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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PEDRO SUSANO HERRERA MARQUEZ, Plaintiff and Appellant, v. RESEARCH METAL INDUSTRIES, INC., Defendant and Appellant.	B329641 consolidated with B334617 (Los Angeles County Super. Ct. No. 20STCV49576)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, David K. Reinert and Dierdre Hill, Judges. Affirmed.

Mardirossian Akaragian, Garo Mardirossian, Armen Akaragian, and Adam Feit for Plaintiff and Appellant.

Robert Lucas Law, Robert W. Lucas; Law Office of Lawrence J. Lennemann, Lawrence J. Lennemann; The Law Office of Alan Keating and Alan Keating for Defendant and Appellant.

Pedro Susano Herrera Marquez (Herrera) suffered serious and permanent injury to his left hand while working for Research Metal Industries, Inc. (RMI). The injury occurred when a power press ram used for stamping metal parts unexpectedly stroked downward while Herrera's hand was beneath it. The question before us is not whether Herrera can seek compensation for this injury. He can and he has. Rather, this appeal requires that we resolve whether Herrera's right of recovery against his employer falls within the workers' compensation exclusivity provisions of the Labor Code,[1] or whether Herrera may also sue RMI in tort.

Subject to certain exceptions, workers' compensation liability, "in lieu of any other liability whatsoever," exists against an employer for any injury sustained by its employees arising out of and in the course of employment. (§ 3600, subd. (a).) "Where the conditions of compensation set forth in [s]ection 3600 concur, the right to recover such compensation is . . . the sole and exclusive remedy of the employee . . . against the employer." (§ 3602, subd. (a).) The underlying purpose of these exclusivity provisions is the workers' " 'compensation bargain.' " (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.) "[T]he employer assumes liability for industrial personal injury . . . without regard to fault in exchange for limitations on 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.]" (*Ibid.*)

Certain types of injurious employer misconduct remain outside the bargain. As relevant here, section 4558 provides that

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[1] Unspecified statutory references are to the Labor Code.

an injured employee may sue his employer in tort when the injury "is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press." (*Id.*, subd. (b).) This narrow exception limits tort liability to cases where "the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer." (*Id.*, subd. (c).)

In addition to filing a workers' compensation claim, Herrera sued RMI for negligence, arguing his claim fell within section 4558. The trial court granted summary judgment in favor of RMI, finding no triable issue that section 4558's exception to workers' compensation exclusivity applied. RMI then sought to recover from Herrera costs of proof pursuant to Code of Civil Procedure section 2033.420 based on Herrera's denial of certain requests for admission (RFAs) during discovery. The trial court denied the motion, finding Herrera had a reasonable ground to believe that he would prevail in proving up his denial of those RFAs.

Both parties now appeal. We affirm the grant of summary judgment, although for a different reason than that relied upon by the trial court. We also affirm the order denying an award of costs of proof to RMI.

BACKGROUND

A. The Accident

Herrera was injured on December 31, 2019, while operating a power press at work. According to a California Occupational Safety and Health Administration (Cal-OSHA) summary prepared after the accident occurred, "At the completion of [the press] stamping a piece of metal, the ram of the punch press

returned to the up position. As [Herrera] went to remove the piece of stamped metal from the punch press's tooling the punch press ram began its next cycle and came down onto [Herrera]'s left hand." "The malfunctioning of [the press's] air control valve did not allow the punch press[']s ram to lock in position after its upright stroke."

B. Herrera's Complaint and Section 4558

In December 2020, Herrera sued RMI as well as Doe defendants. Herrera asserted a single cause of action against RMI for negligence pursuant to section 4558 alleging that RMI failed to repair, maintain, or retrofit the power press and "removed the point of operation guard from the subject power press, rendering the safeguarding mechanism dysfunctional or unavailable for use."[2] To provide context before discussing the facts relevant to RMI's summary judgment motion and motion for costs of proof, we first discuss section 4558.

Our Supreme Court has explained that " '[s]ection 4558 was enacted as part of an extensive overhaul of the workers compensation system designed to address perceived inadequacies in the rules. Employees claimed benefits were too low, while employers and their insurers felt the system was too costly, particularly due to the increasing number of exceptions to the workers' compensation exclusive remedy rule. The resulting legislation reflected a carefully crafted compromise among employer, employee and insurer groups providing increased benefits for injured workers and their families and the potential

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[2] Herrera has also sued other defendants for negligence and on a strict liability/product liability theory. The claims against those defendants are not before us.

for decreased expenses for the employer by strengthening the exclusive remedy rules. In the final legislative package there were only four circumstances under which a worker could bring a civil action against the employer, including the power press exception at issue here.' " (*LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 286, quoting *Jones v. Keppeler* (1991) 228 Cal.App.3d 705, 709.)

Under section 4558, "[a]n employee . . . may bring an action at law for damages against the employer where the employee's injury . . . is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death." (*Id.*, subd. (b).) " 'Failure to install' means omitting to attach a point of operation guard either provided or required by the manufacturer, when the attachment is required by the manufacturer and made known by him or her to the employer at the time of acquisition, installation, or manufacturer-required modification of the power press." (*Id.*, subd. (a)(2).) " 'Removal' means physical removal of a point of operation guard which is either installed by the manufacturer or installed by the employer pursuant to the requirements or instructions of the manufacturer." (*Id.*, subd. (a)(5).)

Section 4558 does not define " 'point of operation guard.' " (*LeFiell Manufacturing Co. v. Superior Court* (2014) 228 Cal.App.4th 883, 893.) Courts interpreting section 4558 have generally defined the term to mean " 'any apparatus or device that keeps a worker's hands outside the point of operation while operating a power press.' " (*Id.* at p. 894.) In determining

whether a safety device is a point of operation guard, courts have not required the device to comply with industry regulations, although one court considered the applicable regulations "as a whole" to understand the meaning of the term " 'guard.' " (*Bingham v. CTS Corp.* (1991) 231 Cal.App.3d 56, 65; see also *LeFiell Manufacturing Co. v. Superior Court*, *supra*, 228 Cal.App.4th at p. 897 [rejecting "attempt[s] to import general safety regulations into [§] 4558"]; *Swanson v. Matthews Products, Inc.* (1985) 175 Cal.App.3d 901, 907 ["knowledge of specifications other than the manufacturer's is simply not relevant"].)

The statute makes clear that "[n]o liability shall arise under [section 4558] absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer. Proof of conveyance of this information to the employer by the manufacturer may come from any source." (§ 4558, subd. (c).)

"It is clear the Legislature did not intend *all* workers injured by the absence of a point of operation guard to bring a legal action. Rather, it intended to provide relief only for a specific portion of those employees—workers whose employer knowingly failed to install or removed guards from a machine where the original manufacturer designed the machine to have a protective guard while in operation. In the give-and-take of the legislative process the Legislature decided that employees . . . injured by their employer's failure to comply with general industry safety orders pertaining to point of operation guards and devices [including certain California safety regulations] [citation] would be limited to the increased benefits provided by the Worker's Compensation Act for the employer's serious and willful

misconduct. (§ 4553.)" (*Jones v. Keppeler*, *supra*, 228 Cal.App.3d at pp. 711-712.) Accordingly, the power press exception to the workers' compensation exclusivity rule in section 4558 "must be narrowly construed." (*LeFiell Manufacturing Co. v. Superior Court*, *supra*, 55 Cal.4th at p. 286.)

C. Evidence Regarding the Press

Federal Press manufactured the subject press, a Federal Press No. 10, in or about 1967. RMI purchased the press at auction in or about 2010. A Federal Press catalog obtained by Herrera after the accident depicted the company's model No. 10 as having a two-button operator control mounted directly on the machine. At the time of Herrera's injury, the subject press did not have such an original mounted two-button control. Rather, the press was equipped with a two-button control on a movable pedestal. Generally, two-button controls keep the operator's hands out of the area where the ram strikes the item being shaped. For the ram to stroke downward, the operator must depress and hold both buttons simultaneously, which requires the operator to use both hands. The ram strokes downward only a single time, no matter how long the buttons are depressed, and the operator must release and press the buttons again in order for the ram to stroke again.

1. *RMI's Person Most Qualified*

RMI's person most qualified, Salvador Vargas, testified that when RMI purchased the press it did not have a two-handed button control. Vargas acknowledged such a button control provides an anti-repeat safety function. Vargas testified that all punch presses require a two-button control and that RMI knew of that requirement for at least 10 years prior to Herrera's accident. A two-button control was industry standard and without it there

was a likelihood of serious injury to an employee. Therefore, RMI had a third party install a two-handed control system. The two-button control was mounted on a movable pedestal that could be "moved out" "about three feet" away from the press.

RMI did not receive any documents regarding the press at the time it purchased the machine other than possibly a receipt. The only documents RMI had regarding the subject power press at the time of Herrera's injury were maintenance logs. After Herrera's injury, Cal-OSHA requested RMI procure a service manual for a Federal Press No. 10 and RMI did so.

RMI did not know at the time of its purchase that Federal Press had manufactured the power press or whether the machine as originally sold came with a point of operation guard. When shown a photograph of the subject press with a portion circled, Vargas did not know whether the circled portion was where Federal Press had originally mounted a two-button hand control. RMI had approximately 15 power presses, but of those only the subject press was manufactured by Federal Press.

Vargas did not know whether the air valve in the machine at the time of the accident was a single or double solenoid valve, the difference between the two, or "[w]hat specifically failed in the valve that caused the power press to continue stroking." He acknowledged a single solenoid valve failure would mean the machine would continuously stroke, but did not know whether a dual solenoid valve failure would be any different. After acquiring the press, RMI did not change the valve until after Herrera was injured.

Vargas testified that the subject press had a light curtain, which is a safety feature that stops the press when a beam of light around the point of operation is obstructed by any part of

the worker's body, but that was "inoperable." He did not know who installed the light curtain, but stated it was part of the machine when it was purchased at auction. It is not clear from Vargas's testimony whether RMI disabled the light curtain or if it had been inoperable prior to RMI purchasing the machine. However, Vargas testified that other than adding the two-handed control, RMI did not make any other modifications to the machine.

2. *Herrera's Deposition*

In deposition, Herrera testified that at the time of injury, the punch press was fitted with a two-button control on a movable pedestal. He had to use both hands to depress the buttons simultaneously to operate the machine, and Herrera agreed the two-handed control was a safety device. Herrera confirmed the two-button control that he used was never removed from the subject power press. Herrera did not know whether the manufacturer of the power press provided the two-handed control to RMI or required any safety device on the machine that RMI had not installed. Herrera was never given and never saw a manual from the manufacturer. Herrera said that in his opinion, RMI's two-button control was too tall and therefore too close to the point of operation.

3. *Federal Press Catalog*

During litigation, Herrera obtained pages of a Federal Press catalog from a Michigan museum (the catalog). The catalog provided information relating to the Federal Press No. 10 as well as other models. Catalog pictures depicted Federal Press power presses both with and without two-button controls. In text, the catalog referred to two-button controls as follows: "Long stroke operation—inch operation through first 180°—then the palm

buttons may be released and the press will continue to the top of the stroke"; "anti-tiedown feature on RUN buttons. Both buttons must be released before actuating press clutch second time"; and under "optional features," "special mountings for push buttons." (Capitalization omitted.) The "optional features" list included "dual solenoid valve." The catalog does not refer to light curtains.

4. *Declaration of Herrera's Engineering Expert*

Herrera's engineering expert, James William Jones, declared that as manufactured by Federal Press, the subject press used a two-button control as part of its point of operation guarding. "The two buttons, as equipped by Federal Press, were . . . directly affixed to the machine, and by design not movable so that the distance between the point of operation and two buttons would always remain the same."

Jones also declared, "The control system for the point of operation guard has an air control valve." "There are different types of air control valves which could have been used for the subject press, including a single solenoid valve and double solenoid valve. Single solenoid valves should not be used in [presses like the subject press] because, among other things, they do not conform with [s]tate and [f]ederal requirements [and] . . . a single solenoid valve that malfunctions . . . can continue to deliver air to the clutch and brake, even if the user is not depressing the two hand controls to activate the ram. This in turn can cause the ram to stroke without any command from or warning to the user . . . . [W]hen a double solenoid valve malfunctions, it will fail safe (stopping the press), inhibiting further operation until the fault is corrected." Jones concluded that the subject press "was equipped with a single solenoid valve that became stuck in the open position and caused the ram to

stroke continuously without any command from Mr. Herrera." (Fn. omitted.)

Jones further declared that the press "had been equipped with light curtains," and identified the light curtains in a photograph of the subject press. He opined that based on his review of Vargas's deposition, RMI had disabled the light curtains. However, Jones did not identify Vargas's testimony that led Jones to that conclusion, and on appeal Herrera similarly fails to identify any such testimony. Jones did not opine one way or the other whether Federal Press had installed or required the light curtains.

Jones also did not opine whether the original press as manufactured by Federal Press used a single or dual solenoid valve. Nor did he identify any instruction from Federal Press that a dual valve needed to be used.

D. RMI's Motion for Summary Judgment

1. *RMI's Moving Papers*

On October 4, 2022, RMI moved for summary judgment. Although RMI argued there was no evidence as to several of the elements Herrera needed to satisfy under section 4558, we focus only on one as it is dispositive. RMI argued Herrera could not adduce evidence that "the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of [the] guards and conveyed knowledge of [the] same to [RMI]" as required under subdivision (c) of section 4558.

In support of this argument, RMI stated, without citation to evidence, that at the time it purchased the power press RMI "did not receive any instruction manual or documentation." Relying upon Herrera's deposition testimony that he did not know whether the manufacturer provided the two-handed control

to RMI and that he never saw a manual for the subject press, RMI further argued, "There [is] no evidence that the manufacturer required (or otherwise provided by specification) for the attachment of guards and no evidence that the manufacturer conveyed this information to [RMI] in any manner."

2. *Herrera's Opposition*

Herrera argued RMI had failed to shift the burden to him to demonstrate a triable issue. Herrera also objected to RMI's use of his testimony, arguing that, among other things, Herrera lacked personal knowledge about the press's history. The trial court overruled Herrera's objections.

Herrera further argued that he submitted evidence demonstrating a triable issue as to whether the manufacturer required a point of operation guard and conveyed that information to RMI. First, Herrera pointed to the catalog he had obtained from the Michigan museum, which included pictures of Federal Press power presses with mounted two-hand controls and text that referred to "palm buttons," "[b]oth buttons" and "push buttons." Herrera argued such catalogs were in the public domain and easily accessible. Second, Herrera cited Vargas's testimony that industry standards required a two-button safety switch be included with power presses to avoid serious injury, and that RMI knew that fact for approximately 10 years before Herrera's injury. Third, Herrera cited RMI's production in discovery of pages from the Federal Press manual that depicted a similar Federal Press with two-button controls mounted on the press. Fourth, Herrera argued RMI could "clearly see where the buttons were originally located, because of the empty screw holes, witness marks, and discoloration on the subject press." Fifth,

contending that RMI knew that a dual solenoid air valve was required as part of a two-button control system on the subject press, Herrera cited Vargas's testimony that an air valve failure will cause the machine to stroke without the user pushing the buttons. Sixth, citing photographs of the subject press and Jones's declaration, Herrera claimed RMI "disabled the light curtains," which was "not in accordance with how Federal Press manufactured the subject press."

In support of his opposition, Herrera submitted the entirety of Vargas's deposition transcript, among other evidence described above. During the deposition, Herrera's counsel repeatedly inquired about documents RMI had concerning the subject press.

3. *RMI's Reply*

In reply, RMI argued that section 4558 required a plaintiff to show that an employer had actual knowledge from the manufacturer concerning a point of operation guard and that constructive notice was insufficient. RMI argued, "[K]nowledge of either a hole in a machine or knowledge of . . . [Cal-]OSHA guard requirements is insufficient as a matter of law." RMI observed Herrera thus did not offer evidence that created a triable issue as to whether Federal Press conveyed point of operation guard information to RMI. RMI further argued, based on Vargas's testimony, that because RMI never changed or modified the valve between the time it procured the press and Herrera's injury, Federal Press must have installed the single valve.[3]

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[3] RMI further argued no light curtain was required because the press used a two-hand control.

RMI filed a declaration attaching, among other things, certain pages from Vargas's deposition. The trial court sustained Herrera's objection to the entirety of the declaration on the basis that new evidence could not be submitted with a reply brief. RMI does not challenge this evidentiary ruling on appeal.

4. *The Trial Court's Ruling*

On May 19, 2023, the trial court granted summary judgment. It found that because RMI submitted evidence that a functional two-button control was in use at the time of Herrera's injury, RMI shifted the burden to Herrera to demonstrate a triable issue. Herrera attempted to do so by arguing that the two-button control did not comply with the manufacturer's design or state and federal regulations and that the solenoid air valve did not comply with point of operation guarding requirements.

The court rejected these arguments. It explained, "It [was] undisputed that the injury occurred as a result of a failure of a component separate and apart from the two-handed control." It found construing the point of operation guard to include the air valve was inconsistent with case law and the plain language of section 4558. It also found case law made clear that section 4558 was not subject to general industry regulations. As to Herrera's argument that there was no guard installed because RMI's two-button control differed from the manufacturer's configuration, the court found Herrera "implicitly concede[d] that the two[-]button control [was] a 'point of operation guard.' " Further, the court found that Herrera's argument was inconsistent with the language of section 4558 that required a knowing removal or knowing failure to install.

E. RMI's Motion for Costs

1. *RMI's Motion and Evidence in Support*

On May 22, 2023, RMI moved to recover $29,669.80 as costs of proof pursuant to Code of Civil Procedure section 2033.420 based on Herrera's denial of two RFAs, Nos. 27 and 30. RFA No. 27 asked Herrera to "[a]dmit that [RMI] did not remove any point of operation guard from the subject [power press] as referenced in [your complaint]." RFA No. 30 asked Herrera to "[a]dmit that [RMI] did not fail to install any point of operation guard on the [power press] as referenced in [your complaint]." On April 28, 2022, Herrera denied both requests as "untrue."

RMI argued that shortly after Herrera served his RFA responses, it was evident that the denials were improper based on Herrera's deposition. On July 6, 2022, Herrera testified there was a two-handed control connected to the press that functioned as a safety device. When asked whether the two-button control and a point of operation guard were the same thing, Herrera responded, "Yes, you're correct." Although Herrera submitted an errata sheet changing this answer to "I don't know," RMI's counsel discounted the revision. In August 2022, RMI's attorney emailed Herrera's attorney stating Herrera's testimony contradicted his responses to RMI's RFAs. RMI requested that Herrera dismiss his lawsuit against it. On February 27, 2023, RMI's attorney again informed Herrera's attorney that Herrera should have admitted the requests, that RMI would seek to recoup attorney fees and costs on the issue, and that Herrera should dismiss his lawsuit.

In its motion, RMI also argued the trial court's summary judgment ruling proved that RMI had established the truth of the matters Herrera had denied.

2. *Herrera's Opposition*

On June 9, 2023, Herrera opposed RMI's motion. He argued RMI did not prove the truth of the matters set forth in the two RFAs. He further argued that an exception to the cost of proof statute—namely that he had a reasonable ground to believe he would prevail on the denied issue—applied. He explained that he had requested documents relating to the subject press, including those relevant to the condition of the press at the time of manufacture and at the time of RMI's purchase, as well as documents showing modifications to the press by RMI or any other party. RMI's July 2021 discovery responses stated that it had no such documents. Herrera also propounded special interrogatories asking RMI to describe any modifications or alterations it had made to the press and any point of operation guards installed by either the manufacturer or RMI. RMI objected that the phrase "point of operation guard" was vague and unintelligible and explained RMI "retrofitted a two-hand control safeguarding-device compliant with the safety standards including, but not limited to, those set forth in . . . California Code of Regulations, title 8, [sections] 4189 through 4216 and 29 Code of Federal Regulations [section] 1910.212(a)(l)." Thus, RMI's discovery responses did not negate that RMI had failed to install or had removed the manufacturer's required guarding.

Further, because RMI's discovery responses did not provide information about the manufacturer's intended guarding, Herrera's counsel conducted his own research and obtained copies of Federal Press's trade catalogs. Those catalogs "showed that the subject press – a Federal No. 10 – was sold by the manufacturer with two-button controls installed on the press, below the plate." A comparison of those images with the Cal-

OSHA photographs of the subject press demonstrated that Federal Press's two-button control was missing. Thus, the facts known to Herrera in April 2022 indicated that the subject press was designed to have a permanently affixed two-button control, and that RMI instead had "retrofitted" the press to use a movable two-button control. Herrera argued this information gave him reasonable grounds to believe that RMI could not establish compliance with applicable regulations or section 4558.

3. *RMI's Reply*

RMI's reply argued that it had proved true the matters Herrera denied because the court could only find a point of operation guard was in use if one had been installed and was not removed. RMI further argued that, despite its own objection in discovery that the term "point of operation guard" was vague and unintelligible, Herrera did not have reasonable grounds to deny the requests on the basis that he did not understand the term "point of operation guard" because of the term's legal definition. It also argued that Herrera effectively admitted in his deposition that RMI did not remove or fail to install a point of operation guard.

4. *The Trial Court's Ruling*

On November 20, 2023, the trial court[4] denied RMI's motion. It found Herrera had a "good faith reasonable belief at the time of denying the RFAs [that] was 'grounded in evidence' through investigation, the overall state of discovery, and the complex legal and factual issues."

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[4] Different judges heard RMI's summary judgment and costs of proof motions.

DISCUSSION

A. The Trial Court Did Not Err in Granting RMI's Motion for Summary Judgment

1. *Summary Judgment Framework and Standard of Review*

A "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant seeking summary judgment has met the "burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action . . . cannot be established." (*Id.*, subd. (p)(2).) 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 the cause of action." (*Ibid.*; see also *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1518.) "An issue of fact can only be created by a conflict of evidence. It is not created by 'speculation, conjecture, imagination or guess work.' [Citation.]" (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196.)

We review the trial court's summary judgment ruling de novo. (*Santos v. Crenshaw Manufacturing, Inc.* (2020) 55 Cal.App.5th 39, 47.) We need not defer to the trial court's reasoning and may affirm the summary judgment if it is correct on any ground that the parties had an adequate opportunity to address in the trial court, regardless of the trial court's stated reasons. (*Martin v. Board of Trustees of California State University* (2023) 97 Cal.App.5th 149, 161.)

2. *The Trial Court Did Not Err in Finding RMI Met its Initial Burden*

Herrera first argues the trial court should have denied RMI's motion for summary judgment because RMI did not carry its burden of producing evidence to show that Herrera could not establish one or more of the elements under section 4558. He argues the trial court thus should have denied the motion without Herrera needing to make any showing at all.

"Summary judgment law in this state . . . require[s] a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. . . . [T]he defendant *must* 'support[ ]' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' " (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855, fn. omitted, citing Code Civ. Proc., § 437c, subd. (b).)

In assessing whether the defendant has met its initial burden, however, one does not focus solely on the defendant's moving papers. Code of Civil Procedure section 437c, subdivision (c) states, "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact." It further explains that in making this determination, "the court shall consider all of the evidence set forth in the papers." " 'All of the evidence' includes evidence supplied by the plaintiff that supports the defendant's motion." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1267.)

Herrera's opposition included the deposition of RMI's person most qualified, Vargas. Vargas's testimony, as described

below, satisfied RMI's initial summary judgment burden and shifted the burden to Herrera to demonstrate a triable issue.

3. *There Is No Triable Issue as to Whether Federal Press Conveyed to RMI That a Point of Operation Guard Was Installed or Required*

On appeal, the parties (like the trial court did) focus on whether RMI's independent installation of a two-button control means RMI failed to install or removed a point of operation guard. However, under section 4558, "the culpable conduct is the employer's ignoring of the manufacturer's safety directive." (*Aguilera v. Henry Soss & Co.* (1996) 42 Cal.App.4th 1724, 1730; see *Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1134 ["From the plain language of section 4558, it is clear that an exception . . . only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required"].) Thus, we consider what, if anything, Federal Press conveyed to RMI concerning a point of operation guard. (§ 4558, subd. (c).)

Santos v. Crenshaw Manufacturing, Inc., *supra*, 55 Cal.App.5th 39 and *Bryer v. Santa Cruz Pasta Factory* (1995) 38 Cal.App.4th 1711 provide guidance on this question. In *Santos*, the court held a manufacturer's instruction manual that the employer acquired with the power press as part of an asset purchase from another company created a triable issue precluding summary judgment. The manual stated, "It is the employer's responsibility. . . to provide proper dies, guards, devices" and "dies should be provided with adequate guards to protect operator." (*Santos*, *supra*, at p. 44, capitalization and fn. omitted.) The employer conceded it knew the contents of the manual. (*Id.* at p. 51.) The court distinguished this statement in

the manual from signs posted on the machine that stated, "Warning[.] This press is supplied with a barrier guard attached. Do not remove the guard when operating." The signs on the machine failed to create a triable issue because despite their warning there was no evidence the signs came from the manufacturer. (*Id*. at pp. 44, 53-54, capitalization, bold, and underlining omitted.)

In *Bryer*, it was undisputed the employer did not receive any information from the manufacturer regarding the necessity of a point of operation guard. (*Bryer v. Santa Cruz Pasta Factory*, *supra*, 38 Cal.App.4th at p. 1713.) The employee, however, submitted affidavits showing that the employer "had 'noticed [a] hole in the machine' which indicated to [the employer] that a safety device should have been in that location and was missing." (*Ibid*.) Further, "[t]he individual who had sold the . . . machine to [the employer] indicated that he had probably pointed out the absence of a safety device when [the employer] purchased the machine." (*Ibid*.) In affirming summary judgment in favor of the employer, the court explained, "While [the] defendant was actually able to discern from the existence of a hole . . . that a safety device was missing, a hole cannot possibly constitute a *conveyance of knowledge from the manufacturer of the need for a point of operation guard*." (*Id*. at p. 1714.) Further, the employee offered no evidence that the representations from the third party from whom the employer acquired the machine were attributable to the manufacturer. (*Ibid*.)

Here, the summary judgment record shows that when RMI purchased the subject press at auction approximately 45 years after Federal Press had manufactured it, the press did not include a two-button hand control. Nor did RMI receive a

Federal Press manual or other documentation at the time of purchase. Thus, RMI made a prima facie showing that Federal Press did not convey any information to RMI concerning a point of operation guard.

This shifted the burden to Herrera to demonstrate a triable issue of fact as to what Federal Press conveyed to RMI. He failed to do so. Herrera first argues "someone" removed Federal Press's original two-button control. However, there is no evidence indicating a triable issue that that "someone" was from RMI. To the contrary, the subject press did not have a two-handed control at the time of purchase and the only modification RMI made to the subject press was to install its own two-handed control.

Herrera next argues RMI knew that the subject press required a two-button control as part of its "point of operation guard" for at least 10 years. But Vargas testified that RMI knew this because it was industry standard, and Herrera offers no evidence to suggest that RMI's knowledge came from Federal Press. Thus, like *Santos*, where the plaintiff could not show that warning signs expressly requiring a guard originated from the manufacturer, RMI's knowledge of what industry standards require does not create a triable issue. (*Santos v. Crenshaw Manufacturing, Inc.*, *supra*, 55 Cal.App.5th at pp. 53-54.) "[K]nowledge of specifications other than the manufacturer's is simply not relevant." (*Swanson v. Matthews Products, Inc.*, *supra*, 175 Cal.App.3d at p. 907.) Nor do the holes, marks, and discoloration on the machine where a two-button control may have been installed at some time in the past constitute a conveyance of knowledge from Federal Press. (*Bryer v. Santa Cruz Pasta Factory*, *supra*, 38 Cal.App.4th at p. 1714.)

Herrera also states, without further explication, that RMI produced a copy of a Federal Press operating manual during discovery and the manual includes a picture of " 'run' buttons" mounted on the sides of the machine. (Capitalization omitted.) To the extent Herrera seeks to imply RMI had the manual in its possession at the time of his injury, that is plainly untrue. The undisputed evidence shows RMI obtained the manual only *after* Herrera's injury because Cal-OSHA asked for the manual.

Herrera also refers to images in Federal Press's catalog, a document distinct from the manual. There is no evidence RMI possessed the catalog at the time of Herrera's injury, or even afterwards. Rather, it was Herrera who obtained the catalog from a museum in Michigan after he sued RMI. Notably, Herrera does not cite any authority that section 4558 requires an employer to seek out and obtain safety information from the manufacturer.[5]

Herrera argues a double solenoid air valve is part of the required point of operation guard that RMI failed to install. Assuming solely for the sake of argument that the air valve is part of the point of operation guard system, Herrera again fails to

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[5] In any event, the catalog does not establish that Federal Press required a two-button control mounted directly on its machine as a point of operation guard. The catalog depicts four machine models and at least one of them does not include any two-button control, suggesting such a control is not mandatory. Nor does any narrative portion of the catalog indicate mounted two-button controls are required. Instead, under "optional features" the catalog lists "special mountings for push buttons." (Capitalization omitted.) Thus, even if it was relevant the catalog does not indicate that Federal Press required push-buttons mounted directly on the machine.

show that Federal Press required a double solenoid air valve be used in its press, much less that Federal Press conveyed that information to RMI. Rather, Federal Press's catalog lists a dual solenoid air valve under "optional features." (Capitalization omitted.)

Finally, Herrera argues the machine "also had light curtains to prevent the subject press from stroking in the event of a failure, which [RMI] disabled." Without deciding whether more than one point of operation guard is required on a power press under section 4558, we observe there is no evidence that RMI disabled the light curtains. Vargas testified the light curtains were "inoperable," but that the only modifications RMI had made to the press between the time of purchase and Herrera's injury was to add the two-button control. More to the point, the Federal Press catalog has no mention of light curtains and a comparison between photographs of the subject press and the catalog images of all four Federal Press models clearly indicate the light curtains were not part of Federal Press's original design.

Accordingly, Herrera failed to carry his burden to demonstrate a triable issue that Federal Press "designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to [RMI]." (§ 4558, subd. (c).) As this is dispositive, we need not consider Herrera's arguments relating to other elements of section 4558.

4. *The Trial Court Did Not Prejudicially Err in Its Evidentiary Rulings*

Herrera also argues we should reverse because the trial court erred in considering RMI's evidentiary objections. He first contends the court should have disregarded these objections

because they did not follow the format prescribed in California Rules of Court, rule 3.1354 (rule 3.1354). He further argues the court erred in sustaining RMI's objections to paragraphs 13, 14, and 15 in Jones's declaration.

Rule 3.1354(b) requires that evidentiary objections submitted in connection with a motion for summary judgment "be numbered consecutively and . . . [¶] (1) [i]dentify the name of the document in which the specific material objected to is located; [¶] (2) [s]tate the exhibit, title, page, and line number of the material objected to; [¶] (3) [q]uote or set forth the objectionable statement or material; and [¶] (4) [s]tate the grounds for each objection to that statement or material." The trial court retains discretion to rule on objections not in conformity with rule 3.1354. (E.g., *Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1118.)

Although RMI did not follow the format required in rule 3.1354, it provided the court with sufficient information for the court to meaningfully consider RMI's objections and for Herrera to respond to them. RMI identified the objected-to material by document, paragraph number, and exhibit number when appropriate. Each objection stated one or more statutory grounds, and, for the majority of objections not based on relevancy, RMI explained why the material was objectionable. The trial court sustained six of these objections,[6] and did not

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[6] Herrera claims the trial court issued a "blanket ruling" on RMI's objections "without providing reasoning or identifying the bases," which frustrated his ability to obtain meaningful review of the objections. That is not what happened. The court ruled on each objection separately and sustained only six out of the 23 objections. For each of the six, RMI objected on only one basis, such that the basis of the court's ruling was clear.

abuse its discretion in excusing RMI's technical non-compliance with rule 3.1354.

As for the Jones declaration, in paragraphs 13 through 15 Jones opined that "[a]fter Federal Press sold the subject press, an unknown party removed the two button controls" and that this was evidenced by empty screw holes, witness marks, and discoloration. Jones further opined that the press was then equipped with a movable two-button control pedestal and "assuming the buttons on the pedestal were moved closer to the point of operation compared to the buttons affixed to the side of the subject press by Federal Press," the user's hands would be closer to the point of operation. This would allow the user to place his hands within the point of operation sooner. Additionally, using a movable two-button control meant the subject press had to conform to regulatory minimum distance requirements. Jones then quoted a California regulation and observed that RMI did not determine the distance between the control and the point of operation. As a result, he concluded RMI had no way to compare the distance between Herrera's hands and the point of operation at the time of his injury with the distance from the original button controls. Nor could RMI confirm whether it complied with regulatory distance requirements.

Even if we assume the trial court erred (and we do not imply that it did) in sustaining the objections to these portions of the Jones declaration, any error was harmless. Other unobjected-to photographs in the record sufficiently demonstrate the presence of holes, witness marks, and discoloration on the subject machine at a location where some Federal Press models had two-button controls mounted. Further, we resolve this appeal based upon the evidence (or lack thereof) regarding what

Federal Press conveyed to RMI, and these paragraphs have no bearing on that issue.

B. The Trial Court Did Not Err in Denying RMI's Motion for Costs

1. *General Legal Principles and Standard of Review*

Code of Civil Procedure section 2033.420, subdivision (a) states, "If a party fails to admit . . . the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees." Subdivision (b) directs that a court "shall make this order unless it finds" certain exceptions, one of which is "[t]he party failing to make the admission had reasonable ground to believe that that party would prevail on the matter." (*Id.*, subd. (b)(3).) The party seeking to avoid paying costs has the burden of proving an exception listed in subdivision (b) of Code of Civil Procedure section 2033.420. (*Samsky v. State Farm Mutual Automobile Ins. Co.* (2019) 37 Cal.App.5th 517, 524.)

We review an order denying a cost of proof award for abuse of discretion. (*Orange County Water Dist. v. The Arnold Engineering Co.* (2018) 31 Cal.App.5th 96, 118.) " ' "An abuse of discretion occurs only where it is shown that the trial court exceeded the bounds of reason. [Citation.] It is a deferential standard of review that requires us to uphold the trial court's determination, even if we disagree with it, so long as it is reasonable." ' [Citation.]" (*Spahn v. Richards* (2021) 72 Cal.App.5th 208, 217.) We review the trial court's findings of fact

for substantial evidence. (*Samsky v. State Farm Mutual Automobile Ins. Co.*, *supra*, 37 Cal.App.5th at p. 521.)

2. *Analysis*

A reasonable ground to believe that that party would prevail on the matter "means more than a hope or a roll of the dice." (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 532.) For one thing, the responding party has a duty to investigate. (*Id*. at p. 531.) Thus, in *Grace*, the trial court erred in denying the plaintiff's costs of proof motion when the defendant had reissued denials to RFAs on the eve of trial, including that a traffic light was red when he entered the intersection, despite "substantial contrary evidence supporting liability." (*Id*. at pp. 527, 530.)

That said, " '[e]xpenses of proving disputed facts which an opposing party denies in response to a request for admission are not recoverable simply because the party promulgating the request prevails at trial.' [Citation.] The opposing party must have no reasonable basis to believe it would prevail. [Citation.]" (*Orange County Water Dist. v. The Arnold Engineering Co.*, *supra*, 31 Cal.App.5th at p. 116.) "The question is not whether a reasonable litigant would have denied the RFAs. Nor is the question simply whether the litigant had some minimum quantum of evidence to support its denial (i.e., 'probable cause')." (*Id*. at p. 119.) "Consideration of this question requires not only an assessment of the substantiality of the evidence for and against the issue known or available to the party, but also the credibility of that evidence, the likelihood that it would be admissible at trial and persuasive to the trier of fact, the relationship of the issue to other issues anticipated to be part of trial (including the issue's importance), the party's efforts to

investigate the issue and obtain further evidence, and the overall state of discovery at the time of the denials and thereafter." (*Ibid.*)

RMI argues the trial court abused its discretion because substantial evidence did not support the court's finding that Herrera had reasonable grounds to believe he would prevail on the RFAs he denied.[7] RMI observes that none of the evidence to which Herrera cited showed RMI failed to install or removed a point of operation guard. Thus, in RMI's view, Herrera's belief that he would prevail was merely a hope or roll of the dice. RMI further argues that Herrera's reliance on state and federal regulations to prove his position conflicted with the law under section 4558 because "knowledge of specifications other than the manufacturer's is simply not relevant." (*Swanson v. Matthews Products, Inc.*, *supra*, 175 Cal.App.3d at p. 907.)

" 'Substantial evidence' is of course a legal term of art, which is not equivalent to a lot of evidence or the preponderance of the evidence. [Citation.] Instead, it is the minimum showing necessary to sustain a . . . finding in a party's favor, i.e., evidence and inferences that are reasonable, credible, and of solid value

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[7] RMI also argued the trial court abused its discretion because it based its decision on an incorrect legal standard. (See *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 [explaining applying an incorrect legal standard is an abuse of discretion].) However, RMI does not articulate what was incorrect about the legal standard the court applied. We therefore do not address this conclusory argument. (See *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 146 [" 'In order to demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record' "].)

that provide proof of the essential elements that the law requires in a particular case. [Citation.]" (*Orange County Water Dist. v. The Arnold Engineering Co.*, *supra*, 31 Cal.App.5th at p. 128, fn. 12.)

Here, substantial evidence supported the trial court's finding that *at the time* Herrera responded to the requests, he reasonably believed that he would prevail on the issue. Herrera conducted discovery to obtain information from RMI concerning the existence of point of operation guards on the press at the time of manufacture and of RMI's acquisition. RMI responded that it did not have any such documents. RMI further stated it had "retrofitted" a two-handed control on the machine, leaving open the possibility pending further discovery that RMI had disabled the manufacturer's originally designed point of operation guard. Herrera's counsel's own independent research confirmed that Federal Press had manufactured the subject press with a permanently mounted two-button control, and that at the time Herrera was injured that control was no longer attached to the machine. Thus, when Herrera responded to the RFAs, he had some basis upon which to reasonably believe RMI had removed the original guard or failed to install it.

RMI's other arguments also fail to demonstrate that the trial court abused its discretion. RMI suggests that Herrera's own deposition testimony concerning the point of operation guard contradicted his RFA responses. However, Herrera lacked the knowledge necessary to conclusively foreclose the possibility that RMI failed to install or removed the manufacturer's point of operation guard.

In its reply brief, RMI argues Vargas's deposition testimony conclusively demonstrated that when RMI purchased the

machine, it did not have the manufacturer's two-handed control. Even if we were to consider this belated argument, Vargas's deposition took place approximately 10 months *after* Herrera denied the RFAs at issue, and RMI does not argue nor cite any authority that Herrera was required to update his responses after Vargas's deposition.

Finally, relying on *Samsky v. State Farm Mutual Automobile Ins. Co.*, *supra*, 37 Cal.App.5th at pages 519 and 523, RMI argues the trial court erred by failing to rule first on whether RMI proved the truth of the matters encompassed in the RFAs through its summary judgment motion. We disagree. Even if the court had expressly held that RMI had so proved the truth of the matters at issue, it would not have changed the court's ultimate conclusion. RMI still would not have been entitled to costs despite such proof because the court found an exception under Code of Civil Procedure section 2033.420, subdivision (b) applied, namely that a reasonable ground existed at the time of the discovery response for believing to the contrary. Thus, whether RMI proved the truth of the matters encompassed by the RFAs was not dispositive.

DISPOSITION

The judgment and the order denying RMI's proof of costs motion are affirmed. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.

We concur:

ROTHSCHILD, P. J.

M. KIM, J.