) He alleged the intersection was dangerous due to its obstructed sight lines. (*Id.* at p. 555.) In addition to suing several governmental entities, the plaintiff sued a private developer and two contractors that had obtained permits to construct a condominium project near the intersection. The plaintiff alleged the private defendants "obligated themselves to provide an operating traffic light signal" when they applied for the permits, yet they "negligently delayed" in performing the task. (*Id.* at pp. 553-555.)

Insofar as the plaintiff asserted timely installation of the signals would have "negated" the allegedly dangerous condition (*Paz, supra,* 22 Cal.4th at p. 553), the *Paz* court determined his claim against the private defendants was "necessarily . . . grounded in the negligent undertaking theory of liability articulated in [Restatement Second of Torts,] section 324A." (*Paz,* at p. 558.) Section 324A states: " 'One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if [¶] (a) his failure to exercise reasonable care increases the risk of such harm, or [¶] (b) he has undertaken to perform a duty owed by the other to the third person, or [¶] (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.' " (*Paz,* at p. 558, fn. omitted.) The Supreme Court concluded none of these conditions for liability was present and, thus, under the circumstances of the case, the private defendants did not owe the plaintiff a duty simply by undertaking work that may have alleviated an allegedly dangerous condition on public property. (*Id.* at pp. 554, 560-561.)

Unlike the plaintiff in *Paz*, Plaintiff in the instant case does not allege AVEK and Nicholas are liable because they failed to remedy a *preexisting* dangerous condition that caused her injuries. On the contrary, Plaintiff claims she was harmed by an alleged dangerous condition that AVEK and Nicholas *created* in the course of performing the Feeder Relocation Project—namely, placing k-rails as specified in the traffic control plan to eliminate an escape lane. As the *Paz* court explained, the negligent undertaking doctrine is rooted in the basic common law principle "that a person who has *not created* a peril is not liable in tort for failing to take affirmative action to protect another." (*Paz, supra,* 22 Cal.4th at p. 558, italics added.) Here, because the evidence raises a triable issue as to whether AVEK and Nicholas were responsible, at least in part, for creating the alleged peril, the negligent undertaking doctrine does not apply. The trial court erred in concluding *Paz* foreclosed the existence of a legal duty running from AVEK and Nicholas to Plaintiff with respect to the Feeder Relocation Project.

On appeal, AVEK and Nicholas contend they cannot be charged with liability for Plaintiff's injuries because they were not responsible for creating the traffic control plan. Viewing the evidence in the light most favorable to the nonmoving parties, we must disagree. As far as AVEK is concerned, the evidence shows that, under its excavation permit, AVEK was required to submit a traffic control plan to the County before closing a roadway for the Feeder Relocation Project. Though the County provided AVEK with an initial draft of a traffic control, and acted as a consultant to assist AVEK with the plan, this did not release AVEK from its legal duty to refine the plan in a manner consistent with the particulars of the Feeder Relocation Project and the safety needs of the traveling

public.[6] The evidence suggests AVEK understood it retained this responsibility. Among other things, the County produced several emails showing AVEK advised the County that it had "concerns regarding the [traffic control plan] [the County] provided," some of those concerns involved the placement of the k-rails, and the revisions AVEK proposed to accommodate those concerns were incorporated into the final traffic control plan. Though the County retained ultimate authority to approve AVEK's traffic control plan, this fact, and other evidence concerning the County's involvement in preparing the plan, is relevant only to the County's comparative fault for any harm caused by the plan—it does not negate the duty AVEK owed to the traveling public to use reasonable care in formulating a safe traffic control plan for its Feeder Relocation Project.

As AVEK's contractor on the relocation project, the same analysis applies to Nicholas. It is settled that " ' "[a] highway contractor doing work on a public highway or street owes to the traveling public the duty of protecting it from injury that may result from his negligence" ' [citations] and is under 'a duty to protect the public against dangerous conditions existing where the public in rightful use of the roadway might encounter such conditions' [citation]." (*Thirion v. Fredrickson & Watson Constr. Co.* (1961) 193 Cal.App.2d 299, 304-305.) Here, the evidence showed Nicholas was involved in formulating AVEK's proposed revisions, and these revisions were

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[6] AVEK and Nicholas introduced a series of emails by County employees discussing whether the County should provide AVEK with a traffic control plan for the Feeder Relocation Project. One of the emails acknowledges that the County "typically [does not] provide a traffic control plan for utility companies," but since the County would be reimbursing AVEK for its costs associated with the relocation project, "it might be cheaper" for the County to prepare the plan. Another email recommends that the County prepare the traffic control plan "in-house" notwithstanding concerns about "potential liability." In response to this evidence, the County offered the declaration of William Winter, a civil engineer with the County, who testified that the County agreed only to "***act as a consultant for AVEK***" with respect to AVEK's obligation to prepare the traffic control plan, as this would reduce costs and expedite the County's approval of the plan. Viewing all the evidence in the light most favorable to the nonmoving parties, we cannot say as a matter of law that AVEK was released from all responsibility for preparing the traffic control plan. (See *Artiglio, supra,* 18 Cal.4th at p. 615.)

incorporated into the final traffic control plan. In fact, the evidence shows it was Nicholas that participated in most of the meetings to revise the plan. Further, under AVEK's excavation permit, Nicholas had the authority to make "minor revisions to the traffic control [plan] to accommodate field conditions." (Capitalization omitted.) The evidence shows Nicholas exercised this authority on at least one occasion to change the location of k-rails. For these reasons, we cannot say as a matter of law that foreseeability of harm was so lacking as to justify a departure from the fundamental principle embodied in Civil Code section 1714. (See *Rowland, supra*, 69 Cal.2d at p. 113; and see fn. 5, *ante*.)

Lastly, the trial court reasoned that AVEK and Nicholas owed no duty to Plaintiff because "[t]he modifications adopted at the behest of Nicholas in the final Traffic Control Plan limited the extent of the k-rails and thus, did not increase the risk of harm to Plaintiff." We disagree. This evidence may be relevant to the issues of breach and apportionment of fault, but it does not negate the existence of a duty. As we have explained, the presence of the k-rails on the Sierra Highway was not a preexisting condition that Nicholas contracted to remedy; rather, the evidence shows Nicholas placed the k-rails on the highway to facilitate its work on the Feeder Relocation Project. In performing its work on behalf of AVEK, Nicholas had a duty to use reasonable care in formulating and modifying the traffic control plan to meet field conditions. As for removing some of the k-rails, a triable issue exists as to whether AVEK and Nicholas breached their duty by failing to propose either a more significant reduction to the k-rails' length, or some other modification that would not have required the elimination of an escape lane for northbound traffic.[7]

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[7] Of course, triable issues also exist as to whether any party breached the duty of care at all. The County, AVEK and Nicholas all introduced evidence suggesting the k-rail barrier was necessary to facilitate safe working conditions for Nicholas's construction team performing the Feeder Relocation Project. In view of this evidence, a jury could find the design of the traffic control plan and placement of the k-rails were not unreasonable under the circumstances. Likewise, triable issues exist as to whether the k-rails were a substantial factor in causing Plaintiff's injuries.

Because we conclude the evidence, when viewed in the light most favorable to Plaintiff, establishes Nicholas owed Plaintiff a duty to use reasonable care in preparing and implementing the traffic control plan, the summary judgment in favor of Nicholas on Plaintiff's complaint is reversed.[8] Further, as we discuss below, because AVEK likewise owed Plaintiff a duty with respect to the Feeder Relocation Project and traffic control plan, the summary judgment in favor of Nicholas and AVEK on the County's cross-complaint also must be reversed. We turn to the cross-complaint now.

3. *Triable Issues Exist as to Whether the County Is Entitled to Equitable Indemnity for AVEK's and Nicholas's Alleged Negligence*

The Code of Civil Procedure allows a tort defendant to seek indemnity by filing a cross-complaint to allege "[a]ny cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action . . . ." (Code Civ. Proc., § 428.10, subd. (b).) Thus, "a defendant may generally file a cross-complaint against any person from whom he seeks equitable indemnity. [Citation.] [¶] 'The purpose of equitable indemnification is to avoid the unfairness, under joint and several liability theory, of holding one defendant liable for the plaintiff's entire loss while

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[8] While the summary judgment in favor of Nicholas on Plaintiff's complaint must be reversed because the evidence, viewed in the light most favorable to Plaintiff, supports the conclusion that Nicholas owed Plaintiff a legal duty with respect to the design of the traffic control plan and placement of the k-rails, we note that a different analysis applies to Plaintiff's charge that Nicholas acted negligently in failing to cover conflicting speed limit signs. As the trial court observed with respect to that claim, the undisputed evidence showed that the County retained responsibility to cover the conflicting signs. Specifically, the approved traffic control plan general notes state: "Existing signs that are in conflict with these plans will be removed or covered by *the agency*"—i.e., the Los Angeles County Department of Public Works. (Italics added) Though Plaintiff offered evidence to show the County requested that Nicholas cover the conflicting signs, there was no evidence that Nicholas agreed to do so. On the contrary, the evidence showed only that Nicholas responded by requesting that the County redline the traffic control plan and confirm the direction in writing. Absent evidence that Nicholas undertook the County's duty to cover the conflicting signs, and that the County relied on Nicholas's undertaking, we agree with the trial court that Nicholas had no such duty. We express no opinion with respect to the trial court's conclusion that the alleged failure to cover the signs did not cause Plaintiff's injuries.

allowing another responsible defendant to escape " 'scot free' " [citation omitted].' [Citation.] A defendant 'has a right to bring in other tortfeasors who are allegedly responsible for plaintiff's action through a cross-complaint . . . for equitable indemnification.' " (*Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal.App.3d 1439, 1444.)

"A key restrictive feature of traditional equitable indemnity is that, on matters of substantive law, the doctrine is 'wholly derivative and subject to whatever immunities or other limitations on liability would otherwise be available' against the injured party." (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1158-1159 (*Prince*); *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114 [recognizing the "fundamental principle that 'there can be no indemnity without liability' "].) Further, "[a]lthough traditional equitable indemnity once operated to shift the entire loss upon the one bound to indemnify, the doctrine is now subject to allocation of fault principles and comparative equitable apportionment of loss." (*Prince*, at p. 1158.)

In the instant case, the trial court determined the County could not maintain a claim for equitable indemnity against AVEK and Nicholas because neither entity owed a legal duty to Plaintiff under the negligent undertaking doctrine. As we explained above, the negligent undertaking doctrine does not bar the County's claim, because the County's asserted right to equitable indemnity is premised on an alleged dangerous condition that AVEK and Nicholas created in performing the Feeder Relocation Project—not a preexisting condition that these entities undertook to remedy. (Cf. *Paz*, *supra*, 22 Cal.4th at pp. 558-559.)

AVEK and Nicholas owed Plaintiff a legal duty to use reasonable care in performing the Feeder Relocation Project. To the extent their participation in preparing the traffic control plan breached that duty and constituted a substantial factor contributing to Plaintiff's alleged injuries, AVEK and Nicholas may be held comparatively at fault. Because the questions of breach and allocation of loss are subject to factual disputes, triable issues exist as to whether the County is entitled to equitable indemnity from AVEK and Nicholas.

4. *Triable Issues Exist as to Whether the County Is Entitled to Express Indemnity for Harm Not Caused by the County's Active Negligence*

"Express indemnity refers to an obligation that arises ' "by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances." ' [Citation.] Express indemnity generally is not subject to equitable considerations or a joint legal obligation to the injured party; rather, it is enforced in accordance with the terms of the contracting parties' agreement." (*Prince, supra,* 45 Cal.4th at p. 1158.)

The excavation permit the County granted to AVEK and Nicholas for the Feeder Relocation Project provides, in relevant part: "In consideration of the granting of this permit, it is agreed by the applicant that the County of Los Angeles and the city where the permit work is to be performed and any of their officers or employees, thereof, shall be saved harmless by the applicant from any liability or responsibility for any accident, loss, or damage to persons or property happening or occurring [*sic*] as the proximate result of any of the work undertaken under the terms of this application, and the permit or permits which may be granted in response thereto, and that all of said liabilities are hereby

assumed by the applicant."[9] Because the permit required AVEK and Nicholas to prepare, submit and make field modifications to the traffic control plan for the Feeder Relocation Project, the County contends it is entitled to express indemnity from AVEK and Nicholas for any liability proximately caused by the lane closure.

The trial court concluded the County could not maintain a claim for express indemnity because any liability determination against the County would necessarily entail a finding of "active negligence," thereby barring the County from obtaining indemnification under the permit's "general" indemnity clause. Though the provision may be a general indemnity clause, we disagree with the trial court's conclusion that a finding of active negligence per se bars the County from enforcing the express indemnity

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[9] A substantively identical indemnity clause also appears in the road permit application submitted by AVEK and Nicholas.

After reviewing the appellate record and the parties' briefs, we gave notice to the parties that this court was considering affirming summary adjudication of the express indemnity claim in favor of Nicholas on a ground not relied upon by the trial court. In accordance with Code of Civil Procedure section 437c, subdivision (m)(2), we invited the parties to file supplemental briefs addressing whether Nicholas was bound by the terms of the indemnity clause in view of the clause's express language naming the "applicant" as indemnitor and the road permit application naming AVEK as "OWNER/APPLICANT" and Nicholas as "CONTRACTOR." In its supplemental brief, the County cited an attachment to the road permit application that also listed Nicholas as "OWNER/APPLICANT." Additionally, the County noted, in moving for summary adjudication of the express indemnity claim, Nicholas had taken the position that "The reasonable expectation of AVEK *and NICHOLAS* was that there would be a duty to indemnify and insure the COUNTY for all liability caused by the negligent acts of AVEK *and/or its* [*sic*] *NICHOLAS* under the scope of the permit . . . ." (Italics added.) In view of this evidence and the representation by Nicholas, we agree with the County that the term "applicant" as used in the indemnity clause is reasonably susceptible of an interpretation that includes Nicholas within its scope. (See *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351 ["Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible"].) Further, because other extrinsic evidence may be necessary to determine the parties' intent, the proper interpretation of the term "applicant" must be addressed in the trial court. (See *id.* at pp. 1359-1360.)

obligation. On the contrary, we conclude that under the clause's plain terms, the County has the contractual right to seek indemnification for any liability not attributable to its own negligence that proximately results from the work authorized by the permit.

"If an indemnity clause does not address itself to the issue of an indemnitee's negligence, it is referred to as a 'general' indemnity clause." (*Rossmoor Sanitation, Inc. v. Pylon, Inc*. (1975) 13 Cal.3d 622, 628 (*Rossmoor*).) "Provisions purporting to hold [an indemnitee] harmless 'in any suit at law' [citation], 'from all claims for damages to persons' [citation], and 'from any cause whatsoever' [citation], without expressly mentioning an indemnitee's negligence, have been deemed to be 'general' clauses." (*Id.* at pp. 628-629.) Inasmuch as the subject indemnity clause provides that the County "shall be saved harmless by the applicant from any liability . . . occurring as the proximate result of any of the work undertaken under the terms of . . . the permit," without addressing itself to the County's negligence, it is properly characterized as a general indemnity clause.

The trial court held that "[a]n indemnitee may only benefit from a general indemnity clause if it is deemed to have been merely passively negligent, as opposed to actively negligent."[10] This statement is both too broad and inconsistent with the modern trend toward applying general contract interpretation principles, rather than strict adherence to the active-passive negligence dichotomy, in determining express indemnity obligations. (See *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1820 (*Hernandez*).)

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[10] "Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. [Citations.] Active negligence, on the other hand, is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform. [Citations.] 'The crux of the inquiry is to determine whether there is participation in some manner by the person seeking indemnity in the conduct or omission which caused the injury beyond the mere failure to perform a duty imposed upon him by law.' " (*Rossmoor, supra,* 13 Cal.3d at p. 629.)

Although an indemnitee's active negligence may in some instances preclude its recovery under a general indemnity agreement, our Supreme Court has cautioned against strictly applying such a rule. (*Hernandez, supra,* 28 Cal.App.4th at p. 1820, citing *Rossmoor, supra,* 13 Cal.3d at pp. 628, 632-633.) As the high court stated in *Rossmoor,* "we do not employ the active-passive dichotomy as wholly dispositive of this or any other case." (*Rossmoor,* at p. 632.) Rather, the *Rossmoor* court explained, "the question whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts." (*Id.* at p. 633.)

Applying the teaching from *Rossmoor,* the Court of Appeal in *Hernandez* held that an indemnitee's active negligence did not bar it from enforcing a general indemnity obligation with respect to that portion of a joint and several damage award not attributable to its own negligence. (*Hernandez, supra,* 28 Cal.App.4th at p. 1818.) In that case, the indemnitor, NASSCO, rented a crane from the indemnitee, Carde, for use at NASSCO's shipyard. (*Id.* at p. 1799.) The rental agreement provided: " 'User [NASSCO] shall hold Owner [Carde] free and harmless from and indemnify and defend Owner against any and all [suits and liability] resulting, or claimed to result, from injury or damage to any and all persons, employees and property in any way caused by User or any person acting for or in behalf of User, occasioned by the use, maintenance, operation, handling, transportation or storage of the equipment during the rental term . . . .' " (*Id.* at p. 1818.) The plaintiff, an employee of NASSCO, was injured in an accident involving the crane and sued Carde for damages. (*Id.* at p. 1798.) Carde, in turn, cross-complained against NASSCO for indemnity under the rental agreement. (*Id.* at p. 1801.)

The jury returned a special verdict for the plaintiff, finding NASSCO 55 percent at fault and Carde 20 percent at fault for the plaintiff's injuries, with the remainder of fault allocated between the plaintiff and another defendant. (*Hernandez, supra*, 28 Cal.App.4th at p. 1802.) The special verdict included a finding that Carde had been actively negligent in causing the plaintiff's injuries. (*Ibid.*) Based on the active negligence finding, the trial court ruled NASSCO was not obligated to indemnify Carde under the general indemnity provision in the parties' rental agreement. (*Id.* at pp. 1802, 1819.) The Court of Appeal reversed.

Relying on *Rossmoor*, the *Hernandez* court explained that the modern trend was to apply "well-established general principles of contract interpretation in determining indemnity obligations." (*Hernandez, supra*, 28 Cal.App.4th at p. 1820.) "[D]espite an indemnitee's active negligence," the court observed, "those principles may under appropriate circumstances necessitate a proportional indemnity analysis." (*Ibid.*) The court found that was the case with the general indemnity provision at issue in *Hernandez*: "Reasonably read, the contractual indemnity language here did not obligate NASSCO to indemnify Carde for Carde's own negligence. . . . However, reasonably construed, the contractual language obligated NASSCO to indemnify Carde for the portion of Carde's liability attributable to NASSCO's fault. Such interpretation is consistent with Carde's reasonable expectation it would be indemnified for liability arising from the negligence of NASSCO. Thus, we conclude despite its 20 percent active negligence Carde was contractually entitled to indemnification from NASSCO for the portion of plaintiffs' joint and several economic damage award attributable to NASSCO's 55 percent negligence that is ultimately paid by Carde." (*Id.* at p. 1822.)

We conclude a similar analysis applies in the instant case. Though the permit's indemnity clause does not obligate AVEK and Nicholas to indemnify the County for the County's own negligence, it does require indemnification for damages proximately caused by the permitted work that is not attributable to the County's conduct.[11] This interpretation is consistent with the County's reasonable expectation that permitting the work to be performed on the Feeder Relocation Project would not expose it to liability for the negligent conduct of those performing that work.

As discussed, the County presented sufficient evidence to raise triable issues concerning the extent of AVEK's and Nicholas's responsibility for Plaintiff's alleged injuries that were caused by the lane closure. The County is not entitled to indemnification for any damages proximately caused by its own active negligence. However, a finding of active negligence does not bar the County from seeking indemnification for damages it must pay due to another's negligence in performing the permitted work. Because there are triable issues concerning the existence and apportionment of fault, the trial court should not have granted AVEK and Nicholas summary judgment with respect to the County's express indemnity and declaratory relief causes of action. (See *Morton Thiokol v. Metal Bldg. Alteration Co.* (1987) 193 Cal.App.3d 1025, 1030 ["Where, as here, the agreement clearly indicates that one party was to be indemnified for any damages sustained as a result of another's breach of the contract, and it is undisputed that the accident would never have happened except for such breach, we conclude that the indemnity is viable notwithstanding the jury's finding of the indemnitee's 'active' negligence"].)

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[11] Any provision purporting to relieve the County of liability for its active negligence would have been void and unenforceable. (Civ. Code, § 2782, subd. (b)(1) ["provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency entered into before January 1, 2013, that purport to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable"].)

5. *AVEK Owed the County a Duty to Defend Pursuant to the Indemnity Clause*

With respect to the County's declaratory relief action, we also conclude summary judgment was improper because AVEK has a duty to defend the County against claims "embraced by the indemnity" obligation. (Civ. Code, § 2778, subd. 4; *Crawford v. Weather Shield Mfg., Inc*., 44 Cal.4th 541, 557 (*Crawford*) ["subdivision 4 of section 2778, by specifying an indemnitor's duty 'to defend' the indemnitee upon the latter's request, places in every indemnity contract, unless the agreement provides otherwise, a duty to assume the indemnitee's defense, if tendered, against all claims 'embraced by the indemnity.' "].) Indeed, because that duty arose upon the County's tender of its defense to AVEK, the existence of that duty is not dependent upon the outcome of the litigation or an ultimate finding that AVEK must indemnify the County for damages. (See *Crawford,* at p. 558 ["under subdivision 4 of section 2778, claims 'embraced by the indemnity,' as to which the duty to defend is owed, include those which, at the time of tender, *allege* facts that would give rise to a duty of indemnity"]; *UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10, 21-22 ["a duty to defend arises out of an indemnity obligation as soon as the litigation commences and regardless of whether the indemnitor is ultimately found negligent"].)

Plaintiff's complaint alleges that construction on the Sierra Highway, including the lane closure that eliminated an escape route, proximately caused her injuries. The evidence shows the lane closure was implemented in accordance with the traffic control plan required by the permit for AVEK's Feeder Relocation Project. After receiving service of the complaint, the County filed a government claim on AVEK, which advised AVEK of Plaintiff's claims and requested defense of the action. The complaint's allegations and the County's tender to AVEK establish AVEK's duty to defend pursuant to the permit's indemnity provision and Civil Code section 2778, subdivision 4. The trial court erred in granting AVEK summary judgment on the County's declaratory relief cause of action.

DISPOSITION

The summary judgment in favor of Nicholas Construction Inc. on Plaintiff's complaint is reversed. The summary judgment in favor of Antelope Valley-East Kern Water District and Nicholas Construction Inc. on the County's cross-complaint is reversed. Plaintiff and the County are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

EDMON, P. J.

ALDRICH, J.