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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DAVID P. BUENO, Plaintiff and Appellant, v. UNIVERSITY OF SOUTHERN CALIFORNIA, Defendant and Respondent.	B280693 (Los Angeles County Super. Ct. No. BC559277)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Aminpour & Associates, King Aminpour, Oliver Shami, Chelsea Grover and Mike VanGalio, for Plaintiff and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester; Sevan Gobel and Ladell Hulet Muhlestein; for Defendant and Respondent.

Plaintiff and appellant David P. Bueno (plaintiff) was injured while working security at a football game when fans of defendant and appellant University of Southern California (USC) stormed the field after USC eked out a victory over Stanford University (Stanford) in the game's final seconds. Plaintiff sued USC on a negligence theory, and the trial court granted summary judgment for USC after this court issued an alternative writ so suggesting. We consider whether plaintiff has raised any issues of material fact meriting a jury trial.

I. BACKGROUND

A. November 2013 USC-Stanford Football Game

On November 16, 2013, USC and Stanford played a football game at the Los Angeles Memorial Coliseum (the Coliseum), USC's home stadium.[1] USC had a contract with Contemporary Services Corporation (CSC) to provide "crowd management services" at the Coliseum on game days. The contract provided USC would "make all requests regarding deployment, positioning, post assignments and conduct through [CSC's] Event Coordinator" and CSC would be "accountable for the direct supervision of its employees." Plaintiff worked for CSC as a licensed security guard and was assigned to work the USC-Stanford game.

Security personnel working at the Coliseum during the USC-Stanford game included 754 uniformed CSC guards, 69 uniformed off-duty Los Angeles Police Department (LAPD)

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[1] Since the advent of the Pac-12 Football Championship Game in 2011, Stanford's football team has the most championships of any school (three).

officers, 180 to 200 uniformed on-duty LAPD officers (who patrolled outside the stadium), and approximately 50 uniformed USC campus police officers. On the day of the game, plaintiff received all his instructions from CSC and did not speak to, or receive direction from, any USC employees. Plaintiff was initially posted at the stadium entrance gate, where he checked bags for alcohol and weapons. Alcohol was not sold at the Coliseum during the game.

USC football fans had not stormed the Coliseum field since 1999, and no injuries occurred on that date. Nevertheless, USC had a written "contingency plan"—and it engaged in a test run of that plan prior to the 2013-2014 football season—in the event it appeared spectators might rush the field. The plan called for redeploying security personnel to the lower levels of the stadium, assigning campus police officers to patrol the student section, and broadcasting announcements near the end of the game asking spectators not to go onto the field. The contingency plan further provided that if fans did rush the field, security personnel were to "fall back" and let them enter.

USC's contingency plan was discussed twice in the days immediately preceding the USC-Stanford game because of the rivalry and relative ranking of the teams. At half-time, the game was close and USC decided to implement the contingency plan. CSC repositioned a number of its security guards, including plaintiff, to aisles in the lower part of the stadium. Dozens of LAPD officers were also redeployed to the lower level of the stadium, the field, and the tunnel. Campus police officers were assigned to walk up and down the student section. EMTs were positioned at the bottom of the stands. An announcement to

"please refrain from entering the field following the game" was broadcast over the public announcement system.

Around the fourth quarter, plaintiff, together with two other CSC guards and a CSC supervisor, was stationed along a lower-level stairway near the stadium tunnel. CSC supervisors directed plaintiff to stand near the bottom of the staircase and to not allow anybody beyond that point unless they held a special pass. Plaintiff was also told that if spectators began to rush the field, he was to "just get out of the way . . . ."

USC kicked a game-winning field goal with 19 seconds remaining in the game. Fans "started getting riled up and . . . pushing," and plaintiff and his colleagues had difficulty holding them back. As soon as the game ended, a "human wave" of five to ten thousand fans "stormed onto the field," "jumping over the bars" and seeming to "c[o]me out of nowhere." According to plaintiff, not even 100 guards at his location would have been able to stop the onslaught.

A CSC supervisor called out for plaintiff to "[r]un." Plaintiff tried to make it onto the field, but "somebody caught [his] back foot, and [he] went down." He blacked out within seconds, and people trampled him. When he regained consciousness, paramedics had cut his clothes off, and the stands were mostly empty. Plaintiff suffered bruises and contusions to his torso but sustained no broken bones or other injuries.

B. Procedural History

Plaintiff sued USC for negligence; premises liability; negligent hiring, retention, and supervision; and negligent

infliction of emotional distress—all predicated on USC's failure to provide adequate security.[2]

USC moved for summary judgment, or summary adjudication in the alternative. The university contended it had no duty to protect plaintiff from thousands of spectators storming the field considering the limited foreseeability of such an event and the high burden such a duty would impose. Further, and assuming for the sake of argument a duty to protect plaintiff existed, USC contended it did not breach that duty because (a) it prepared and implemented a reasonable plan to secure against harm and (b) its conduct did not actually cause plaintiff's harm. USC asserted plaintiff could not maintain a premises liability claim because he could not show USC failed to disclose any hidden hazard. Plaintiff's negligent hiring, retention, or supervision claim was defective, according to USC, because plaintiff was at all times exclusively employed, supervised, and instructed by CSC and plaintiff could not show USC knowingly hired, supervised, or retained an incompetent person who caused plaintiff's harm. Finally, USC also contended plaintiff's claims were barred by the primary assumption of the risk doctrine because the risk in performing crowd control was an inherent element of plaintiff's job.

In support of its motion, USC submitted a declaration from Joseph James Furin (Furin), a USC employee who served as Assistant General Manager of the Coliseum on the date of the USC-Stanford game and who was, at the time of signing the

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[2] The complaint is not included in the appellate record. We describe plaintiff's causes of action based on the parties' filings that are included in the record.

declaration, the Coliseum's General Manager. USC also submitted excerpts from its deposition of plaintiff. Furin's declaration and plaintiff's deposition formed the basis of USC's separate statement of undisputed material facts.

Plaintiff opposed USC's motion for summary judgment, contending there were material factual issues necessitating a jury trial as to the adequacy of USC's contingency plan. Plaintiff maintained the very existence of the plan showed his injury was foreseeable and jurors could find USC's conduct caused that injury. Plaintiff suggested Furin's declaration raised more questions than it answered, such as whether more effective measures could have been undertaken and why they were not. Plaintiff also contended that "being trampled by a delirious crowd improperly managed" was not a risk inherent in working as a security guard. The only opposition papers submitted by plaintiff, in addition to his memorandum of points and authorities, was a declaration of his attorney and a response to USC's separate statement.[3] Plaintiff did not object to any of USC's evidence, largely failed to dispute any of the facts set forth in USC's separate statement, and did not submit his own separate statement asserting any additional material facts were in dispute.

The trial court denied USC's motion for summary judgment after a hearing.[4] USC challenged the denial via a petition for writ of mandate filed in this court, and we issued an alternative

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[3] The declaration of plaintiff's attorney—and USC's objections to it—are not included in the appellate record.

[4] No reporter's transcript documenting what transpired at this hearing is included in the appellate record.

writ ordering the trial court to either (1) vacate the order denying USC's motion for summary judgment and enter a new order granting that motion, or (2) show cause why a peremptory writ ordering the trial court to do so should not issue. After hearing argument from the parties, the trial court vacated its order denying USC's motion for summary judgment and entered a new order granting that motion.

II. DISCUSSION

Plaintiff contends USC's own evidence in support of its motion for summary judgment establishes triable issues of fact because the evidence raises questions as to whether USC did enough to prevent the foreseeable event of fans rushing the field. In focusing on the issue of foreseeability, however, plaintiff cannot overcome a critical—and in this case, decisive—issue, namely, his status as the employee of an independent contractor. Controlling California Supreme Court authority bars negligence actions by the employee of an independent contractor against the hirer of that contractor unless the hirer affirmatively contributed to the employee's injury or did not warn the contractor of a concealed hazard known to the hirer. Because plaintiff did not present evidence that would establish a prima facie case of liability in either of those two respects, summary judgment was properly granted.

A. Principles of Appellate Review from Summary Judgment

The record provided by plaintiff on appeal does not include, among other things, plaintiff's operative complaint against USC or a reporter's transcript or suitable substitute for either of the

two hearings held by the trial court on USC's motion for summary judgment. USC contends these omissions preclude us from considering the merits of plaintiff's opposition to summary judgment and any argument by plaintiff that he should have received further time to conduct discovery—e.g., to depose Furin. We agree in part—that insofar as plaintiff's claims of error rely on his asserted inability to obtain discovery, the claims are forfeited on appeal; the record does not show plaintiff duly requested any additional time for discovery in the trial court.[5]

"A grant of summary judgment is proper where it appears no triable issues of material fact exist, and judgment is warranted as a matter of law. (Code of Civ. Proc., § 437c, subd. (c); *Miller v. Department of Corrections* [(2005)] 36 Cal.4th 446, 460[ ].) As the moving party, the defendant must show that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case' on one or more elements of the cause of action. [Citations.]" (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 285 (*Hernandez*).) The moving defendant "bears an initial burden of production to make a prima facie showing of

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[5] Plaintiff states he did not seek to depose Furin prior to opposing USC's motion for summary judgment because his opposition was due less than two months after Furin's declaration was filed and the parties had an impending mediation scheduled. Plaintiff says he intended to conduct additional discovery "subsequent to the Court's anticipated denial of [USC's] Motion for Summary Judgment." Plaintiff, however, does not assert or otherwise show he applied for a continuance to conduct additional discovery in order to rebut Furin's declaration. (See Code Civ. Proc., § 437c, subd. (h); *Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 532.)

the nonexistence of any triable issue of material fact; if [the defendant] carries [its] burden of production, [it] causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*)

As the reviewing court, we "independently examine[ ] the record and consider[ ] all of the evidence set forth in the moving and opposing papers except that as to which objections have been made and sustained." (*Hernandez*, *supra*, 47 Cal.4th at p. 285.) We view the evidence and all inferences "reasonably drawn therefrom" in favor of the party opposing summary judgment. (*Aguilar*, *supra*, 25 Cal.4th at p. 843.) "'"Speculation . . . is not evidence" that can be utilized[, however,] in opposing a motion for summary judgment.' [Citation.] Speculation also differs from a reasonable inference. 'When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.' [Citation.]" (*Advent, Inc. v. National Union Fire Ins. Co. of Pittsburgh* (2016) 6 Cal.App.5th 443, 459.)

While the record provided by plaintiff is indeed deficient (lacking a copy of the operative complaint, among other materials), we will decide the appeal on the merits in light of the standard of review and the materials the record does include. (See *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924,

933.) Of course, insofar as we are required to view the evidence and reasonable inferences in the light most favorable to plaintiff, we may do so based only on the evidence properly before us.

B. USC Is Entitled to Summary Judgment

A negligence liability claim requires us to answer two questions: "Did the defendant owe the plaintiff a duty of care? If so, what standard of care applied?" (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 596 (*SeaBright*).) Here, plaintiff claims USC had a duty to prevent spectators from storming the field.[6] We conclude USC owed no duty to plaintiff—an employee of USC's independent contractor—under the circumstances presented.

As a general rule, "when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*SeaBright*, *supra*, 52 Cal.4th at p. 594, citing *Privette v. Superior Court* (1993) 5 Cal.4th 689.) This rule extends to situations where "the hirer retained control over safety conditions at a worksite" unless the "hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 (*Hooker*).) The affirmative conduct requirement means a hirer will not be liable based merely on evidence it was "aware of an unsafe practice and failed to exercise the authority [it] retained to correct it." (*Id.* at p. 215.) On the other hand, a hirer may be liable for an omission

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[6] Because the complaint is not in the record, we accept USC's characterization of the basis of plaintiff's claims, which plaintiff does not dispute.

"if the hirer promise[d] to undertake a particular safety measure" and then negligently failed to do so, resulting in an employee injury. (*Id.* at p. 212, fn. 3.)

The rule set forth in *Hooker*—limiting hirer liability to situations where the hirer affirmatively contributed to the employee's injury—ordinarily extends to claims of premises liability as well. (*Sheeler v. Greystone Homes, Inc.* (2003) 113 Cal.App.4th 908, 921-922.) But an exception applies where "'(1) [the hirer] knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the [hirer] fails to warn the contractor.'" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1160 (*Kesner*), quoting *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 675 (*Kinsman*).)

While there is ample evidence in this case to raise a jury question as to whether USC retained control over the implementation of its contingency plan, plaintiff has not established a prima facie case that USC affirmatively contributed to his injuries in exercising any retained control. The evidence shows plaintiff fell and was trampled when an unidentified person caught plaintiff's foot as he was running towards the field. Plaintiff admits: he was a CSC employee who received no direction from USC; he was instructed to "just get out of the way" if fans rushed to enter the field; USC's contingency plan called for security personnel to "fall back" under those circumstances; and he ran because his CSC supervisor yelled out for him to do so. Plaintiff therefore fails to raise a triable issue of fact as to whether USC affirmatively contributed to his injury. (See, e.g., *Hooker*, *supra*, 27 Cal.4th at pp. 214-215 [Caltrans did not

affirmatively contribute to injury of contractor's employee where it permitted an unsafe practice to occur and did nothing to correct it]; *Brannan v. Lathrop Construction Associates, Inc.* (2012) 206 Cal.App.4th 1170, 1178 [general contractor's conduct in scheduling work to take place under allegedly hazardous conditions did not affirmatively contribute to injury of subcontractor's employee]; *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1276-1278 [general contractor did not affirmatively contribute to injury of subcontractor's employee where it permitted the employee to work on a raised patio without a guardrail].) Plaintiff points to no affirmative conduct by USC causing his injury, and he points to nothing in the record showing USC "promise[d] to undertake a particular safety measure" (*Hooker*, at p. 212, fn. 3) that would have prevented that injury. Nor can plaintiff establish that USC knew of a "'concealed, preexisting hazardous condition'" (*Kesner*, *supra*, 1 Cal.5th at p. 1160) that it failed to disclose to CSC.[7] Accordingly, summary adjudication of plaintiff's causes of action for negligence and premises liability in favor of USC was proper.

Summary adjudication of plaintiff's cause of action for negligent hiring, retention, and supervision was also proper. In order to state a claim under that theory, plaintiff must show USC knew, or should have known, "facts which would warn a

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[7] Plaintiff suggests that because he was not personally privy to discussions regarding the contingency plan, he was unaware of the extent of the danger imposed by crowds rushing the field. Our Supreme Court has stated, however, that a landowner's duty to disclose a concealed hazard runs to the contractor, not to the contractor's employee. (*Kinsman*, *supra*, 37 Cal.4th at p. 675.)

reasonable person that the [unfit] employee present[ed] an undue risk of harm to third persons in light of the particular work to be performed." (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1214, italics omitted.) There is no record evidence in support of a claim USC knew any of its employees—plaintiff never says who—presented an undue risk of harm in carrying out the contingency plan. Furthermore, insofar as plaintiff's claim could be based on the notion that USC was negligent in hiring CSC, such claims are barred by the holding in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235: An employee of an independent contractor is barred from suing the hirer of the contractor on the ground that the hirer was negligent in retaining the contractor. (*Id.* at p. 1238.)

Plaintiff's cause of action for negligent infliction of emotional distress is also no good. Plaintiff's appellate briefs contain no argument regarding this claim. We conclude he has abandoned any possible claim of error regarding the trial court's summary adjudication of his emotional distress cause of action.[8] (See, e.g., *G & W Warren's, Inc. v. Dabney* (2017) 11 Cal.App.5th 565, 580-581; *Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1564.)

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[8] In any event, our disposition of the other negligence claims would require the same result as to plaintiff's emotional distress claim.

DISPOSITION

The judgment is affirmed. USC shall recover its costs on appeal.

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BAKER, Acting P. J.

We concur:

KIM, J.

SEIGLE, J.*

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