Filed 9/12/13 Hernandez v. Thermal Structures CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

HERIBERTO HERNANDEZ, Plaintiff and Appellant, v. THERMAL STRUCTURES, INC., Defendant and Respondent.	E054878 (Super.Ct.No. RIC512086) OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson, Judge. Affirmed.

The Harmon Firm and James H. Harmon for Plaintiff and Appellant.

Fisher & Phillips, Christine Baran, and Jimmie E. Johnson for Defendant and Respondent.

Plaintiff Heriberto Hernandez suffered a gruesome on-the-job injury when his hands were crushed in a power press. Under the worker's compensation exclusivity rule (Lab. Code, § 3600, subd. (a)), and under the power press exception to that rule (Lab.

Code, § 4558), Hernandez cannot recover against his employer, Thermal Structures, Inc. (Thermal) unless he can show that the accident occurred because Thermal either removed or failed to install a point of operation guard on the press.

When the accident occurred, the press did have a point of operation guard — two buttons, mounted on a pedestal; the press was not supposed to operate unless both buttons were pushed simultaneously. Hernandez's current theory is that Thermal "removed" the guard by adding wheels to the pedestal, which allowed the pedestal to move so close to the main body of the press that he could push the buttons with his elbows while his hands were still dangerously close to the press. The problem with this theory is that, in discovery, Hernandez admitted that (1) Thermal did not remove a point of operation guard, (2) no changes were ever made to the press, and (3) the buttons were not being pushed when the accident occurred. Accordingly, the trial court properly granted summary judgment for Thermal.

I

FACTUAL BACKGROUND

Hernandez was an employee of Thermal. As part of his job, he used a power press to shape sheet metal.

The press was not supposed to operate unless two buttons were pushed simultaneously. The buttons were mounted on a pedestal, three and a half feet apart from each other. The pedestal was separate from the main body of the press, though connected to it by a cable.

The press came with an operator's manual, which instructed the user to "[a]ssemble and secure all guards."

On November 1, 2007, Hernandez was injured while using the press in the course of his job. His hands were in the press when it came down on them. The index and middle fingers on both hands had to be amputated. Hernandez did not remember how the accident occurred.

At the time of the accident, the pedestal was on wheels and located about a foot or a foot and a half away from the main body of the press. In opposition to the motion for summary judgment, Hernandez testified that, when he first started working on the press, the pedestal did not have wheels; it was heavy and placed "far away" from the main body of the press. "Thermal . . . added wheels to the pedestal so that I could move the buttons close to the machine more easily." This allowed him to produce parts more quickly.

Hernandez also testified that the press was defective, in that he and others were able to operate it while pushing only one of the two buttons. Also, sometimes, it operated on its own, without warning.

In response to requests for admissions, when asked to "[a]dmit that you did not press the dual hand actuator buttons at the same time as the [press] closed on your hands," Hernandez responded, "Admit." (Capitalization omitted.) In an interrogatory response, he added, "[T]he b[u]ttons had been pressed in prior operations but not immediately prior to the subject incident." (Punctuation omitted.)

Hernandez also admitted that he had "no evidence" that Thermal had "removed a point of operation guard" from the press. He further admitted that one of his contentions was that the press malfunctioned.

In his deposition, Hernandez testified:

"Q: During the time that you worked at Thermal Structure, did you observe any changes made to the specific machine on which you were injured?

"A: No.

"Q: So as far as you know, no changes were ever made on that machine?

"A: That I know of, no."

He also testified:

"Q: . . . [D]id you push any buttons with any part of your body while your hands were between the molds?

"A: No."

II

HERNANDEZ'S OWN DISCOVERY RESPONSES CONCLUSIVELY ESTABLISHED THAT THE ACCIDENT WAS NOT CAUSED BY THE REMOVAL OF A GUARD

Hernandez contends that there was a triable issue of fact as to whether the accident occurred because Thermal removed a point of operation guard.

A. *General Summary Judgment Principles*.

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

"[I]n moving for summary judgment, a 'defendant . . . has met' his 'burden . . . if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .' [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

"We review the trial court's decision de novo . . . . [Citations.]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.)

B. *The Effect of Hernandez's Discovery Responses*.

"Where an employee is injured in the course and scope of his or her employment, workers' compensation is generally the exclusive remedy of the employee . . . against the employer. [Citations.] . . . .

"There are, however, limited statutory exceptions to the exclusivity rule . . . . [Citations.] One such exception is found in [Labor Code] section 4558, the 'power press exception.' [Labor Code s]ection 4558 authorizes an injured worker to bring a civil action for tort damages against his or her employer where the injuries were 'proximately caused by the employer's knowing removal of, or knowing failure to install, a point of

operation guard on a power press,' where the 'manufacturer [had] designed, installed, required or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer.' [Citation.]" (*LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 279-280.)

It is undisputed that the press involved in this case was a "power press" within the meaning of Labor Code section 4558. It is equally undisputed that the buttons on the pedestal were a "point of operation guard."

Hernandez cannot show, however, that Thermal removed a guard, for two reasons. First, in response to a request for admissions, he admitted that he had "no evidence" that Thermal had "removed a point of operation guard . . . ." He never moved to amend or withdraw this admission. (See Code Civ. Proc., § 2033.300.) Hence, it was conclusive, and he could not contradict it. (Code Civ. Proc., § 2033.410, subd. (a).)

Second, Hernandez has to get around the fact that the guard had not been physically removed; the buttons were still attached to the pedestal, and the pedestal was still attached to the main body of the press by a cable. Accordingly, he relies on *Bingham v. CTS Corp.* (1991) 231 Cal.App.3d 56, which stated: "Physical removal, for the purpose of liability under [Labor Code] section 4558, means to render a safeguarding apparatus, whether a device or point of operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned." (*Id*. at p. 68.) He argues that Thermal added wheels to the pedestal, making it possible to move the pedestal within

arm's — or, more important, elbow's — reach of the press, and thus, making the guard dysfunctional or unavailable.

The only evidence that Thermal did add wheels, however, came from Hernandez's own declaration. He was not allowed to contradict his own sworn deposition testimony that "no changes were ever made on that machine[.]" "'[A] party cannot create an issue of fact by a declaration which contradicts his prior discovery responses.' [Citations.]" (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087.) "Where a declaration submitted in opposition to a motion for summary judgment motion clearly contradicts the declarant's earlier deposition testimony or discovery responses, the trial court may fairly disregard the declaration and '"conclude there is no substantial evidence of the existence of a triable issue of fact."' [Citation.]" (*Ibid*.)

Hernandez argues that the questions he was asked on this topic — and hence his responses — were ambiguous. He focuses on the first question, which was, "During the time that you worked at Thermal Structure, did you observe any changes made to the specific machine on which you were injured?"; he answered, "No." He argues that it could be understood to ask whether he observed the changes *being made*; they could have been made when he was not present. However, this overlooks the second question, which was "So as far as you know, no changes were ever made to the machine?"; he answered, "That I know of, no." This was unambiguous and flatly inconsistent with his later testimony that Thermal added wheels.

Separately and alternatively, Hernandez cannot show that the asserted addition of wheels caused the accident. In response to another request for admissions, he admitted that, when the accident occurred, he was not pushing the buttons. Similarly, in an interrogatory response, he stated, "[T]he b[u]ttons had been pressed in prior operations but not immediately prior to the subject incident." (Punctuation omitted.) Finally, in his deposition, he testified that, when the accident occurred, he was not pushing the buttons "with any part of [his] body . . . ."

Hernandez argues that there was also evidence that the press was not supposed to operate unless both buttons were being pushed. He would have us infer that he must have been pushing the buttons. Hernandez himself testified, however, that the press was malfunctioning and sometimes operated on its own.

In addition, Rockland Branum, who was the chairman of Thermal's safety committee, testified: "[B]ecause *we found out that* [*Hernandez*] *did it with his elbows*, we put a cover over the top so you couldn't do that anymore." (Italics added.) Arguably, this testimony was objectionable as hearsay and/or not based on personal knowledge. Thermal, however, did not object to it. In fact, it was Thermal that introduced it. Accordingly, it constituted substantial evidence. (*Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1268; see also Evid. Code, § 353, subd. (a).) Nevertheless, Hernandez could not use any of this evidence to contradict his own sworn testimony; in particular, he could not use it to contradict his conclusively established response to a request for admission.

We therefore conclude that the trial court properly granted summary judgment.

III

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Thermal and against Hernandez.

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RICHLI
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.