Filed 5/15/17 Ortega v. Crabb Construction CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WALTER ORTEGA, Plaintiff and Appellant, v. CRABB CONSTRUCTION COMPANY, INC., Defendant and Respondent.	B264837 Los Angeles County Super. Ct. No. BC510497

APPEAL from a judgment of the Superior Court of Los Angeles County, Elia Weinbach and Michelle W. Court, Judges. Affirmed.

McNally Law Firm and Bryan L. McNally for Plaintiff and Appellant.

The Hahn Legal Group, Adrienne R. Hahn and James P. Mayo for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Walter Ortega is a construction worker who was injured at work after he fell from an elevated plywood walkway. Plaintiff's employer, Jim Gilchrist Construction, Inc. (Gilchrist), was the framing subcontractor on the job. Gilchrist was hired by the general contractor, defendant and respondent Crabb Construction Company, Inc. (Crabb). Plaintiff sued Crabb, alleging it was negligent with regard to workplace safety. The trial court granted Crabb's motion for summary judgment based on the *Privette* doctrine—a well-established body of law generally immunizing those who hire independent contractors from tort liability arising from workplace injuries sustained by the contractor's employees. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

1. The construction project

In 2011, Taco Bell, Inc. hired Crabb to oversee construction of a new Taco Bell restaurant on property it owned in the Redondo Beach area. Crabb, the general contractor, subcontracted the framing for the building to Gilchrist. At all relevant times, plaintiff was an employee of Gilchrist.

2. The accident

While framing was underway, Gilchrist built an elevated walkway for use by its employees. The walkway consisted of plywood planks placed on top of the roof joists, which were separated by a gap of approximately 32 inches. The walkway was between 13 and 15 feet off the ground.

On the day of the accident, plaintiff was sheathing a portion of the roof of the new restaurant building. Plaintiff alleged that as he attempted to cross from one side of the roof to the other using the plywood plank walkway, one of the planks broke and he fell to the ground, sustaining significant injuries.

3. The lawsuit

Plaintiff subsequently filed a complaint against Taco Bell, Gilchrist, and Crabb, alleging they "negligently owned, operated, controlled and maintained their premises so as to allow plaintiff to fall from a roof."

4. The motion for summary judgment

Crabb moved for summary judgment, arguing plaintiff's claims were barred by the *Privette* doctrine.[1] Specifically, Crabb contended it did not manage the means or methods used by Gilchrist to perform the framing of the building and did not direct Gilchrist to construct the walkway. Further, Crabb asserted it did not provide tools or materials to plaintiff, give plaintiff instructions regarding his job duties, or control any aspect of plaintiff's actions on the day of the accident. Crabb also submitted excerpts from plaintiff's deposition, in which he conceded he did not follow instructions given by anyone working for Crabb; instead, he took direction only from his immediate supervisor, Juan Prebots, an employee of Gilchrist. Accordingly, Crabb urged, it could not be liable for plaintiff's injury because it fully delegated the duty to provide a safe workplace for plaintiff

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[1] Taco Bell joined in the motion for summary judgment, but plaintiff later dismissed his claims against Taco Bell with prejudice. Taco Bell is not a party to this appeal.

to Gilchrist and did not affirmatively contribute to plaintiff's accident.

In opposition to the motion for summary judgment, plaintiff argued that, by virtue of its contract with Taco Bell, Crabb retained control over safety at the building site and contributed to plaintiff's accident by negligently exercising that control. Plaintiff asserted Crabb's safety foreman conducted weekly safety meetings at the job site to address safety issues, including scaffolding and walkways. Further, plaintiff submitted a declaration in which he stated Crabb's safety foreman indicated the plywood walkway was safe, and directed plaintiff and other workers to use the walkway without safety harnesses.

Plaintiff also submitted a declaration by an accident reconstruction and safety expert. The expert opined that Crabb fell below the standard of care in the construction industry by, among other things, failing to have a fall protection plan in place, allowing or encouraging workers to cross the roof on plywood planks without using a safety harness, failing to ensure Gilchrist had a fall protection plan in place, and failing to ensure Gilchrist complied with Cal-OSHA requirements. According to plaintiff, Crabb affirmatively contributed to plaintiff's accident by these, and other, acts and omissions.

5. The judgment and the appeal

On April 16, 2015, the court heard argument on the motion for summary judgment and issued its order granting the motion on that date. Defendant's counsel apparently served a notice of ruling on April 22, 2015.

On June 15, 2015, defendant filed a notice of appeal indicating he was appealing from a judgment after an order

granting a summary judgment motion, purportedly entered on April 17, 2015.

CONTENTIONS

Plaintiff contends the trial court erred by granting summary judgment in favor of Crabb because triable issues of fact exist concerning Crabb's retention and negligent exercise of control over worker safety at the job site.

DISCUSSION

1. Appealability

Although neither party addresses appealability, we do so, as it concerns our jurisdiction. (See *Jennings v. Marralle* (1994) 8 Cal.4th 121, 126 (*Jennings*) [noting "[a] reviewing court must raise the issue [of appealability] on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1"].)

In his opening brief, plaintiff asserts the court entered a final judgment on April 16, 2015, which is appealable as a "final order" under Code of Civil Procedure section 904.1, subdivision (a)(1). Likewise, plaintiff's notice of appeal purports to appeal from a judgment dated April 17, 2015, which the notice of appeal designates as a judgment entered after an order granting summary judgment. The record on appeal does not contain a judgment entered on either date. (Indeed, as discussed *post*, some time passed before the court entered a final judgment.) Instead, the record contains a copy of the order granting the motion for summary judgment, filed on April 16, 2015. It

appears, therefore, plaintiff attempted to appeal from the order granting summary judgment.

We have reiterated that "[a]n order granting summary judgment is not an appealable order; the appeal is from the judgment." (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.) Here, because the court had not yet entered a judgment on the date plaintiff filed the notice of appeal, the appeal was premature. However, "[w]hen the order [granting summary judgment] is followed by a judgment, the appellate court may deem the premature notice of appeal to have been filed after the entry of judgment. [Citations.]" (*Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 288.) We do so in this case, as a judgment was eventually entered. (Cal. Rules of Court, rule 8.104(d)(2); see, e.g., *Morales v. Coastside Scavenger Co.* (1985) 167 Cal.App.3d 731, 733 [treating appeal from order granting motion for summary judgment as premature appeal from subsequently entered judgment].)

We note, however, that the parties failed to obtain a judgment in the normal course. Instead, this court issued an order to show cause after the appellant's opening brief was filed, indicating the appeal would be dismissed unless the parties obtained a final judgment from the trial court. Five months after we issued that order—and nine months after the trial court granted the motion for summary judgment—Crabb obtained a final judgment and filed a copy of it with this court.

We cannot overemphasize that "[t]he existence of an appealable judgment is a jurisdictional prerequisite to an appeal." (*Jennings, supra*, 8 Cal.4th at p. 126; see also *Griset v. Fair Political Practices Com'n* (2001) 25 Cal.4th 688, 696 ["A reviewing court has jurisdiction over a direct appeal only when

there is (1) an appealable order or (2) an appealable judgment"].) Strict compliance with Code of Civil Procedure section 904.1 is not merely recommended; it is required.

2. Standard of review

The applicable standard of review is well established. "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) As such, the summary judgment statute (Code Civ. Proc., § 437c), "provides a particularly suitable means to test the sufficiency of the plaintiff's prima facie case and/or of the defendant's [defense]." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) A summary judgment motion must demonstrate that "material facts" are undisputed. (Code Civ. Proc., § 437c, subd. (b)(1).) The pleadings determine the issues to be addressed by a summary judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, revd. on other grounds by *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490; see *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.)

The moving party "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." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) A defendant moving for summary judgment must " 'show[ ] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Id.* at p. 853 [quoting Code Civ. Proc., § 437c, subd. (o)(2)].) A defendant meets its burden by presenting affirmative evidence that negates

an essential element of plaintiff's claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) Alternatively, a defendant meets its burden by submitting evidence "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" supporting an essential element of its claim. (*Aguilar, supra,* 25 Cal.4th at p. 855.)

On appeal from summary judgment, we review the record de novo and independently determine whether triable issues of material fact exist. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*); *Guz, supra,* 24 Cal.4th at p. 334.) We resolve any evidentiary doubts or ambiguities in favor of the party opposing summary judgment. (*Saelzler, supra,* 25 Cal.4th at p. 768.)

In performing an independent review of the granting of summary judgment, we conduct the same procedure employed by the trial court. We examine (1) the pleadings to determine the elements of the claim, (2) the motion to determine if it establishes facts justifying judgment in the moving party's favor, and (3) the opposition—assuming movant has met its initial burden—to decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 629-630.) We need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Ibid.*)

3. The trial court properly granted the motion for summary judgment.

3.1. In the absence of its own negligence, the hirer of an independent contractor is generally immune from liability for workplace injury sustained by the contractor's employees.

The scope of an employer's liability for workplace injury is well established. "Under the Workers' Compensation Act (hereafter the Act), all employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' [Citations.]" (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 696-697 (*Privette*).) Recovery under the Act " 'is the exclusive remedy against an employer for injury or death of an employee.' [Citation.]" (*Id.* at p. 697.) The Act's exclusivity clause, however, "does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury." (*Ibid.* [citing Lab. Code, § 3852 which states "[t]he claim of an employee . . . for [workers'] compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person *other* than the employer," emphasis added].)

In *Privette*, the Supreme Court discussed the interplay between the workers' compensation system and the peculiar risk doctrine. "At common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work." (*Privette, supra*, 5 Cal.4th at p. 693.) As the court noted, however, numerous exceptions to that general rule developed over time. (*Ibid.*) The peculiar risk doctrine, for example, imposed liability on the hirer of an independent contractor for

injuries sustained by third parties where the contracted work posed some inherent risk of injury to others. (*Ibid.*) However, the hirer would be entitled to equitable indemnification from the independent contractor that caused the injury. (*Id.* at p. 695.) By holding the hirer vicariously liable for injuries to third parties arising out of the dangerous work, the courts aimed to place the risk of loss for the work on the person who benefited from the work, rather than the victim of the contractor's negligence. (*Id.* at p. 694.)

Prior to *Privette*, the Supreme Court had expanded the peculiar risk doctrine to allow employees of an independent contractor to sue the hirer of the contractor. (*Privette, supra*, 5 Cal.4th at p. 696.) In *Privette*, the court reversed course, holding: "When an employee of the independent contractor hired to do dangerous work suffers a work-related injury, the employee is entitled to recovery under the state's workers' compensation system. That statutory scheme, which affords compensation regardless of fault, advances the same policies that underlie the doctrine of peculiar risk. Thus, when the contractor's failure to provide safe working conditions results in injury to the contractor's employee, additional recovery from the person who hired the contractor—a nonnegligent party—advances no societal interest that is not already served by the workers' compensation system. Accordingly, we join the majority of jurisdictions in precluding such recovery under the doctrine of peculiar risk." (*Id.* at p. 692.)

More recently, in *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590 (*SeaBright*), the Supreme Court further explained that "[b]y hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes *to*

the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (*Id.* at p. 594.)

3.2. The hirer of an independent contractor may be liable for injuries to the contractor's employee where the hirer retains control of the work site and exercises that control in a negligent manner.

Although *Privette* changed the state of the law significantly, it does not bar an injured employee of an independent contractor from *all* recovery against the contractor's hirer. In a series of cases after *Privette,* the Supreme Court explained that a hirer could be directly liable for its own independent negligence, to the extent that negligence causes the worker's injury.

Pertinent here, in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*), the court held "that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Id.* at p. 202.) The court reasoned that "if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Id.* at p. 212, fn. 3.) Subsequently, in *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219 (*McKown*), the court explained that *Hooker* was consistent with *Privette,* "because the liability of the hirer in such a case is *not* in essence *vicarious or derivative* in the sense that it derives from the act or omission of the hired contractor. 'To the contrary, the liability of

the hirer in such a case is *direct* in a much stronger sense of that term.' (*Hooker, supra,* 27 Cal.4th at p. 212.)" (*Id.* at p. 225.)

3.3. Several of plaintiff's negligence theories have been explicitly rejected by the Supreme Court.

Plaintiff contends Crabb retained control of the work site by consenting to be solely responsible for construction at the work site in its contract with Taco Bell, and by placing a foreman at the site to supervise overall safety at the site. Typically, we would consider whether plaintiff created a dispute of material fact as to whether Crabb retained control of the worksite and then consider whether Crabb exercised that control in negligent manner. However, because it is plain that plaintiff failed to create a dispute of material fact regarding Crabb's alleged negligence, we assume without deciding that plaintiff created a material dispute of fact regarding Crabb's control of the work site and move directly to our discussion of negligence.

Plaintiff asserts Crabb was negligent in numerous ways. First, plaintiff contends Crabb was negligent by "failing to have appropriate fall protection," and by failing "to determine if Gilchrest [*sic*] Construction, Inc. had an appropriate fall protection program in place." In making these assertions, plaintiff presumes Crabb had a duty to provide him with a safe working environment. We reject plaintiff's argument because it is fundamentally at odds with the *Privette* line of cases discussed *ante*, which establish, as applicable here, that a general contractor does not, in most circumstances, owe such a duty of care to the employees of a subcontractor. (See *SeaBright, supra*, 52 Cal.4th at p. 600 ["The *Privette* line of decisions discussed above establishes that an independent contractor's hirer presumptively delegates to that contractor its tort law duty to

provide a safe workplace for the contractor's employees"].) We decline plaintiff's invitation to depart from *Privette* and its progeny. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)

Second, plaintiff asserts Crabb was negligent by "violating OSHA safety standards." As a factual matter, plaintiff incorrectly states that *Crabb* violated the California Occupational Safety and Health Act (Cal-OSHA) and its regulations and safety standards. The only evidence before us indicates that *Gilchrist* was cited, after plaintiff's accident, for violating regulations relating to worker fall protection.

In any event, even if Crabb failed to comply with Cal-OSHA regulations, it would not be liable for plaintiff's injuries here, as a matter of law. The Supreme Court considered—and rejected—plaintiff's theory of liability in *SeaBright*. There, an employee of an independent contractor hired by US Airways was injured after his arm was caught in the mechanism of a luggage conveyor belt. (*SeaBright, supra*, 52 Cal.4th at p. 594.) It was undisputed that the conveyer belt was missing safety guards required under Cal-OSHA regulations. (*Id*.) After the contractor's workers' compensation insurer, SeaBright, sued US Airways to recover the benefits paid to the employee, the employee intervened in the suit and asserted claims of negligence and premises liability against US Airways. (*Id*. at pp. 594-595.) The trial court granted summary judgment in favor of US Airways, but the Court of Appeal reversed. (*Id* at p. 595.) Reversing the Court of Appeal, the Supreme Court found in favor of US Airways, and held that an employer's duty to comply with Cal-OSHA regulations in order to provide a safe working environment extends only to its own employees. (*Id*. at p. 603.) By hiring an independent

contractor to perform the conveyor belt maintenance work, US Airways impliedly delegated the responsibility to provide a safe workplace for the injured employee to the independent contractor. (*Ibid*.) We decline plaintiff's invitation to depart from *SeaBright*. (See *Auto Equity Sales, supra*, 57 Cal.2d at p. 455.)

Third, plaintiff urges that Crabb was negligent in "failing to correct a hazardous condition," which we presume relates to Gilchrist's installation of the plywood walkway. Again, the Supreme Court has considered—and rejected—a similar argument. In *Hooker,* the plaintiff's decedent was killed in an accident at a work site overseen by the California Department of Transportation (Caltrans). The plaintiff asserted her husband, a crane operator, died after he failed to reengage the crane's outriggers before operating the crane, causing the crane to tip over. (*Hooker, supra,* 27 Cal.4th at p. 202.) The decedent was required to retract the outriggers in order to allow traffic to pass close to the crane, and the supervising Caltrans engineer was aware that operating the crane without reengaging the outriggers could cause instability. (*Id*. at p. 203.)

The plaintiff argued that Caltrans retained control of the worksite and failed to correct the dangerous condition which caused her husband's death. The court rejected that argument, noting the accident was not caused by the traffic (which was regulated by Caltrans), but rather by the crane operator's failure to reengage the crane's safety equipment. (*Hooker, supra*, 27 Cal.4th at p. 215.) The court concluded the plaintiff failed to create a triable issue regarding negligence on the part of Caltrans. The court reasoned that "liability cannot be imposed on the general contractor based upon a mere failure to require the subcontractor to take safety precautions, where the general

contractor's failure is not shown to have affirmatively contributed to the creation or persistence of the hazard causing the plaintiff's injuries." (*Id.* at p. 211 [adopting standard set forth in *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28].) Because Caltrans did not instruct the plaintiff's decedent to retract the outriggers, or otherwise direct or supervise the safe operation of the crane, the court concluded Caltrans was not liable for the plaintiff's decedent's death. (*Hooker, supra*, at p. 215.) "There was, at most, evidence that Caltrans's safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it," which the court held was inadequate as a matter of law to establish negligence by Caltrans. (*Ibid.*)

Applying *Hooker* here, we conclude plaintiff failed to create a dispute of material fact with respect to Crabb's failure to correct a dangerous condition in the workplace. In the same way that Caltrans could not, as a matter of law, be liable to the plaintiff based on its failure to ensure the crane operator used appropriate safety precautions before operating the crane, here Crabb cannot be held liable based on its failure to correct the hazard created by Gilchrist's plywood walkway. (See *Hooker*, *supra*, 27 Cal.4th at p. 209 ["[t]he mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff"]; *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 (*Khosh*) ["[a] hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution" to the plaintiff's injury].)

3.4. Plaintiff failed to produce competent evidence that Crabb affirmatively directed plaintiff to use the walkway without a safety harness.

Finally, plaintiff maintains Crabb affirmatively contributed to his injury by directing him to use the plywood walkway without using a safety harness. Under *Hooker*, Crabb could be liable to plaintiff to the extent it directed plaintiff to engage in an unsafe activity which led to his injury. (See *Hooker*, *supra*, 27 Cal.4th at p. 209 ["[a] general contractor owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices *to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct*"], emphasis added.) However, our courts have held that " '[i]n order for a worker to recover on a retained control theory, the hirer must engage in some active participation.' [Citation.] An affirmative contribution may take the form of directing the contractor about the manner or performance of the work, directing that the work be done by a particular mode, or actively participating in how the job is done." (*Khosh, supra*, 4 Cal.App.5th at p. 718, second brackets added.)

Plaintiff contends Crabb "actively directed the means of how other workers on the site were to use the plank that caused [plaintiff's] fall (i.e.) [*sic*] not to use the protective harness." In support of this contention, plaintiff cites to one piece of evidence: the declaration of his accident reconstruction expert, Carl Sheriff. According to Sheriff, Crabb's actions fell below the standard of care in the construction industry by, among other things, "allowing and encouraging workers on the site to cross the roof without harnesses on plywood planks." In turn, Sheriff's declaration relies on a declaration signed by plaintiff shortly

before counsel filed plaintiff's opposition to the motion for summary judgment. However, the court disregarded the supporting statements in plaintiff's declaration because those statements conflict directly with plaintiff's prior deposition testimony, relied upon by Crabb in its motion for summary judgment. There, plaintiff testified he only took direction from Juan Prebots, his supervisor at Gilchrist.

In *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1 (*D'Amico*), the Supreme Court held that a party may not defeat summary judgment by means of declarations or affidavits which contradict that party's prior deposition testimony or sworn discovery responses. (*Id.* at pp. 21-22; *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12.) "Properly applied, the *D'Amico* rule allows the trial court to disregard a party's declaration or affidavit only where it and the party's deposition testimony or discovery responses are 'contradictory and mutually exclusive' [citation] or where the declaration contradicts 'unequivocal admissions' in discovery. [Citation.]" (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 460.)

Here, the statements in plaintiff's declaration plainly contradict his prior testimony. During his deposition, which took place sometime prior to January 27, 2014, plaintiff testified that although Crabb had a safety foreman at the site, he took direction only from his supervisor, who also worked for Gilchrist:

"Q. Okay. And there was a—was Gilchrist your supervisor?

A. No. He was the owner.

Q. All right.

A. The supervisor, his name was Juan Prebots.

Q. And did Juan Prebots work for Gilchrist?

A. Correct.
Q. And Juan Prebots told you what to do?
A. Yes.
Q. Was Juan the foreman?
A. Yes.
Q. Was there anyone from Crabb Construction on the project?
A. Yes, the one in charge was there, but I do not remember the name.
Q. Did you take all of your instructions from Juan Prebots?
A. Yes.
Q. Did you take any instructions from the person from Crabb?
A. No."

By the time plaintiff signed his declaration on March 16, 2015—at least 15 months later—he recalled the material facts very differently:

"5. Crabb Construction Company ("Crabb"), the general contractor for the construction of the aforementioned Taco Bell located at 2201 Artesia Blvd., Redondo Beach, CA. [*Sic*.] Crabb had a foreman at this site by the name of Howard Levine who, based upon my understanding and knowledge, was in charge of safety at the subject construction site. Prior to my fall on May 31, 2011, Mr. Levine would hold weekly safety meetings. During a meeting at the construction site prior to my fall on May 31, 2011, Mr. Levine indicated to workers on the site, including me, that anyone working on the roof during the framing stage of the subject Taco Bell located at 2201 Artesia Blvd. should use the plywood walkway that will be put in place to

walk across the roof as this was the safest way to cross. In addition, Mr. Levine told workers on the site, including me, to not use a harness while on the roof as it would make walking difficult."

Plaintiff asserts, in cursory fashion, that the court erred by disregarding this portion of his declaration. First, plaintiff argues the court should have considered the portions of his declaration which discussed Mr. Levine's instructions to *other* workers, because the deposition excerpts relied upon by Crabb do not indicate he was asked about instructions given to other employees. Even if plaintiff is correct, the point is irrelevant. As we discussed *ante*, the material issue is whether Crabb instructed *plaintiff* to act in a particular manner, thereby substantially contributing to plaintiff's injury. Under the facts of this case, Crabb's instructions to other employees could not have caused plaintiff's injuries unless plaintiff heard and followed those instructions—the very point on which his deposition testimony and his declaration conflict.

Second, plaintiff contends the court was "misguided" when it concluded, in the first instance, that there is a contradiction between his declaration and deposition testimony, urging that "[t]he lines of questions cited to by the Trial Court in its order are vague at best," and do not constitute "unequivocal admissions subject to contradiction." We reject this argument and concur with the trial court's assessment of the evidence: "Plaintiff, at his deposition, testified expressly and simply that he did not take any direction from Crabb or its employees/supervisors. He testified that he only took direction from his own boss at Gilchrist. There was nothing ambiguous in his answers. In his declaration, he declares that he DID take direction from Crabb,

in the form of obeying Levine's order that he use the plywood to cross the area and not use a harness. This declaration . . . directly contradicts the testimony given in his deposition."

Finally, plaintiff cites one case in support of his position: *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853 (*Benavidez*). Unfortunately, plaintiff provides only a bare citation without any explanation as to why this case is of assistance to him. We conclude *Benavidez* supports the court's finding in this case. In *Benavidez*, the plaintiff was the victim of repeated incidents of domestic violence at the hands of her boyfriend and, after sustaining serious injuries, she sued the police department and individual officers who responded to her 9-1-1 calls for, *inter alia*, negligence. (*Id.* at p. 856.) In order to establish that the officers owed her a special duty of care, the plaintiff submitted a declaration averring that she asked the officers to take her to a shelter, and that the officers assured her they would stay at her home to prevent further violent incidents. (*Id*. at pp. 861-862.) Those sworn statements conflicted directly with her deposition testimony, in which she repeatedly denied telling the officers she wanted to leave the apartment, and stated she knew officers left her home and even asked them what she should do if her boyfriend returned to the house. (*Ibid*.) The Court of Appeal concluded, in light of *D'Amico*, that the trial court properly discounted the conflicting statements in the plaintiff's declaration.

We find the case before us materially indistinguishable from *Benavidez*. Accordingly, we conclude the court properly disregarded the portions of plaintiff's declaration which contradicted his deposition testimony. Further, because plaintiff's declaration is the only piece of evidence offered to

support plaintiff's contention that Crabb instructed plaintiff to walk on the plywood walkway without a harness, we conclude plaintiff failed to create a dispute of material fact on that point.

DISPOSITION

The judgment is affirmed. Respondent to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.