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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GRANDPA'S JUMPS, Cross-complainant and Appellant, v. ARCHDIOCESE OF LOS ANGELES, Cross-defendant and Respondent.	B265924 (Los Angeles County Super. Ct. No. BC477461)

APPEAL from a judgment of the Superior Court of Los Angeles County, John L. Segal, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Howard A. Slavin, Louis R. Di Stefano and Allison A. Arabian for Cross-complainant and Appellant.

Polsinelli, Daniel W. Bir, Mathew R. Groseclose and J. Alan Warfield for Cross-defendant and Respondent.

After a jury found that Grandpa's Jumps was actively negligent when it rented a defectively designed inflatable slide to a parochial school and installed it at the school fundraiser, the trial court ruled in favor of the Archdiocese of Los Angeles (Archdiocese) on a cross-complaint brought by Grandpa's Jumps for contractual indemnity. Grandpa's Jumps filed this timely appeal, and we affirm.

BACKGROUND

On May 1, 2011, Steven Martinez, a minor, fell over the outer wall of an inflatable slide and hit his head on the parking lot during a "Fiesta" fundraiser at Santa Clara High School (School) in Oxnard, California. He suffered a fractured skull and a brain injury. On April 8, 2013, he filed a first amended complaint against the Archdiocese (alleging that it controlled the School),[1] the School, Grandpa's Jumps (the rental company that owned the slide, rented it to the School, and set it up at the fundraiser), and Happy Jumps, Inc. (the company that designed, manufactured, and

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[1] Martinez sued the School and the Archdiocese, but the true party name was Archdiocese of Los Angeles Education and Welfare Corporation on behalf of and for the benefit of Santa Clara High School.

distributed the slide). The complaint alleged that the School, the Archdiocese, and Grandpa's Jumps were negligent when they placed the slide on concrete, failed to warn, and failed to supervise, and Happy Jumps negligently designed and manufactured the slide. All defendants eventually settled with Martinez (as relevant here, Grandpa's Jumps for $1,000,000, and the Archdiocese for $1,600,000).

In 2012, Grandpa's Jumps filed a cross-complaint against the Archdiocese for express contractual indemnity, among other claims, alleging that the Archdiocese was obligated to reimburse Grandpa's Jumps for resolving Martinez's claims. The Archdiocese filed a first amended cross-complaint against Grandpa's Jumps and Happy Jumps for equitable and implied indemnity, among other claims, alleging that it had no obligation to indemnify Grandpa's Jumps and that the slide was defective and or unsafe.

Evidence at trial

Shannon Garcia testified that in 2011 she worked part-time for Grandpa's Jumps. She reserved six inflatables for the fiesta after a phone call from Sally Trevino, a member of the fiesta committee. Garcia filled out a standard preprinted rental contract for the inflatables and faxed it to Trevino, who later told her that the fiesta committee had approved the contract.

On the morning of the fiesta, Garcia went to the School with her husband to help set up. She read the contract out loud to Trevino, including the safety rules (including

"F, . . . *MUST BE SUPERVISED*") and the indemnity clause, which Trevino initialed.[2] (Italics added.) Trevino signed the contract and gave Garcia a check in payment. Garcia then helped set up the16-foot slide on the parking lot (the word "[c]oncrete" was circled on the contract). She helped her husband place the inflatable slide on tarps, attach a blower, and secure the slide with 10 straps looped around sandbags. At her deposition, however, she had testified that she did not remember helping to set up the slide. Garcia then left the School. When she returned after learning of the accident, it appeared that the slide had been moved slightly. Garcia never saw an instruction book or safety guidebook for the slide.

Garcia's husband Rudy Garcia testified that he also worked part-time for Grandpa's Jumps. He had set up the inflatable slide about 10 times before, and at the fiesta he set it up on the southeast corner of the parking lot. To secure

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[2] "Lessee agrees to indemnify and hold lessor harmless from any and all claims, actions, suits, proceedings, costs, expenses, damages, and liability, including attorney fees, fines, and penalties arising out of, connected with, or resulting from the equipment or its use or the personnel provided hereunder including without limitation the manufactures [sic] selection, delivery, possession, use, operation, conduct or return of said equipment. Lessee agrees not to hold lessor responsible for any unfavorable weather condition, i.e., that is high winds exceeding 25 mph per hour, rain, or other unexpected conditions that may arise. No refund."

the slide on the concrete, he had to put 10 sandbags on each corner and the sides, and connect them to the slide with straps. When he returned to the School after the accident, the slide had been moved. He did not remember thinking that at the time, but he had since seen photos that led him to conclude the slide was in a different location. The straps and sandbags were absent, as shown in a photograph admitted as exhibit 58, and the inflatable was shoved up to a fence. After the Archdiocese's counsel read into evidence his deposition, in which he had testified he did not recall exactly how the slide was secured in place on the day of the fiesta, he admitted he could not specifically remember the condition of the inflatable slide after the accident.

Manuel Gomez testified that he and his wife, parents at the school, arrived at the school to volunteer on the morning of the fiesta, and then were assigned to collect tickets and watch children at the slide. He saw a boy playing around and jumping as he went up the slide, and Gomez wagged his finger at him. His wife later yelled that the child had fallen; he did not see the accident. Manuela Gomez testified that she also warned the child to stop jumping, but did not see the accident. She was not given any instructions on how to supervise the slide beyond taking tickets.

Ruben Araujo, the owner of Grandpa's Jumps, testified that the contract with the School was his standard rental contract. Araujo handwrote on the contract that the slide would be set up on concrete. He always placed a tarp on

concrete to protect the inflatable. He bought the used 16-foot slide on Craig's List from a seller who told him how to set it up (including that sandbags were required on a hard surface), but who did not provide a manual.

Ten general warnings for users appeared on a label on the slide.[3] Grandpa's Jumps did not have written protocols or checklists for setting up or using its inflatables, and did not have owner's or operator's manuals for any of the inflatables it rented to the School, including the slide. The general recommendations on the preprinted contract were not specific to any inflatable. Araujo did not know who manufactured the slide (although Happy Jumps' name was on the slide) or the manufacturer's recommendations for use or safety, and made no attempt to obtain the manual. He did not know the recommended weight of the sandbags to be secured to the tie-downs. After the accident no one told Araujo that the inflatable had not been set up properly. Proper supervision and other rules were just common sense. Grandpa's Jumps had rented the slide once a month since the accident and no one else had been injured.

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[3] The warnings were to remove shoes, glasses, and sharp objects before entering, no food, no flips, no piling on or wrestling, "[d]o not bounce against the side or near the doorway," keep hands off the net, leave by the door if the slide begins to deflate, do not enter without an attendant present, riders must be unloaded if winds are higher than 15 miles an hour, and do not enter when wet. The warnings applied to all Grandpa's Jumps' inflatables.

Trevino testified that she was a co-chair of the fiesta committee. When she reserved the inflatables with Grandpa's Jumps, she told the employee that the slide would be placed on the concrete parking lot. On the morning of the fiesta a woman from Grandpa's Jumps met Trevino by the cafeteria, in a hurry, apologizing for being late, and looking for payment. Trevino saw that the slide was set up by the fence as she had requested. Trevino signed and initialed the contract without reading it, and paid the woman with a check from the School. When she learned of the accident over her walkie-talkie Trevino went straight to the slide, which was in the same spot by the fence. As far as she knew, the people supervising the inflatable devices received no training.

Devon Saunders, a co-chair of the fiesta committee, testified that she ran to the slide when she learned of the fall. She saw a young boy lying on the ground. A volunteer who was a registered nurse tended to him while they waited for emergency services to arrive. Others were trying to locate his parents. After emergency services left, Saunders took photos of the front, side, and back of the slide (exhibit 58) with her cellular phone. She had seen the slide during her many trips around the parking lot and noticed the only anchor was two blue straps on the back, attached to the fence. The slide was in its planned location and had not been moved. Material around the base of the slide had been folded back to allow the emergency services truck to drive in.

Roubik Amirian testified that he was president of Happy Jumps, which designed and manufactured the slide in 2004, and sold and shipped it to another company (not Grandpa's Jumps). To gauge safety, Amirian would compare his slides to others on the market, and consulted safety guidelines and mechanical engineers. During final inspection he would make sure all the tie-downs (at the bottom) and tethers (at the top) were properly installed. Each slide was sold with a 14-page owner's manual and instructions. The owner's manual told the user not to use the slide before reading the manual, and that use must be supervised by a trained operator. Amirian testified that the wall on the ramp of the 16-foot slide was 38 inches high. There were 10 black tie-downs, and blue straps for wrapping the slide for packing. Exhibit 58 showed two of the blue packing straps attached to the fence, and no attached tethering lines.

Grandpa's Jumps' expert on head injuries testified that he could not say exactly what caused the accident. Martinez fell from at least six feet eight inches onto asphalt, and padding would not have altered his head injuries. Martinez's center of gravity was about 29 inches and the wall on the slide was 30 inches high. On cross-examination, the expert testified that safety standards recommended a wall height of 38 inches for Martinez's age group. Given the slope of the ramp, however, the 30-inch wall was appropriate to contain Martinez.

The Archdiocese's expert on inflatables testified that Grandpa's Jumps was a "pretty terrible operator" which did not have the manuals for the inflatables and did not train employees or those who maintained or operated the slides. Happy Jumps' design for the slide did not comply with industry safety standards. The slope to climb up the slide was too steep, the walls were only about 30 inches tall (the industry minimum was 38), and there was no safety netting.

The Archdiocese's expert on accident reconstruction testified that he had inspected the slide, whose walls were 30 inches high. He believed Martinez fell out of the slide (to the rear and leftward) at the top of the ramp, as the boy's center of gravity was higher than the wall. Thirty-eight inches was the standard height for a barrier wall on equipment installed on playgrounds open to the public. A wall that high would have prevented Martinez from falling out. Happy Jumps' design did not follow safety requirements for inflatable slides, and Grandpa's Jumps installed an unsafe slide on a playground open to the public. On cross-examination, the expert testified that Martinez himself stated in a deposition that he lost his balance and fell off the top of the slide. More training for the slide supervisors would not have prevented the accident. If Martinez was bouncing, that did not cause the fall; the barrier wall simply was not high enough.

Instructions and closing arguments

The court instructed the jury to determine whether each of the defendants (Grandpa's Jumps, Happy Jumps,

and the School) was negligent. If the defendants were negligent, the jury was to determine whether each defendant's negligence was a substantial factor in Martinez's injury, and to assign percentages of fault that together would total 100 percent. A negligent defendant could not avoid responsibility simply because another defendant's negligence was also a substantial factor. The jury was to decide whether Happy Jumps was negligent in the design and or manufacture of the inflatable slide, and whether Grandpa's Jumps failed to adequately warn or instruct the School about the risks and dangers associated with the slide, and was negligent in inspecting the slide for defects or installing the slide. The jury was also to decide whether Grandpa's Jumps was passively negligent (failing to discover a dangerous condition, or to perform a duty) or actively negligent (personally participating in an affirmative act of negligence, being connected with a negligent act, or omitting to perform a precise duty). "The crux of the inquiry is to determine whether there is participation in some manner by the persons seeking indemnity, and the conduct or omission which caused the injury beyond the mere failure to perform a duty imposed on him or her [by] law."

In closing, Grandpa's Jumps argued that the jury must determine whether in "furnishing a defective product or being negligent," its behavior was a substantial factor in the injury. The School argued that the slide was defective in design and manufacture, and Grandpa's Jumps was negligent in not obtaining and furnishing the specific

instructions and warning for the slide, and in setting up the slide without complying with those instructions.

Verdict and judgment

The jury returned a special verdict finding that the School and Grandpa's Jumps entered into a contract with an indemnity provision. Further, the inflatable slide was defective, Grandpa's Jumps was actively negligent, and Happy Jumps and the School were negligent, and each party's negligence was a substantial factor contributing to Martinez's injury. The jury apportioned fault as follows: 30 percent to Grandpa's Jumps, 40 percent to Happy Jumps, 27 percent to the School, and 3 percent to Martinez's parents. The trial court entered a modified judgment on July 30, 2015 stating "under the terms of the Agreement, the School has no obligation to indemnify Grandpa's Jumps for any losses as a result of the claim of Plaintiff Steven Martinez."

DISCUSSION

I. The trial court correctly applied the law of indemnity.

Grandpa's Jumps argues that the trial court erred as a matter of law in concluding that it was a question for the jury whether Grandpa's Jumps was actively negligent and therefore not entitled to indemnification. We disagree.

During a discussion of jury instructions, Grandpa's Jumps argued that the court should find that although the contract did not expressly address the indemnitee's negligence, it required indemnification of Grandpa's Jumps even if Grandpa's Jumps was negligent. The Archdiocese

responded that the contract contained a general indemnity clause that lacked the clear and explicit language required for indemnification for Grandpa's Jumps' negligence.

The trial court concluded that the California Supreme Court required clear and explicit contract language (construed against the indemnitee) before a party could be indemnified for its own act of negligence. The general indemnity clause in the contract did not explicitly provide that Grandpa's Jumps would be indemnified for its own negligent acts, so "the jury must decide if Grandpa's Jumps' negligence was active or passive. There is evidence that Grandpa's Jumps' negligence was active in setting up the slide and in putting a defective product into the stream of commerce." The court quoted *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 629 (*Rossmoor*), which states: "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." While the passive or active distinction was no longer a hard and fast rule, and the intent of the parties as expressed in the agreement controlled, the active or passive distinction was considered a guide, as explained in *McCrary Construction Co. v. Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th

1528, 1538 (*McCrary*). Reading the indemnity clause in the contract, "it is clear that the parties did not intend the indemnification to apply to the indemnitee's, Grandpa's Jump[s], own negligence." The jury therefore needed to determine whether Grandpa's Jumps was actively or passively negligent.[4]

The court instructed the jury: "Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. 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. '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 on him by law.' " The jury found that Grandpa's Jumps was actively negligent.

Grandpa's Jumps first argues that the court failed to consider the parties' intent. To the contrary, the court explained that intent was determinative, and explicitly found that the language of what Grandpa's Jumps admits

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[4] "Whether conduct constitutes active or passive negligence depends upon the circumstances of a given case and is ordinarily a question for the trier of fact." (*Rossmoor*, *supra*, 13 Cal.3d at p. 629.)

was a general indemnity clause showed the parties did not intend that Grandpa's Jumps be indemnified for its own negligent acts. The court was fully aware that the intent of the parties controlled, but concluded correctly that the general indemnity clause did not evince an intent to indemnify Grandpa's Jumps for active negligence.

Grandpa's Jumps then acknowledges that the general indemnity clause did not refer to negligence, but nevertheless argues that under the contract's plain language, it was entitled to indemnification even if it was actively negligent. This flies in the face of *Rossmoor*, *supra*, 13 Cal.3d 622 on which Grandpa's Jumps relies. *Rossmoor* concerned a general indemnity clause which, like the clause in this case, did not address the issue of an indemnitee's negligence. (*Id.* at p. 629.) Therefore, as in this case, "under existing case law Rossmoor may not benefit from the agreement if it is deemed actively negligent." (*Ibid.*) The *Rossmoor* trial court found Rossmoor was "at most *passively* negligent" (italic added), a conclusion our Supreme Court stated was not erroneous, and therefore the company was entitled to indemnification. (*Id.* at pp. 629, 633.)

Here the jury made the opposite finding, concluding that Grandpa's Jumps was *actively* negligent. As a result, the trial court was correct to conclude that Grandpa's Jumps was not entitled to indemnity, given that the court also found no evidence that the parties intended to indemnify Grandpa's Jumps for such active negligence. "[F]ollowing *Rossmoor*[, *supra*, 13 Cal.3d 622], an indemnity provision

that does not refer to the issue of the indemnitee's negligence will be considered to be a general indemnity clause under which the indemnitee is not entitled to indemnity for its active negligence, unless the circumstances of the case and language of the contract evince a different intent by the parties." (*McCrary*, *supra*, 133 Cal.App.4th at p. 1538.)

Grandpa's Jumps cites *Morton Thiokol, Inc. v. Metal Building Alteration Co.* (1987) 193 Cal.App.3d 1025 (*Morton Thiokol*), but that case supports our conclusion that the trial court was correct to deny indemnity. Morton Thiokol contracted with Metal Building to install a new roof at a salt refinery, and then signed a contract requiring Metal Building to supervise the work and take all precautions to protect all persons from injury. The contract also contained a general indemnity clause in which Metal Building agreed to indemnify Morton Thiokol for any liability caused by Metal Building's "failure to exercise due care." (*Id.* at p. 1027, italics omitted.) Metal Building had inspected the refinery, presumed salt was "abundantly present on the roof" (*id.* at p. 1028) (which made the roof "so slippery that a man could not have stood upright on it"), and recognized that the roof was so steep that extra safety precautions were necessary (which would have prevented any accident). Still, Metal Building never advised its subcontractor to take any precautions or checked to see if safety precautions were in place. An employee of the subcontractor, working without any safety equipment, slipped, fell, and sustained serious

injuries. (*Id.* at pp. 1027–1028.) The trial court found that Morton Thiokol was actively negligent (presumably for allowing salt to accumulate on the roof) and therefore could not recover from Metal Building under the general indemnity clause. (*Id.* at p. 1028.)

The court of appeal disagreed. *Rossmoor*, *supra*, 13 Cal.3d 622 rejected mechanical application of the rule that a party will not be indemnified for active negligence under a general indemnity agreement, and required an examination of the parties' intent through " '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.' " (*Morton Thiokol*, *supra*, 193 Cal.App.3d at p. 1029.) Metal Building had inspected the roof and knew it was steep and covered with salt, requiring extra safety precautions, and both parties were aware of the hazardous conditions on the roof. When Metal Building subsequently signed a contract containing safety provisions requiring it to supervise the work and take all necessary safety precautions, it "must have been aware of the precise hazards at issue as well as the necessity of safeguarding against them." (*Ibid.*) It did not matter that Morton Thiokol never expressly raised or discussed Metal Building's contractual obligation to take safety precautions, because the contract alone was objective evidence that Metal Building agreed to take the precautions that would have prevented the worker's injury. (*Id.* at p. 1030.) To deny indemnity to Morton Thiokol would deprive it of the benefit of its bargain, as the

contract "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." (*Ibid.*) The court of appeal reversed.

In this case, the Archdiocese, unlike Metal Building, did not inspect the inflatable slide in advance, and was entirely unaware of the safety hazard, a side wall that was too short to prevent small children from falling out of the slide. Grandpa's Jumps was actively negligent under a number of theories: it rented a defectively designed and manufactured slide to the School and brought it to the fiesta, failed to secure it properly, and provided no supervision or training for fiesta volunteers. No contractual language or other evidence exists to show that the parties intended that the School would indemnify Grandpa's Jumps regardless of how many ways it failed to exercise due care.

II. Substantial evidence supported the jury's finding of active negligence by Grandpa's Jumps.

Grandpa's Jumps argues that the jury's finding that it was actively negligent was not supported by substantial evidence, as the testimony and other evidence showed only that Grandpa's Jumps failed to discover that the slide was dangerous. We disagree. "[W]hen a finding of fact is attacked on the ground there is not any substantial evidence to sustain it, the power of the appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which

will support the finding of fact." (*Herman Christensen & Sons, Inc. v. Paris Plastering Co.* (1976) 61 Cal.App.3d 237, 253.) We resolve all conflicts in the Archdiocese's favor and indulge every reasonable inference to uphold the verdict. (*Ibid.*) We "begin[] with a bias toward confirming findings already made, and reject[] them only if there is no evidence upon which a reasonable person could make such findings." (*Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1017.)

Grandpa's Jumps argues that it simply failed to discover a dangerous defect in the slide that it rented to the School, which constitutes only passive negligence. To the contrary, substantial evidence showed that Grandpa's Jumps was actively negligent, participating in multiple negligent acts or omissions. Witnesses testified that Grandpa's Jumps bought the unsafe inflatable slide second hand, without obtaining the manual, and its employees never saw an instruction book or safety manual. Grandpa's Jumps rented the slide to the School without any written instructions or protocols specific to the slide. The testimony of the Grandpa's Jumps' employees, the Garcias, supports the conclusion that the installation of the slide was negligent, lacking any anchoring sandbags and tethered only to the fence. There was no evidence that Grandpa's Jumps instructed anyone at the School in the safe use of the slide. A reasonable person could conclude that Grandpa's Jumps was actively negligent when it rented to the School a slide for which it never had instructions or a manual, its

employees set up the slide in the school parking lot at the School without properly securing it, and Grandpa's Jumps did not train or provide any instructions on use or safety to the School volunteers.

As substantial evidence supports the finding of active negligence, we need not consider Grandpa's Jumps' arguments regarding strict liability.

DISPOSITION

The judgment is affirmed. The Archdiocese of Los Angeles is awarded costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.