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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

FRANCISCO CARRILLO-TORRES, Plaintiff and Appellant, v. LANELLE D. BERGEN et al., Defendants and Respondents.	A144704 (Alameda County Super. Ct. No. RG12656391)

Plaintiff Francisco Carrillo-Torres (Torres) was injured while working for a subcontractor on a home remodel project, and brought this premises liability action against the property owner, defendant Lanelle D. Torkelsen a/k/a Lanelle D. Bergen (Bergen) alleging negligence and seeking damages.[1] Bergen moved for summary judgment, contending she owed Torres no duty. The trial court granted the motion and Torres has appealed.

We conclude that summary judgment was properly granted because this action is barred by the exclusive remedy provisions of the Workers' Compensation Act (Lab. Code,[2] § 3600 et seq.), and Torres did not present prima facie evidence that Bergen affirmatively contributed to the cause of Torres's injuries.

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[1] Torkelsen was Bergen's married name. Torres initially also named Jere A. Torkelsen as a defendant; but he later dismissed the complaint against Torkelsen without prejudice and Torkelsen is not a party to this appeal.

[2] All statutory references below are to the Labor Code, unless otherwise indicated.

I. STATEMENT OF FACTS

On January 10, 2010, Bergen hired cross-defendant KL Construction, Inc. (KL Construction), a licensed general building contractor, to build an addition to her home and replace her garage. Bergen and KL Construction executed a standard "Short Form Agreement for Small Construction Contracts" (the contract), specifying that Sam Mathau of Mathau/Roche Design Group (Mathau) would be the project architect, and that Bergen would pay KL Construction a total of $249,000, in a specified number of installments.

The form contract included general conditions, which, among other things defined the responsibilities of the architect, Mathau, and the contractor, KL Construction. *Article 9* of the general conditions described the architect's responsibilities and authority, providing that Mathau: "[would] be the Owner's representative during the construction period"; "[would] make periodic visits to the site . . . . [and] keep the Owner informed"; "ha[d] authority to reject Work which [did] not conform to the Contract Documents"; and "ha[d] authority . . . to stop the Work, or any portion thereof, if necessary to insure its proper execution."

Article 11 of the general conditions described the responsibilities of "[the] Contractor [KL Construction]." Among other things, Article 11 required KL Construction to: "supervise and direct the Work"; "be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work"; "provide and pay for all labor, materials, equipment, [and] tools . . . necessary for the proper execution and completion of the Work"; "be responsible for the acts and omissions of all [its] employees and all Subcontractors, their agents and employees"; and "indemnify and hold harmless the Owner and the Architect . . . from and against all claims, damages, losses, and expenses . . . arising out of or resulting from the performance of the Work." *Article 12* required KL Construction to furnish the architect with a written list of any proposed subcontractors prior to the award of the contract and prohibited it from "employ[ing] any Subcontractor to whom [the

Architect or the Owner had] a reasonable objection." Additionally, *article 18* provided that KL Construction would "be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work." Appendices attached to the contract indicated Bergen would provide certain fixtures for KL Construction to install and certain supplies, and would complete other work herself or retain others to do so.

Once Bergen and KL Construction executed the contract, Bergen wrote an initial deposit check to KL Construction for $1,000. KL Construction's managing officer Kwok Wong then asked Bergen to write payment checks directly to individual workers, saying this would be easier for him as he would not have to deposit her checks and then write more checks paying workers; Bergen agreed. KL Construction did not issue W-2 forms or 1099 forms to the workers reporting the income Bergen provided in those checks, did not make payroll deductions for the income, and did not include the income in payroll reports it submitted to its workers' compensation insurance carrier, State Compensation Insurance Fund (SCIF). There is no evidence Bergen was aware of these omissions.

KL Construction's representative Wong negotiated an oral agreement with a subcontractor, Miguel Gonzalez of Miguel's Stucco, to perform stucco work. Bergen wrote Gonzalez a check on October 31, 2010.[3] About a month later, on December 1, 2010, Bergen emailed Dominic Kan, who was her KL Construction liaison, expressing concern that the stucco work had not begun, and remarking that it was "holding up a lot of other work." The stucco work commenced the same afternoon.

Gonzalez brought Torres and two or three other people to help him do the stucco work. Torres saw no other construction workers on the site while he was there, and

[3] The parties assert that Gonzalez did not have a contractor's license. Although they cite no evidence confirming this point, we assume it is true for purposes of our analysis.

spoke only to members of Gonzalez's team; he never spoke to Bergen.[4] Together, Gonzalez's team constructed scaffolding, moving it as the stucco work progressed. They did not have enough materials to include a guard or rail on the third floor of the scaffolding to prevent falls. But no one on Gonzalez's team said anything about this omission; they wanted to finish the job.

On December 4, 2010, Torres was standing on the third level of the scaffolding, detailing a stucco wall, without a belt or strap securing him. Focused on his work, he took a small step to the right without realizing he was at the edge of the scaffolding and he fell. Torres contends he dislocated and fractured his right wrist, fractured his left elbow, lacerated his scalp, and sprained his back, requiring surgeries and hospitalization costing $86,364.45. He asserts he was off work for about one year thereafter, continued to experience pain in his back, hand, and arm, and required future medical care estimated to cost $185,000.

KL Construction concluded it was Gonzalez's responsibility to assist Torres, and for that reason did not initially report the accident to its workers' compensation carrier, SCIF, did not assist Torres in submitting a claim to the carrier, and did not give Torres the information about how to do so himself. In December 2014, however, SCIF sent Torres a claim form and, in May 2015, SCIF agreed to accept the claim Torres subsequently submitted.[5]

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[4] Torres's first language was Spanish; he spoke only a few words of English.

[5] We previously granted Torres's unopposed request for judicial notice of a joint status report that he and KL Construction filed with the trial court subsequent to the summary judgment, supplying an update on the status of Torres's workers' compensation claim. We now grant Bergen's unopposed request for judicial notice of the declaration of SCIF claims adjuster Lesa Malanche, which KL Construction filed with the trial court in December 2015, advising that SCIF had agreed to pay Torres's claim, had authorized medical treatment, and was gathering information necessary for a final award.

II. PROCEDURAL BACKGROUND

On November 15, 2012, Torres filed a complaint against Bergen alleging one cause of action for premises liability and negligence. He contended Bergen was his employer on the home remodel project, but that he did not qualify for workers' compensation coverage under her homeowner's insurance policy, because he did not work the required number of hours. Bergen filed an answer to the complaint on December 20, 2012, generally denying the allegations and asserting several affirmative defenses, including one based on workers' compensation exclusivity. Simultaneously, Bergen filed a cross-complaint against KL Construction for indemnification, alleging that its negligence caused the injury. Acting as its own attorney, KL Construction filed an answer on March 4, 2013, generally denying the allegations of the cross-complaint and asserting its own affirmative defenses, including one denying it had employed Torres or authorized his employment. In February 2014, Torres amended his complaint to add KL Construction as a defendant. KL Construction subsequently retained counsel, who filed an answer to Torres's complaint, generally denying the allegations and asserting various affirmative defenses but not workers' compensation exclusivity.[6]

A. Bergen's Motion for Summary Judgment

Bergen moved for summary judgment on July 15, 2014 asserting that she owed no duty to Torres and did not cause the accident. As support for the first point, she cited *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*). Our Supreme Court there ruled that the nonnegligent hirer of an independent contractor was not liable in tort for an

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[6] We previously granted Torres's unopposed request for judicial notice of an entry on the California Secretary of State's website indicating the entity, KL Construction, has since dissolved. (Evid. Code, §§ 452, subd. (h), 453.) We deny Bergen's request for a judicial notice of another entry on the same website, which Bergen contends shows the existence of a similarly titled and subsequently formed entity, for whom Kwok Wong is named as the agent for service of process. Torres opposed the request, and Bergen has not explained the relevance of that information.

injury the contractor's employee sustained while performing inherently dangerous work that was subject to workers' compensation coverage. (*Id*. at pp. 692, 702.) The *Privette* rule applied here, Bergen contended because: she hired KL Construction as an independent contractor; KL Construction controlled the manner and means of accomplishing the work on her home remodel project; it employed Gonzalez and Torres; and it was responsible for any injury resulting from its own negligence or from the negligence of its employees. The doctrine of nondelegable duties, an exception to the rule, did not apply, Bergen contended, because there was no evidence her property was in an unsafe condition before KL Construction came onto the property to do the remodel job.

B. Torres's Opposition to Summary Judgment

Torres filed his opposition to the summary judgment motion on October 9, 2014. He contended *Privette* did not apply because there was a triable issue of material fact about whether Bergen—who had worked many years as a human resources manager for a general contractor—retained and exercised control over the project, acting as her own general contractor, and whether KL Construction and Gonzalez therefore qualified as her employees. As support for these points, Torres cited evidence that: Bergen's agent, architect Mathau, selected the contract form that Bergen and KL Construction used; Bergen wrote in all necessary contract details regarding the scope of the work and the timing and schedule for payments; Bergen directly paid the city for the necessary permits; Bergen selected and paid for most of the materials, arranging for delivery to the job site; Bergen ordered the concrete and hired the person who pumped the concrete for the foundation; Bergen reserved a (qualified) right to reject subcontractors; Bergen wrote individual checks directly paying all of the workers and subcontractors on the job; Bergen made an initial payment to Gonzalez before the stucco work commenced; and Bergen exercised the right to control the pace of the project by emailing KL Construction, pressuring it to commence the stucco work.

In support of his summary judgment opposition, Torres submitted the declaration of Arnold Rodio, as an expert on general construction practices and the roles of owner, general contractor, and subcontractor on home renovation projects. Rodio opined that Bergen's actions in connection with the project "were consistent with those of an owner acting in the capacity of a general contractor," and that her relationship with the workers "was that of employer-employee." Relying on Rodio's declaration, Torres contended Bergen was Gonzalez's employer and, under the doctrine of respondeat superior, responsible for his negligence in constructing the scaffolding. Bergen acted as her own general contractor, retained the right to approve subcontractors, and paid Gonzalez directly, Torres contended, supporting the inference that she hired Gonzalez. Although Bergen claimed KL Construction hired Gonzalez, Torres observed, her only evidence was Torres's statement on "information and belief" in an early discovery response, and this did not suffice. Further, if KL Construction had hired Gonzalez, Torres submitted, there should have been a written contract between the two and there was not.

Even if Bergen did hire KL Construction as an independent contractor, however, Torres asserted, she had a nondelegable duty to discover and cure dangerous conditions on her property, such as the unsafe scaffolding. Rather than cure the problem, however, Torres maintained, Bergen exacerbated it by failing to ensure Gonzalez was properly licensed and insured, and urging that the stucco work be done more quickly. Torres asked that the court deny summary judgment or, in the alternative, continue the hearing to allow him to complete key depositions and related discovery.

C. Bergen's Reply in Support of Summary Judgment

Bergen filed her reply brief on October 17, 2014. She rejected the suggestion she retained control of the project as a general contractor. While she acknowledged she wrote checks paying individual workers and Gonzalez, she submitted she did so at KL Construction's request, relying on its directions as to payment amounts and timing, without knowing most of the recipients. Similarly, although she paid for materials,

Bergen observed, KL Construction provided her the work schedules and told her when materials would be needed. Although she wrote in language describing the scope of the work for the contract, Bergen added, the text was dictated to her by the architect. Finally, Bergen submitted, her email asking when the stucco work would commence provided no directions about the manner or method for that work; she was merely voicing a common homeowner concern about the length of the project. Torres cited no legal authority indicating she assumed the role of general contractor by her actions, Bergen observed, and the expert declaration could not bridge that gap. Nor did the absence of a written contract between KL Construction and Gonzalez alone signify that she retained Gonzalez, Bergen asserted, particularly as KL Construction representative Wong testified in his deposition he negotiated an oral agreement with Gonzalez.

Further, Bergen submitted, even if she were the general contractor, she could not be held liable here because she did not affirmatively contribute to any unsafe practices, or assert control over the means and methods by which the work was accomplished. The cases Torres cited on the nondelegable duty issue were distinguishable, Bergen contended, because they did not involve injuries to a subcontractor's employee, and the unsafe condition here (the scaffolding) was not a part of her property. It was undisputed, Bergen observed, that she did not provide the scaffolding or participate in its construction. Finally, Bergen submitted, there was no need to continue the summary judgment hearing because the parties' essential roles were clear from the depositions conducted to that date.

D. Torres's Supplemental Opposition to Summary Judgment

After hearing argument from the parties on October 23, 2014, the trial court continued the matter to allow Torres to conduct additional discovery, and allowed supplemental briefing. Torres filed a supplemental brief on December 2, 2014, reiterating that Bergen had employed the stucco team. As support for his position, Torres contended: (1) Bergen controlled the manner and means of the stucco work, by deciding

stucco would be colored before it was applied, rather than being painted afterward as originally planned; (2) KL Construction acted for Bergen in retaining Miguel's Stucco, but was not the employer, because it did not supervise or pay for the stucco work, it did not list the stucco workers in its workers' compensation payroll reports, and it did not report Torres's injury to its workers' compensation carrier; and (3) by having Bergen write checks to workers directly, KL Construction avoided payroll obligations and dramatically reduced its workers' compensation premium, a benefit that it passed on to Bergen, because it agreed to complete her project at a cost that was significantly below the bid of its nearest competitor, all facts Bergen must have understood as a human resources professional.

E. Bergen's Supplemental Reply

Bergen filed her supplemental brief on December 11, 2014. She maintained Torres's new evidence did not alter the following facts: Bergen hired a licensed contractor, KL Construction, who retained Gonzalez, and Gonzalez hired Torres; under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 215 (*Hooker*), the *Privette* protections applied absent evidence that Bergen retained and exercised control over safety conditions on the job in a manner affirmatively contributing to Torres's injury; there was no such evidence; Bergen did not exercise control in a manner qualifying her as the employer simply by requesting that colored stucco be used; Bergen was not responsible for any malfeasance on KL Construction's part in its handling of workers' compensation matters; and Bergen's agreement to write checks paying workers directly did not remove the *Privette* protections.

F. Hearing on Bergen's Summary Judgment Motion

The trial court concluded its hearing on Bergen's summary judgment motion on December 16, 2014. At that hearing, the parties agreed Gonzalez could not be an independent contractor under section 2750.5, because he did not have a license to

perform stucco work, signifying that he was an employee as a matter of law.[7] Torres's counsel also agreed that KL Construction selected Gonzalez. But, counsel contended, the following facts created a triable issue of material fact about whether Bergen or KL Construction *employed* Gonzalez: Bergen wrote the checks paying Gonzalez (and other workers on the project); as an experienced human resources professional, Bergen had reason to know this allowed KL Construction to reduce its workers' compensation insurance costs by claiming a small payroll for the job, and allowed it to charge Bergen less for the project; Bergen had authority to terminate Gonzalez's work on the project, and Gonzalez would have had no contractual recourse; and there was no evidence KL Construction acted as an employer by giving direction to the stucco team.

Bergen's counsel maintained Bergen was protected from liability under *Privette* because she hired KL Construction, a licensed and insured contractor, who hired Gonzalez, and because Bergen exercised no control over project safety. Bergen's counsel seemed to agree that, while KL Construction might be considered Gonzalez's employer as a matter of law, because Gonzalez was unlicensed, there was no evidence KL Construction exercised control over the methods and means for performing the stucco work beyond the initial conversation with Gonzalez at the time of his selection. KL Construction's counsel appeared to concur, advising that his client had assumed Gonzalez was licensed and intended to retain him as an independent contractor.[8] Any error KL

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[7] Section 2750.5 provides in pertinent part as follows: "There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. . . . [¶] . . . . [¶] . . . [A]ny person performing any function or activity for which a license is required . . . shall hold a valid contractors' license as a condition of having independent contractor status . . ."

[8] KL Construction's counsel later asserted generally that his client's managing officer Kwok Wong had given Gonzalez regular directions, although he cited no evidence.

Construction made, by failing to include stucco workers in payroll records submitted to its workers' compensation carrier, was the result of ignorance, its counsel added, and not an intentional misrepresentation. Further, counsel contended, regardless of any such error, workers' compensation exclusivity applied because it was undisputed his client had a workers' compensation policy at the time of the accident.

G. Order Granting Summary Judgment

On December 17, 2014, the day after the hearing, the trial court issued an order granting summary judgment in favor of Bergen. The protections of *Privette* applied, the court concluded, because Bergen had hired KL Construction as an independent contractor, and KL Construction then retained Gonzalez who hired Torres. Under the contract between Bergen and KL Construction, the court observed, KL Construction was solely responsible for the means and methods of completing the project, and was responsible also for all safety precautions.

The trial court concluded the evidence cited by Torres did not demonstrate Bergen: hired, employed, or supervised Gonzalez or Torres; controlled the manner and means of the work; supplied the scaffolding or other equipment used on the project; or helped to construct the scaffolding. Further, even if there were evidence indicating Bergen acted as her own general contractor, the court concluded citing *Hooker*, *supra*, 27 Cal.4th at pp. 210, 215, Bergen could not be held liable to Torres because there was no evidence she exercised any retained control over job safety in a manner that affirmatively contributed to his injury. Evidence regarding whether KL Construction properly handled its obligations under the workers' compensation law, or whether Bergen understood the workers' compensation claims process, was "completely irrelevant" to these issues, the trial court ruled. Nor could Bergen be held liable for breaching a nondelegable duty to Torres as the property owner, the court concluded, because Torres had not identified any "concealed, preexisting dangerous condition" on her property that caused his injuries; rather, the court found, the undisputed evidence established the

hazardous condition that caused Torres's injuries was the scaffolding, which Bergen did not assist in assembling. After ruling on the parties' evidentiary objections, the trial court ordered the dismissal of Torres's complaint as against Bergen.[9]

Bergen's counsel served Torres with a copy of a notice of entry of judgment on February 9, 2015, and this timely appeal followed.

III. DISCUSSION

A. Standard of Review

" ' "The standard for deciding a summary judgment motion is well-established, as is the standard of review on appeal." [Citation.] "A defendant moving for summary judgment has the burden of producing evidence showing that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action. [Citations.] The burden then shifts to the plaintiff to produce specific facts showing a triable issue as to the cause of action or the defense. [Citations.]" ' " (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1050 (*American Way*).) " 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation, fn. omitted.]" (*Dammann v. Golden Gate Bridge, Highway and Transportation Dist.* (2012) 212 Cal.App.4th 335, 340.) " ' "The trial court must grant a summary judgment motion when the evidence shows that there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citations.] In making this determination, courts view the evidence, including all reasonable inferences supported by that evidence, in the

[9] Bergen requested judicial notice of the trial court's subsequent order ruling on KL Construction's motion for summary judgment. Because Bergen did not adequately explain the relevance of that ruling, and because the information is unnecessary to our analysis, we deny the request.

light most favorable to the nonmoving party. [Citations.]" [Citation.]' [Citation.]" (*American Way*, *supra*, 216 Cal.App.4th at p. 1050.)

" ' "On appeal, we review de novo an order granting summary judgment. [Citation.]" ' " (*American Way*, *supra*, 216 Cal.App.4th at p. 1050.) " '[T]he appellant has the burden of showing error . . . . [Citation.] . . . "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." [Citation.]' [Citation.]" (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1519.)

B. Duty of Care

Torres, after falling from an improperly constructed scaffolding while working on Bergen's property, sought to recover damages from Bergen, alleging that her negligence proximately caused his injury. To prevail on this cause of action, among other things, Torres must show Bergen owed him a legal duty of care. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) Torres contends Bergen owed him a duty under the theory of respondeat superior as the employer of his employer, Gonzalez. (See, e.g., *Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 396 ["Under the theory of respondeat superior, an employer is vicariously liable, irrespective of fault, for the tortious conduct of its employees within the scope of their employment"]; *Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396, 400 [in this context, the employer has a "derivative nondelegable duty"].) The trial court rejected this contention, however, finding instead "the undisputed facts establish[ed] that KL [Construction] was an independent contractor on Bergen's project; that KL [Construction] hired [Torres's] employer Gonzalez; and that

Gonzalez and [Torres] were not employees of Bergen." The trial court subsequently referred to "Gonzalez and [Torres]" as "employees of . . . KL [Construction]."

Torres first contends that the trial court erred in concluding Bergen was not Gonzalez's employer. This conclusion was not error. In reaching the conclusion, the trial court relied primarily on *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, which held that, "[u]nder the common law, ' "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." ' [Citations.]" (*Id.* at p. 531; see also *id.* at p. 535 [what matters is whether there is a " '*legal right* to control' " the person's activities], italics added.) Applying that test here, the trial court first examined the contract that described the relative authority Bergen and KL Construction each had over the project. That contract gave KL Construction *sole* responsibility "for all construction means . . . [and] methods," and responsibility "for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work." The trial court also considered the uncontradicted deposition testimony of KL Construction representative Wong that he negotiated an oral agreement with Gonzalez for the stucco work. And, finally, the court considered pertinent facts from Bergen's separate statement, including that "Bergen did not provide any direction or supervision to [KL Construction], Gonzalez or his workers on how to perform the renovation to her home"; "Bergen did not supply the scaffolding or any of the equipment that [KL Construction], Gonzalez or the workers used during the renovation of her home"; and "Bergen did not participate in the construction of the scaffolding."

Against all of these undisputed facts, the court considered the evidence proffered by Torres that: Bergen's architect Mathau provided the form contract for Bergen and KL Construction to use; Mathau had the right to approve subcontractors under the contract, and to approve work performed before Bergen made payments; Bergen wrote checks directly paying KL Construction's workers and Miguel Gonzalez, at KL Construction's

request and pursuant to its directions regarding payees and amounts; and Bergen paid for building permits and some materials, which she had delivered to KL Construction at its request based on its work schedule. The court concluded Torres's evidence did not demonstrate Bergen controlled the manner and means of the remodeling project generally or the stucco work specifically.

In his opening appellate brief, Torres cites no case law or other legal authority compelling a different conclusion. (*Golightly v. Molina*, *supra*, 229 Cal.App.4th at p. 1519 [it is the appellant's responsibility to affirmatively demonstrate error].) Instead, Torres cites a case, *Empire Star Mines Co. v. California Employment Commission* (1946) 28 Cal.2d 33, 43, overruled on other grounds in *People v. Sims* (1982) 32 Cal.3d 468, 479, fn. 8, which identifies an additional factor that can be considered in determining the existence of an employment relationship, viz. the right to discharge a worker at will. Torres, however, does not explain the relevance of that factor, nor does he point to any evidence Bergen had any such right to discharge Torres or any worker.[10] Because Torres does not develop his argument about the "discharge at will" factor, we need not consider the issue. (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.) We note, however, that *Empire State Mines* does not support Torres's position. There, the court did not find an employment relationship because the workers had the right under the contract to perform their labor entirely independent from the principal's supervision or direction. (*Empire State Mines*, *supra*, 28 Cal.2d at p. 44.) This factor supports the trial court's ruling here, as it was undisputed that under the contract KL Construction would perform its work independently subject to Mathau's quality control,

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[10] Elsewhere in his opening brief, Torres submits Bergen had a right under the contract to reject subcontractors. Torres characterizes this provision as conferring "dismissal rights." In actuality, it provided only that KL Construction would propose a list of subcontractors in advance, with Bergen and Mathau then reserving the right to reject any to whom they had a reasonable objection, before any subcontractor commenced work.

and that Bergen provided no direction or supervision to KL Construction, Gonzalez, or Gonzalez's workers.

In his reply brief, Torres contends that Bergen failed to negate the element of duty because she did not demonstrate there was no hypothesis under which she could be considered Gonzalez's employer, citing *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826. This is so, Torres argues, because Bergen failed to adduce evidence about the conduct of her representative, architect Mathau, or the control that he exercised on the project. But *Eriksson* does not support Torres's position. The court there reversed summary judgment in a wrongful death suit, concluding the defendant, a riding coach, did not meet her burden to demonstrate there was no triable issue of fact about whether she owed and breached a duty of care to the rider. (*Id*. at pp. 830, 849.) To meet that burden, the court observed, the defendant would have had to include in her separate statement of undisputed facts "a clear statement negating the element of duty." (*Id*. at p. 849.) She might have done so, the court suggested, by setting forth an undisputed fact that "she had no control over or responsibility as to" whether the rider and her horse participated in the competition during which the rider was killed, or that the rider's horse was not unfit for the competition. (*Ibid*.) The defendant there did neither.

Bergen, in contrast, here did include in her separate statement the undisputed facts that the agreement covering the project stated that KL Construction was "*solely responsible*" for all construction means and methods (italics added) and that Bergen did not direct or supervise any work on the project. These were clear statements indicating Bergen had no control over or responsibility for the means and methods employed to complete work on the project. Torres's unsupported hypothesis that "Mat[]hau must have exercised control" over Gonzalez because there is no evidence anyone else did so is pure speculation and not evidence that would support a finding in his favor. (See *Dammann v. Golden Gate Bridge, Highway and Transportation Dist.*, *supra*, 212 Cal.App.4th at p. 340.)

Apart from his citation of these two cases, Torres offers no legal argument supporting his position that the trial court erred in concluding Bergen was not Gonzalez's employer. Instead, he simply rehashes the evidence, attempting to minimize the materials the trial court relied on, while insisting that the evidence he presented sufficed to create a triable issue of fact. Torres suggests, for example, that the trial court relied on just two points in concluding Bergen was not the employer, i.e., KL Construction's selection of Gonzalez, and Bergen's denial that she controlled Gonzalez's work. He is wrong. As discussed, the trial court cited: the plain language of the contract governing the home renovation project, which specified that KL Construction (not Bergen) would supervise and direct the workers; uncontradicted evidence that KL Construction negotiated an oral agreement with Gonzalez for his work; and uncontradicted evidence—Bergen's statement under penalty of perjury and Torres's corroborating deposition testimony—that Bergen provided no direction or supervision to Gonzalez or his workers. This evidence sufficed to make a prima facie showing that Bergen was not the employer. (See, e.g., *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1123 [if the party moving for summary judgment makes " 'a prima facie showing of the nonexistence of any triable issue of material fact,' " the burden of production shifts to the opposing party].) The trial court did not err in determining that Torres's contrary evidence did not create a triable issue of material fact.

Torres also suggests the trial court erred because it relied on Bergen's undisputed material fact number six (UMF 6), which, in turn, relied on one of Torres's interrogatory responses, in which he asserted "KL [Construction] employed the services of Miguel Gonzalez." Torres contends it was error to consider this response, because it lacked foundation as he provided it on "information and belief," and it was later amended.[11]

[11] The amended response, which Torres does not quote or cite, was not much different; it asserted, again on "information and belief," that KL Construction "requested the services of Miguel Gonzalez." As Bergen points out, the trial court considered

While Torres is correct that statements on information and belief are inadmissible at trial (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1498), and insufficient to establish a point on summary judgment (*Overland Plumbing, Inc. v. Transamerica Ins. Co.* (1981) 119 Cal.App.3d 476, 483), he cites no authority suggesting the trial court committed prejudicial error in considering his verified discovery response; nor does he dispute the admissibility of the other evidence the trial court cited as support for its ruling. Because the other evidence amply supported the trial court's ruling, any evidentiary error was not prejudicial. (See, e.g., *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [a party claiming error must affirmatively show it was reasonably probable he would have received a more favorable result had the error not occurred].)

Torres submits Bergen had "active involvement" with the project by buying the materials, paying for the permits, sending an email expressing concern about the delay in the stucco work, and explaining an instruction to one of the tile workers. Torres, however, does not cite to any authority supporting his claim that, on this evidence, "a trier of fact could reasonably conclude that Bergen was the actual employer of Gonzalez" and we have found none. An owner's "active involvement" in a remodeling project is to be expected and, without more, cannot transform her into an employer.

Torres suggests the trial court mischaracterized the evidence in summarizing the testimony of KL Construction representative Wong by stating Wong "hired" Gonzalez. But the statement was a fair characterization of the evidence presented to the trial court. Torres's counsel himself conceded at the summary judgment hearing that KL Construction selected Gonzalez and Wong provided uncontradicted testimony that he negotiated an oral agreement with Gonzalez to perform the stucco work. Although

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Torres's response to UMF 6, and his supporting evidence, including the amended interrogatory response, and concluded neither created a triable issue of material fact. Again, Torres cites no legal authority compelling a contrary conclusion.

Bergen wrote two checks to Gonzalez, she testified she did not know who Gonzalez was even after Torres's injury and only recognized his name because she had written a check to him at KL Construction's request. The undisputed evidence was that KL Construction hired Gonzalez.[12]

Finally, Torres makes a cursory and wholly unsupported argument that the trial court placed an improper burden on him by requiring him to "demonstrate" that Bergen hired or employed Gonzalez or Torres, or controlled the project. As noted above, however, if the party moving for summary judgment makes " 'a prima facie showing of the nonexistence of any triable issue of material fact,' " the burden of production shifts to the opposing party. (*Food Safety Net Services v. Eco Safe Systems USA, Inc.*, *supra*, 209 Cal.App.4th at p. 1123.) Bergen met her initial burden here and the burden of production consequently shifted to Torres. We reject Torres's claim, therefore, that the trial court imposed an improper burden on him.[13]

C. Workers' Compensation Exclusivity

Torres also contends the trial court erred in applying the California Supreme Court's decision in *Privette* to conclude Bergen was not liable for his injuries, because Bergen's and KL Construction's payroll practices "subverted the federal and state

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[12] We reject Torres's contention that Bergen must have hired Gonzalez (and thus must have been his employer) simply because she wrote two checks paying him. Torres relies for this argument entirely on a dictionary's definition of the term "hire," but ignores case law discussing the test for determining whether an employment relationship existed. (See, e.g., *Ayala v. Antelope Valley Newspapers, Inc.*, *supra*, 59 Cal.4th at p. 531 [" ' "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control *the manner and means* of accomplishing the result desired" ' "], italics added.)

[13] In light of this conclusion, we need not address Bergen's argument, citing *Zaragoza v. Ibarra* (2009) 174 Cal.App.4th 1012, 1023, that, even if she could be considered Gonzalez's employer, the trial court's order granting summary judgment should be affirmed, because there also was no triable issue of negligence on her part.

systems for taxation and benefits related to laborers." To provide a framework for our analysis of this contention, we first discuss the *Privette* decision.

1. Privette v. Superior Court

Privette v. Superior Court, *supra*, 5 Cal.4th 689, established the general rule that, "when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594.) The Supreme Court explained its reasoning as follows:

"Under the Workers' Compensation Act [hereafter the Act], all employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' [Citation.]" (*Privette*, *supra*, 5 Cal.4th at pp. 696–697, fn. omitted.) "When the conditions of compensation exist, recovery under the workers' compensation scheme 'is the exclusive remedy against an employer for injury or death of an employee.' [Citations.] The purpose of this exclusivity provision is to give efficacy to the theoretical 'compensation bargain' between the employer and employee. [Citation.] In *Shoemaker* [*v. Myers* (1990) 52 Cal.3d 1], we described that bargain as follows: '[T]he employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations in the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort. [Citations.]' [Citation.]" (*Id*. at p. 697.)

Prior to *Privette*, the principal who hired the contractor/employer could also be liable in tort for the employee's injuries, under the California courts' expansive interpretation of the peculiar risk doctrine. (*Privette*, *supra*, 5 Cal.4th at p. 696.) In *Privette*, the court curtailed this interpretation, noting that it had been criticized because it produced "the anomalous result that a nonnegligent person's liability for an injury [was] greater than that of the person whose negligence actually caused the injury . . . ." (*Id*. at

p. 698.) Consequently, the court held that "[w]hen . . . the injuries resulting from an independent contractor's performance of inherently dangerous work are to an employee of the contractor, and thus subject to workers' compensation coverage, the doctrine of peculiar risk affords no basis for the employee to seek recovery of tort damages from the person who hired the contractor but did not cause the injuries." (*Id.* at p. 702.) As a result, the court held, the owner was entitled to summary judgment in an action brought against him by the employee of an independent roofing contractor, who was injured when he fell off a ladder while carrying a bucket of hot tar. (*Id.* at pp. 692–693, 702–703.)

2. Analysis

Here, the trial court found KL Construction "was an independent contractor on Bergen's project," and Torres does not seriously contest this point on appeal.[14] The parties also stipulated Gonzalez was not an independent contractor under section 2750.5 because he did not have a license to perform stucco work. This meant Gonzalez and his employees were statutory employees of the general contractor, KL Construction. (*Sanders Construction Co., Inc. v. Cerda* (2009) 175 Cal.App.4th 430, 434–435 [if a subcontractor is unlicensed, workers' compensation liability for the subcontractor's employees is imposed on the general contractor as a matter of law].) KL Construction was, therefore, liable for Torres's injuries under the Workers' Compensation Act, the trial court concluded, and, by extension, the *Privette* rule prohibited Torres's premises liability claim against Bergen. (See *Privette*, *supra*, 5 Cal.4th at pp. 692, 702.)

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[14] Although Torres signals his disagreement with the ruling by referring to KL Construction as the "putative" or "alleged" independent contractor and by asserting that it did not behave as a "normal" independent contractor would, he does not directly challenge the ruling by presenting a cogent legal argument under separate heading. He, therefore, forfeited the right to do so. (See, e.g., *Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179 [An appellant must state " 'each point under a separate heading or subheading summarizing the point,' " must support " 'each point by argument,' " and must cite authority, if possible; failure to do so "forfeits issues that may be discussed in the brief but are not clearly identified by a heading"]; Cal. Rules of Court, rule 8.204(a)(1)(B).)

On appeal, Torres challenges the ruling, contending the *Privette* rule does not apply here because this case involves special circumstances. In *Privette*, Torres notes, the injured worker was not denied prompt payment of workers' compensation benefits. (See *Privette*, *supra*, 5 Cal.4th at pp. 692–693.) In contrast, Torres points out, here it is undisputed that KL Construction's workers' compensation carrier, SCIF, denied his claim contending that he was not an employee and that the claim was untimely; further, he received no workers' compensation benefits for four years following his injury, and, although SCIF more recently reversed course and accepted his claim, it reserved its defenses in doing so, suggesting it still may not pay him any benefits.

Torres does not, however, explain his own two-year delay in submitting a workers' compensation claim after he secured the representation of counsel.[15] Further, the joint status report that he attached to his request for judicial notice does not support his claim that SCIF reserved its defenses when it reversed course and accepted his claim. The declaration of SCIF claims adjuster Malanche affirmed that SCIF agreed to compensate Torres in December 2015, approved medical treatment for him, and was collecting information to determine the amount of his benefits. Although there was a delay, therefore, there is no dispute Torres is entitled to benefits under the workers' compensation system.[16]

While we certainly do not condone the delay here, Torres cites no legal authority indicating that a delay defeats workers' compensation exclusivity or creates an exception to the *Privette* rule. Nor do we find such authority on our independent review. To the contrary, case law confirms that "[t]he trigger for workers' compensation exclusivity is a

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[15] Torres's counsel filed his civil complaint commencing this action in November 2012, but Torres did not file his workers' compensation claim with SCIF until December 2014.

[16] In his reply brief on appeal, Torres reiterates that he was denied workers' compensation benefits for four years, but does not repeat the concern he expressed in his opening brief that SCIF might still refuse to compensate him.

compensable injury." (*Charles J. Vacanti, M.D. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 813.) "Courts have . . . consistently held that injuries arising out of and in the course of the workers' compensation claims process fall within the scope of the exclusive remedy provisions because this process is tethered to a compensable injury. Indeed, every employee who suffers a workplace injury must go through the claims process in order to recover compensation." (*Id*. at p. 815.) Our Supreme Court, therefore, has "barred all claims based on 'disputes over [a] delay' " in providing workers' compensation benefits. (*Ibid*.)

Citing *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, Torres contends a property owner who violated state and federal law may not invoke workers' compensation exclusivity as a shield or, by extension, the *Privette* rule. In *Singh*, the plaintiff filed a civil suit alleging, among other things, that the employer violated Labor Code section 970 by making misrepresentations to induce him to relocate from India to California for employment. (*Id*. at pp. 344, 369.) The Court of Appeal ruled that workers' compensation exclusivity did not preclude that cause of action because the alleged injury resulted from conduct that violated "fundamental public policy." (*Id*. at p. 368, citing *Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 554 [confirming that section 970 established a fundamental public policy].)

Torres contends the same result is required here because Bergen "schemed" with KL Construction to illegally retain Gonzalez, who was unlicensed and uninsured, and to improperly reduce the costs of the project by having Bergen write checks to employees directly, allowing KL Construction to avoid making required payroll deductions and to reduce the payroll it reported to its workers' compensation carrier. Torres fails, however, to adequately develop this argument. He does not identify any specific law that he alleges *Bergen* violated, for example, or cite any case law establishing that her alleged conduct violated fundamental public policy. Instead, he resorts to overheated hyperbole,

while failing in most instances to provide record citations supporting his factual assertions. Further, the evidence, when found, does not support key assertions.

Torres contends, for example, that Bergen "knew (or should have known)" Gonzalez was unlicensed and uninsured because "she insisted on knowing the identities of subcontractors before the work started." It is true the form contract that Bergen and KL Construction used included a provision requiring the contractor to submit a list of proposed subcontractors to the architect and property owner, and allowed the latter to reject specific individuals if they had a reasonable objection. But Torres does not assert, and cites no evidence indicating, that KL Construction complied with this requirement by advising Bergen it proposed to hire Gonzalez as a subcontractor for the stucco work. The only evidence on this point is Bergen's uncontradicted deposition testimony that she did not know who Gonzalez was; that she wrote a check to him at KL Construction's request thinking he was an employee; and that she assumed Torres also worked for KL Construction when she learned of his injury. There was no triable issue of material fact indicating Bergen knew of the decision to hire Gonzalez as the stucco subcontractor or knew that he lacked a required license.

As noted, Torres also contends Bergen schemed with KL Construction to improperly reduce the costs of the project by having Bergen write checks to workers directly. Although, again, Torres does not provide the required record citations to support his factual assertions, it is undisputed Bergen wrote the checks to workers, and that KL Construction then failed to make required deductions, for example, for taxes and social security contributions. It also is undisputed that KL Construction did not include the amounts Bergen paid in payroll reports it submitted to its workers' compensation carrier. But, while Bergen undoubtedly made a questionable decision in acquiescing to the request that she pay workers directly, particularly in light of her experience as a human resources manager for a large general contractor, again Torres does not sufficiently develop his argument. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["To

demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error"].) Torres cites no evidence Bergen had any expertise in payroll requirements, or had access to the payroll reports KL Construction submitted to its workers' compensation insurance carrier. More importantly, he does not establish Bergen violated any specific statute or a fundamental public policy.[17] Nor does he contend Bergen's conduct—writing checks directly to workers—caused his injury. (See *Singh*, *supra*, 186 Cal.App.4th at pp. 368-369 ["The workers' compensation exclusivity rule does not apply to *an injury resulting from conduct in violation of a fundamental public policy*"], italics added.)

Quoting *Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430, 444, Torres contends " '*Privette* made clear . . . the doctrine of peculiar risk is founded on principles of equity and public policy.' " He then contends the same principles favor holding Bergen responsible here. *Lopez v. C.G.M. Development, Inc.*, *supra*, does not assist him, however, as the court there concluded the property owner did not have a duty to ascertain whether the subcontractor who employed the injured worker was properly insured. (*Id.* at p. 445.)

Torres points to language included in *Privette*, which recognized it was an objective of the Workers' Compensation Act " ' "to ensure . . . the cost of industrial injuries [would] be part of the costs of goods rather than a burden on society." ' " (*Privette*, *supra*, 5 Cal.4th at p. 697.) Here, he contends, application of workers' compensation exclusivity would not further that objective because the state of California,

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[17] Similarly, Torres faults Bergen because she did not post "required workplace notices," pay workers' compensation insurance premiums herself, ensure KL Construction paid workers' compensation insurance premiums covering him, provide him a workers' compensation claim form after he was injured, or report his injury to KL Construction's workers' compensation carrier. But he provides no record citations to support these factual assertions and cites no legal authority establishing she was obligated to take such actions. Accordingly, we disregard these assertions. (See *Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 628.)

through Medi-Cal, has already paid his initial medical bills and is statutorily precluded from recovering reimbursement. (See § 3716, subds. (a), (c) [if a person's employer fails to provide workers' compensation benefits, the person may apply to, and receive compensation from, the Uninsured Employers Benefits Trust Fund; the fund has no liability to pay for medical treatment paid pursuant to the California Medical Assistance Program].) Torres provides no record citations supporting his factual assertions on this point, however; nor does he explain his failure to apply for benefits from the Uninsured Employers Benefits Trust Fund. He also does not address the fact that SCIF subsequently authorized additional medical treatment for him and was gathering information necessary for a final award, costs that would be absorbed by the workers' compensation system and not by society at large. Further, Torres cites no authority supporting his theory that workers' compensation exclusivity does not apply here because his initial costs were paid through Medi-Cal. As he has not provided adequate authority or argument to support his contention, it is forfeited. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Finally, Torres contends Bergen failed to carry her burden of showing she did not exercise retained control over the job in a way that contributed to his injuries. Torres cites *Hooker*, *supra*, which held that a party who hires an independent contractor but "retain[s] control over safety conditions at a worksite," can be liable to an employee of the contractor if the hirer's "exercise of retained control *affirmatively contributed* to [an] employee's injuries." (*Hooker*, *supra*, 27 Cal.4th at p. 202.) Torres notes *Hooker*'s observation that a hirer might affirmatively contribute to an employee's injuries by omission, for example, if he or she "promise[d] to undertake a particular safety measure" but then negligently failed to do so, leading to an injury. (*Id*. at pp. 211–212 & fn. 3.) After quoting these portions of *Hooker*, however, Torres points to no evidence indicating that Bergen exercised retained control in a manner that affirmatively contributed to his injuries, either through action or omission. "[W]here, as here, the plaintiff fails to present

a triable issue as to whether the defendant's exercise of retained control affirmatively contributed to the employee's injuries, summary judgment is appropriate." (*Id.* at p. 212; see also, e.g., *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078 [summary judgment properly granted where undisputed evidence was that property owner did not direct how the work should be done nor otherwise interfere with the means or methods of accomplishing the work]; *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 717–719 [summary judgment properly granted where plaintiff presented evidence that the party who hired the independent contractor retained control over the work, but there was no evidence that the party affirmatively contributed to plaintiff's injury].) As discussed above, Torres also failed to establish the premise of the argument, i.e., that Bergen retained control over the work on the project.

Torres contends that Bergen failed to carry her burden of persuasion because she did not demonstrate that she did not affirmatively contribute to his injuries. We disagree. There is no dispute Torres was injured when he fell from an improperly constructed scaffolding. Bergen included the following facts in her separate statement, which Torres did not dispute: (1) "Bergen did not provide any direction or supervision to [KL Construction], Gonzalez or his workers on how to perform the renovation to her home"; (2) "Bergen did not supply the scaffolding or any of the equipment that [KL Construction], Gonzalez or the workers used during the renovation of her home"; and (3) "Bergen did not participate in the construction of the scaffolding." It is also undisputed that the contract assigned responsibility to KL Construction (not Bergen) for "initiating, maintaining, and supervising *all safety precautions and programs* in connection with the Work."[18] (Italics added.) It is beyond cavil that Bergen met her

[18] Although it is true, as Torres points out, that the contract provided KL Construction was "solely" responsible for construction means and methods, but did not use the word "solely" in describing its responsibility for job safety, it is also true the contract did not include any provision assigning Bergen responsibility for job safety. Nor does Torres cite evidence indicating she assumed such responsibility.

initial burden of persuasion on this issue and the burden then shifted to Torres "to establish, by means of competent and admissible evidence, that a triable issue of material fact still remain[ed]. [Citation.]" (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525.) Torres does not contend he met this burden.

For the foregoing reasons, we conclude Torres has not met his burden on appeal of showing the trial court erred in granting Bergen summary judgment.

IV. DISPOSITION

The judgment is affirmed.

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Schulman, J.[*]

We concur:

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Reardon, Acting P.J.

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Streeter, J.

[*] Judge of the Superior Court of California, County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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