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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA,

Plaintiff,

v.

BERNZOMATIC, et al.,

Defendants.

NO. 2:10-cv-1224 FCD GGH

MEMORANDUM AND ORDER

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This matter is before the court on defendants Bernzomatic,¹
Irwin Industrial Tool Company, and W.W. Grainger, Inc.'s
(collectively, "defendants") motion for summary judgment pursuant
to Rule 56 of the Federal Rules of Civil Procedure.² For the

¹ Defendant Bernzomatic asserts that it was also
erroneously sued as Newell Rubbermaid, Inc.

² Plaintiff also filed a motion for leave to amend
complaint to add defendants discovered as a result of initial
discovery in this matter. Defendants do not oppose the motion.
Upon review of the submissions, good cause having been shown,
plaintiff's motion for leave to amend is GRANTED.

1 reasons set forth below,³ defendants' motion for summary judgment
2 is DENIED.

3 **BACKGROUND**⁴

4 This case arises out of injuries suffered by Scott Callaway
5 ("Callaway") and James Bartlett ("Bartlett") on September 2,
6 2008, during the course and scope of their employment with
7 plaintiff. (PUF ¶¶ 1-2.) Callaway and Bartlett were using a
8 Bernzomatic MAPP gas canister and Lenox torch tip assembly. (PUF
9 ¶ 2.) Specifically, the assembly has been identified as a Lenox
10 branded Bernzomatic torch with a MAPP gas cylinder, bearing a
11 Bernzomatic label ("the Bernzomatic product"). (PUF ¶ 3.) In
12 the course of using the Bernzomatic product, Callaway and
13 Bartlett suffered burn injuries. (PUF ¶ 4.) Plaintiff has paid
14 workers' compensation benefits to and on behalf of Callaway and
15 Bartlett. (PUF ¶ 5.) At the time plaintiff filed its opposition
16 to defendants' motion for summary judgment, plaintiff had
17 expended \$32,938.07 in benefits for the treatment of Bartlett's
18 injuries and \$134,524.48 in benefits for the treatment of
19 Callaway's injuries. (PDF ¶ 5.)

20
21 ³ Because oral argument will not be of material
22 assistance, the court orders the matter submitted on the briefs.
E.D. Cal. L.R. 230(g).

23 ⁴ Unless otherwise noted, the facts herein are
24 undisputed. (See Pl.'s Response to Defs.' Statement of
25 Undisputed Facts ("PUF") [Docket #27], filed Sept. 2, 2010; Pl.'s
Statement of Disputed Facts ("PDF") [Docket #27], filed Sept. 2,
2010.)

26 Plaintiff also filed numerous objections to defendants'
27 evidence. The court has reviewed the filings and concludes that
28 the evidence objected to is either irrelevant to the court's
determination or the objections are otherwise without merit.
Accordingly, the objections are OVERRULED.

1 On August 5, 2009, Callaway and Bartlett filed a personal
2 injury lawsuit against defendants. (PUF ¶ 6.) Subsequently,
3 counsel for Callaway and Bartlett contacted defendants' counsel,
4 stating that their expert witness had established that the
5 Bernzomatic product was not defective in design or manufacture
6 and, therefore, that they were going to dismiss the action.⁵
7 (PUF ¶ 7.) A stipulated dismissal with prejudice of the lawsuit
8 was signed by attorneys for Callaway and Bartlett and for
9 defendants and filed on January 4, 2010. (PUF ¶ 8.) The
10 stipulated dismissal provided that "each party shall bear its own
11 costs and attorneys' fees in connection with the lawsuit and the
12 negotiation and preparation of this Stipulation Dismissal." (Ex.
13 B to Decl. of Michael C. Osborne ("Osborne Decl."), filed Aug.
14 13, 2010.)

15 On April 5, 2010, plaintiff filed a complaint against
16 defendants in the Superior Court of California, County of Yolo.
17 Defendants were served on April 20, 2010. On May 19, 2010,
18 defendants removed the case to this court on the basis of federal
19 diversity jurisdiction.

20 STANDARD

21 The Federal Rules of Civil Procedure provide for summary
22 judgment where "the pleadings, the discovery and disclosure
23 materials on file, and any affidavits show that there is no
24 genuine issue as to any material fact and that the movant is
25

26 ⁵ Plaintiff objects to this evidence as inadmissible
27 hearsay. However, the evidence is not being offered for the
28 truth of the matter asserted, but rather as evidence of what was
said to defendants' counsel regarding dismissal. Further, the
reliability of the expert's opinion is irrelevant on this point.

1 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c);
2 see California v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998).
3 The evidence must be viewed in the light most favorable to the
4 nonmoving party. See Lopez v. Smith, 203 F.3d 1122, 1131 (9th
5 Cir. 2000) (en banc).

6 The moving party bears the initial burden of demonstrating
7 the absence of a genuine issue of fact. See Celotex Corp. v.
8 Catrett, 477 U.S. 317, 325 (1986). If the moving party fails to
9 meet this burden, "the nonmoving party has no obligation to
10 produce anything, even if the nonmoving party would have the
11 ultimate burden of persuasion at trial." Nissan Fire & Marine
12 Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000).
13 However, if the nonmoving party has the burden of proof at trial,
14 the moving party only needs to show "that there is an absence of
15 evidence to support the nonmoving party's case." Celotex Corp.,
16 477 U.S. at 325.

17 Once the moving party has met its burden of proof, the
18 nonmoving party must produce evidence on which a reasonable trier
19 of fact could find in its favor viewing the record as a whole in
20 light of the evidentiary burden the law places on that party.
21 See Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th
22 Cir. 1995). The nonmoving party cannot simply rest on its
23 allegations without any significant probative evidence tending to
24 support the complaint. See Nissan Fire & Marine, 210 F.3d at
25 1107. Instead, through admissible evidence the nonmoving party
26 "must set forth specific facts showing that there is a genuine
27 issue for trial." Fed. R. Civ. P. 56(e).

28 /////

1 No release or settlement under this chapter, with or
2 without suit, is valid or binding as to any party
3 thereto without notice to both the employer and the
4 employee, with opportunity to the employer to recover
5 the amount of compensation he has paid or become
6 obligated to pay and any special damages to which he
7 may be entitled under Section 3852, and opportunity to
8 the employee to recover all damages he has suffered and
9 with provision for determination of expenses and
10 attorney's fees as herein provided.

11 Section 3852 has been characterized as "codifying principles
12 of equitable subrogation, rather than indemnity." Fremont Comp.
13 Ins. Co., 121 Cal. App. 4th at 398 (noting that such
14 characterizations have been made in response to claims that §
15 3582 creates a source of substantive liability). "Equitable
16 subrogation is a legal device which permits a party who has been
17 required to satisfy a loss created by a third party's wrong to
18 step into the shoes of the loser and recover from the wrongdoer."
19 Id. "Because the subrogee steps into the shoes of the subrogor,
20 the third party has all defenses against the subrogee that it
21 would have against the subrogor." Id. (citing Fireman's Fund
22 Ins. Co. v. Maryland Cas. Co., 65 Cal. App. 4th 1279, 1291 (1st
23 Dist. 1998)).

24 However, "the generality that the Labor Code models common
25 law subrogation principles does not warrant disregarding the
26 explicit terms of the statutory scheme." Id. Rather, the
27 California Supreme Court has explained that subrogation
28 principles must be applied to further the legislative purposes of
the compensation statutes. Id. (citing Bd. of Admin. v. Glover,
34 Cal. 3d 906, 916-17 (1983)). The addition of §§ 3859 and 3860
to the compensation statutes in 1971 "authorize an employee's
settlement of his own unreimbursed claim for damages without the

1 employer's approval and recognize the employer's independent
2 right to proceed against the alleged tortfeasor to recover
3 payments it had made to its employee." Glover 34 Cal. 3d at 914.
4 Courts have construed the legislative purpose of these sections
5 as ensuring that "the third party is liable for all the wrong his
6 tortfeasance brought about; this includes both the damage to the
7 employee and payments made or required to be made by the
8 employer." Fremont Comp. Ins. Co., 121 Cal. App. 4th at 400
9 (citations and quotations omitted); see Van Nuis v. Los Angeles
10 Soap Co., 36 Cal. App. 3d 222, 229 (2d Dist. 1974) (noting that
11 the dual purpose of the subrogation provisions are to ensure full
12 reimbursement to the employer for the amount of compensation
13 benefits paid to the employee and to prevent an employee's double
14 recovery of payments for the same compensable injury). There is
15 also a "corresponding public policy to reduce the cost of
16 compensation insurance by allowing carriers to recoup payments."
17 Id. (citing Abdala v. Aziz, 3 Cal. App. 4th 369, 377 (2d Dist.
18 1992)). Accordingly, there is "a clear legislative policy
19 militating in favor of reimbursement whenever possible." Abdala,
20 3 Cal. App. 4th at 377; see Fremont Comp. Ins. Co., 121 Cal. App.
21 4th at 400 ("When [an employer] has *paid out money* it should be
22 able to recoup.") (emphasis in original).

23 Under the compensation statutes, an employer may have an
24 independent action against an alleged third-party tortfeasor,
25 notwithstanding a settlement or release between the tortfeasor
26 and the employee, if the statutory notice and consent
27 requirements in favor of the employer have not been satisfied.
28 See Roski v. Superior Court, 17 Cal. App. 3d 841, 846 (2d Dist.

1 1971).⁶ The obligation to provide notice of release or
2 settlement to an employer is generally imposed upon the employee.
3 See Glover, 34 Cal. 3d at 916 (noting that "the burden of failure
4 to comply with the statutory obligation of notice to [the
5 employer] of the employee's settlement is placed upon the
6 employee" because the employee is the only participant in the
7 settlement who knew of the employer's claim for reimbursement).
8 However, "where . . . the third party tortfeasor prior to
9 settlement is or reasonably should be aware of the possibility of
10 the employer's claim, such tortfeasor may also incur liability to
11 the employer under the statutory scheme because of his failure to
12 notify the employer of the settlement and to obtain its consent
13 thereto." Id. at 919; see Ventura County Employees' Retirement
14 Ass'n v. Pope, 87 Cal. App. 3d 938, 957 (1978) (noting that a
15 knowing third-party tortfeasor who proceeded with a settlement
16 and release with an employee - without the employee or the
17 tortfeasor giving notice of the prospective settlement to the
18 employer - entered into the settlement at its peril; absent such
19 notice to the employer, the settlement is not binding on the
20 employer and need not be taken into account in future litigation
21 against the tortfeasor); see also McKinnon v. Otis Elevator Co.,
22 149 Cal. App. 4th 1125, 1135 (3d Dist. 2007) (applying the same
23 principle to a settlement entered into by an employer and third
24 party without notice to the employee).

25
26 ⁶ The court's decision in Roski addressed the validity of
27 a settlement and voluntary dismissal agreed to by the employer
28 and a third party. Id. at 843. However, the Supreme Court has
noted that "[u]nder the California workers compensation scheme,
employer and employee third-party actions are interchangeable."
County of San Diego v. Sandax Corp., 19 Cal. 3d 862, 872 (1977).

1 In this case, Callaway and Bartlett's voluntary dismissal
2 with prejudice of their claims against defendants does not bar
3 plaintiff's lawsuit against defendants. First, the stipulated
4 dismissal of the claims, signed by both the employees' counsel
5 and defendants' counsel, served as a release of claims by the
6 employees against defendants.⁷ As such, the notice and consent
7 provisions of §§ 3859 and 3860 apply. Second, there is no
8 evidence that either the employees, employees' counsel,
9 defendants, or defendants' counsel provided plaintiff with the
10 requisite notice; nor is there evidence that plaintiff consented
11 to the release.⁸ Third, defendants concede that they were aware
12 that plaintiff had an interest in the claim. Specifically, in
13 their reply, defendants note that "there was an inspection of the
14 torch and cylinder attended by the injured workers'
15 representatives, Bernzomatic's representatives, and also the
16 Regents' representatives." Further, the employees' complaint
17 "specified all the identifying and factual details of [the]
18 accident and injury" that occurred during "their course and scope
19 of employment with the University of California, Davis."
20 McKinnon, 149 Cal. App. 4th at 1137 (noting that the third party
21 knew or reasonably should have been aware of the employee's
22

23 ⁷ While defendants assert in their reply that the
24 dismissal was not the result of a "negotiated" release or
25 settlement, nothing in the compensation statutes requires such
26 negotiation. Rather, §§ 3859 and 3860 refer to any "release or
settlement." Moreover, the stipulated dismissal included a
mutual waiver of costs. (Ex. B to Osborne Decl.)

27 ⁸ See Van Nuis, 36 Cal. App. 3d at 230 ("The conceivable
28 reason an employer would withhold his consent to a settlement is
that the settlement does not include the amount of compensation
benefits paid by the employer.").

1 possible claim for damages as a result of the employer's
2 complaint); (Complaint for Damages for Personal Injuries, Ex. A
3 to Osborne Decl., filed Aug. 13, 2010, ¶ 5). Therefore,
4 defendants were aware or reasonably should have been aware of
5 plaintiff's claim for reimbursement. Accordingly, under the
6 circumstances, plaintiff has an independent action against
7 defendant, notwithstanding the employees' release because the
8 statutory notice and consent requirements in favor of the
9 employer have not been satisfied.

10 Defendants' reliance on Hubbard v. Boelt, 140 Cal. App. 3d
11 882 (4th Dist. 1983), is misplaced. In Hubbard, the court noted
12 that it was established that the employee's claim was barred by
13 the "fireman's rule" because the employee had "knowingly and
14 voluntarily confronted a hazard" and thus, the employee was not
15 entitled to damages. Id. at 883. The court held that as the
16 employee did not have a claim for damages, the employer similarly
17 did not have a claim under § 3852 because "an employer who has
18 paid benefits to an injured employee cannot collect reimbursement
19 from a party who is immune to suit by the employee." Id. at 884.
20 However, unlike this case, Hubbard addressed an underlying
21 defense on the merits of the claim against the defendant; it did
22 not involve a release or settlement of the underlying claim.
23 Further, unlike this case, no statutory provisions were directly
24 implicated by that defense. Accordingly, because Hubbard did not
25 involve a release or settlement or raise issues under §§ 3859 or
26 3860, the court's reasoning and conclusion in that case is
27 unpersuasive.

28 /////

1 For the foregoing reasons, and in light of the "clear
2 legislative policy militating in favor of reimbursement whenever
3 possible," the dismissal of the employee's lawsuit does not bar
4 plaintiff's suit against defendants.

5 **B. Evidence of Defect**

6 To set forth a claim of product defect, a plaintiff must
7 "present substantial evidence" that a defendant manufactured the
8 product, the product was defective in its manufacture or design,
9 the defect existed when the tire left the defendant's possession,
10 the defect was the cause of the injury, and the injury was caused
11 by a reasonably foreseeable use. Stephen v. Ford Motor Co., 134
12 Cal. App. 4th 1363, 1370 (2d Dist. 2005). "[W]here . . . the
13 complexity of the causation issue is beyond common experience,
14 expert testimony is required to establish causation." Id. at
15 1373.

16 In this case, there is conflicting evidence regarding
17 whether defendants' product was defective and whether any such
18 defect caused Callaway and Bartlett's injuries. Defendants rely
19 upon Callaway and Bartlett's retained expert,⁹ Michael O'Connor.
20 O'Connor, a licensed structural, electrical, and mechanical
21 engineer, determined that the cylinder breach, which was a
22 substantial factor in the injuries, was due to improper handling
23 and user abuse, not manufacturing or design defect. (See PUF ¶
24 9-12.) Plaintiff has retained the services of Ramesh Kar

25
26 ⁹ Plaintiff objects to consideration of O'Connor's
27 declaration because it contends there has been no showing that
28 the conclusion was based on reliable principles and methods.
Because the court concludes that plaintiff has raised a material
issue of fact regarding defect and causation, the court need not
reach the merits of this objection.

1 ("Kar"), Ph.D., P.E., a Registered Professional Metallurgical
2 Engineer and a Board Certified Diplomate by the American Board of
3 Forensics Examiner. (PDF ¶¶ 5-6.) Kar concluded that the
4 premature failure in the brazed neck region of the cylinder was
5 not caused by abuse, accidental dropping of the cylinder, or
6 impact stresses. (PDF ¶ 10.) Rather, he asserts that
7 macroscopic examination of the fractured neck region "indicates
8 that failure more likely than not was caused by a serious
9 metallurgical manufacturing defect in the brazed region of the
10 neck." (Decl. of Ramesh J. Kar, Ph.D., P.E., filed Sept. 2,
11 2010, ¶ 13.)¹⁰

12 Accordingly, because plaintiff and defendants have proffered
13 conflicting evidence regarding whether there was a defect and
14 whether the defect cause the injuries, summary judgment is
15 inappropriate.

16 **CONCLUSION**

17 For the foregoing reasons, defendants' motion for summary
18 judgment is DENIED.

19 IT IS SO ORDERED.

20 DATED: December 7, 2010



21 _____
22 FRANK C. DAMRELL, JR.
23 UNITED STATES DISTRICT JUDGE
24
25
26

27 _____
28 ¹⁰ Defendants did not respond to plaintiff's evidence
regarding defect or causation in their reply.