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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DYLAN RIDGEL, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. SACV 12-0071 JGB (MLGx) **ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOC. NO. 27)**

Before the Court is a Motion for Summary Judgment filed by Defendant United States of America. After considering the papers filed in support of and in opposition to the Motion, and the arguments advanced by counsel at the May 20, 2013 hearing, the Court DENIES Defendant's Motion for Summary Judgment.

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I. BACKGROUND

A. Procedural Background

On January 17, 2012, Plaintiff Dylan Ridgel ("Ridgel") filed his Complaint against the United States of America ("the Government") alleging negligence under a premises liability theory pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80. (Compl. at 1 (Doc. No. 1).)

On April 22, 2013, the Government filed this Motion for Summary Judgment ("MSJ") along with:

1. Statement of Undisputed Facts ("SUF");
2. Declaration of W. Thomas Hendon, attaching four exhibits;
3. Declaration of Alberto Salazar;
4. Declaration of Archie Sanchez, attaching one exhibit; and
5. Expert report prepared by Charles Miller of construction consultants Bert L. Howe & Associates.

(Doc. Nos. 27 through Doc. No. 27-10.)

On April 29, 2013, Ridgel filed his Opposition, along with:

1. Statement of Genuine Issues of Material Fact ("SGI") (Doc. No. 28-1 at 1-29);
2. Statement of Additional Undisputed Facts ("SAUF") (id. at 30-39);
3. Objections to the Government's Evidence ("Objections");
4. Declaration of Kenneth G. Ruttenberg, attaching nine exhibits;
5. Declaration of Dylan Ridgel, attaching three exhibits;
6. Declaration of Daniel S. Daderian, attaching two exhibits; and
7. Declaration of David E. Kalb, attaching three exhibits.

(Doc. Nos. 28 through 28-23.)

Finally, the Government filed its Reply on May 10, 2013, along with two exhibits consisting of deposition excerpts. (Doc. Nos. 33 through 33-2.)

II. LEGAL STANDARD

A court shall grant a motion for summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter

of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. See Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998) (citing Anderson, 477 U.S. at 256-57); Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Because summary judgment is a "drastic device" that cuts off a party's right to present its case to a jury, the moving party bears a "heavy burden" of demonstrating the absence of any genuine issue of material fact. See Avalos v. Baca, No. 05-CV-07602-DDP, 2006 WL 2294878 (C.D. Cal. Aug. 7, 2006) (quoting Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc., 182 F.3d 157, 160 (2d Cir. 1999)).

Where the non-moving party has the burden at trial, however, the moving party need not produce evidence negating or disproving every essential element of the

non-moving party's case. Celotex, 477 U.S. at 325. Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's case. Id.; Horphag Research Ltd. v. Garcia, 475 F.3d 1029, 1035 (9th Cir. 2007). "[A] summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(c)).

The burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. See also William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial § 14:144. A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248.

In ruling on a motion for summary judgment, a court construes the evidence in the light most favorable to the non-moving party. Scott v. Harris, 550 U.S. 372, 378,

380 (2007); Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991); T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

III. FACTS

A. Evidentiary Issues

Ridgel objects to (1) the Expert Report of Charles Miller ("Miller Report") as inadmissible evidence (Objections ¶¶ 4, 5); (2) several declaration statements as improper opinion under Federal Rule of Evidence ("FRE") 701 (id. ¶¶ 16, 18, 34, 36, 37); and (3) various other factual contentions and declaration statements as legal conclusions, irrelevant, lacking foundation, or speculative (see generally Objections).

1. Miller Report

The Court sustains Ridgel's objection to the Miller Report and thus strikes it as inadmissible evidence. First, the Report is not attached to any declaration and is unauthenticated and unsworn. See Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773-75 (9th Cir. 2002) (finding exhibits improperly authenticated and thus inadmissible and stating that "[a] trial court can only consider admissible evidence in ruling on a motion for summary

judgment"). Courts in the Ninth Circuit "have routinely held that unsworn expert reports are inadmissible." Harris v. Extendicare Homes, Inc., 829 F. Supp. 2d 1023, 1027 (W.D. Wash. 2011); see also Shuffle Master, Inc. v. MP Games LLC, 553 F. Supp. 2d 1202, 1210-11 (D. Nev. 2008); King Tuna, Inc. v. Anova Food, Inc., No. 07-7451-ODW, 2009 WL 650732, at *1 (C.D. Cal. Mar. 10, 2009) (stating that "[i]t is well-settled that under Fed.R.Civ.P. 56(e), unsworn expert reports are not admissible to support or oppose summary judgment" and that "to be competent summary judgment evidence, an expert report must be sworn to or otherwise verified, usually by a deposition or affidavit").

Second, the Government failed to attach or otherwise provide the documents on which Miller relied in drafting his report. See FRCP 56(c); Harris, 829 F. Supp. 2d at 1027 ("The [expert] reports are also inadmissible because they fail to attach copies of the documents to which they refer. . . . The Court will not simply assume that the experts have accurately quoted or characterized those documents.") Even if the Court overlooks that images of multiple documents referenced are embedded in the Report, rather than being attached and authenticated as exhibits, the Government still fails to attach the four depositions and the response to interrogatories that Miller must have relied on to write his factual statement and from which

he drew his conclusions.[1] (See Miller Rep. at 32 (Documents Reviewed Nos. 8-12), 43-45.)

The Court therefore finds the Miller Report inadmissible and does not consider it here.

2. Improper Opinion

The Court overrules Ridgel's objections based on FRE 701, which states that non-expert witnesses are limited to offering opinions that are (1) "rationally based on the witness's perception"; (2) "helpful . . . to determining a fact in issue; and (3) "not based on . . . specialized knowledge" that is within the scope of expert witness testimony. (Objections ¶¶ 16, 18, 34, 36, 37.) The underlying evidence in the objected-to portions of the SUF consists of sworn statements from Alberto Salazar (Pipe Shop Supervisor), W. Thomas Hendon (Maintenance Team Supervisor), and Archie Sanchez (Occupational Health and Safety Specialist). All three were employed in these capacities by the Department of Veteran Affairs in Long Beach, California, the site of Ridgel's injury, and their

[1] The only citation Miller provides for his recitation of the facts regarding Ridgel's injury is the single-paragraph, undated "Report of Contact Regarding Dylan Ridgel's Injury on 3/23/11," which is signed by Alberto Salazar. (See Miller Rep. at 44, 45.) Miller primarily states facts that are not listed in this Report of Contact, and no other items listed in the Report's "Documents Reviewed" section could provide facts as to Ridgel's injury and the events preceding it. (See id. at 32, 43-45.)

testimony is properly based on personal knowledge and the conclusions they drew as part of their job responsibilities. (See Salazar Decl. ¶ 1; Hendon Decl. ¶ 1; Sanchez Decl. ¶ 1.) Statements such as Salazar's regarding the purpose and functioning of pipe at issue (Objections ¶¶ 16, 18) are properly interpreted as statements of his knowledge and belief developed in the course of his daily duties, which is material to Ridgel's negligence claim, rather than as expert testimony that goes primarily to the truth of the statement. Thus, the nature of Ridgel's objection is more appropriately considered in the determination of whether the Government has established the facts submitted in its SUF, not as a question of admissibility of the evidence.

3. Remaining Objections

The majority of Ridgel's remaining objections are either not properly grounded in evidentiary rules or are duplicative of the summary judgment standard, requiring consideration of material facts only, and thus unnecessary to resolve here. Regarding Ridgel's many objections under FRE 602, which requires that witnesses have personal knowledge of the matter about which they are testifying, the Court finds that there is clearly sufficient foundation for all except two of the of the

objected-to declaration statements, which are considered below.

First, Ridgel objects to the following sentence from Paragraph 7 of the Salazar Declaration (Objection ¶ 22): "After Mr. Ridgel and I walked through the door leading to the third floor roof, I took Mr. Ridgel far enough away from the door so he and I could see the top of the hot steam vent pipe that was still regularly emitting scalding condensate on the fourth floor roof." The Court construes this sentence as a statement that Salazar could see the top of the pipe and that Salazar believed Ridgel could see it too. The language "hot steam vent pipe" and "regularly emitting scalding condensate" refers only to Salazar's personal knowledge; the Court does not interpret the language to state that Ridgel had this knowledge as well. Thus construed, the Court overrules Ridgel's objection.

Second, Ridgel objects to Paragraph 6 of the Sanchez Declaration. (Objections ¶¶ 30-33.) Sanchez declares that, "[b]ased on what I learned about the work that Mr. Ridgel performed on May 23, 2011, it appears that Mr. Ridgel did not take adequate basic safety precautions." (Sanchez Decl. ¶ 6.) Sanchez then cites the following three examples of Ridgel's unsafe actions or inactions: (1) Ridgel did not use "fall protection"; (2) Ridgel

touched the pipe to determine its temperature; and (3) Ridgel "made no effort to inform any" supervisors or safety office employees before he went on to the roof where he suffered his injury. (Id. ¶¶ 6(a)-(c).) The Court sustains Ridgel's objections. Sanchez does not claim to have personal knowledge of and offers no foundation for these statements, which are the sole evidentiary basis for the Government's submitted facts regarding Ridgel's alleged lack of safety precautions. (See SUF ¶¶ 30-33.) As such, Sanchez's statement that it "appears that Mr. Ridgel did not take adequate basic safety precautions" is not based on personal knowledge. For such an opinion to be relevant, it would have to be based on specialized knowledge and satisfy the requirements for expert witnesses under FRE 702. The Court therefore sustains Ridgel's objection and does not consider Paragraph 6 of the Sanchez Declaration.

B. Undisputed Facts

The following material facts are supported adequately by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for purposes of the MSJ. Local R. 56-3 (stating that facts not "controverted by declaration or other written evidence" are assumed to exist without controversy); Fed. R. Civ. P. 56(e)(2) (stating that where a party fails to address

another party's assertion of fact properly, the court may "consider the fact undisputed for purposes of the motion").

Dylan Ridgel, doing business as Precision Firestop Contracting, was an independent contractor who had been hired on multiple occasions for discrete jobs at the Department of Veteran Affairs, Long Beach Medical Center in Long Beach, California ("VA"), including sealing water pipes and patching leaks for W. Thomas Hendon, the VA Maintenance Team Supervisor. (SUF ¶¶ 1, 2; SGI ¶¶ 1, 2; Hendon Decl. ¶ 2.) Ridgel also performed work at the VA for a different VA contractor and, prior to that, had done roof repairs at the VA with his father. (Hendon Decl. ¶ 2.) Ridgel's work at the VA also included installing synthetic caulking around pipes and ducts. (SGI ¶ 1; Ridgel Decl. ¶ 3.)

In early March 2011, Hendon requested that Ridgel perform water sealant work at several locations at the VA. (SUF ¶ 9; SGI ¶ 9.) On March 4, 2011, Ridgel faxed Hendon a work proposal listing the services to be performed and the proposed price. (Hendon Decl., Ex. 1; Ridgel Decl. ¶ 4.) After Hendon contacted Ridgel, VA personnel observed a water leak in the medical center and reported it to Alberto Salazar, the VA's Pipe Shop Supervisor, who investigated the leak and traced it up to

the fourth floor roof of building 126. (SUF ¶¶ 10, 11; SGI ¶¶ 10, 11.) Salazar went to the third floor roof and "observed [on the fourth floor roof] a hot steam vent pipe that was emitting steam and liquid" that Salazar "believed to be 190 degree condensate." (SUF ¶ 12; SGI ¶ 12.) According to Salazar, he "observed the vent pipe was having . . . almost like a volcanic effect, where water was gushing out every so often . . .[,] meaning like every minute or two." (SAUF ¶ 5; Ruttenberg Decl., Ex. D (Deposition of Alberto Salazar ("Salazar Dep.")) at 35:4-7.) Salazar "believed that the scalding condensate was probably eating away at the protective sealant on the roof at the base of the pipe, resulting in a leak of water into the walls." (Salazar Decl. ¶ 2; SUF ¶ 13; SGI ¶ 13.) Salazar then traced the fourth-floor pipe to the mechanical room in the basement, where he "discovered that a 'liquid mover' may have been malfunctioning," causing condensate water to back up and vent out of the pipe. (SUF ¶ 14; SGI ¶ 14; Salazar Decl. ¶ 3.) Salazar suspected the cause to be a malfunctioning liquid mover or regulator based in part on his "general experience at the VA[, where] [t]hat is a very common incident." (SAUF ¶¶ 6, 8; Salazar Dep. At 35:13-25.) After Salazar investigated the leak and observed the fourth-floor pipe emitting liquid, he told Hendon that the roof leak needed to be fixed and notified Jorge Guzman, the boiler plant supervisor, that the liquid mover may have been

malfunctioning. (SUF ¶¶ 15, 19; SGI ¶¶ 15, 19.) Salazar did not tell anyone that the liquid mover should be repaired before the roof leak was fixed and did not tell Hendon anything about the liquid mover. (SAUF ¶ 14, 15.) Salazar does not believe he ever showed Hendon the water emitting from the pipe and does not recall ever telling Hendon about the water emitting from the pipe. (SAUF ¶¶ 11, 12.)

Within "a few days" of Salazar informing Hendon about the leak, Ridgel came to the VA to see the site of the proposed job and to have Salazar explain the work that needed to be performed. (SUF ¶¶ 20, 21; SGI ¶¶ 20, 21.) After meeting Ridgel in the hallway on the third floor, Salazar led Ridgel through a locked doorway onto the third-floor roof, from where the pipe on the fourth-floor roof was visible, and pointed out the fourth-floor roof as the possible source of the leak and the proposed work site. (SUF ¶¶ 21, 22; SGI ¶¶ 21, 22; SAUF ¶¶ 18-20.) Salazar did not tell Ridgel that he thought the liquid mover was malfunctioning. (SAUF ¶ 31.) After meeting with Salazar, Ridgel, per Hendon's request, revised his work proposal and added the line, "Buildin[g] 126, Hot vent pipe 3rd floor roof." (SAUF ¶ 38; Hendon Decl, Ex. 2.)

On March 11, 2011, the VA processed and approved a Credit Card Worksheet requested by Hendon, which authorized payment of $2,380 to Ridgel and required him "[t]o repair rain leaks from roofs due to penetrations in BLDG's 5, 126, and 1." (SAUF ¶ 44; Ruttenberg Decl., Ex. A (March 11, 2011 Credit Card Worksheet).) There is no other text regarding the nature or scope of the required work on the Credit Card Worksheet.

On March 23, 2011, Ridgel went to the VA to perform the request work. (Ridgel Decl. 19.) Ridgel, without telling Hendon or Salazar, accessed the third-floor roof with the help of two VA employees, including Walter Schmidt, a member of the VA's engineering staff who was supervised by Hendon. (SUF ¶ 28; SGI ¶ 28; SAUF ¶¶ 66-77.) Neither Hendon nor Salazar had told Ridgel that he was authorized to access the fourth-floor roof without first telling them. (SUF ¶ 29; SGI ¶ 29.) Ridgel accessed the fourth-floor roof without first telling Hendon or Salazar. (SUF ¶ 33; SGI ¶ 33.) Once on the fourth-floor roof, Ridgel applied synthetic caulking around the vent pipe penetration. (SUF ¶ 37; SGI ¶ 37.) He did not see any steam or water emitting from the pipe, until, while kneeling down to spread the caulk, the vent emitted scalding water, inflicting burns on Ridgel's back, arms, shoulders, back of neck, right foot, ears,

forehead, lower-right side of abdomen, and buttocks. (SAUF ¶¶ 80, 88.)

Within 10 days of Ridgel's injury, the site of the injury was inspected separately by Olivia Parducho (the VA's Safety and Occupational Health Manager and Sanchez's supervisor), James M. Bachman (a Certified Safety Professional), and Brian Pepi Woods (the VA's Maintenance Control Manager and Hendon and Salazar's supervisor). (SAUF ¶¶ 93, 95, 97; Ruttenberg Decl, Exs. G, H, E.) Neither Parducho, Bachman, nor Woods saw the vent pipe emit water during their inspections; Parducho saw "nothing out of the ordinary" about the pipe or roof. (SAUF ¶¶ 94, 96, 97.)

One month after Ridgel's injury, Guzman requested a Credit Card Worksheet to authorize payment to a vendor for "New Complete Pump head assembly with valves for Condensate Return Pump Station in Building 126. Existing Pump station is damaged and not working properly . . . . Unit is causing condensate to back-up and water to shoot out from the bent line on roof. Making this a Safety Issue." (SAUF ¶ 98; Ruttenberg Decl., Ex. F (April 22, 2011 Credit Card Worksheet).)

At the time of his injury, Ridgel was a Class C-61 limited specialty contractor, with a D-12 subcategory

classification (as defined by the California Contractors State License Board) of Synthetic Products Contractor; he was not a C-39 roofing contractor. (SUF ¶¶ 3, 5; SGI ¶¶ 3, 5.)

C. Controverted Facts

The following material facts submitted by the Government are sufficiently controverted by Ridgel's evidence such that there exists a genuine dispute. See Local R. 56-3; FRCP 56(c).

First, there are genuine disputes as to most of the submitted facts regarding Ridgel's meeting and conversation with Salazar. The parties dispute what Salazar told Ridgel and the specificity with which Salazar pointed out the "proposed work site," that is, the vent pipe. (See SUF ¶ 23; SGI ¶ 23; SAUF ¶¶ 16-21.) The parties dispute whether Salazar told Ridgel that the pipe was a "steam pipe" and, if he did not, whether Ridgel knew it was a steam pipe. (See SUF ¶ 23; SGI ¶ 23; SAUF ¶ 81.) Further, according to Ridgel, when he met with Salazar, Salazar told him that he did not know where the leak was coming from, but that it could be coming from the fourth floor roof through a pipe or drain or could be the result of rain water or condensation build-up outside a vent pipe. (SAUF ¶ 16; Ridgel Decl. ¶

6.) While this does not directly controvert the Government's assertion that Salazar told Ridgel he "believed that the scalding condensate was deteriorating the penetration around the hot steam vent pipe, resulting in water leaks into the building" (SUF ¶ 23), it does raise the material fact question of what Salazar told Ridgel in total and what Ridgel would have reasonably interpreted from the combined statements.

More directly, Ridgel controverts the Government's assertions that Salazar instructed Ridgel to notify him or Hendon before he went up to the roof to fix the leak. (SUF ¶ 24; SGI ¶ 24; SAUF ¶¶ 25-28.) In addition to declaring he never received such instruction from Salazar, Ridgel submits evidence that (1) he was never required to seek approval before accessing the roof or, absent written instructions, before beginning his work during his multiple previous jobs at the VA (SAUF ¶¶ 52, 54); (2) he never received any written instructions to notify an employee before beginning his work or regarding any safety issue (id. ¶ 56); and (3) Hendon, Ridgel's primary contact at the VA for this job, declares that he never asked Ridgel to notify him before beginning work (id. ¶¶ 57-60).[2]

[2] In Paragraphs 25-27 of the SUF, the Government again asserts that Salazar instructed Ridgel to notify him or Hendon before beginning work, but also indicates that Salazar provided Ridgel with three specific rationales for this request; that is, Salazar gave Ridgel (continued...)

Second, the Government submits the fact that Ridgel accessed the third-floor roof without contacting Hendon, Salazar, "or any employees from the Long Beach VA Safety Office." (SUF ¶ 28.) Ridgel does not controvert this fact, but the submitted fact gives rise to further issues of material fact, as Ridgel did notify and was granted access to the third-floor roof by Walter Schmidt, a member of the VA's engineering staff who reported to Hendon. (SGI ¶ 28; SAUF ¶¶ 65-71.) Sanchez, a Safety Specialist at the VA, testified that when Ridgel asked Schmidt to unlock the door for him to the third-floor roof, Schmidt "should have probably notified the safety office" and that, at "safety meetings," Schmidt and others were likely "told . . . to make sure that they . . . call the safety office before . . . any contractors go up on the roof." (SAUF ¶¶ 72, 73; Ruttenberg Decl., Ex. C ("Sanchez Dep.") at 34:25-35:18; 36:4-16.)

Third, the Government asserts that, had Ridgel informed Salazar or Hendon prior to beginning his work,

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[2](...continued)
the notification instructions "so either Mr. Hendon or Mr. Salazar could provide Plaintiff access through the locked door" (SUF ¶ 25); "to determine how Plaintiff could actually reach the fourth floor roof" (id. ¶ 26); and "so the VA could take steps to ensure" Ridgel's safety (id. ¶ 27). As the Government has not submitted evidence to establish that Salazar stated these reasons to Ridgel, as opposed to just having thought them, these submitted facts are immaterial. (See Salazar Decl. ¶ 8 ("I gave Mr. Ridgel these instructions for three reasons: . . . .").)

they would have taken certain precautions that could have prevented Ridgel's injury. (See SUF ¶¶ 34-36.) While such asserted facts are hypothetical and thus difficult to establish, the most salient of the assertions, that notifying the appropriate people would have lead them to divert the flow of potential condensate away from the steam pipe, is controverted by Ridgel's evidence. (Id. ¶ 36.) Salazar, who allegedly gave Ridgel these instructions, had never operated the boiler system, which includes the liquid mover, and did not know how to operate it, and Salazar had not told Hendon about the potentially malfunctioning liquid mover. (SGI ¶ 36; SAUF ¶ 11, 12, 14, 15, 61.) Thus, there is a material issue of fact as to what role, if any, notifying Salazar or Hendon would have had with to Ridgel's injury.

IV. DISCUSSION

A. Substantive Law for Independent Contractors and Negligence Claims

In California, "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury

upon himself or herself." Cal. Civ. Code § 1714. "The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." Bily v. Arthur Young & Co., 3 Cal. 4th 370, 397 (1992). Nevertheless, where the injured party is an independent contractor or employee of an independent contractor, under California law, the injured contractor generally "cannot sue the party that hired the contractor to do the work." SeaBright Ins. Co. v. US Airways, Inc., 52 Cal. 4th 590, 594 (2011). This rule, established in Privette v. Superior Court 5 Cal. 4th 689 (1993), is subject to limited exceptions. See id.; Kinsman v. Unocal Corp., 37 Cal. 4th 659, 680 (2005). The exception to the Privette rule upon which Ridgel relies, a claim of premises liability, holds that a "hirer as landowner may be independently liable to the contractor's employee . . . if (1) [the hiring landowner] knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." Kinsman, 37 Cal. 4th at 675.

This exception, however, is subject to its own limitations. The hirer is not liable, for example, where the contractor creates the hazard or where the hazard is

apparent and the contractor fails to take appropriate safety precautions. See Gravelin v. Satterfield, 200 Cal. App. 4th 1209, 1216 (2011). "A hirer is also not liable where a worker is injured because the contractor 'has failed to engage in inspections of the premises implicitly or explicitly delegated to it.'" Id. (quoting Kinsman, 37 Cal. 4th at 677).

B. Judgment as a Matter of Law

The Court finds that Ridgel's submitted evidence shows that there are a number of genuine disputes of material fact in this matter. Thus, the evidence submitted by the parties does not establish facts upon which the Court can grant judgment as a matter of law under FRCP 56.

The Government argues that the evidence establishes that a reasonable jury cannot find that (1) Ridgel was injured by a concealed, hazardous condition; (2) Ridgel was not aware of or could not reasonably ascertain the condition of the pipe; and (3) the VA did not explicitly warn Ridgel about the pipe. The Court disagrees.

First, the Government argues that that the pipe was not concealed, as "there was nothing concealed about the fact that the pipe could emit steam" and Ridgel knew from his revised work proposal that he would be doing work

regarding a "hot vent pipe." (MSJ at 8.) This argument fails. There are disputed facts as to whether Ridgel knew the pipe was a steam pipe. Even if Ridgel did know this, the Government offers no explanation as to why a non-concealed "hot vent pipe" or "steam pipe" would lead to the conclusion that the pipe's "volcanic effect, where [190-degree] water was gushing out every so often," would not be a concealed, hazardous condition. (Salazar Dep. At 35:4-7.) Further, the concealed, hazardous condition may be more properly identified as the malfunctioning liquid mover. The evidence establishes or shows a genuine dispute of facts as to (1) the VA's lack of effort to repair the malfunctioning liquid mover before Ridgel's injury; (2) Salazar's failure to mention the malfunction to Hendon when telling him about what work needed to be done; and (3) Salazar's failure to mention the malfunction to Ridgel. Therefore, there is sufficient evidence on which a jury could reasonably find that Ridgel was injured by a concealed, hazardous condition.

In its Reply, the Government argues that Ridgel "has failed to present any evidence to establish that [the VA] was aware, or should have been aware, of an unsafe, hazardous condition with respect to the liquid mover on March 23, 2011." (Reply at 2.) The Government's argument is unavailing. Salazar investigated a reported

water leak and determined that a likely cause was a malfunctioning liquid mover in the basement that was causing the fourth-floor pipe to emit scalding water. Salazar also declares that when he took Ridgel to the third-floor roof, the pipe "was still regularly emitting scalding condensate on the fourth floor roof." (Salazar Decl. ¶ 7.) This constitutes evidence that the Government should have been aware that the liquid mover that was malfunctioning shortly before March 23, 2011, and which had not been repaired, would still be malfunctioning on March 23, 2011.

Second, the Government argues that Ridgel knew or could have ascertained the condition of the pipe. (MSJ at 9.) The factual disputes regarding what Salazar told Ridgel or whether Ridgel saw water emitting from the pipe when Salazar took him to the third-floor roof are the key issues of fact as to this element. Resolving these disputed facts and making credibility determinations regarding Ridgel and Salazar's statements are functions that must be performed by the jury, not the Court. See Anderson, 477 U.S. at 355; Aloe Vera of Am., Inc. v. United States of America, 699 F.3d 1153, 1165 (9th Cir. 2012). The Government contends that, despite these disputed facts as to Ridgel's knowledge, Ridgel would have ascertained the hazardous condition "had he taken even the most basic safety precautions." (MSJ at 9.)

The Government submits no admissible evidence though to show that Ridgel failed to take basic safety precautions. Nor does the Government establish that it was unreasonable for Ridgel not to inform Hendon or Salazar before he began his work, particularly in light of the evidence that Ridgel had performed work, including roof work, at the VA many times without going through or being asked to go through the notification procedures that the Government now describes as basic safety precautions. Further, the evidence shows that VA employees *did* know that Ridgel was beginning his work, as Hendon's subordinate, Walter Schmidt, and another VA employee helped Ridgel access the third-floor roof. The Government also fails to support its defense that Ridgel failed to make a reasonable inquiry or inspection. (Id. at 10.) While Ridgel submits evidence that he did inspect the worksite on March 23, 2011 (Ridgel Decl. ¶¶ 23-24), it is unclear what inspection Ridgel could reasonably be expected to perform that would allow him to discover a malfunctioning liquid mover in the basement causing the emission of scalding liquid from the pipe to which he was hired to apply sealant.

Third, the Government's argument that Salazar "explicitly warned" Ridgel "about the hot steam vent pipe" has no merit as it is clearly premised on controverted facts, as described above. (MSJ at 11.)

The Government also argues that Ridgel should be "barred from suing for premises liability" because he "was not qualified or licensed to perform the work he contracted to do for the Long Beach VA." (Reply at 7.) In its MSJ, the Government identifies and defines Ridgel's contractor license in the "Statement of Facts" section and in the SUF. (MSJ at 2-4; SUF ¶¶ 3-8.) The Government does not, however, make any arguments based on the terms of Ridgel's license or even mention the license or related facts in the "Argument" section of its MSJ.[3] The Court therefore does not consider this argument, as it is made by the Government for the first time in its Reply. See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]n argument raised for the first time in a *reply* brief . . . is not an argument that we may consider here.") (emphasis in original); In re WellPoint, Inc. Out-of-Network UCR Rates Litig., 865 F. Supp. 2d 1002, 1047 (C.D. Cal. 2011). The Court particularly notes here that a party cannot preserve lines of argument by listing relevant facts but then waiting until the Reply to make any arguments or draw inferences based on those facts. Cf. Smith, 194 F.3d at 1052 n.5 (stating a district court is "under no obligation to take factual claims made by the parties and fashion them into legal arguments"); Entertainment Research Group, Inc. v. Genesis Creative

[3] The Court notes that the Government had ample room to include such an argument in its 10-page MSJ.

Group, Inc., 122 F.3d 1211, 1217 (9th Cir. 1997) ("We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim. . . .").

The Court therefore finds that there are multiple genuine disputes of material fact established by the evidence and that the Government is not entitled to judgment as a matter of law. The Court thus DENIES the Government's Motion for Summary Judgment.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES the United States of America's Motion for Summary Judgment.

Dated: May 21, 2013

Jesus G. Bernal
United States District Judge