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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BISON BUILDERS, INC., Cross-Complainant and Appellant, v. THYSSENKRUPP ELEVATOR CORPORATION, Cross-Defendant and Respondent.	A131622 (Marin County Super. Ct. No. CV 084313)
BISON BUILDERS, INC., Defendant and Appellant, v. DAVID TRAVIS, Plaintiff and Respondent.	A131623 (Marin County Super. Ct. No. CV 084313)

Respondent David Travis worked for ThyssenKrupp Elevator Corporation (Thyssen) installing elevators. Thyssen was a subcontractor for appellant general contractor Bison Builders, Inc. (Bison) in the construction of a hotel. Travis was injured when he struck his head on a portion of scaffolding erected at the entrance to the worksite.

Travis sued Bison for negligence and went to trial on the theory that as general contractor, Bison had negligently exercised its retained control over the safety of his worksite. Bison tendered defense of Travis's suit to Thyssen, citing the terms of its

subcontract. Bison filed a cross-complaint against Thyssen for indemnification and defense costs when Thyssen declined the tender.

The jury found Bison negligent and awarded Travis substantial damages. After the jury reached its verdict, the trial court denied Bison relief on its cross-complaint, concluding that Bison's active negligence barred any indemnity and that Thyssen had not been obligated to provide Bison a defense. The court entered judgments in favor of Travis and Thyssen.

Bison appeals from both judgments. It raises a number of arguments on appeal, including claims of error in the jury instructions and special verdict form. It also contends the trial court erred in failing to exclude evidence of the amount of Travis's medical bills and in denying Bison's request for a reduction in the jury's award for Travis's future medical expenses. Bison challenges the judgment in favor of Thyssen, arguing that the trial court misconstrued the indemnity provision of the parties' subcontract.

We affirm the judgments.

I. FACTUAL AND PROCEDURAL BACKGROUND

On appeal, we recite the facts in the light most favorable to the prevailing parties, Travis and Thyssen. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 747 [judgment on jury verdict]; *Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1263 [judgment under Code Civ. Proc., § 631.8].) We recognize that the parties offered sharply differing versions of the events that led to Travis's injury, but in keeping with our standard of review, we give Travis and Thyssen the benefit of every reasonable inference and resolve all conflicts in support of the judgments in their favor.[1] (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1233, fn. 2.)

[1] In this section of our opinion, we set out the facts giving rise to the underlying litigation and summarize the proceedings below. Additional facts related to the issues raised by the parties are included in our legal discussion. On August 14, 2012, shortly before argument and long after briefing was completed, Bison sought to supplement its appellant's appendix with certain trial exhibits. While the particular significance of these

The Bison-Thyssen Subcontract

Bison was retained as the general contractor for construction of the Extended Stay America Hotel in San Rafael. The hotel project required installation of two elevators.

In November 2005, Thyssen submitted to Bison a proposal to install the elevators. Bison responded to the proposal with a 15-page form subcontract agreement entitled "Bison Builders, Inc. Subcontract Agreement," dated March 30, 2006. Section 15.1 of Bison's form agreement stated that Thyssen would indemnify Bison for personal injury claims caused by any act or omission of Thyssen, "regardless of whether such personal injury or damage is caused by [Bison]." Section 15.1 further provided that the subcontract's "indemnity provisions apply regardless of any active and/or passive negligent act or omission of [Bison]," but that Thyssen was not obligated to indemnify Bison for claims arising from Bison's "sole negligence or willful misconduct." The subcontract agreement also provided that Thyssen would "defend . . . all Claims as defined in Section 15.1."

In July 2006, the parties executed their final written agreement for the elevator installation. The final agreement consisted of the 15-page form subcontract dated March 30, 2006, and a two-page amendment entitled "Amendment No. 1." Amendment No. 1 altered the indemnity provision contained in section 15 of the subcontract. It provided as follows: "SECTION 15. Amend so indemnity and hold harmless is limited solely to losses to the extent caused by [Thyssen's] acts, actions, omissions or neglects and in no way to include the acts, actions, omissions or neglects of [Bison], Owner, Architect, other subcontractors, or others." The amendment further provided that "in the event of conflict with other articles, terms, conditions, or contract documents, this Amendment No. 1 shall be final."

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exhibits has not been discussed in briefing, the exhibits are part of the trial record (Cal. Rules of Court, rule 8.122(a)(3)) and we therefore grant the application.

Bison's Role as General Contractor

Bison's project manager, Ron Lacy, testified at trial that Bison had control over the common areas of the worksite and was therefore responsible for providing Thyssen's crew with "safe, OSHA-compliant access from outside to inside." Lacy said this meant the subcontract required that Bison provide "adequate ingress and egress" to the elevator hoistway.

Bison superintendent Tim Waters was personally responsible for ensuring that Thyssen had adequate access. He agreed that "safe access" as defined by the California Occupational Safety and Health Act (Cal-OSHA), required a height clearance of six feet, eight inches. Bison was also responsible for providing lighting in the common areas of the worksite and for ensuring those areas were clear of debris and other hazards.

Installation of Scaffolding at the Worksite

Before Thyssen's installers arrived at the worksite, another Bison subcontractor, Kenyon Plastering, enclosed the perimeter of the hotel with scaffolding for use in applying stucco to the hotel's exterior. The scaffolding enclosed the entire hotel, including the area immediately outside the front entrance to the hotel, an area referred to as the "portico."

On the left side of the portico area, the scaffolding included three "bays" (space between scaffolding frames). Two of the three scaffold bays, including the middle one, had cross-bracing at a height of between five and one-half feet and six feet.[2] The third scaffold bay was not blocked by cross-bracing and had vertical clearance in excess of six

[2] Under California's "General Industry Safety Orders," where walkways are required during the course of new construction, overhead clearance of "6 feet 8 inches" is required to provide workers "a safe means of egress from the building." (Cal. Code Regs., tit. 8, § 3272, subd. (b).) In "existing installations," obstructions are to be removed to the extent reasonably practicable, but "[i]n no case shall the clear headroom be less than 6 feet." (*Ibid.*) A more general regulatory provision (from the "Construction Safety Orders") provides that "walkways on [a] construction site shall be maintained reasonably free of dangerous depressions, obstructions, and debris." (Cal. Code Regs., tit. 8, § 1513, subd. (c).)

feet eight inches. If this bay had been free of other obstructions, workers could have accessed the worksite without passing under low cross-bracing.

Thyssen's Elevator Installers Arrive at the Worksite

Thyssen's installers, including Travis, arrived at the hotel worksite on January 31, 2007. With Travis were three other Thyssen employees, including mechanic in charge, Rene Bourque. After arriving at the worksite, Waters led the Thyssen crew into the building to look at the elevator hoistway. To enter the building, Waters led the Thyssen crew through the scaffolding into the hotel's front entrance. They passed under the cross-bracing, which had a vertical clearance of less than six feet. Travis and his coworkers had to duck to pass under the cross-bracing.

When Thyssen's crew arrived, the third scaffold bay—the only one not obstructed with cross-bracing—was blocked by boxes or crates and cluttered with trash. The Thyssen crew considered using other entrances, but only the front entrance was large enough to permit them to bring in their larger pieces of equipment.

Bison Installs a Plywood Ramp for Access

When the Thyssen crew first arrived, the area around the front entrance was covered with gravel, which made it difficult for the crew to roll carts loaded with heavy equipment into the building. Bourque therefore asked Bison to install a ramp through the portico. In response, Bison installed a plywood ramp under the middle scaffold bay, i.e., the bay blocked by cross-bracing. After conferring with Kenyon, Bison assistant superintendent Guy Jones chose the path for the ramp through the scaffold bay.

In the morning when the Thyssen crew arrived at the worksite, Jones would lead them over the plywood ramp, through the scaffolding, to the hotel's front entrance. When they reached the front entrance, Jones would unlock the door so Thyssen's crew and other workers could enter the hotel.

Bison Fails to Provide Adequate Lighting and Vertical Clearance

Travis and the other Thyssen employees normally arrived at the hotel around 6:00 a.m. Because it was winter, it was "pitch black" in the portico area when they started work. Bourque found the lighting so bad that he bought two miners' lights, which

he and a coworker attached to their hard hats. Travis carried a flashlight with him which he used to illuminate his passage through the portico.

Despite the poor illumination, Bison failed to install lighting in the portico area.[3] Due to the inadequate lighting, it was difficult to see the scaffold cross-bracing in the early morning hours. Even after the sun came up, the contrast between the bright sun outside and the unlit portico area sometimes made it difficult to see everything clearly in the portico area. Waters testified that the shadows in the portico had the potential to obscure overhead hazards.

Travis and his coworkers made numerous trips in and out of the hotel, often carrying heavy loads of tools, equipment, and supplies. In the course of walking in and out of the hotel, Travis repeatedly bumped his head on the cross-bracing. Travis first bumped his head the morning of his first day on the job. Over the course of his first week on the job, Travis hit his head on the cross-bracing about six times. Travis tried to duck to avoid the cross-bracing but was not always successful because he was often carrying heavy loads and looking down to avoid tripping hazards. Other Thyssen workers also struck their heads on the cross-bracing.

Thyssen crew members complained to Bourque about the height of the cross-bracing. Bourque then requested that Bison adjust the cross-bracing.[4] Bourque raised the issue with Bison on at least one occasion and believes he raised it more than once. Nevertheless, it took several days for Bison to adjust the cross-bracing.

Travis's Injuries

While still on the job, Travis felt minor neck pain after he hit his head on the scaffold cross-bracing. In the weeks following his injury, he experienced increasing numbness in his limbs. He was later diagnosed with spinal cord compression resulting

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[3] Under applicable Cal-OSHA regulations, the minimum lighting requirement for a work area such as the portico is "five foot-candles." According to Travis's safety expert, Bison failed to comply with this requirement.

[4] Thyssen's workers were unable to directly correct the hazardous condition because Thyssen had no right to reconfigure any of Kenyon's scaffolding.

from herniated discs and underwent surgery. Because of his injuries, there is no possibility that Travis will be able to return to his prior occupation. He is expected to experience continuing functional decline and will eventually need to use a wheelchair.

Travis filed a workers' compensation claim. The Workers' Compensation Appeals Board made an award in favor of Travis and against Ace Primary (Ace), the workers' compensation carrier. Travis was awarded temporary disability and "[a]ll further medical treatment reasonably required to cure or relieve from the effects of the injury herein."

The Action Below

Travis filed a complaint seeking recovery against Bison and certain Doe defendants on various negligence theories.[5] Bison then cross-complained against Thyssen, seeking indemnity under the provisions of the Bison-Thyssen subcontract.

Travis went to trial against Bison. At the end of the trial, the court instructed the jury on the retained control doctrine, under which a general contractor may be held liable for injuries to a subcontractor's employee, but only where the general contractor retained control over some aspect of the subcontractor's work and negligently exercised its retained control in a manner that affirmatively contributed to the employee's injuries. (See *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202, 209–210 (*Hooker*).)

The jury found that Bison was negligent and that its negligence was a substantial factor in causing Travis's harm. The jury allocated 75 percent of the fault to Bison; 20 percent to Thyssen; 5 percent to Travis; and 0 percent to Kenyon.

The jury awarded Travis damages in the sum of $11,732,637.46. After reducing the award for Travis's comparative fault and for workers' compensation payments, the trial court entered judgment for Travis and against Bison in the amounts of $5,267,486 in economic damages and $4,500,000 in noneconomic damages, for a total award of

[5] Travis did not name Thyssen as a defendant because his exclusive remedy against Thyssen was workers' compensation. (Lab. Code, § 3602, subd. (a).)

$9,767,486, plus prejudgment interest. The award of economic damages included more than $2.5 million for future life care, including medical expenses and household services.

After the jury trial of Travis's action and before the trial of the cross-action, Bison and Thyssen stipulated that the jury would make no determination on the issues raised by the cross-complaint and that those issues would instead be tried by the court. The trial court concluded Bison's active negligence in causing Travis's injuries barred any recovery under the indemnity agreement. It also rejected Bison's claim that Thyssen was obligated to provide Bison with a defense in Travis's action and/or reimburse it for attorney fees it incurred in defending that suit.

Bison filed timely notices of appeal from both the judgment for Travis in the main action and the judgment for Thyssen in the cross-action. We consolidated the appeals for purposes of briefing and decision.

II. DISCUSSION

Bison's appeals challenge both the jury verdict in favor of Travis and the trial court's judgment in favor of Thyssen on Bison's cross-complaint for indemnification. We turn first to Bison's multiple claims of error regarding the jury's verdict.

A. *The Invited Error Doctrine Bars Bison's Challenge to the Jury Instruction on Negligent Exercise of Retained Control.*

Bison contends the trial court's instruction on a hirer's negligent exercise of retained control incorrectly suggested that a failure to act, without more, amounts to an affirmative contribution to the plaintiff's injury. In Bison's view, this instruction, coupled with the standard negligence and premises liability instructions (CACI Nos. 400, 401, and 1011) misled the jury and misstated the law on the issue of retained control. Bison contends this error was compounded by what it views as a defective special verdict form. It argues the verdict form should have included an interrogatory on the controverted issue of affirmative contribution.

Travis responds that Bison either invited the instructional error of which it now complains or failed to preserve the issue for appeal. Similarly, he argues Bison forfeited any objection to the special verdict form by making no objection to the final verdict form

and by failing to propose an alternative. Before we may address Bison's argument on the merits, we must determine whether it is properly before us. We begin with the question of the jury instructions. To place this issue in the proper context, we will summarize the trial court proceedings regarding those instructions.

1. *Factual Background*

On Wednesday, December 15, 2010, the trial court held the first of two jury instruction conferences. The conference itself was not transcribed, but the court reported its results on the record and then offered counsel an opportunity to state any objections. Thyssen's counsel objected that CACI No. 1009B, "as phrased, makes no reference to the fact that in order for plaintiff to recover, there has to be a finding of affirmative contribution to the injury by the defendants." Citing *Hooker*, *supra*, 27 Cal.4th 198, counsel argued the instruction should be modified "to include a requirement that in order for there to be a finding against defendants, that there has to be a finding that they affirmatively contributed to the injury suffered by plaintiff." Counsel for Bison joined in Thyssen's request and proposed "Special Instruction Number 4."[6]

Travis's counsel opposed modification of the instruction. He argued "the affirmative contribution requirement simply means there must be causation between the hirer's conduct and the plaintiff's injury[.]" He objected to the use of the term "affirmative contribution" in the jury instruction, because it "might be construed by the jury to require active conduct rather than a failure to act; and therefore, it would lead to a misunderstanding of the *Hooker* case, or a misapplication of the *Hooker* case." The trial judge opined that CACI No. 1009B adequately addressed the issue and ruled that she would not modify it at all.

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[6] The language of this proposed instruction read: "David Travis claims that he was injured while employed by ThyssenKrupp Elevator Corporation and working on property controlled by Bison Builders, Inc. To establish this claim, David Travis must prove all of the following: [¶] 1. That Bison Builders, Inc. controlled the property; [¶] 2. That Bison Builders, Inc. retained control over David Travis's work while on the property; [¶] 3. That Bison Builders, Inc. affirmatively contributed to the cause of his injury; and [¶] 4. That David Travis was damaged as a direct result of the accident."

On Friday, December 17, court held a second conference on jury instructions. The trial judge stated, "We settled jury instructions on Wednesday, and I sent you the final form early Wednesday afternoon." She went on to explain that she had then received "a blizzard of e-mails" Thursday afternoon proffering new instructions. In addition, Bison's counsel had submitted new instructions that very morning only 10 minutes before the court convened. The trial court asked Travis's counsel whether he was abandoning his theory of premises liability. Counsel responded affirmatively and explained he was seeking to withdraw the premises liability instructions, while retaining CACI No. 1009B. The latter instruction was necessary, he argued, because it dealt with negligent exercise of retained control, the only theory on which he was proceeding.

When the court asked Bison's counsel for her views, the latter responded that she had "proposed *two alternatives* that added the affirmatively contributing language. One was to 1009B, and the second was to Special Instruction 4, because premises liability is applicable, and *Hooker* is, and affirmative contribution is necessary." (Italics added.) Counsel for Bison explained that since the premises liability allegations were being withdrawn, "this is a case governed by *Hooker*. So Special Instruction Number 4 as modified and sent this morning is applicable. That's our position."

After the matter was submitted, the trial court first ruled it would permit Travis to withdraw the premises liability instructions. The trial judge then stated, "I will retain 1009B, but I do think it's reasonable to add the following element, which is that Bison Builders, Inc. affirmatively contributed to David Travis' damage. *The affirmative contribution need not be act of conduct* [sic] *but may be in the form of an omission to act.* And this is all straight from *Hooker*." (Italics added.) Bison's counsel did not object to the court's statement that the affirmative contribution may take the form of an omission. After a discussion of the special verdict form and certain evidentiary issues, Travis's counsel asked the court to clarify whether it would give an unrelated instruction. Bison's counsel raised no other questions regarding the jury instructions. The court told counsel it would "clean . . . up" the instructions and provide copies to counsel when they were done. According to Bison, the trial court "provided the instruction to counsel shortly

before instructing the jury . . . ." The record reflects no further objections to, or discussion of, the jury instructions.

After a recess, the jury was brought in and instructed. The trial court's instruction on retained control read as follows: "David Travis claims that he was damaged by an unsafe condition while employed by ThyssenKrupp Elevator Corporation and working on Bison Builders, Incorporated's property. To establish this claim, David Travis must prove all of the following: [¶] 1, that Bison Builders, Incorporated controlled the property; 2, that Bison Builders, Incorporated retained control over safety conditions at the work site; 3, that Bison Builders, Incorporated negligently exercised its retained control over safety conditions; 4, that David Travis was damaged; 5, that Bison Builders, Incorporated affirmatively contributed to David Travis' damage. The affirmative contribution need not be active conduct but may be in the form of an omission to act; and, 6, that Bison Builders, Incorporated's negligent exercise of its retained control over safety conditions was a substantial factor in causing David Travis' damages."[7]

2. *The Invited Error Doctrine and Jury Instructions*

"The doctrine of invited error bars an appellant from attacking a verdict that resulted from a jury instruction given at the appellant's request. [Citations.]" (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653.) Indeed, the invited error doctrine "applies 'with particular force in the area of jury instructions. . . .' [Citation.]" (*Ibid*.) Parties raising claims of instructional error on appeal bear the burden of providing this court with a record sufficient to support those claims. (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678 (*Bullock*).) To be sufficient, the record must "establish that the claimed error was *not* invited by" the appellant. (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1091.) Accordingly, reviewing courts will not

[7] The court's instruction was taken almost verbatim from CACI No. 1009B. The sentence stating that "affirmative contribution need not be active conduct but may be in the form of an omission to act" is a direct quotation from the advisory committee's use note for the instruction. (Use Note to CACI No. 1009B (Spring 2011 ed.) p. 637 [reflecting Dec. 2010 revision].)

consider claims regarding errors in jury instructions where the record does not show who requested the instructions. (*Faulk v. Soberanes* (1961) 56 Cal.2d 466, 471 ["appellant . . . has the burden to present a record sufficiently complete to establish that the claimed errors were not invited by her, and in the absence of such a showing she may not properly complain"].)

Under the invited error doctrine, where the record does not disclose which party requested an allegedly erroneous instruction, "the reviewing court *must presume the appellant requested the instruction* and therefore cannot complain of error. [Citation.]"[8] (*Bullock, supra,* 159 Cal.App.4th at p. 678, italics added.) We will also presume the appellant withdrew the instruction at issue "if the record does not show whether an instruction 'was withdrawn, abandoned, or lost in the shuffle[.]' " (*Ibid.,* quoting *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 312.) It is therefore also the appellant's burden to ensure both that the trial court has ruled on a requested instruction and that the record on appeal discloses the trial court's ruling. (*Huber, Hunt & Nichols, Inc. v. Moore, supra,* 67 Cal.App.3d at p. 312.) Where the record is silent on these questions, we assume appellant invited the instructional error. (See *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1671–1672; *Morehouse v. Taubman Co.* (1970) 5 Cal.App.3d 548, 559 [absent "any indication before us which party requested the challenged instruction in the first instance . . . , it is presumed to have been given at appellant's request"].)

[8] More than 50 years ago, the California Supreme Court explained the proper method of providing a record adequate to support a claim of instructional error: "[I]n making up the record on appeal 'Each instruction should be identified by a number and should indicate by whom it was requested or that it was given by the court of its own motion; on each requested instruction the trial judge should endorse the fact as to whether it was given or refused or given as modified, with the modification, if any clearly indicated.' " (*Lynch v. Birdwell* (1955) 44 Cal.2d 839, 846–847, quoting *Vaughn v. Jonas* (1948) 31 Cal.2d 586, 596.)

3. *Bison Has Failed to Provide a Record Sufficient to Demonstrate It Did Not Invite the Instructional Error.*

Applying the foregoing standards, we first reject Bison's claim of instructional error to the extent it rests on any supposed confusion resulting from the giving of CACI Nos. 400, 401, and 1011. Bison tells us Travis offered the general negligence instructions (CACI Nos. 400 and 401), but it provides no citations to the record to support this contention. Nor does it point to anything in the record showing which party proposed CACI No. 1011. Since we do not know which party requested these instructions, we must presume Bison did. (*Bullock, supra,* 159 Cal.App.4th at p. 678.) Because Bison has failed to provide a record sufficient to establish that it did not invite error with respect to these three instructions, it is barred from complaining about them on appeal. (See *Mayes v. Bryan, supra,* 139 Cal.App.4th at p. 1091.)

We turn to Bison's objections to CACI No. 1009B. Contrary to Bison's contention, there is nothing in the record indicating that Travis drafted the language to which Bison now objects. Indeed, the source of the instruction ultimately given by the trial court is not apparent from the record before us. The text of the instruction appears in Bison's appendix, but without any information as to who proposed it. As noted above, Bison's counsel told the court she had submitted *two* alternative instructions containing the "affirmative contribution" language, one of which was a version of CACI No. 1009B. The other was a version of Special Instruction Number 4. Only the second of these proposed instructions appears in the record; the language of Bison's proposed alternative to CACI No. 1009B is not before us.[9]

[9] The gap in the record arises from Bison's failure to comply with the rules governing the contents of the record on appeal. In designating the record in this case, Bison elected to file an appendix in lieu of a clerk's transcript. (Cal. Rules of Court, rules 8.120(a)(1)(B), 8.124(a)(1)(A).) Among the items Bison was required to include in its appendix was "[a]ny item listed in rule 8.122(b)(3) that is necessary for a proper consideration of the issues . . . ." (Cal. Rules of Court, rule 8.124(b)(1)(B).) Rule 8.122.(b) states that a clerk's transcript must contain "[a]ny jury instruction that any party submitted in writing and the cover page required by rule 2.1055(b)(2) indicating the party requesting it . . . ." (Cal. Rules of Court, rule 8.122(b)(3)(C).) Rule 2.1055(b)(2)

Although we do not know precisely what language Bison proposed, certain facts are clear from the record. First, the "affirmative contribution" explanatory language was added at Thyssen's and Bison's request. Second, the transcript of the second jury instruction conference indicates Bison's counsel drafted affirmative contribution language for the instruction. Third, at that conference Bison contended "this is a case governed by *Hooker*." Fourth, in announcing its decision granting Bison's request to modify the instruction to include affirmative contribution language, the trial court stated its intention to instruct the jury that the required affirmative contribution could take the form of an omission to act, and Bison did not object. Finally, the trial court explained that the proposed modification "is all straight from *Hooker*," and Bison's counsel expressed no disagreement.[10]

On this record, we cannot determine the source of the portion of the instruction to which Bison objects. To meet its burden of establishing prejudicial error, it is not enough for Bison to "show[] the source of only a portion of the instruction given[.]" (*Lynch v.*

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governs the form and format of jury instructions proposed in the superior court, and it states, "Each set of proposed jury instructions must have a cover page, containing the caption of the case and stating the name of the party proposing the instructions, and an index listing all of the proposed instructions." Thus, under the applicable rules, Bison's appendix should have contained copies of the proposed jury instructions with a cover page indicating which party requested those instructions. Although Bison's appendix includes copies of the written instructions given to the jury, the appendix does not disclose who requested them.

We note that on January 31, 2012, long after the record in this case had been filed, Bison moved to augment the record with a series of e-mails exchanged among counsel and the trial court. In the alternative, Bison requested that we take judicial notice of these documents. Attached to one of these e-mails was Bison's proposed amended version of CACI No. 1009B. On February 21, 2012, this court denied Bison's motion to augment the record as untimely. (See Ct. App., First Dist., Local Rules of Ct., rule 7(b) ["Appellant should file requests for augmentation . . . within 30 days of the filing of the record"].) As these materials were not made part of the record on appeal, we do not consider them. (See *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364 ["if it is not in the record, it did not happen"].)

[10] In its reply brief, Bison concedes that the instruction given "included language from footnote 3 in *Hooker* . . . that affirmative contribution may take the form of an omission . . . ."

Birdwell, supra, 44 Cal.2d at p. 846.) In addition, since Bison did not include the text of its proposed modification of CACI No. 1009B in its appendix, it may be that Bison proposed an instruction substantially similar to the one the court gave. If that were the case, Bison would also be precluded from objecting to the instruction on appeal. (See *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670 [since "plaintiffs requested a substantially similar instruction . . . , they may not now complain of the corresponding portion of the instruction given by the court"].)

4. *Bison's Counterarguments Are Unpersuasive.*

Bison's attempts to avoid the invited error doctrine are unavailing. First, it argues the doctrine does not apply because "mere acquiescence in or failure to object to an instruction is not invited error." The case upon which Bison relies for this proposition, *Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, is inapposite. In that case, it was clear the party challenging the instruction did not request it. (*Id.* at p. 706.) That cannot be said here.

Second, Bison relies on Code of Civil Procedure section 647, but its reliance is misplaced. That section provides that certain matters "are deemed excepted to," including "giving an instruction, refusing to give an instruction, or modifying an instruction requested[.]" But it applies only to instructions "an appellant . . . has not requested or agreed to . . . , [and] a presumption of invited error may result from failure to provide the reviewing court with an adequate record." (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 759.) In this case, Bison has failed to provide an adequate record and thus we must presume it invited the instructional error of which it now complains.

Third, Bison asserts it could not have proposed a clarifying instruction because the case on which it would have based such an instruction—*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590 (*SeaBright*)—had not yet been decided. Bison contends *SeaBright* "rejected the notion that the mere failure to act constitutes affirmative contribution under *Hooker* footnote 3." We disagree with Bison's reading of *SeaBright.* That case held that US Airways could not be held liable for the injuries suffered by an

employee of an independent contractor hired by US Airways to maintain a luggage conveyor belt. (*Id.* at pp. 594, 603.) The California Supreme Court held that "[b]y hiring an independent contractor, [US Airways] implicitly delegate[d] to the contractor any tort law duty it owe[d] *to the contractor's employees* to ensure the safety of the specific workplace that is the subject of the contract." (*Id*. at p. 594.) Thus, the holding in *SeaBright* turned on whether US Airways could delegate to the contractor its duty under the California Occupational Safety and Health Act to ensure the safety of the conveyor belt. (*Id*. at pp. 595, 600–603.) Such delegation is not at issue in this case, however, because Bison was held liable on the theory that it had negligently exercised its retained control of Travis's worksite. "If a hirer entrusts work to an independent contractor, but *retains* control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control. [Citations.] Because the hirer *retains* control, it cannot logically be said to have *delegated* that authority." (*Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1446.)

Finally, we reject the suggestion that the trial court was obligated to give Bison's Special Instruction No. 4. (See fn. 6, *ante*.) That instruction was at best an incomplete statement of the law, because it did not tell the jury that to impose liability on Bison, it must find Bison had negligently exercised its retained control over safety conditions and that Bison's negligent exercise of that retained control was a substantial factor in causing Travis's injuries. (See *Hooker, supra,* 27 Cal.4th at p. 213 ["if a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer"]; CACI No. 1009B [plaintiff must prove hirer's negligent exercise of retained control was substantial factor in causing injury].) Accordingly, the trial court was entitled to refuse it. (*Orient Handel v. United States Fid. & Guar. Co.* (1987) 192 Cal.App.3d 684, 698.) This is particularly true here, because the standardized instruction adequately instructed the jury on the applicable law. (See *id.* at pp. 698–699.)

B. *Bison Forfeited Any Objection to the Alleged Defects in the Special Verdict Form.*

Bison contends the special verdict form was defective because the trial court did not ask the jury to determine "the critical, controverted issue of whether Bison's retained control over jobsite safety affirmatively contributed to Travis' injuries." Travis responds that Bison failed to preserve this claim for appeal because Bison neither objected to the proposed special verdict form nor sought clarification of the jury's verdict after it was returned. We agree with Travis.

1. *Factual Background*

After the trial court informed counsel it would modify CACI No. 1009B to include language requiring the jury to find that Bison had affirmatively contributed to Travis's injuries, the court asked counsel whether they had anything further to say about the verdict forms. Thyssen's counsel responded that "the affirmative contribution language in Special Instruction 1009B . . . should also be a part of the special verdict form and specifically added as a new question to the jury . . . so the jury would be asked whether or not Bison affirmatively contributed to the harm allegedly suffered by plaintiff."

Travis's counsel objected to the proposal, and the court again asked counsel whether they had anything to say on the verdict form. Bison's counsel responded, "I think it's fine as it is." Thyssen's counsel again requested that a question on affirmative contribution be included in the special verdict, and the matter was then submitted. The trial court refused Thyssen's request, reasoning that "affirmative contribution is . . . really a secondary issue. The issue is whether certain defendants were negligent. The affirmative contribution is just a piece of that. So I think it's addressed already in the verdict form, and I'm not going to make the jury answer a question about it separately." Counsel for Bison made no objection to the court's ruling.

The jury later reached a verdict, which was read in open court. The court polled the jury at the request of Thyssen's counsel, after which the trial judge announced she intended to discharge the jury. The jury was then discharged, but the record reflects no challenge to the verdict from Bison.

2. *Bison's Failure to Object to the Special Verdict Form Before Discharge of the Jury Precludes It From Raising the Issue on Appeal.*

"A party who fails to object to a special verdict form ordinarily waives any objection to the form." (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 530, citing *Lynch v. Birdwell, supra,* 44 Cal.2d at p. 851.) Where, as here, the issue is whether a question was omitted from a special verdict form, the objection must be raised before the jury is discharged. (*American Modern Home Ins. Co. v. Fahmian* (2011) 194 Cal.App.4th 162, 170, fn. 1.) To preserve the objection for appeal, a party must either object to the allegedly defective special verdict form in the trial court or propose its own verdict form containing the question or questions the party contends were improperly omitted. (See *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 276–277 (*Mardirossian*).) In this case, since Bison contends the issue of affirmative contribution was critical to determining its liability or the absence thereof, it was incumbent upon Bison to ensure that a finding on that issue was included in the verdict. (*Behr v. Redmond,* at p. 530.)

Bison does not contend it ever proposed its own special verdict form including a finding on affirmative contribution. It also points to nothing in the record demonstrating that it ever objected to the verdict form in the trial court on the grounds it now raises on appeal. In fact, it appropriately concedes in its reply brief that its counsel "agreed to the verdict form as given." Bison asserts instead that the doctrines of invited error and forfeiture do not apply to this situation.

Whether Bison invited error with respect to the special verdict form is a question we need not address, because it is clear Bison forfeited any challenge by failing to object to the verdict before the jury was discharged. Bison was certainly given the opportunity to object to any perceived deficiencies in the form before the case was submitted to the jury, but it made no objection. "Not only did [Bison] not do so, [it] failed to seek any correction or clarification of the verdict at any time, even though the jury was polled regarding the verdict[.]" (*Behr v. Redmond, supra,* 193 Cal.App.4th at p. 530.) Bison has therefore forfeited its objection to the failure of the verdict form to inquire

specifically about the issue of affirmative contribution. (*Ibid*.; see also *Henrioulle v. Marin Ventures, Inc.* (1978) 20 Cal.3d 512, 521 ["Failure to object to a verdict before the discharge of the jury and to request clarification or further deliberation precludes a party from later questioning the validity of the verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected"]; *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 858 ["where the record is devoid of any showing that appellant objected to the special verdict questions, any inherent error therein is waived"].)

Moreover, even if Bison had properly preserved this argument for appeal, we would be disinclined to find any defect in the verdict form. A special verdict "must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc., § 624.) "A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325.) A verdict form is not defective merely because it does not ask the jury to make separate findings on each element of a given cause of action. (See *Babcock v. Omansky* (1973) 31 Cal.App.3d 625, 630 [where jury was instructed on elements of fraud, court did "not believe a cumbersome interrogatory embracing each of the several elements [of a fraud claim] was necessarily required"], disapproved on another point in *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 485–486, 496.)

As the trial court correctly noted, the issue before the jury was whether Bison was negligent, and affirmative contribution "is just a piece of that." The advisory committee's use note to CACI No. 1009B explains that "the 'affirmative contribution' requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because 'affirmative contribution' might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard 'substantial factor' element adequately expresses the 'affirmative contribution' requirement." (Use Note to CACI No. 1009B, *supra*, p. 638.) The modified version of

CACI No. 1009B given by the trial court was more favorable to Bison than the standard instruction, because unlike the standard instruction, it included a specific direction that the jury must find that Bison had "affirmatively contributed to David Travis' damage." The jury's finding that Bison was negligent thus necessarily means it found that Bison had affirmatively contributed to Travis's injury.[11] (See *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1558 [where jury was properly instructed that element of claim for breach of duty of good faith was harm to plaintiff, jury's finding of breach of duty necessarily included finding that plaintiff had been damaged]; *Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 364–365 [jury was instructed that party's performance under contract was discharged if affirmative defense of impossibility or impracticability was proved; finding of breach showed jury rejected affirmative defense].)

C. *The Trial Court Did Not Abuse Its Discretion in Denying Bison's Motion in Limine.*

Bison contends the trial court erred in denying its motion in limine to exclude evidence of any medical bills showing the amounts charged by Travis's health care providers. On appeal, Bison asserts that the trial court's decision is inconsistent with the California Supreme Court's recent opinion in *Howell v. Hamilton Meats & Provisions,*

[11] Contrary to Bison's contentions, this case is unlike *Saxena v. Goffney*, *supra*, 159 Cal.App.4th 316. In that case, the plaintiff sued a surgeon who had treated her husband, alleging causes of action for lack of informed consent and battery. The special verdict form submitted to the jury asked only whether plaintiff's decedent had given informed consent to the procedure performed. (*Id*. at pp. 321–323.) The Court of Appeal held the special verdict form fatally defective and insufficient to support the verdict on the battery claim, because while it asked whether the decedent have given his *informed* consent, it did not ask whether he had given *any consent at all*. (*Id*. at pp. 325–326.) Since a verdict for plaintiff on the battery count would have required a finding that the defendant had performed the procedure "without obtaining any consent" (*id.* at p. 324), the special verdict form was deficient because it did not include that finding. (*Id.* at p. 326; see also *Fuller-Austin Insulation Co. v. Highlands Ins. Co.* (2006) 135 Cal.App.4th 958, 1004–1006 [in insurance coverage action, special verdict form defective because it asked only whether insured had engaged in inequitable misconduct, but did not ask distinct question of whether insured's bankruptcy settlement was reasonable].)

Inc. (2011) 52 Cal.4th 541 (*Howell*). We find nothing in *Howell* suggesting the trial court erred in permitting the jury to hear evidence of the full amount of the medical bills, and the trial court's ruling is entirely consistent with precedent from the California Courts of Appeal. Accordingly, we reject Bison's argument.

1. *Factual Background*

Citing Evidence Code sections 350 and 352, Bison's motion in limine argued Travis should be prohibited from offering in evidence the amounts his medical providers *charged* for their services and should instead be limited to proving the amounts *actually paid* to satisfy those charges. Bison contended "the amount of a medical bill is irrelevant, if the bill was satisfied for a lesser amount pursuant to prior agreement between the provider and [the] insurance company." (See *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 643 (*Hanif*) [plaintiff entitled to recover no more than actual amount expended or incurred for past medical services].) Travis opposed Bison's motion, pointing out that cases like *Hanif* governed the recoverability of damages, not the admissibility of evidence to establish recoverable damages. The trial court denied Bison's motion, but it expressly reserved "until after a verdict, the matter whether any medical expense recovery should be reduced per *Hanif*."

The jury awarded Travis $153,804.46 in past medical expenses. Bison moved to reduce that portion of the verdict to the amount actually paid by Ace, the workers' compensation carrier. The trial court granted the motion, ruling that Travis was entitled to recover only "the amount [actually] paid by [Ace] and accepted as payment in full by the medical providers[.]" That amount, as found by the jury, was $73,847. The trial court concluded Travis was not entitled to recover the full amount of his past medical expenses, because he had not shown he remained liable for the full amount.

2. *Standard of Review*

Trial judges have broad authority over the admission and exclusion of evidence. (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1156 (*Greer*) [reviewing trial court's denial of motion in limine to exclude evidence of full amount of plaintiff's billed medical expenses].) Because the motion in limine at issue here pertains to the admissibility of

evidence, the trial court's ruling is subject to review under the abuse of discretion standard. (*Mardirossian, supra,* 153 Cal.App.4th at p. 269.)

3. *The Trial Court Could Properly Admit Evidence of the Reasonable Cost of Travis's Medical Care.*

Bison contends the trial court's denial of its motion in limine amounted to an abuse of discretion under *Howell, supra,* 52 Cal.4th 541. This argument is not extensively articulated, and we fail to see how *Howell* supports Bison's position.

In *Howell,* our state high court addressed whether a tortiously injured person could recover from the tortfeasor the undiscounted sum billed by the injured person's medical provider, where the provider had accepted a discounted sum as full payment pursuant to a preexisting insurance contract. (52 Cal.4th at p. 548.) The Supreme Court held no such recovery is allowed, because the injured plaintiff did not suffer an economic loss in the amount of the undiscounted sum. (*Ibid*.) The court went on to explain the implications of its holding on the admissibility of evidence: "Where the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Id.* at p. 567.) The Supreme Court noted, however, that it was expressing no opinion as to the relevance or admissibility of evidence of the full billed amount "on other issues, such as noneconomic damages or future medical expenses." (*Ibid.*) Thus, the court in *Howell* clearly declined to take a position on the question now before us.

In contrast, all of the Courts of Appeal that have addressed the question, including this appellate district, have concluded it is not error for a trial court to permit the jury to hear evidence of the full amount of an injured plaintiff's medical bills, even when the plaintiff's damages are limited to the amount actually paid to the provider. (See *Olsen v. Reid* (2008) 164 Cal.App.4th 200, 204; *Greer, supra,* 141 Cal.App.4th at p. 1157; *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 309 (*Nishihama*).) "*Nishihama* and *Hanif* stand for the principle that it is error for the plaintiff to *recover* medical expenses in excess of the amount paid or incurred. Neither case, however, holds that *evidence* of the reasonable cost of medical care may not be

admitted. . . . Such evidence gives the jury a more complete picture of the extent of a plaintiff's injuries." (*Greer*, at p. 1157; accord, *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1296 ["regardless of whether defendants were entitled to a *Nishihama*-type *reduction* of the medical damage award, there was no basis in law to prevent the jurors from receiving evidence of the amounts billed"].) The trial court in this case followed precisely the same procedure approved in *Greer*. It denied Bison's motion in limine while making "clear that if the jury rendered an award that was excessive under *Hanif/Nishihama*, it would consider a posttrial motion to reduce the recovery." (*Greer*, at p. 1157.) Here, as in *Greer*, "[t]he court's ruling was correct." (*Ibid.*) Consequently, Bison's "claim of error in connection with the motion in limine is without merit." (*Ibid.*)

D. *The Trial Court Did Not Err in Refusing to Reduce the Award for Travis's Future Medical Expenses.*

Bison next challenges the trial court's denial of its posttrial motion to reduce the amount of damages for Travis's future medical costs. We conclude California law requires no such reduction.

1. *Factual Background*

As part of its motion seeking a reduction of Travis's damages pursuant to *Hanif*, Bison made a one-paragraph argument proposing a 40 percent reduction in the award for Travis's future medical costs. Bison claimed Ace would be paying those costs, and therefore Travis could not be billed for more than the workers' compensation medical charges scale. In Bison's view, the award for Travis's future medical costs should either be reduced to 60 percent of what the jury awarded or denied in its entirety.

The trial court denied Bison's motion. It observed that Bison had cited no authority for its request to reduce the award of Travis's future medical expenses. Relying on *Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal.App.3d 668 (*Curtis*), the court held that a reduction in the jury's award could only be made for workers' compensation benefits paid as of the time of trial and not for future benefits. (*Id.* at p. 683.) It explained that if Travis made a posttrial demand for future workers'

compensation benefits from Ace, Ace would be entitled to a credit against future benefits based on the amount Bison had paid to Travis. Because Travis had recovered damages for his injuries from third parties, Bison was entitled to a credit against its obligation to pay future benefits for Travis, but its credit would be reduced by the extent to which its fault caused Travis's damages. The trial court concluded that application of the employer's or carrier's credits would ensure that Travis will not receive a double recovery, and it therefore refused to reduce the damage award for future medical expenses.

2. *Bison Is Not Entitled to a Reduction in the Award Merely Because Travis May Receive Workers' Compensation Benefits in the Future.*

In challenging the trial court's denial of its posttrial motion,[12] Bison contends that *Howell*, *supra*, 52 Cal.4th 541, prohibits the introduction of evidence of Travis's "projected future medical specials" because those costs are based on what Travis's health care providers would charge rather than on what they would agree to accept as payment from a private insurer or workers' compensation carrier. As we explained in the previous section of this opinion, however, *Howell* expressly declined to decide whether such evidence could be admitted "on other issues, such as . . . future medical expenses." (*Id.* at p. 567.) Thus, to the extent Bison's argument is predicated upon *Howell*, it fails.

Bison complains that Travis will receive a windfall, because he has been awarded his future medical expenses even though Ace has been ordered to pay them. It contends

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[12] It is not entirely clear whether Bison's posttrial motion should be treated as one for new trial, and Bison's briefs do not address either that issue or the related question of the applicable standard of appellate review. (Cf. *Olsen v. Reid*, *supra*, 164 Cal.App.4th at p. 203, fn. 2 [it is unclear what form a motion to reduce the judgment under *Hanif/Nishihama* should take; trial court's order failed under either substantial evidence or abuse of discretion standard].) Travis's opposition characterized Bison's motion as one for new trial, a characterization Bison did not dispute in its reply. At the hearing on posttrial motions, the trial court seems to have viewed the motion as one for new trial.

Travis therefore argues that our standard of review is abuse of discretion. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859.) Bison's reply brief does not suggest otherwise. We need not decide which standard applies, as we conclude that the trial court's order is correct under any standard.

Travis's award "should be reduced to the amount that will actually be paid[.]" Under established California precedent, however, a third party tortfeasor is not entitled to a reduction in an employee's judgment in the amount of future workers' compensation benefits payable to the employee when the employer has been found concurrently negligent. (*Slayton v. Wright* (1969) 271 Cal.App.2d 219, 229, 232–233.) "The argument has been advanced before that plaintiff's recovery should be reduced not only by the amount which he had already received in compensation benefits but also by any amounts which he might receive in the future; however, the contention has been rejected . . . ." (*Id*. at p. 232.) The court in *Curtis* summarized the rule as follows: "Where a third party tortfeasor is entitled to a setoff because of an employer's concurrent negligence, a reduction in the jury verdict can only be made as to those workers' compensation benefits paid as of the time of trial and not reduced for future workers' compensation benefits. [Citations.]" (*Curtis, supra,* 128 Cal.App.3d at p. 683.)

Moreover, as Travis points out, there is no evidence of what future medical care Ace will actually cover. In such cases, California courts have refused to reduce awards for a plaintiff's future medical expenses. In *Castro v. Fowler Equipment Co.* (1965) 233 Cal.App.2d 416, the court explained, "Even though a rating had been made by the Industrial Accident Commission, it does not necessarily follow that the [injured employee] would receive all that such award would allow as it may be terminated by death or other events, and to require that the [injured employee] should have his judgment against the tortfeasor reduced by that amount would mean that he would not be able to collect on his common law right . . . ." (*Id*. at p. 421.) California law thus does not require that a plaintiff's recovery be reduced solely because future workers' compensation payments are available. (*Slayton v. Wright, supra,* 271 Cal.App.2d at p. 233.)

The trial court's ruling is thus amply supported by precedent. Although the trial court specifically noted Bison's failure to cite any authority in support of its position, Bison's briefs on appeal do not remedy this deficiency. We therefore hold the trial court

properly denied Bison's request for a reduction in the award of Travis's future medical expenses.

E. *The Record Contains Substantial Evidence of Affirmative Contribution.*

Bison challenges the trial court's denial of its motion for judgment notwithstanding the verdict. It contends the trial court should have granted the motion because there was no evidence Bison affirmatively contributed to Travis's injuries. Specifically, Bison argues there was no evidence it directed Thyssen to use a particular entrance to the building, and it asserts it was Thyssen's responsibility to provide a safe means of entrance and egress for its employees. Viewing the evidence in the light most favorable to Travis, as we must, we cannot say there is no substantial evidence to support the jury's conclusion. (See *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68 ["motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support"].) We therefore conclude the trial court did not err in denying Bison's motion.

Initially, we observe that in making this argument, Bison has lost sight of its burden on appeal. Because Bison attacks the sufficiency of the evidence to support the jury's finding, we will consider its argument "only after a party tenders such an issue together with a fair summary of the evidence bearing on the challenged finding, particularly including evidence that arguably *supports* it." (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409–410.) Here, Bison's brief focuses largely, if not entirely, on the evidence favorable to Bison, and it ignores the contrary evidence. "What [Bison] attempts here is merely to reargue the 'facts' as [it] would have them, an argumentative presentation that not only violates the rules noted above, but also disregards the admonition that [it] is not to 'merely reassert [its] position at trial.' [Citations.]" (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531.) Bison may not simply ignore unfavorable evidence "as if it did not exist," and it may not treat the Court of Appeal as "a second trier of fact[.]" (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.) Given Bison's failure to discuss the evidence supporting

the jury's findings, we would be justified in deeming its contentions abandoned. (*Arechiga v. Dolores Press, Inc.* (2011) 192 Cal.App.4th 567, 572.)

Although Bison has not properly preserved its substantial evidence claim, we have nevertheless examined it. We conclude the record contains ample evidence to support a finding that Bison affirmatively contributed to Travis's injuries. Bison's employees testified it was Bison's responsibility to provide Cal-OSHA-compliant access to the worksite. As general contractor, it was obligated to provide lighting, remove debris, and ensure the entrance had sufficient height clearance. Although Bison contends there was no evidence it directed Thyssen's employees to use any particular entrance to the site, there was testimony that Bison did designate the entrance to be used.

In coordination with Kenyon, Bison chose the route for the plywood walkway. The route led through a scaffolding bay with low cross-bracing to the front entrance of the building. Bison employees put down the plywood planks and built the ramp. The plywood had been "cupped and warped" by rain, was difficult to walk on, and rocks and debris beneath it caused the plywood to bounce back and forth under workers' feet. The path was littered with debris and unlighted. Workers hit their heads on the low cross-bracing. Thyssen reported the hazard to Bison, but Bison never asked Kenyon to modify the scaffolding, and Thyssen could not alter the scaffolding on its own.

While we have not detailed all of the evidence supporting the jury's verdict, the facts outlined above are sufficient to sustain a finding that Bison affirmatively contributed to Travis's injury. " '[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor.' " (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225; accord, *Tverberg v. Fillner Construction, Inc., supra*, 202 Cal.App.4th at pp. 1447–1448 [act of directing that unsafe condition occur is active participation; hirer affirmatively contributed to injury by ordering digging of bollard holes and requiring plaintiff to conduct work near them].)

Finally, much of Bison's argument on this issue appears to be directed at showing that Thyssen was negligent. The jury did find that Thyssen was negligent and that its

negligence was a substantial factor in causing Travis's injuries. As the jury was instructed, however, "Bison . . . cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing . . . Travis's damage." (CACI No. 431.) "Admittedly, [Bison] was not the only one at fault, but then the jury's verdict reflected that." (*McKown v. Wal-Mart Stores, Inc., supra,* 27 Cal.4th at p. 226.) Thus, Thyssen's negligence is simply beside the point.[13]

F. *The Trial Court Properly Granted Judgment to Thyssen on Bison's Cross-Complaint for Indemnity and Defense Costs.*

Bison also appeals from the trial court's grant of judgment to Thyssen on Bison's cross-complaint for indemnification. The trial court found that the plain language of the subcontract limited Thyssen's duty to indemnify Bison " 'solely to losses to the extent caused by [Thyssen's] acts, actions, omissions or neglects and in no way to include the acts, actions, omissions or neglects of [Bison].' " Based on the jury's finding that Bison was responsible for 75 percent of Travis's injuries, the trial court ruled the express terms of the subcontract precluded Thyssen from having to indemnify Bison. It also held that the allegations of Travis's complaint against Bison took the action outside the claims encompassed by the indemnity provision, and therefore Thyssen owed no duty to provide a defense to Bison.

On appeal, Bison argues the trial court erred both in denying its claim for indemnity from Thyssen and in concluding Thyssen owed Bison no duty to defend it against Travis's claims. We find no error and accordingly affirm the trial court's judgment.

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[13] Bison does not challenge the verdict on the grounds that there was insufficient evidence to support a finding that it retained control over the safety conditions at Travis's worksite. Nevertheless, Bison's brief seems to suggest it cannot be held liable because it delegated to Thyssen any responsibility Bison had for ensuring Thyssen's employees worked in a safe manner. Bison's argument misunderstands the law. Since it was found to have retained control over Travis's worksite, "it cannot logically be said to have *delegated* that authority." (*Tverberg v. Fillner Construction, Inc., supra,* 202 Cal.App.4th at p. 1446.)

1. *Standard of Review and Principles of Interpretation*

We review the trial court's interpretation and application of the indemnity agreement de novo. (*McCrary Construction Co. v. Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th 1528, 1535 (*McCrary*).) To the extent the trial court's interpretation of the agreement was based on its assessment of the parties' contract negotiations and the facts leading to Travis's injury, " 'we accept the trial court's implied credibility determinations; to the extent the evidence is not in conflict, we construe the instrument, and we resolve any conflicting inferences, ourselves. [Citation.]' [Citation.]" (*Id.* at p. 1536.)

"Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred. [Citation.]" (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628 (*Rossmoor*).) The obligation may be: (1) created by express contract; (2) implied from a contract that does not specifically mention indemnity; or (3) found to arise from equity. (*Ibid.*) Where, as in this case, the parties' contract deals specifically with the issue of indemnity, the extent of the duty to indemnify is determined by the contract itself. (*Ibid.*; see *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 551 (*Crawford*) ["Parties to a contract, including a construction contract, may define therein their duties toward one another in the event of a third party claim against one or both arising out their relationship"].) The contracting parties enjoy "great freedom to allocate such responsibilities as they see fit." (*Ibid.*)

As a general matter, we interpret indemnity agreements using the same rules applicable to other contracts. (*Crawford*, *supra*, 44 Cal.4th at p. 552.) Although such agreements resemble liability insurance policies, for reasons of public policy, the rules of construction applicable to indemnity agreements differ from those applicable to liability insurance policies. (*Ibid.*) Outside of the insurance context, "it is the *indemnitee* who may often have the superior bargaining power, and who may use this power unfairly to shift to another a disproportionate share of the financial consequences of its own legal fault." (*Ibid.*) As a consequence, if a party seeks indemnity for its own active negligence or regardless of the indemnitor's fault, the indemnity agreement's "language on the point

must be particularly clear and explicit, and will be construed strictly against the indemnitee." (*Ibid*.)

Indemnity agreements ordinarily fall into one of two broad categories. (See *Rossmoor, supra,* 13 Cal.3d at p. 628.) The first category includes agreements that "provide for indemnification against an indemnitee's own negligence[.]" (*Ibid*.) The second category embraces agreements that do not address the issue of the indemnitee's negligence, a category called general indemnity agreements.[14] (*Id.* at pp. 628–629.) Under a general indemnity agreement, an indemnitee is not entitled to indemnity if it is deemed actively negligent. (*Id.* at p. 629; *McCrary, supra,* 133 Cal.App.4th at p. 1537.) Whether conduct constitutes active negligence depends upon the circumstances of each case and is ordinarily a question for the trier of fact, unless the evidence is so clear and undisputed that reasonable people could not disagree. (*Rossmoor,* at p. 629.)

2. *Bison's Claim for Indemnity Is Barred by its Active Negligence.*

We turn to an examination of the relevant language of Thyssen's subcontract with Bison. Indemnity is addressed in section 15 of the subcontract. The parties agreed, however, to amend a number of provisions of the form subcontract, and they therefore executed Amendment No. 1. That amendment states that it "shall be made a part of this Agreement and in the event of conflict with other articles, terms, conditions, or contract documents, this Amendment No. 1 shall be final." With regard to section 15 of the

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[14] In a case predating *Rossmoor,* the Second District identified three categories of indemnity agreements. (*MacDonald & Kruse, Inc. v. San Jose Steel Co.* (1972) 29 Cal.App.3d 413, 419–421 (*MacDonald & Kruse*).) According to *MacDonald & Kruse,* the third category of agreement "is that which provides that the indemnitor is to indemnify the indemnitee for the indemnitee's liabilities caused by the indemnitor, but which does not provide that the indemnitor is to indemnify the indemnitee for the indemnitee's liabilities that were caused by other than the indemnitor." (*Id*. at p. 420.) In cases decided since *Rossmoor,* some Courts of Appeal have questioned the continuing validity of the *MacDonald & Kruse* classifications. (See *McCrary, supra,* 133 Cal.App.4th at pp. 1538–1539 & fn. 2 [citing cases].) We need not address this question, as neither Bison nor Thyssen contends that we should apply the *MacDonald & Kruse* framework. Bison does concede, however, that the agreement at issue here would arguably fall within *MacDonald & Kruse's* third category.

subcontract, Amendment No. 1 states: "Amend so indemnity and hold harmless is limited solely to losses to the extent caused by [Thyssen's] acts, actions, omissions or neglects and in no way to include the acts, actions omissions or neglects of [Bison.]

Thyssen characterizes the agreement before us as a "general indemnity agreement" under *Rossmoor*. (See *McCrary*, *supra*, 133 Cal.App.4th at p. 1538.) As a consequence, it contends Bison's active negligence bars its recovery of indemnity from Thyssen. (*Id.* at pp. 1537, 1541 [usual rule is that actively negligent indemnitee cannot recover under general indemnity agreement].) Bison responds to this argument by claiming that "Thyssen, and not Bison, retained control over the worksite. Thus, because Thyssen retained control, Bison could not be actively negligent." This argument is untenable in light of the jury's finding that Bison was negligent and that its negligence was a substantial factor in causing Travis's injuries. As explained in part B, *ante*, Bison's liability was predicated on the theory that it negligently exercised its retained control over Travis's worksite. We have already determined that the jury's finding on that issue is supported by substantial evidence, and we are not at liberty to disregard the jury's decision.

We also have little doubt that the conduct in which Bison engaged meets the definition of active negligence found in California case law. "Active negligence . . . 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 has agreed to perform. [Citations.]" (*Rossmoor*, *supra*, 13 Cal.3d at p. 629.) We need not repeat our recitation of the evidence on this point. It suffices to note that the evidence adduced at trial showed that although Bison had an admitted duty to provide Cal-OSHA-compliant access to the site, Bison designated an access route that required workers to duck under cross-bracing too low to provide adequate vertical clearance. It built the plywood ramp workers used, but it failed to provide adequate lighting or clear debris. Bison's employees were made aware of this hazard, but they failed to correct it in a timely fashion. This is the kind of conduct California courts have considered active negligence. (See *id.* at p. 630

["knowingly supplying a scaffold which did not meet the requirements of a safety order" is active negligence]; *Morgan v. Stubblefield* (1972) 6 Cal.3d 606, 626–627 [contractor guilty of active negligence as matter of law where it created hole in floor that it failed to cover in proper manner and failed to provide sufficient lighting, "all in violation of construction safety orders"]; *McCrary, supra,* 133 Cal.App.4th at pp. 1540–1541 [contractor that had assumed obligation to cover holes but failed to do so properly held actively negligent].) It is not, as Bison would have it, the sort of "mere nonfeasance" that is the hallmark of passive negligence. (See *Rossmoor,* at p. 629 [examples of nonfeasance are "the failure to discover a dangerous condition or to perform a duty imposed by law"].)

Because Bison was actively negligent, it would be entitled to indemnity only if Thyssen could be said to have agreed to indemnify Bison in "particularly clear and explicit" terms.[15] (*Crawford, supra,* 44 Cal.4th at p. 552.) Here, Thyssen limited its duty to indemnify Bison "solely to losses to the extent caused by" Thyssen itself, and its duty was "in no way to include the acts, actions, omissions or neglects of [Bison]." This language can hardly be construed as a clear and explicit acceptance by Thyssen to indemnify Bison in cases of Bison's active negligence. Thyssen's duty to indemnify Bison is limited solely to losses caused by Thyssen, and it "in no way" includes Bison's acts or omissions. Contrary to Bison's suggestion, the fact that Thyssen was held partially responsible for Travis's injuries does not alter the general rule that an actively negligent indemnitee is not entitled to indemnity. (See *McCrary*, *supra,* 133 Cal.App.4th at pp. 1533, 1540–1541 [where both general contractor and subcontractor shared liability for plaintiff's injuries, general contractor's active negligence precluded indemnity].)

[15] Although Bison's opening brief asserts that "the subcontract language evinces a clear intent by the parties that each will indemnify the other for their own negligence," Bison's opening brief eschews any discussion of the actual language at issue. It is not until the end of its reply brief that Bison even mentions what the agreement says, and even then it quotes only a portion of the relevant section of the agreement.

Bison seeks refuge in language in its subcontract with Thyssen by which Thyssen assumed sole responsibility for providing a safe place of work for its employees. This argument is unavailing, because it is yet another attempt by Bison to sidestep the jury's implied finding that it, not Thyssen, retained control over Travis's worksite. In addition, even if this contractual language were somehow relevant to the issue of indemnity, Bison ignores the terms of Amendment No. 1, which specifies that the terms of that amendment prevail in the event of any conflict with other provisions of the subcontract.

3. *Bison Is Not Entitled to Comparative Indemnity.*

Bison's opening brief appears to argue that it is entitled to a comparative indemnity equal to 25 percent of the judgment, because the jury apportioned 25 percent of the fault to Travis and Thyssen collectively. This argument relies principally on language from *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791 (*Hernandez*) and *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626 (*Rodriguez*), disapproved on another point in *Coito v. Superior Court* (2012) 54 Cal.4th 480, 499. While Thyssen responds to this argument on the merits, we question whether it has been preserved for appeal. (See *S.M. v. Los Angeles Unified School Dist.* (2010) 184 Cal.App.4th 712, 722 [appellate court may find issue forfeited even though respondent addressed merits of issue].) In the court below, Bison made only an oblique, passing reference to the idea that it was entitled to some form of comparative indemnification. It cited neither *Hernandez* nor *Rodriguez,* and it never specifically asked the trial court to award it an indemnity equal to 25 percent of the judgment. In these circumstances, we would be loath to reverse the trial court's decision on the basis of an argument Bison failed to articulate below.

Even if the argument had been properly preserved, we would find it unpersuasive. Bison cites no California case that has adopted the comparative indemnity approach it now advocates on appeal. In fact, *Rodriguez, supra,* 87 Cal.App.3d 626, one of the cases upon which Bison places principal reliance, expressly *rejected* the notion that California's comparative fault and comparative indemnity principles "mandate[] that indemnity between [a general contractor, subcontractor, and employer] be that of partial

indemnity on a comparative fault basis." (*Id*. at p. 676.) Indeed, the court went on to discuss "the *all-or-nothing* right of indemnification that is created by the parties to an indemnity contract." (*Ibid.*, italics added.) Thus, *Rodriguez* provides no support whatsoever for Bison's argument.[16] *Hernandez* is likewise inapposite. There, the court took care to state that the issue of allocating liability in proportion to comparative fault had not been specifically argued by the parties and was "not the basis of [its] decision[.]" (*Hernandez, supra,* 28 Cal.App.4th at p. 1823.) In addition, the same court that decided *Hernandez* later refused to interpret that decision so broadly as to permit an actively negligent indemnitee to seek indemnity on a comparative fault basis from the indemnitor. (*Maryland Casualty Co. v. Bailey & Sons, Inc.* (1995) 35 Cal.App.4th 856, 868–869.) In short, the cases Bison cites have given us "no reason to depart from the general rule that an actively negligent indemnitee cannot recover under a general indemnity contract." (*McCrary, supra,* 133 Cal.App.4th at p. 1541.)

4. *The Trial Court Did Not Err in Finding Thyssen Owed Bison No Defense.*

Bison's final contention is that the trial court wrongly concluded Thyssen did not owe Bison a duty to defend this action. Once again, Bison's opening brief contains almost no discussion of the actual language of the subcontract. Bison's failure to ground its argument in the language of the agreement it asks us to construe entitles us to deem the contention forfeited. (See *Jie v. Liang Tai Knitwear Co.* (2001) 89 Cal.App.4th 654, 658, fn. 2 [declining to address argument where appealing parties failed to make necessary connection between alleged error and facts of case].)

Even if Bison's argument is properly before us, it is unpersuasive. Thyssen's duty to defend Bison is set forth in section 15.2 of the subcontract. That section required Thyssen to "defend . . . all Claims as defined in Section 15.1 that may be brought or instituted by third persons . . . against [Bison] . . . ." Under Amendment No. 1, however,

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[16] Moreover, while the general contractor in *Rodriguez* was found to be entitled to indemnification, the reason was because the trial court had found the general contractor only passively negligent, a finding the Court of Appeal held was supported by substantial evidence. (*Rodriguez, supra,* 87 Cal.App.3d at pp. 675–676.)

Thyssen limited its liability for indemnity solely to losses to the extent caused by Thyssen's own acts or omissions, and it was "in no way" liable for Bison's acts or omissions. We construe this language strictly against Bison as indemnitee (*Crawford, supra,* 44 Cal.4th at p. 552) and in light of well-established law barring indemnity for active negligence. (See *Maryland Casualty Co. v. Bailey & Sons, Inc., supra,* 35 Cal.App.4th at p. 869 [interpreting indemnity agreement in light of case law barring indemnity for active negligence].)

Thyssen's duty to defend Bison extended only "to the matters embraced by the indemnity[.]" (Civ. Code, § 2778, subd. 4.) Under the terms of their indemnity agreement, Thyssen was "in no way" liable for Bison's acts or omissions. Travis's complaint, however, alleged causes of action arising only out of *Bison's* negligence and out of the negligence of certain Doe defendants responsible for the scaffolding and stucco work at the Extended Stay Hotel. The complaint makes no allegations that Thyssen was in any way negligent or otherwise responsible for Travis's injuries. The trial court thus correctly concluded that Travis's allegations took this personal injury action outside the claims encompassed by the indemnity provision.

Bison seeks to have it both ways. It argues Thyssen's duty to defend does not turn on whether it was ultimately liable for Travis's injuries but rather upon the terms of the subcontract. That much is true. (*Crawford, supra,* 44 Cal.4th at p. 558 [duty to defend under indemnity agreement cannot depend on outcome of underlying litigation].) But it then goes on to argue that it is precisely the jury's ultimate assessment of liability—its allocation of 20 percent of the fault to Thyssen—that establishes Thyssen's obligation to accept Bison's tender of defense. To the contrary, Thyssen was only required to defend claims embraced by the indemnity. The claims Travis made in his lawsuit alleged negligence by Bison and parties other than Thyssen. Under the terms of the subcontract, those claims were outside of the scope of the agreed indemnity. Consequently, Thyssen had no duty to defend them.

We conclude Thyssen had no obligation either to indemnify or defend Bison. The trial court therefore did not err in granting judgment to Thyssen on Bison's cross-complaint.[17]

III. DISPOSITION

The judgments are affirmed. Travis and Thyssen shall recover their costs. (Cal. Rules of Court, rule 8.278(a)(1), (2).) We remand the matter to the trial court for the limited purpose of awarding Thyssen reasonable attorney fees on appeal.

_____
Bruiniers, J.

We concur:

_____
Jones, P. J.

_____
Needham, J.

[17] Our affirmance necessarily means Thyssen is the prevailing party in this appeal. (See Cal. Rules of Court, rule 8.278(a)(2).) Thyssen contends it is therefore entitled to an award of attorney fees on appeal under its subcontract with Bison. (*Wu v. Interstate Consolidated Industries* (1991) 226 Cal.App.3d 1511, 1517–1518 [lease that provided for award of attorney fees to prevailing party in any action on the lease entitled prevailing party on appeal to award of appellate attorney fees].) Bison does not dispute Thyssen's contention. We will therefore direct the trial court on remand to determine the amount of a reasonable fee award.