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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PHILADELPHIA INDEMNITY  
INSURANCE COMPANY, et al.,

Plaintiffs,

No. C 12-0567 PJH

v.

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

SIMPLEXGRINNELL LP,

Defendant.

\_\_\_\_\_ /

Defendant's motion for summary judgment came on for hearing before this court on March 6, 2013. Plaintiff Philadelphia Indemnity Insurance Company appeared by its counsel Carl Guerrieri; plaintiff Mid-Century Insurance Company appeared by its counsel Dean A. Alper; and defendant SimplexGrinnell LP appeared by its counsel Randall Haimovici. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS defendant's motion as follows and for the reasons stated at the hearing.

**BACKGROUND**

This is an insurance subrogation case in which the plaintiffs seek compensation for payment on property damage claims. University of Sports, LLC ("UOS") leased premises ("the UOS building"), which since 2008 has been owned by El Capitan Investments, LLC ("El Capitan"). Plaintiff Philadelphia Indemnity Insurance Company ("Philadelphia") issued a policy of casualty insurance to UOS, and plaintiff Mid-Century Insurance Company ("Mid-Century") issued a policy of casualty insurance El Capitan.

**United States District Court**  
For the Northern District of California

1           The policies insured UOS and El Capitan from loss due to water, fire, and other  
2 catastrophes to their businesses, business personal property, real property, and other  
3 resulting damages as described in the policies. The policies also provided that in the event  
4 of an insured loss, the insurers would be subrogated to any rights that the insureds might  
5 have against a third party who was responsible for the loss.

6           In 2002, the UOS building was owned by Bishop & Bishop Land LLC (“Bishop &  
7 Bishop”), which retained Zak’s Enterprises (“Zak’s”) to serve as general contractor on a  
8 project to remodel the building. The remodeling project, which was paid for by Bishop &  
9 Bishop, included the construction of an indoor soccer field as part of the premises to be  
10 leased to UOS. As part of the deal, William Bishop (a member of Bishop & Bishop) and  
11 Chris Dzulak (owner of Zak’s) became part owners of UOS.

12           According to the testimony of Mr. Dzulak, Bishop & Bishop hired an architect to  
13 prepare the plans, and to coordinate with the city and the structural engineer. Bishop &  
14 Bishop did not contract directly with any of the subcontractors. Mr. Dzulak oversaw the  
15 remodeling project on a daily basis, and Zak’s entered into a contract with defendant  
16 SimplexGrinnell LP (“Simplex”) for work on the fire sprinkler system, to include expanding  
17 the existing sprinkler system and installing two-piece head guards to protect the indoor  
18 soccer facility’s sprinkler heads from soccer balls.

19           Simplex installed approximately 200 sprinkler head guards at the building, including  
20 above the soccer field. Simplex sells one and two-piece head guards; two-piece head  
21 guards are stronger than one-piece guards. According to the product literature, both the  
22 1-piece and the 2-piece head guards “are designed to provide protection against low level  
23 impacts to the sprinkler head.” The 2-piece design “features a cage and clamping base  
24 plate” which can provide “additional protection for sprinklers that may experience greater  
25 opportunity for repeated abuse.”

26           Mr. Dzulak testified that he had a strong understanding of sprinkler systems,  
27 although he always hired a subcontractor to do the installation. During the remodeling of  
28 the UOS building, Mr. Dzulak visited two or three other indoor soccer facilities to determine

1 how they designed their facilities and protected their sprinkler systems. The facilities he  
2 toured used sprinkler head guards to protect their sprinkler systems from soccer balls. He  
3 did not see any that were protected with nets. Mr. Dzulak asserts that Simplex told him  
4 that the sprinkler head guards they installed would adequately protect the sprinkler heads  
5 from flying soccer balls.

6 On July 10, 2010, more than two years after the UOS building had been sold to El  
7 Capitan, a soccer ball struck one of the sprinkler heads above the soccer field. Although  
8 the sprinkler head was protected by a two-piece head guard, it broke from the impact and  
9 discharged a large amount of water onto the field.

10 Aaron Locks, who is a former owner and former president of UOS, testified that he  
11 was shocked to learn of the incident. Mr. Locks referred to the soccer ball kick at issue as  
12 a “six-in-one-million” type of a shot, because of its power and because of the way it must  
13 have ricocheted off the ceiling in order to damage the sprinkler head in the way that it did.

14 UOS and El Capitan filed claims with the plaintiff insurers. Philadelphia paid  
15 \$351,413.28 on the claim submitted by UOS, and Mid-Century paid \$699,063.83 on the  
16 claim submitted by El Capitan.

17 In February 2012, Philadelphia and Mid-Century filed the present action seeking  
18 recovery of the amounts they had paid their insureds. In the original complaint, plaintiffs  
19 alleged a single cause of action for negligence. Simplex moved for judgment on the  
20 pleadings, arguing that plaintiffs had failed to allege any duty that could give rise to a claim  
21 of negligence. The court granted the motion, with leave to amend. Plaintiffs filed the first  
22 amended complaint (“FAC”) on May 16, 2012.

23 In the FAC, plaintiffs again allege a single cause of action, for negligence. They  
24 assert that Simplex negligently “designed, constructed, supervised, inspected,  
25 manufactured, installed, assembled and/or built” the sprinkler system and its component  
26 parts; that Simplex owed a legal duty to exercise reasonable care in their “design,  
27 construction, supervision, inspection, manufacture, installation, assembly and/or building”  
28 of the sprinkler system; that Simplex breached this duty by failing to “design, construct,

1 supervise, inspect, manufacture, install, assemble and/or build” the sprinkler system and its  
2 component parts in a “reasonably safe and prudent manner so as not to cause injury or  
3 property damage; and that Simplex’s breach of these duties was the direct and/or  
4 proximate cause of the damages alleged in the complaint. See FAC ¶¶ 32-36.

5 Simplex now seeks summary judgment, arguing that plaintiffs cannot establish that  
6 Simplex owed them an independent tort duty.<sup>1</sup>

## 7 DISCUSSION

### 8 A. Legal Standard

9 A party may move for summary judgment on a “claim or defense” or “part of . . . a  
10 claim or defense.” Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there is  
11 no genuine dispute as to any material fact and the moving party is entitled to judgment as a  
12 matter of law. Id.

13 A party seeking summary judgment bears the initial burden of informing the court of  
14 the basis for its motion, and of identifying those portions of the pleadings and discovery  
15 responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp.  
16 v. Catrett, 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome  
17 of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a  
18 material fact is “genuine” if there is sufficient evidence for a reasonable jury to return a  
19 verdict for the nonmoving party. Id.

20 Where the moving party will have the burden of proof at trial, it must affirmatively  
21 demonstrate that no reasonable trier of fact could find other than for the moving party.  
22 Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). On an issue where  
23 the nonmoving party will bear the burden of proof at trial, the moving party can prevail  
24 merely by pointing out to the district court that there is an absence of evidence to support  
25 the nonmoving party’s case. Celotex, 477 U.S. at 324-25. If the moving party meets its  
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27 <sup>1</sup> Philadelphia filed an opposition to the motion, in which Mid-Century filed a notice of  
28 joinder. Mid-Century filed a separate opposition and cross-motion, but subsequently withdrew  
the cross-motion.

1 initial burden, the opposing party must then set out specific facts showing a genuine issue  
2 for trial in order to defeat the motion. Anderson, 477 U.S. at 250; see also Fed. R. Civ. P.  
3 56(c), (e).

4 When deciding a summary judgment motion, a court must view the evidence in the  
5 light most favorable to the nonmoving party and draw all justifiable inferences in its favor.  
6 Anderson, 477 U.S. at 255; Hunt v. City of Los Angeles, 638 F.3d 703, 709 (9th Cir. 2011).

7 B. Defendant’s Motion

8 Simplex argues that summary judgment should be granted on the negligence claim.  
9 Simplex asserts that it owed plaintiffs no independent tort duty, and the public policy factors  
10 make clear that it owed plaintiffs no independent tort duty; and also contends that the  
11 “completed and accepted” doctrine bars plaintiffs’ claims.

12 The elements of a cause of action for negligence are a duty to exercise due care,  
13 breach of that duty, causation, and damages. See Merrill v. Navegar, Inc., 26 Cal. 4th 465,  
14 500 (2001). “The threshold element of a cause of action for negligence is the existence of  
15 a duty to use due care toward an interest of another that enjoys legal protection against  
16 unintentional invasion.” Bily v. Arthur Young & Co., 3 Cal. 4th 370, 397 (1992); see also  
17 Waseloh Family Ltd. Partnership v. K.L. Wessel Const. Co., 125 Cal. App. 4th 152, 163  
18 (2004). Whether this element has been established in a particular case is a question of law  
19 to be resolved by the court. Bily, 3 Cal. 4th at 397.

20 Simplex argues that it owed plaintiffs no independent tort duty, because any duty  
21 arose solely from its contract with Zak’s,<sup>2</sup> and that plaintiffs cannot recover in tort for  
22 Simplex’s alleged negligence in performing the contract. Simplex contends that this is not  
23 a construction defect case, and that its negligence did not cause the six-in-one-million  
24 soccer kick – and that at best plaintiffs can argue that Simplex somehow failed to prevent  
25 the damage. However, Simplex asserts, the common law does not impose such a duty.

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27 <sup>2</sup> The actual contract between Zak’s and Simplex is not in evidence before the court,  
28 although the parties have attached a copy of what Mr. Dzulak identified at his deposition as  
the proposal submitted by Simplex to Zak’s for the work on the fire sprinkler system.

1 Contract and tort are different branches of law. Contract law exists to enforce legally  
2 binding agreements between parties; tort law is designed to vindicate social policy. Applied  
3 Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 515 (1994); Foley v. Interactive  
4 Data Corp., 47 Cal. 3d 654, 683 (1988). Courts generally enforce the breach of a  
5 contractual promise through contract law, except when the actions that constitute the  
6 breach also violate a social policy that merits the imposition of tort remedies. Erich v.  
7 Menezes, 21 Cal. 4th 543, 552 (1999) (quoting Freeman & Mills, Inc. v. Belcher Oil Co., 11  
8 Cal. 4th 85, 107 (1995)). That is, conduct amounting to a breach of contract becomes  
9 tortious only when it also violates an independent duty arising from principles of tort law.  
10 Freeman, 11 Cal. 4th at 95; Applied Equip., 7 Cal. 4th at 516.

11 Thus, tort liability has been imposed in contract cases in certain limited contexts  
12 such as where the breach causes physical injury, breach of the covenant of good faith and  
13 fair dealing in insurance contracts, wrongful termination in violation of public policy, or  
14 fraudulent inducement of a contract. Erich, 21 Cal. 4th at 551-52. However, “[i]f every  
15 negligent breach of contract gives rise to tort damages the limitation would be meaningless,  
16 as would the statutory distinction between tort and contract remedies.” Robinson  
17 Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 990 (2004) (citing Erich, 21 Cal. 4th at  
18 553-54).

19 For example, California courts have found an independent duty, based on public  
20 policy considerations, in cases where negligent construction causes damage. See, e.g.,  
21 Sabella v. Wisler, 59 Cal. 2d 21, 28-29 (1963) (builder liable in negligence where he built  
22 plaintiff’s house on soil that was unable to support the weight of the house, which led to  
23 structural damage); Stewart v. Cox, 55 Cal. 2d 857, 863-65 (1961) (subcontractor liable in  
24 negligence where it negligently applied concrete to inside of swimming pool, thereby  
25 causing release of water that damaged the pool, lot, and house).

26 On the other hand, where a plaintiff alleges that the defendant negligently performed  
27 its contract by failing to protect against something that later caused damage, no tort duty  
28 exists. See Valenzuela v. ADT Sec. Servs., Inc., 820 F.Supp. 2d 1061, 1071-72 (C.D. Cal.

1 2001) (defendant ADT did not owe plaintiffs a tort duty where burglary resulted because  
2 ADT allegedly failed to properly install alarm system and failed to provide notification of  
3 alarm signals, since these failures arose from the parties' contractual relationships, not  
4 from independent tort duty), aff'd, 475 Fed. Appx. 115 (9th Cir. 2012). Here,  
5 Simplex argues, its alleged negligent breach of contract cannot create a tort claim. Simplex  
6 entered into a contract with Zak's to expand the sprinkler system and install 200 sprinkler  
7 head guards at the UOS facility. Plaintiffs assert that Simplex was the "design-builder" of  
8 the sprinkler system, and that it negligently "designed" the system by failing to provide  
9 stronger head guards and/or by failing to recommend that a net be installed. Simplex  
10 argues, however, that plaintiffs' claim is nothing more than a breach of contract claim, and  
11 that this case is nothing like Sabella or Stewart because Simplex's work did not cause the  
12 property damage. For example, Simplex contends, if the sprinkler heads were improperly  
13 installed and suddenly began leaking, and caused property damage, then Sabella and  
14 Stewart might apply. But, Simplex asserts, that is not what happened.

15 Simplex argues that this case is similar to Valenzuela, because plaintiffs here allege  
16 that Simplex failed to properly install a sprinkler system that could withstand a direct hit  
17 from a soccer ball, and that this failure allowed a soccer ball to damage a sprinkler head.  
18 Simplex asserts that it performed its work pursuant to the contract – and did exactly what it  
19 was paid to do (expand the sprinkler system and install 200 head guards). Simplex  
20 contends that to the extent that plaintiffs claim it failed to do this, then Bishop & Bishop or  
21 Zak's has a remedy for breach of contract, but, as in Valenzuela, plaintiffs cannot assert a  
22 tort claim.

23 Simplex also asserts that the public policy factors make clear that Simplex owed  
24 plaintiffs no independent tort duty. In instances where a bright line cannot be drawn  
25 regarding whether the common law imposes a tort duty separate from the parties' contract,  
26 California courts look to various public policy considerations. See Applied Equip., 7 Cal.  
27 4th at 514-15; Mintz v. Blue Cross of Calif., 172 Cal. App. 4th 1594, 1610-12 (2009).

28 California courts employ a checklist of factors that they use in assessing legal duty,

1 including “the extent to which the transaction was intended to benefit the plaintiff, the  
2 foreseeability of harm to him, the degree of certainty that he suffered injury, the closeness  
3 of the connection between the defendant’s conduct and the injury suffered, and the policy  
4 of preventing further harm.” Stewart, 55 Cal. 2d at 863 (citing Biakanja v. Irving, 49 Cal. 2d  
5 647, 649 (1958); see also Sabella, 59 Cal. 2d at 28. Other factors include the moral blame  
6 attached to the defendant's conduct, the extent of the burden to the defendant and  
7 consequences to the community of imposing a duty to exercise care with resulting liability  
8 for breach, and the availability, cost, and prevalence of insurance for the risk involved. See  
9 O’Neil v. Crane Co., 53 Cal. 4th 335, 364 (2012).

10 Here, with regard to the extent its work was intended to benefit plaintiffs, Simplex  
11 argues that its work was primarily intended for the former owners of the building, Bishop &  
12 Bishop, and Zak’s Enterprises (the general contractor for the remodel). It was not  
13 specifically intended for subsequent owners such as El Capitan. Moreover, the intent was  
14 to provide a fire sprinkler system, not to protect the property from a “six-in-one-million”  
15 soccer ball kick.

16 With regard to foreseeability, Simplex contends that it performed the work in 2002-  
17 2003, nearly eight years before a soccer ball hit one of the sprinklers and damaged it.  
18 Simplex argues that thousands of soccer games were likely played on the field during that  
19 eight-year period, and hundreds of thousands of kicks were probably made, until that one  
20 extremely rare kick that damaged the sprinkler head. Moreover, Simplex asserts, the  
21 physical structure of the sprinkler heads protected them from direct impacts from soccer  
22 balls – the sprinkler heads sat above the two-inch piping – and thus were further protected.

23 Simplex contends that to cause this incident, the soccer ball had to fly at least 25  
24 feet in the air, ricochet off the ceiling, avoid the beams, and maintain enough force to sheer  
25 off the head guard and the steel sprinkler head. Simplex argues that there was no way it  
26 could have foreseen this type of a soccer ball kick – and that plaintiffs’ insureds were in the  
27 best position to know the risks posed by errant soccer balls because they watched the  
28 activities on the field and knew what sort of players were using the field. Simplex claims it

1 did not know these things, and that in any event, its last contact with the system was in  
2 2003, before UOS had even opened for business.

3 With regard to the degree of certainty of plaintiffs' injury, Simplex argues that no one  
4 expected the soccer ball to reach the ceiling, avoid the piping and structural beams, bounce  
5 off the ceiling, strike the head, break both the head guard and the sprinkler head, and  
6 cause the sprinkler head to discharge water. Simplex contends that the length of time that  
7 passed between the installation of the sprinkler system and the soccer ball kick that caused  
8 the damage simply reinforces how remote and uncertain it was.

9 With regard to the closeness of the connection between Simplex's conduct and the  
10 injury suffered, Simplex argues that any such connection is extremely tenuous. Simplex  
11 asserts that unlike construction defect cases where work performed (or not performed) by  
12 the contractor leads directly to the damages, any damage was caused by an errant and  
13 unusual soccer ball kick, not by any work performed in connection with the installation of  
14 the sprinkler system.

15 With regard to the factor of moral blame, Simplex argues that its primary goal in this  
16 commercial transaction was to provide a product (a fire suppression system) that would  
17 save lives in the event of a fire – and that indeed, that is the sole goal of installing a  
18 sprinkler system. Simplex contends that its alleged negligence (failure to provide more  
19 protection for sprinkler heads) did not impact the functioning of the sprinkler system, did not  
20 risk loss of life, and did not cause damage that was uninsured. Thus, Simplex asserts,  
21 there can be no moral blame.

22 With regard to the public policy of preventing future harm, Simplex asserts that the  
23 court need not be concerned about those very rare future instances where soccer balls  
24 might strike sprinkler heads and cause property damage. Simplex notes that this is a  
25 subrogation case, that no one was injured, and that all of the damage was paid for by  
26 insurance. More importantly, Simplex argues, the societal cost of placing additional liability  
27 upon companies that install fire suppression systems outweighs any concern that such a  
28 rare event might again occur.

1 With regard to the availability, cost, and prevalence of insurance or other means of  
2 protection, Simplex contends that it is undisputed that plaintiffs' insureds purchased  
3 insurance covering the damage at issue. By contrast, Simplex notes, if a homeowner's  
4 residence is damaged because of a construction defect, the homeowner may not have  
5 insurance to cover its loss. Here, Simplex argues, the plaintiffs here are sophisticated  
6 insurance companies whose business function is to collect premiums to reimburse for  
7 damages such as that caused by a "six-in-one-million" soccer kick. Thus, public policy  
8 need not be concerned about providing additional protection for this type of damage.

9 In addition to arguing that it owed plaintiffs no independent tort duty, Simplex  
10 contends that the "completed and accepted" doctrine bars plaintiffs' claims. This doctrine  
11 holds that when a contractor completes work that is accepted by the owner, the contractor  
12 is not liable to third parties injured as a result of the condition of the work, even if the  
13 contractor was negligent in performing the work. See Sanchez v. Swinterton & Walberg  
14 Co., 47 Cal. App. 4th 1461, 1468 (1996). The rationale for this doctrine is that the owner  
15 has a duty to inspect the work and ascertain its safety, and that the owner's acceptance of  
16 the work shifts liability for its safety to the owner, provided that a reasonable inspection  
17 would have disclosed any defect. Id. at 1466-68.

18 In Sanchez, the defendants were a general contractor that constructed a building,  
19 and a concrete subcontractor that poured walkways, and entrance ramp, a stairway, and a  
20 landing at the entrance of the building. Two years after the construction was completed  
21 and had been accepted by the owner, the plaintiff fell on the landing, where there was  
22 accumulated rainwater.

23 The court held that the defendants did not owe the plaintiff a duty, even though they  
24 had built the structure to benefit visitors like the plaintiff, and even though a slip-and-fall  
25 injury was clearly foreseeable, because the owner knew about the water pooling and had  
26 taken no precautions (which removed any close connection between the defendants and  
27 the plaintiff). Id. at 1471 (even if the defect could have been considered latent, once it was  
28 discovered by the owner, it became patent).

1 Here, Simplex asserts that the former owner of the building – Bishop & Bishop –  
2 accepted Simplex’s work knowing that the sprinkler system lacked the extra protection of a  
3 net. Simplex also points to the deposition testimony of Aaron Locks, the former owner and  
4 president of UOS (and the one who coined the term the “six-in-one-million” kick), who  
5 stated that prior to the July 2010 incident, a soccer ball had struck a sprinkler head covered  
6 by a head guard, and the sprinkler had discharged water (not as much water as in July  
7 2010, “but there was a lot”). Thus, Simplex argues, the building owner also was aware that  
8 on at least one other occasion, a stray soccer ball had damaged a sprinkler head, causing  
9 some leaking. Under these facts, Simplex asserts, it cannot be held liable for the incident,  
10 where the prior owner and the general contractor knew of and accepted the work, and  
11 accepted the risk of errant soccer balls damaging sprinkler heads.

12 In opposition, plaintiffs’ first main argument is that Simplex owed them a duty as a  
13 matter of law based on its role as the “design-builder” of the sprinkler system. They assert  
14 that Simplex “conceded” that it was the “design-builder,” citing to deposition testimony of  
15 Simplex’s corporate designee. They contend that under California law, a design-builder  
16 assumes a non-delegable duty to design and build the product or structure safely and  
17 appropriately, so as to not cause property damage. The court has reviewed the cases  
18 cited by plaintiffs in support of the argument that Simplex owed a duty as a “design-builder,”  
19 and finds that those decisions either have no applicability, or are clearly distinguishable on  
20 their facts.

21 Plaintiffs first contend that a “design-builder” assumes the responsibilities of a  
22 “design professional” and furnishes all services – designing, engineering, constructing –  
23 necessary to deliver a completed project for an agreed price. In support, they cite Thomas  
24 v. Buttress & McClellan, Inc., 141 Cal. App. 2d 812 (1956).

25 Thomas was a 1956 decision arising from an action for the recovery of commissions  
26 under an oral contract of employment. The plaintiff was a sales manager for a company  
27 (the defendant) that sold “package” or “turnkey” construction jobs, which required the  
28 defendant to furnish all engineering and architectural services, supply all labor and

1 material, and deliver a completed structure for an agreed price. Id. at 815. The plaintiff  
2 filed suit because he believed he had not been adequately compensated for his work. Id.  
3 at 815-19. There is nothing in the opinion relating to the obligations of designers or  
4 installers of sprinkler systems, or stating a general rule that a “design-builder” assumes all  
5 responsibilities and furnishes all services in connection with a construction project.

6 Second, plaintiffs argue that public policy precludes a “design-builder” from shifting  
7 responsibility for structural design defects, code compliance, safety precautions, and  
8 supervisory duties to the owner. In support of this argument, plaintiffs cite Maloney v. Rath,  
9 69 Cal. 2d 442 (1968).

10 Maloney was a 1968 decision arising from an action to recover damages for  
11 personal and property injury incurred in an automobile accident. The court held that the  
12 duty of an owner and operator of an automobile to maintain its brakes in compliance with  
13 the provisions of the Vehicle Code is nondelegable; and that to establish a defense to  
14 liability for damages caused by a brake failure, the owner and operator must establish not  
15 only that he did what might reasonably be expected of a person of ordinary prudence,  
16 acting under similar circumstances, who desired to comply with the law, but also that the  
17 failure was not due to the negligence of any agent, whether employee or independent  
18 contractor, employed by him to inspect or repair the brakes. Id. at 446-47. There is  
19 nothing in Maloney relating to the obligations of designers or installers of sprinkler systems,  
20 or even stating that design-builders or design professionals owe a “nondelegable” duty.

21 Third, plaintiffs assert that an architect who plans and supervises construction work,  
22 as an independent contractor, is under a duty to exercise ordinary care for the protection  
23 of any person who foreseeably or with reasonable certainty may be injured by his failure to  
24 do so, even though such injury may occur after the work has been accepted by the person  
25 engaging his services. In support of this argument, plaintiffs cite Montijo v. Swift, 219 Cal.  
26 App. 2d 351 (1963).

27 Montijo was a 1963 decision arising from an action for personal injuries suffered by  
28 the plaintiff when she fell while descending a bus depot stairway designed by the defendant

1 architect. The plaintiff claimed that the stairway was defectively designed, because the  
2 handrails did not go all the way to the bottom and the wall tile was laid out in such a way  
3 that it appeared that the bottom step was actually the landing. The jury found in the  
4 plaintiff's favor, but the Court of Appeal reversed, finding insufficient evidence to support  
5 the claim that the architect was responsible for that portion of the design.

6 The Montijo court stated the general rule that

7 [a]n architect who plans and supervises construction work, as an independent  
8 contractor, is under a duty to exercise ordinary care in the course thereof for  
9 the protection of any person who foreseeably and with reasonable certainty  
after his work has been accepted by the person engaging his services.

10 Id. at 353. The decision does discuss the duty of architects to design structures that are  
11 safe – but says nothing about any general duty of design-builders, much less about any  
12 duties imposed on designers or installers of sprinkler systems or any other safety or  
13 property-protection system.

14 Fourth, plaintiffs contend that the “fiduciary duty of design professionals is long-  
15 standing in California.” In support of this argument, they cite Palmer v. Brown, 127 Cal.  
16 App. 2d 44 (1954). Palmer was a 1954 decision arising from an action by two co-partners  
17 in an architectural firm to recover \$2,190 due for architectural services. The defendants  
18 denied that they owed the money, in part because one of the co-partners was not a  
19 licensed architect (although the other one was).

20 The defendants filed a counterclaim, alleging, among other things, fraud, based on  
21 the allegation that at the same time that the plaintiffs were receiving compensation for  
22 architectural services from the contractor, they were also supervising the contractor's  
23 performance on the construction project. It was in this context that the court stated that  
24 “[a]n architect owes to his client a fiduciary duty of loyalty and good faith.” Id. at 59. While  
25 the Palmer decision does discuss certain obligations of architects, it says nothing about any  
26 duties of designers or installers of sprinkler systems or any other building-safety or  
27 property-protection system.

28 Finally, plaintiffs assert that a design professional's failure to warn of a design defect

1 exposes the professional to negligence liability. In support of this argument, they cite  
2 Mallow v. Tucker, Sadler & Bennett Architects & Engineers, Inc., 245 Cal. App. 2d 700  
3 (1966). Mallow was a 1966 decision arising from an action for wrongful death based on  
4 negligence, brought by the heirs of a workman killed when his jackhammer struck a high-  
5 voltage transmission line. The defendant architect had independently contracted with the  
6 owner to act as the architect for the construction project (a remodel of a motel). The  
7 architect was accused of negligence for failing to warn of the existence of the high-voltage  
8 line – specifically, by not showing it on the plans it prepared for the construction project.

9 The court held that because the architect had failed to include any mention on its  
10 plans of the high-voltage line, notwithstanding that those plans called for excavation in the  
11 area where the buried electrical line was located, there was a direct progression between  
12 the architect’s negligence and the death of the workman. Id. at 702-03. Again, the  
13 Mallow decision addresses the professional duties of architects with regard to creating  
14 plans relating to construction, but does not mention any duties owed by designers or  
15 installers of sprinkler systems, or any other building-safety or property-protection system.

16 Mid-Century adds the separate argument that “design firms” can be liable to  
17 “successors” who could be affected by their work, even if there was no contract between  
18 them; that there is an important public policy in favor of protecting purchasers from  
19 negligent design; and that both contractors and subcontractors have a duty to perform their  
20 work in a good and workmanlike manner, and a subcontractor who is careless and  
21 negligent in the performance of its work is liable to the general contractor as well as to third  
22 persons for any damage caused.

23 In support, Mid-Century cites a number of cases including Beacon Residential  
24 Comm’ty Assoc. v. Skidmore, Owings & Merrill LLP, 211 Cal. App. 4th 1301 (2012), which  
25 it asserts is “dispositive.” In that case, a homeowners’ association filed suit against two  
26 architectural firms (identified by the court as “design professionals”), which had provided  
27 architectural and engineering services, as well as construction administration and  
28 construction contract management, in connection with the construction of condominium

1 residences. The plaintiff homeowners alleged that defendants' negligence during the  
2 course of the planning and construction resulted in defects such as water infiltration,  
3 inadequate fire separations, structural cracks, and other life safety hazards including  
4 inadequate ventilation and excessive heat buildup.

5 Mid-Century attempts to extrapolate from the court's ruling regarding the liability of  
6 the "design professionals" in Beacon, but as with the other cases cited by plaintiffs  
7 regarding the duties of architects, the principles articulated in Beacon do not support an  
8 independent tort duty of care with regard to Simplex's installation of the sprinkler system at  
9 issue in this case. In addition, the court notes that two weeks after Mid-Century filed its  
10 opposition, the Beacon decision was superceded by the California Supreme Court's order  
11 granting review. See Beacon Residential Comm'ty Assoc. v. Skidmore, Owings & Merrill,  
12 2013 WL 718741 (Cal. Feb. 27, 2013).

13 In their second main argument, plaintiffs assert that public policy encourages the  
14 protection of fire suppression systems, and that the relevant public policy factors impose a  
15 duty on Simplex in addition to its non-delegable duty as a "design-builder."

16 With regard to the extent the transaction was intended to benefit them, plaintiffs  
17 argue that as a tenant, UOS had a legal ownership interest in the property; and that the  
18 soccer field was built for UOS, not for El Capitan or Bishop & Bishop. Plaintiffs claim that  
19 Simplex was aware of that fact, that it knew what the field was to be used for and by whom.  
20 In its separate opposition, Mid-Century adds that a "design professional" attempting to  
21 protect sprinkler heads from the potential of catastrophic discharge caused by soccer balls  
22 cannot be unaware of the fact that its work will have a direct effect on the integrity, safety,  
23 and habitability of the property with respect to both present and future owners and  
24 occupants, and that Simplex's argument is directly contrary to the court's holding in the  
25 residential construction defect case of Aas v. Superior Court, 24 Cal. 4th 627 (2000)  
26 (conduct of person engaged in construction is intended to affect all foreseeable purchasers  
27 of property).

28 With regard to foreseeability, plaintiffs contend that the only possible reason for

1 installing the head guards on the sprinkler heads over the soccer field was to protect the  
2 heads from flying soccer balls. They contend that a design professional's failure to warn of  
3 a "design deficiency" exposes the professional to negligence liability (citing Mallow).  
4 Plaintiffs argue that in this case, Simplex either installed the sprinkler head guards without  
5 any knowledge of their durability, or installed head guards it knew would be "insufficient."  
6 Either way, they assert, Simplex breached its duty to warn UOS of the potential harm to its  
7 sprinkler heads.

8         With regard to the degree of certainty of the plaintiffs' injury, plaintiffs contend that  
9 the rarity of the kick that caused the ball to hit the sprinkler head is irrelevant. What is  
10 important, plaintiffs argue, is that Simplex installed guards to protect the sprinkler heads,  
11 but actually had no knowledge of whether or not the guards would serve that function.  
12 Plaintiffs assert that Simplex installed a product that "lulled" UOS "into a feeling of safety"  
13 when in fact it was only a matter of time before an impact would cause a water discharge.  
14 They also argue that [t]his is not a grocery store where a customer decided to kick a  
15 watermelon into the ceiling," but rather an indoor soccer field. Because the sprinkler  
16 discharged due to an impact from a soccer ball, and because Simplex installed head  
17 guards over the soccer field, plaintiffs contend that it is obvious that it did so to protect  
18 against the very injury that occurred.

19         With regard to the closeness of the connection between Simplex's conduct and the  
20 injury suffered, plaintiffs argue that Simplex's negligence stems from either not knowing if  
21 the head guards would be sufficient to protect the sprinkler heads, or from knowing the  
22 head guards were not sufficient and installing them anyway. Plaintiffs reiterate that  
23 Simplex's duty to warn was non-delegable (citing Maloney). They also assert that unlike in  
24 Sanchez, where the owner knew about the pooled water, in this case, UOS had no way of  
25 knowing that the head guards were insufficient until a soccer ball struck the head guard.

26         With regard to moral blame, plaintiffs argue that the mere fact that a negligent act  
27 may have occurred during a commercial transaction does not mean that the tortfeasor  
28 owed no duty to the plaintiff. They assert that the law creates a fiduciary duty for design-

1 builders (citing Palmer). Plaintiffs contend that Mr. Dluzak relied on this duty and trusted  
2 Simplex to safely design and build the sprinkler system, and that Simplex breached this  
3 duty by inadequately protecting the sprinkler heads. Therefore, plaintiffs argue, regardless  
4 of whether it was a commercial transaction, Simplex is the only party morally culpable in  
5 this situation.

6         With regard to the public policy of preventing future harm, plaintiffs assert that public  
7 policy favors “properly designed” sprinklers. They contend that the activation of a sprinkler  
8 system is a serious threat to public safety, because once the sprinkler flow alarm is  
9 activated, the occupants are not in a position to know whether the activation is the result of  
10 a fire, or in this case, a soccer ball. They claim that the mass flow of people at or towards  
11 fire exits is a serious safety hazard, and that therefore, public policy favors sprinklers that  
12 do not activate prematurely.

13         With regard to the availability, cost, and prevalence of insurance, plaintiffs argue that  
14 because they issued payments to their insureds, they now stand in the shoes of their  
15 insureds with regard to any cause of action the insureds may have had against Simplex,  
16 based on the law of subrogation. Thus, plaintiffs contend, the fact that their insureds “acted  
17 responsibly” and purchased insurance does not mean that plaintiffs cannot now seek to  
18 recover under a theory of subrogation.

19         In their third main argument, plaintiffs assert that the “completed and accepted”  
20 doctrine is inapplicable in this case. They note that as explained in Sanchez, this doctrine  
21 applies to patent defects, not to latent defects. They suggest that the alleged “defects”  
22 were latent because neither UOS nor Bishop & Bishop had any way to inspect the durability  
23 and/or protective capabilities of sprinkler head guards that were located high above the  
24 soccer field. More importantly, they argue, Mr. Dluzak, the owner of Zak’s, trusted Simplex  
25 with the duty to inspect the sprinklers, and had no reason to anticipate that the head guards  
26 would be insufficient. Mid-Century also argues that Sanchez is inapplicable because there  
27 is no evidence in this case that both the “defective sprinkler design” and the “hazards it  
28 posed” were apparent to El Capitan.

1           The court finds that the motion must be GRANTED. As an initial matter, the court  
2 finds that Simplex did not owe plaintiffs an independent tort duty as a “design builder” – i.e.,  
3 a general contractor or a design professional such as an architect or engineer. The  
4 evidence shows that Simplex accomplished what it was hired to do under its contract with  
5 Zak’s – install a working fire sprinkler system with the strongest head guards it sold – and  
6 that Zak’s received what it contracted for. Had the damage to the property resulted from a  
7 failure of the sprinkler system to activate during a fire, or from the spontaneous activation of  
8 one of the sprinkler heads, the case would be entirely different.

9           Nor have plaintiffs identified any “duty” that Simplex breached. Plaintiffs appear to  
10 be arguing that Simplex should have installed stronger head guards. However, they offer  
11 no evidence as to what alternative head guards Simplex could have installed. Simplex  
12 offers two types of head guards – the one-piece head guard and the two-piece head guard  
13 – and per the contract with Zak’s, it installed the two-piece head guards. Without any  
14 evidence that stronger head guards existed, and that Simplex knew about them, plaintiffs’  
15 claim regarding the “inadequate” head guards fails as a matter of law.

16           With regard to the suggestion that Simplex had a duty to recommend installation of a  
17 protective net, plaintiffs have provided no evidence that Simplex is in the business of  
18 selling, designing, or installing protective nets – for that matter, designing soccer arenas.  
19 Simplex is a fire sprinkler and fire protection contractor, and its work is limited to designing  
20 and installing sprinkler systems for the purpose of life safety and property protection in the  
21 event of fire. Simplex offered what was available in the fire protection industry to protect  
22 the sprinkler heads and installed a fully functioning fire protection system. It had no duty to  
23 recommend a protective net.

24           Simplex is not a “design professional” and moreover, plaintiffs have not sued  
25 Simplex for professional negligence. Simplex was not employed to serve as an architect or  
26 an engineer with regard to the construction of the soccer facility. Plaintiffs appear to have  
27 created this concept of Simplex as a “design professional” in order to manufacture a duty to  
28 support the negligence cause of action. However, plaintiffs have ignored crucial

1 distinctions between the construction defect cases they cite and the present case.

2 As the installer of fire protection and sprinkler systems, Simplex is not a “design-  
3 builder” or a “design professional” as contemplated by California law, because it is not an  
4 engineering or architectural firm. Architects, engineers, and surveyors may be subject to  
5 professional malpractice claims, see Cooper v. Jevne, 56 Cal. App. 3d 860, 868 (1976),  
6 and firms of this type are therefore subject (by the California Legislature) to licensing and  
7 registration requirements. See Bus. & Prof.Code §§ 5500 et seq., 6700 et seq. Indeed, a  
8 plaintiff asserting a professional malpractice claim against an architect, professional  
9 engineer, or land surveyor is require to file a “Certificate of Merit” at the time the suit is filed.  
10 See Cal. Civ. P. Code § 411.35. Plaintiffs in this case have not done so.

11 Moreover, plaintiffs have not established that public policy supports a finding that  
12 Simplex had a common law duty to anticipate the force by which an errant soccer ball might  
13 strike a sprinkler head, or that it owed such a duty to the plaintiffs, who are strangers to the  
14 contract with Zak’s.

15 With regard to the extent to which the transaction was intended to benefit the  
16 plaintiffs, and the foreseeability of the harm to the plaintiffs, the intent of the contract  
17 between Simplex and Zak’s in 2003 was to expand and update the fire sprinkler system, to  
18 protect against damage or injury caused by fire – not to protect the property from the “six-  
19 in-one-million” soccer ball kick that occurred almost eight years (and thousands of soccer  
20 games) after the sprinkler system work was completed. Had the sprinkler system failed to  
21 perform during a fire, this factor might favor imposing a tort duty. As it is however, it does  
22 not.

23 With regard to the degree of certainty that plaintiffs suffered injury, and the  
24 closeness of the connection between Simplex’s conduct and any injury suffered, there is no  
25 evidence that anyone at the time the work was performed anticipated that eight years later,  
26 an errant soccer ball would reach the ceiling and damage the head guard and the sprinkler  
27 head, and cause the damage. Moreover, there appears to be no connection between the  
28 work Simplex performed pursuant to the contract and the injury suffered. The damage was

1 clearly not caused by Simplex. These factors do not favor imposing a tort duty.

2 With regard to moral blame and the public policy of preventing future harm, Simplex  
3 was retained to provide a fire suppression system that would save lives in the event of a  
4 fire, and there is no evidence that it failed to do so. It's alleged negligence (failure to  
5 provide stronger sprinkler heads and/or failure to recommend that a net be installed) did not  
6 impact the functioning of the sprinkler system and did not result in any loss of life. Thus,  
7 this factor also does not favor imposing a tort duty.

8 With regard to the availability, cost, and prevalence of insurance or other means of  
9 protection, the court notes that a key consideration for declining to extend a tort duty in  
10 Bily was that the plaintiffs – who were sophisticated investors, not powerless consumers –  
11 had the ability to protect their interests through other means. Here, the plaintiffs are  
12 subrogated insurance companies that paid EI Capitan and UOS for all of their damages.

13 Moreover, UOS and EI Capitan could have allocated the risk of loss to the prior  
14 owner, the architect, or the general contractor, or could have protected themselves by  
15 hiring a company to install a net after they observed water leaking from another sprinkler  
16 head that had been hit by a soccer ball. But, they chose not to, and were completely  
17 compensated by their insurance companies (to whom they had paid premiums to  
18 underwrite the risks associated with operating an indoor soccer facility). Thus, this factor  
19 does not favor imposing a tort duty.

20 Finally, the court finds that the “completed and accepted” doctrine bars plaintiffs’  
21 claims. Plaintiffs argue that the alleged defects were “latent,” but the evidence shows that  
22 there was at least one prior occasion when a sprinkler head guard was damaged by a flying  
23 soccer ball. Moreover, the fact that there was no net protecting the sprinkler system would  
24 have been obvious to anyone who looked up at the ceiling of the UOS soccer facility.  
25 Thus, any damage caused by the lack of a net is therefore the responsibility of Bishop &  
26 Bishop, which accepted Simplex’s work.

27 For the “completed and accepted” doctrine to apply, the alleged “defect” simply has  
28 to be discoverable. See Neiman v. Leo A. Daly Co., 210 Cal. App. 4th 962, 970 (2012).

1 Plaintiffs have provided no evidence that the alleged defect (the lack of a net or the type of  
2 head guard used) was undiscoverable. While plaintiffs provide a lengthy list of all the  
3 things Simplex supposedly failed to do, they have not established that the failure to do any  
4 of these things created a duty to do them. Simplex had a contract to install a fire sprinkler  
5 system and 200 head guards, and it did just that. It had no duty to anticipate the “six-in-  
6 one-million” soccer ball kick that penetrated the head guard and broke the sprinkler head.

7 It bears repeating that there is no allegation or proof that the sprinkler system  
8 installed by Simplex was defective in that it failed to protect against fires. The purported  
9 “negligent design” claim is a claim that Simplex should have designed a system that  
10 included stronger head guards and/or a net, but there is no evidence that stronger head  
11 guards were available, and Simplex does not sell or install nets (which in any event are not  
12 normally part of a sprinkler system).

13 Most importantly, plaintiffs have provided no evidence that Simplex was an expert on  
14 designing indoor soccer facilities. The fact that Simplex may have known the facility was  
15 going to be used for indoor soccer does not mean that Simplex had a duty as a “design-  
16 builder” of indoor soccer facilities. The sprinkler head was damaged by an outside force –  
17 the errant soccer ball – and there is no evidence that the design of the sprinkler system  
18 caused the damage to the building.

19 **CONCLUSION**

20 In accordance with the foregoing, the court finds that defendant’s motion for  
21 summary judgment must be GRANTED.

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23 **IT IS SO ORDERED.**

24 Dated: March 29, 2013

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PHYLLIS J. HAMILTON  
United States District Judge