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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

COUNTY OF RIVERSIDE,

Cross-complainant and Appellant,

v.

YEAGER SKANSKA, INC. et al.,

Cross-defendants and Respondents;

ZURICH AMERICAN INSURANCE
COMPANY,

Movant and Appellant.

E052034

(Super.Ct.No. RIC425702)

O P I N I O N

COUNTY OF RIVERSIDE,

Cross-complainant and Appellant,

v.

YEAGER SKANSKA, INC. et al.,

Cross-defendants and Respondents.

E052439

APPEAL from the Superior Court of Riverside County. Leslie C. Nichols,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Arias & Lockwood and Christopher D. Lockwood for Cross-complainant and
Appellant.

Greenan, Peffer, Sallander & Lally, Robert L. Sallander, Jr. and Robert Seeds for
Movant and Appellant.

Thompson & Colegate, Susan Knock Brennecke and John W. Marshall for Cross-
defendant and Respondent Yeager Skanska, Inc.

Murtaugh Meyer Nelson & Treglia and James A. Murphy for Cross-defendant and
Respondent Lim & Nascimento Engineering Corporation.

I. INTRODUCTION

In this opinion we consider three consolidated appeals. The County of Riverside (the County) appeals from an adverse judgment on its cross-complaint for contractual indemnity against Yeager Skanska, Inc. (Yeager) and Lim & Nascimento Engineering Corporation (LAN). The County also appeals from postjudgment orders awarding LAN its attorney fees and costs incurred in defending the cross-complaint. Zurich American Insurance Company (Zurich) appeals from an order denying its motion to intervene in the cross-action. We affirm the challenged judgment and orders in their entirety.

II. FACTS AND PROCEDURAL HISTORY

A. *Background*

On October 12, 2004, around 11:30 p.m., John McLauchlin was seriously injured when the front wheel of his motorcycle went off the road and crashed on a near 90-degree curve on Bridge Street, a County roadway. Mr. McLauchlin sued the County, Yeager, and LAN for his injuries, and his wife alleged a derivative claim for loss of consortium. (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067.)¹

At the time of the accident, traffic heading east on Gilman Springs Road, another County roadway, was being detoured southbound to Bridge Street while the County made improvements to Gilman Springs Road. LAN was the County's design engineer on portions of the Gilman Springs Road project, and Yeager was the County's general contractor. Mr. McLauchlin was traveling home from work, and took the Bridge Street detour. He had never before traveled southbound on Bridge Street, during the day or night.

Bridge Street was a two-lane, asphalt surface roadway, and was unlit. Due to the closure of Gilman Springs Road, 7,000 cars were being detoured to both lanes of Bridge Street each day. Shortly before the near 90-degree curve on which Mr. McLauchlin crashed, a reflective detour sign with an arrow pointing straight ahead partly obscured an existing curve sign. Around the area of the curve, the lines in the middle of the roadway were faded or washed out, there was no striping or edge lines delineating the pavement

¹ John McLauchlin and his wife are referred to as plaintiffs.

from the soft shoulder of the roadway, and the shoulder was even with the pavement.

After Mr. McLauchlin rounded the curve, the front wheel of his motorcycle went off the roadway and onto the soft shoulder, causing him to crash.

As part of its work on the Gilman Springs Road project, LAN prepared a “Detour and Traffic Management Plan” (the detour plan), providing for the detouring of traffic from Gilman Springs Road to Bridge Street. The detour plan was not a “traffic-engineered” detour plan because it did not call for the placement of additional striping, edge lines, chevrons, or signs on the road, including in the area of the near 90-degree curve, to account for dangerous conditions caused by the detour and increased volume of traffic on the roadway, or to remediate existing dangerous conditions on the roadway. Instead, the detour plan was only a “route concept plan,” which outlined the placement of detour signs along Bridge Street in order to alert motorists they were traveling on the detour. Yeager placed the detour signs on Bridge Street in accordance with the detour plan, including the reflective detour sign placed shortly before the curve that partly blocked the existing curve sign.

In their complaint against the County, Yeager, and LAN, plaintiffs claimed that dangerous conditions on Bridge Street and inadequate traffic conditions on the detour route caused or contributed to the accident and plaintiffs’ injuries. Plaintiffs alleged that the signs and roadway markings along the detour route inadequately warned motorists of the near 90-degree curve, and inadequately delineated the paved roadway from the soft shoulder. In a first amended cross-complaint against Yeager and LAN, the County

claimed that Yeager and LAN were contractually obligated to *defend and indemnify* the County against plaintiffs' personal injury claims.

As part of their agreements to work on the Gilman Springs Road project, Yeager and LAN entered into separate indemnity agreements with the County. In brief, Yeager agreed to defend and indemnify the County against "any liability . . . based *or asserted* upon any act or omission" of Yeager, "relating to or in anywise connected with" Yeager's work for the County, "in any legal action based upon any such *alleged* acts or omissions." (Italics added.)

LAN's indemnity agreement was more limited. LAN agreed to indemnify the County against "claims, actions, damages and liabilities arising from death, personal injury, property damage, *or other cause asserted or, based upon* any negligent act or omission" of LAN "relating to or in any way connected with the accomplishment of the work or performance of services" on the Gilman Springs Road project, "regardless of the existence or degree of fault or negligence on the part of County . . . other than the active negligence of County" (Italics added.) LAN also agreed to "protect and defend" the County "from legal action based upon any negligent acts or omissions, as stated herein."

The County was an additional insured on Yeager's comprehensive general liability policy with Zurich. From the outset of the litigation, Zurich defended the County against plaintiffs' claims under a reservation of rights. Yeager denied it was obligated to defend or indemnify the County against plaintiffs' claims, in part because the claims arose from the County's sole and active negligence. (Civ. Code, § 2782.)

LAN consistently refused to defend the County, claiming its indemnity agreement only covered claims based on work LAN performed for the County, and the scope of its work did not include designing a traffic-engineered detour plan. LAN maintained that the task of designing a traffic-engineered detour plan was negotiated out of the scope of its work for the County, and was retained by the County.

B. Procedural History

LAN paid plaintiffs \$150,000 to settle their claims, and the court determined that the settlement was in good faith.² (Code Civ. Proc., § 877.6.)³ Yeager obtained a judgment on plaintiffs' complaint after its motion for summary judgment, which the County did not oppose, was granted.

In a three-week jury trial in January and February 2010, plaintiffs tried their complaint for personal injuries against the County, the only remaining defendant. During jury deliberations, the County agreed to settle plaintiffs' claims for \$500,000. Shortly thereafter, the County paid the \$500,000 settlement.

² Before LAN settled with plaintiffs, this court reversed a summary judgment in favor of LAN on plaintiffs' complaint on the ground there were triable issues of fact concerning whether LAN had a duty of care to the prospective users of the detour route "to perform traffic [engineering] studies, identify dangerous conditions, and make remedial recommendations to the County regarding any dangerous conditions on the detour route." (*McLauchlin v. LIM & Nascimento Engineering Corporation* (May 30, 2008, E042242) [nonpub opn.] [Fourth Dist., Div. Two].)

³ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Before the trial of plaintiffs' complaint against the County, the County, Yeager, and LAN agreed that (1) the trial of the cross-complaint would be bifurcated from the trial of plaintiffs' complaint, (2) the cross-complaint would be tried before the same judge who presided at the trial of the complaint, Judge Leslie C. Nichols, and (3) all evidence presented in the trial of the complaint would be admitted in the trial of the cross-complaint, subject to evidentiary objections.

A bench trial on the cross-complaint took place in May 2010. The principal issue in the cross-action was whether Yeager and LAN were liable to indemnify the County for the \$500,000 sum the County paid to settle plaintiffs' personal injury claims, pursuant to Yeager's and LAN's indemnity agreements with the County.⁴

In a 39-page statement of decision, the trial court denied the County's contractual indemnity claims against both Yeager and LAN. The court concluded that neither Yeager nor LAN were obligated to indemnify the County for the amount it paid to settle plaintiffs' claims, because the County was "actively negligent" in failing to remediate the dangerous conditions on Bridge Street that caused Mr. McLauchlin's accident and plaintiffs' injuries. The court further concluded that, as between the County and Yeager, the County was *solely* negligent in failing to remediate the dangerous conditions. The court concluded that as a matter of law Yeager was not obligated to indemnify the County against claims based on the County's sole or active negligence. (Civ. Code,

⁴ By the time of the trial on the cross-complaint, the court had dismissed the County's cause of action for equitable indemnity against Yeager and LAN.

§ 2782.) LAN's indemnity agreement expressly excluded liability for claims based on the County's active negligence.

The court also found that LAN did not agree to perform any traffic engineering studies for the detour route, or make any recommendations to the County to remedy any dangerous conditions on the detour route. For this reason, the court concluded that LAN's duties to indemnify and defend the County never arose under the terms of its indemnity agreement with the County, regardless of whether the County was actively negligent in causing plaintiffs' injuries. In postjudgment orders, the court awarded LAN \$245,949 in attorney fees incurred in defending the cross-complaint (§ 411.35), together with expert witness fees (§ 998) and costs of suit (§ 1032, 1033.5).

In June 2010, after the trial on the cross-complaint had concluded but before the court issued its statement of decision, Zurich moved to intervene in the cross-action. The court denied the motion on the grounds it was untimely and prejudicial to LAN.

C. Additional Background

During plaintiffs' trial against the County, Mr. McLauchlin testified that, around 11:30 p.m. on October 12, 2004, he was riding his motorcycle home from work, traveling east on Gilman Springs Road. Gilman Springs Road was closed near its intersection with Bridge Street, and Mr. McLauchlin followed detour signs onto Bridge Street, heading south. Mr. McLauchlin had never before traveled southbound on Bridge Street. It was dark that night with no moon, and Bridge Street was not lit. Traffic was light; there was no opposing traffic and only one car a half-mile behind him. He was traveling 40 to 45

miles per hour with his “high beams” on. The posted speed limit on Bridge Street was 55 miles per hour.

After riding south on Bridge Street for around a mile, Mr. McLauchlin saw a reflective sign that said “detour” with an arrow pointing straight ahead, and slowed to 30 to 35 miles per hour. If he had followed the arrow sign, he would have run off the road, but he saw that the road curved to the left. Hence the detour sign was “a little confusing at first.”

As he entered the curve, Mr. McLauchlin noticed another sign “out of the edge of [his] eye,” but he could not tell what it said because he was looking into the curve. He later learned it was a curve sign. He thought he was through the curve and brought his motorcycle to an upright position when his front wheel ran off the pavement and his motorcycle crashed. There was no color distinction, striping or “edge line” separating the pavement of Bridge Street from the soft shoulder of the road, and the pavement and shoulder were level with each other. As a result of the accident, Mr. McLauchlin suffered a fractured thoracic vertebra, among other serious injuries.

Plaintiffs presented the expert testimony of accident reconstructionist Robert Cargill, who testified that, at night, the reflective detour sign made it more difficult to see any other surrounding detail, and obscured views of the curve. The detour sign also blocked the view of the preexisting curve sign.

David Royer, plaintiffs’ traffic engineering expert, testified that the detour sign placed shortly before the curve should have instead been placed “significantly in advance

of the curve.” Further, any detour sign placed before the curve should have had a left arrow or a 45-degree up arrow indicating that the detour continued around the curve. Mr. Royer also opined that the traffic engineering on the detour route fell below the applicable standard of care. He explained that the volume of traffic being detoured onto Bridge Street due to the closure of Gilman Springs Road exceeded 7,000 vehicles per day, and in order to handle this increase in traffic the standard of care required, at a minimum, the placement of chevron signs and an edge line at the curve. Both Messrs. Cargill and Royer opined that the absence of striping and other visual cues to guide motorists around the curve caused the accident.

III. ANALYSIS/THE COUNTY’S CLAIMS AGAINST YEAGER

On its appeal from the judgment on the cross-complaint for contractual indemnity, the County does not challenge the trial court’s legal or factual determinations in favor of LAN. Instead, it only challenges the rulings in favor of Yeager. As to Yeager, the County claims the trial court erroneously determined that the County was solely and actively negligent in causing plaintiffs’ injuries. Hence, the County claims that Yeager was contractually obligated, under the terms of its indemnity agreement with the County, to indemnify the County for the \$500,000 the County paid to settle plaintiffs’ claims. We conclude that the trial court properly determined that the County was actively negligent in causing the accident; thus it is unnecessary to address whether the court properly determined that, as between Yeager and the County, the County was solely negligent in causing the accident.

“Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.” (Civ. Code, § 2772.) ““A collection of rules, developed primarily in insurance and construction cases governs actions to enforce indemnity agreements. Paramount is the rule that “[w]here . . . the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity.” [Citation.]” (*Mel Clayton Ford v. Ford Motor Co.* (2002) 104 Cal.App.4th 46, 54.)

In July 2004, before the accident occurred in October 2004, Yeager entered into a contract with the County for the construction of improvements to Gilman Springs Road. Pursuant to the contract, Yeager agreed to hold the County “harmless from any liability whatsoever, including wrongful death, based or asserted upon any act or omission of [Yeager], its officers, agents, employees or subcontractors relating to or in anywise connected with or arising from the accomplishment of the work, whether or not such acts or omissions were in furtherance of the work required by the Contract Documents and agrees to defend at [its] expense, including attorney fees, Owner, County of Riverside . . . in any legal action based upon any such alleged acts or omissions.”

In order to establish its contractual indemnity claim against Yeager, the County had the burden of demonstrating that its \$500,000 settlement with plaintiffs was covered by Yeager’s indemnity agreement with the County. (*Peter Culley & Associates v. Superior Court* (1992) 10 Cal.App.4th 1484, 1497 [“[W]hen the indemnitee settles

without trial, . . . [it] must show the liability is covered by the contract, that liability existed, and the extent thereof.”].) Yeager did not dispute the reasonableness of the \$500,000 settlement amount, or its existence.

The trial court denied the County’s contractual indemnity claim against Yeager on two independent grounds: (1) the indemnity provision required the County to prove Yeager was “somehow negligent” in its work, and the County did not meet this burden; and (2) Yeager proved the County was “actively negligent” in causing the October 2004 accident in which Mr. McLauchlin was injured.

The County claims the trial court misinterpreted its indemnity agreement with Yeager and erroneously concluded that the County was both solely and actively negligent in failing to discover the conditions on the Bridge Street roadway and detour route that caused the accident. The County also claims the trial court misinterpreted plaintiffs’ liability allegations as set forth in plaintiffs’ first amended complaint against the County, and that these allegations were “important to determining whether there [was] a valid basis for defense and indemnity” pursuant to the County’s indemnity agreement with Yeager.

As we explain, we agree that the trial court erroneously construed the indemnity provision as requiring the County to prove Yeager was negligent in its performance of the work, specifically in its placement of the reflective detour sign before the near 90-degree curve, in order to prevail on its indemnity claim. Nevertheless, as we further explain, the court reasonably determined, and substantial evidence shows, that the County was

actively negligent in failing to discover and remediate the dangerous conditions on the Bridge Street curve that caused the accident. This finding precludes the County from recovering its \$500,000 settlement liability to plaintiffs, pursuant to the County's indemnity agreement with Yeager. (Civ. Code, § 2782, subs. (a), (b).)

We begin with the trial court's interpretation of the indemnity provision. When, as here, a trial court interprets an indemnity provision without the aid of extrinsic evidence, the interpretation is a question of law subject to de novo review. (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 504 (*Continental Heller*)). Indemnity provisions are to be construed in accordance with the rules governing the interpretation of other contracts. (*Ibid.*) In order to determine the intended scope of an express indemnity agreement, "the courts look first to the words of the contract." (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1737.) "[U]nless given some special meaning by the parties, the words of a contract are to be understood in their 'ordinary and popular sense.' (Civ. Code, § 1644.)" (*Continental Heller, supra*, at p. 504.)

In *Continental Heller*, a subcontractor agreed to indemnify a contractor for losses "aris[ing] out of or . . . in any way connected with the performance of [the] work" under the subcontract, and the subcontractor's liability applied to "any acts or omissions, willful misconduct, or negligent conduct, whether active or passive," on the part of the subcontractor. (*Continental Heller, supra*, 53 Cal.App.4th at pp. 504-505.) The court interpreted the provision as not requiring the contractor to show negligence or fault on the

part of the subcontractor in order to prevail on an indemnity claim for a loss incurred in connection with the subcontractor's performance of its work. (*Id.* at p. 505.) The court reasoned, "[t]he language of the agreement leaves no doubt the parties intended [the subcontractor] should indemnify [the contractor] irrespective of whether [the contractor's] loss arose by reason of [the subcontractor's] negligence or for any other reason except for the sole negligence or willful misconduct of [the contractor]. (See Civ. Code, § 2782.)" (*Ibid.*; *Centex Golden Construction Co. v. Dale Tile Co.* (2000) 78 Cal.App.4th 992, 997-998 [construing similar indemnity provision as not requiring proof of negligence by the indemnitor].)

Like the indemnity provision in *Continental Heller*, Yeager's indemnity provision required it to indemnify the County against "any liability whatsoever . . . based or asserted upon any act or omission of [Yeager] . . . relating to or in anywise connected with or arising from the accomplishment of the work" Here, as in *Continental Heller*, the phrase "any acts or omissions" cannot properly be construed as being limited to "any *negligent* act or omission," but encompasses *any act or omission* of Yeager regardless of whether the act or omission involved any negligence on the part of Yeager. (*Continental Heller, supra*, 53 Cal.App.4th at p. 505; *Centex Golden Construction Co. v. Dale Tile Co., supra*, 78 Cal.App.4th at pp. 997-998.) Thus Yeager's indemnity provision did not require the County to prove that Yeager was negligent in the performance of its work, including in its posting of the detour sign before the Bridge Street curve, in order to prevail on the County's indemnity claim against Yeager.

Additionally, and as Yeager points out, its indemnity provision did not require it to indemnify the County for “mere ‘claims’” based on Yeager’s work, unlike the indemnity provision in *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541 (*Crawford*).⁵ Instead, Yeager’s indemnity provision only required Yeager to indemnify the County for any “liability” the County incurred “based or asserted upon any act or omission of [Yeager] . . . relating to or in anywise connected with or arising from the accomplishment of the work” Still, the point is a red herring. The \$500,000 sum the County paid plaintiffs in settlement of their claims against the County was not a “mere claim” against the County, but a liability the County incurred in connection with Yeager’s work on the Gilman Springs Road project. (*Peter Culley & Associates v. Superior Court, supra*, 10 Cal.App.4th at pp. 1493, 1497.)

Yeager and the trial court also conflated the County’s \$500,000 settlement liability to plaintiffs with Yeager’s own liability to plaintiffs. For purposes of Yeager’s liability

⁵ The indemnity provision in *Crawford* required a subcontractor to “‘indemnify and save [a builder] harmless against all claims for damages to persons or to property and claims for loss, damage and/or theft . . . growing out of the execution of [the subcontractor’s] work.’” (*Crawford, supra*, 44 Cal.4th at p. 553.) But the issue in *Crawford* was not the meaning of the indemnity provision, but whether, under a separate “duty to defend” provision, the subcontractor was required to *defend* the builder against *alleged* construction defects arising from the subcontractor’s work *even though* (1) a jury ultimately determined the subcontractor was not negligent in its performance of the work, and (2) the parties accepted an interpretation of the subcontract that gave the builder no right of *indemnity* unless the subcontractor was negligent. (*Id.* at pp. 547, 553.) The court concluded the subcontractor had a duty to defend the builder “from the outset” against any suit “founded upon” claims alleging damage or loss from the subcontractor’s negligent role in the project, even *if* it was later determined that the subcontractor was not negligent. (*Id.* at p. 553.) Thus, as the parties agree, *Crawford* only addressed the indemnitor’s duty to defend, not its duty to indemnify.

to the County under the indemnity provision, it is of no moment that Yeager obtained summary judgment on plaintiffs' complaint, or that in granting the motion the court determined that Yeager's placement of the detour sign before the curve was not a substantial factor in causing the accident.⁶ Nor is it of any consequence to Yeager's indemnity obligation to the County that, during the trial of plaintiffs' complaint against the County, the County was precluded from presenting any evidence attributing or apportioning any fault for plaintiffs' injuries to Yeager. (§ 437c, subd. (I).)⁷

Simply put, Yeager agreed to indemnify the County for "any liability . . . based or asserted upon any act or omission of [Yeager] . . . relating to or in anywise connected with or arising from the accomplishment of the work" Pursuant to these express terms of the indemnity provision, the County was not required to show that Yeager was negligent in its performance of the work, including its placement of the detour sign before the Bridge Street curve, in order to prevail on its contractual indemnity claim against Yeager. (*Continental Heller, supra*, 53 Cal.App.4th at p. 505.)

⁶ Yeager's motion for summary judgment was granted on plaintiffs' complaint for personal injuries against Yeager, but was not granted on the County's cross-complaint for contractual indemnity. Yeager withdrew its motion on the cross-complaint, and Yeager and the County stipulated that Yeager's motion for summary judgment on the complaint was not "as to," or did not affect, Yeager's liability to the County on the cross-complaint.

⁷ Section 437c, subdivision (I) states that: "In actions which arise out of an injury to the person or to property, if a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion." (See *Knowles v. Tehachapi Valley Hospital District* (1996) 49 Cal.App.4th 1083, 1094 [quoting former § 437c, subd. (k)].)

That said, the trial court properly denied the County’s contractual indemnity claim against Yeager. The court determined and substantial evidence shows that the County was “actively” negligent in causing the accident and, by extension, plaintiffs’ injuries.

Subject to statutory exceptions not applicable here, any indemnity provision in a construction contract with a public agency that purports “to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency shall be void and unenforceable.” (Civ. Code, §§ 2782, subd. (b); 2783.) Further, a *general* indemnity provision—like the one here, which does not address itself to the issue of the indemnitee’s negligence—will not be interpreted to provide indemnity for losses resulting from the indemnitee’s *active* negligence, only its *passive* negligence. (*Gonzales v. R.J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 809-810.) Because Yeager’s indemnity agreement is part of its construction contract with the County, and the County is a public agency, Yeager is not required to indemnify the County for liabilities arising from the County’s *active* negligence, only its *passive* negligence.

The difference between active and passive negligence, as determined between an indemnitor and indemnitee, was discussed in *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628-633 (*Rossmoor*). “Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. [Citations.] Active negligence, on the other hand, is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform

a precise duty which the indemnitee had agreed to perform. [Citations.]” (*Id.* at p. 629.)

“The crux of the inquiry is to determine whether there is participation in some manner by the person seeking indemnity in the conduct or omission which caused the injury beyond the mere failure to perform a duty imposed upon him by law.” (*Morgan v. Stubblefield* (1972) 6 Cal.3d 606, 625.)

“Passive negligence has been found or assumed from the failure to discover a defective condition created by others [citation], failure to exercise a right to inspect certain work and specify changes [citation], and failure to exercise a supervisory right to order removal of defective material [citation]. Active negligence has been found in digging a hole which later caused an injury [citation], knowingly supplying a scaffold which did not meet the requirements of a safety order [citation], creating a perilous condition that resulted in an explosion [citation], and failing to install safety nets in violation of a contract [citation].” (*Rossmoor, supra*, 13 Cal.3d at p. 630.)

Importantly, “[w]hether conduct constitutes active or passive negligence depends upon the circumstances of a given case and is ordinarily a question for the trier of fact; active negligence may be determined as a matter of law, however, when the evidence is so clear and undisputed that reasonable persons could not disagree. [Citations.]” (*Rossmoor, supra*, 13 Cal.3d at p. 629.) Here the court reasonably determined based on essentially undisputed evidence that the County was actively negligent in causing the accident and plaintiffs’ injuries. (*Herman Christensen & Sons, Inc. v. Paris Plastering*

Co. (1976) 61 Cal.App.3d 237, 253 [applying substantial evidence rule to trial court's active negligence determination].)

Plaintiffs claimed the accident occurred because the area around the Bridge Street curve on which Mr. McLauchlin's motorcycle crashed lacked "adequate natural or man-made visual delineation cues of the curve." The sole claim of negligence by the County and plaintiffs on the part of Yeager was that Yeager's placement of the detour sign on the approach to the Bridge Street curve obstructed the view of the existing curve sign, and was a substantial factor in causing the accident.

It was undisputed that Yeager was responsible for placing the detour signs along the detour route in accordance with the detour plan, and for "maintaining" the detour. On October 1, 2004, several days before the October 12 accident, Yeager placed the detour signs on the detour route in accordance with the detour plan, including the detour and straight arrow sign it placed shortly before the curve that obscured the existing curve sign. The detour plan did not indicate the specific location of the detour signs, only the sequence in which the signs were to be placed and their general locations. Further, the County reserved the right to determine the final placement of the detour signs, and effectively approved Yeager's placement of the detour sign before the curve.

Indeed, the County "reserve[d] the right" to "make any necessary changes, as field conditions warrant," in "traffic control plans," and the County's resident engineer was to determine the "[e]xact location of all . . . traffic control devices." Before the accident, the County's resident engineer, Jesus Mendoza, inspected the detour route and approved

Yeager's placement of the detour signs in accordance with the detour plan. The County's traffic engineer, Lawrence Tai, also inspected portions of the detour route before the accident and "made no adjustment in the detour signage" or any other changes in the detour route. Then, several days after the accident but before the County was aware of the accident, Mr. Tai's assistant, Arthur Higgs, drove both ways on Bridge Street at night and recommended placing chevron signs on the curve, placing an additional curve sign for motorists who might not be familiar with the roadway, and installing a painted edge line for guidance when opposing headlights made it difficult to see the center line. Mr. Tai approved these recommendations, and the chevrons, curve signs, and edge line were installed.

The trial court reasonably determined that the County was actively negligent in failing to "make the appropriate traffic engineering recommendations concerning striping and signage at the curve" before the accident, and in failing to "make the remedial recommendations that both plaintiffs' expert, Mr. Royer, and Mr. Tai's own assistant, Mr. Higgs, found obvious and necessary due to the increased volume on Bridge Street" before the accident.

Indeed, the lack of an edge line along the curve and other visual cues delineating the pavement from the soft shoulder—not the placement of the detour sign before the curve—was the principal cause of the accident. Mr. McLauchlin testified he saw the curve shortly after he saw the detour sign, and slowed to 30 or 35 miles per hour as he entered the curve, even though he did not see the curve sign or the 35-miles-per-hour

sign. His motorcycle ran off the roadway and crashed because he could not see where the pavement of the road ended and the soft shoulder began, due to the lack of an edge line or other visual cues delineating the edge of the road from the soft shoulder. The solid and broken yellow lines in the middle of the road were also washed out, and the roadway was unlit.

Still, the County maintains that, as a matter of law, it was only passively negligent in failing to discover that Yeager's placement of the detour sign before the curve constituted a dangerous condition. To be sure, passive negligence is found in the mere failure to discover a dangerous condition created by others. (*Rossmoor, supra*, 13 Cal.3d at p. 630, citing *Markley v. Beagle* (1967) 66 Cal.2d 951, 955-956, 962.)

But active negligence exists when there is a duty to act coupled with a failure to act.

(*Edmondson Property Management v. Kwock* (2007) 156 Cal.App.4th 197, 209, citing *Rossmoor, supra*, at p. 629.) Here, the County had a duty to remedy *all* of the dangerous conditions on the detour route, including those that may have been created by Yeager's placement of the detour sign before the curve. But the County failed to discharge this duty before the accident, and before the detour route was opened for traffic, even though it had ample time and opportunity to do so.

Accordingly, the trial court reasonably determined that the County was actively negligent in failing to remediate the dangerous conditions on the detour route, including those that may have been caused by Yeager's placement of the detour sign before the

curve. For this reason, the court properly denied the County's contractual indemnity claim against Yeager.

IV. ANALYSIS/THE COUNTY'S CLAIMS AGAINST LAN

In a separate appeal, the County challenges the trial court's postjudgment orders awarding LAN \$245,949 in attorney fees (§ 411.35), \$19,386.24 in expert witness fees (§ 998), and \$21,500 in costs (§§ 1032, 1033.5).⁸ We affirm the attorney fee and cost awards.

A. *The County's Compliance With Section 411.35*

1. Background/The Certificate of Merit

Section 411.35 was enacted to discourage the filing of frivolous lawsuits against professional engineers, architects, and land surveyors. (*UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10, 28.) In any action arising out of the professional negligence of an architect, professional engineer, or land surveyor, the statute requires the attorney for the plaintiff or cross-complainant to file and serve "the certificate specified by subdivision (b)" (the certificate of merit) before serving the complaint or cross-complaint on any defendant or cross-defendant. (§ 411.35, subd. (a).)

⁸ On its appeal from the adverse judgment on its cross-complaint, the County does not challenge the trial court's denial of its \$500,000 contractual indemnity claim against LAN. The court denied the claim on the ground that LAN's indemnity agreement with the County only encompassed liabilities the County incurred based on LAN's work, and LAN's work did not include performing traffic engineering studies or assessing and remediating any dangerous conditions on the detour route. LAN's indemnity agreement also expressly excluded liabilities based on the County's active negligence, and the trial court concluded, as to LAN as well as Yeager, that the County was actively negligent in causing the accident and plaintiffs' injuries.

The certificate of merit must state one of the following:

“(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross-defendant and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross-defendant was negligent or was not negligent in the performance of the applicable professional services.

“(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.

“(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate architects, professional engineers, or land surveyors to obtain this consultation and none of those contacted would agree to the consultation.” (§ 411.35, subd. (b).)

In March 2006, before the cross-complaint was served on LAN and Yeager, the attorney for the County, A. Michael Sabongui, signed and filed a certificate of merit declaring he had “consulted with at least one professional engineer, who would be in the same discipline as the cross-defendants, and who has knowledge of this particular lawsuit,” and had “concluded, on the basis of this review, and consultation, that there is a reasonable and meritorious cause for filing the cross-complaint” against LAN. (§ 411.35, subd. (b)(1).)

Importantly, the certificate of merit does not state that Mr. Sabongui received an opinion from the consulting professional engineer that LAN was negligent in designing the detour plan for the County. In all other respects, the certificate of merit appears to comply with requirements of the statute. (§ 411.35, subd. (b)(1).)⁹

2. LAN’s Verification Motion

Subdivision (h) of section 411.35 provides that: “Upon the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the trial court may, upon the motion of a party or upon the court’s own motion, verify compliance with this section, by requiring the attorney for the plaintiff or cross-complainant who was required by subdivision (b) to execute the certificate to reveal the name, address, and

⁹ The failure to file a certificate of merit “in accordance with” section 411.35 constitutes grounds for a demurrer or motion to strike. (§ 411.35, subd. (g).) LAN did not demur to the cross-complaint or move to strike its professional negligence allegations on the ground the certificate of merit was inadequate or failed to include all of the information described in section 411.35, subdivision (b)(1).

telephone number of the person or persons consulted with pursuant to subdivision (b) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in-camera proceeding at which the moving party shall not be present. If the trial judge finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply with this section."

After the County's cross-complaint for contractual indemnity was adjudicated in favor of LAN, LAN filed a motion to verify the County's compliance with section 411.35 and recover all of its attorney fees incurred in defending the cross-complaint, based on the County's alleged failure to comply with the statute. (§ 411.35, subd. (h).) In its motion, LAN argued that the certificate of merit could not have been filed in good faith and was a "sham" because any engineer with whom the County consulted "could not have examined LAN's scope of work, or LAN's plans, before rendering an opinion," because if they had done so "it would have been obvious that LAN did not undertake the engineering tasks for which the County sought indemnity. . . ." LAN pointed out that the trial court found in its statement of decision that LAN's work for the County did not include performing any traffic engineering studies on the detour route, and the court therefore concluded that LAN was not obligated to indemnify the County for the \$500,000 sum the County paid the plaintiffs to settle their claims against the County.

3. The County's Response to the Motion

In response to the motion, the County submitted, without being ordered to do so, an in camera declaration by Mr. Sabongui, the attorney who signed the certificate of merit. The in camera declaration is part of the record and states that in September 2005, Mr. Sabongui “conferred” with traffic engineering expert Wes Pringle. Mr. Sabongui noted that Mr. Pringle testified in plaintiffs’ trial against the County, and disclosed Mr. Pringle’s address and telephone number. Mr. Sabongui did not state in his in camera declaration that he received an opinion from Mr. Pringle, before the cross-complaint was served on LAN or at any other time, that LAN was negligent in designing the detour plan or in any other work LAN performed for the County.¹⁰

4. The Trial Court's Ruling on the Motion

In awarding LAN \$245,949 in attorney fees—essentially all of the fees LAN incurred in defending the cross-complaint—the trial court found that the County’s certificate of merit did not include three items of information described in section 411.35, subdivision (b)(1), and that Mr. Sabongui’s in camera declaration did “nothing to save” it. The court found that neither the certificate of merit nor Mr. Sabongui’s declaration stated (1) that the County’s consulting engineer, Mr. Pringle, was a professional engineer

¹⁰ Mr. Sabongui also stated in his in camera declaration that he had “conferred with several professional engineers at the County,” including Scott Staley and Lawrence Tai, and with another County employee, Hugh Smith, but Mr. Sabongui did not indicate *when* he conferred with any of these County employees, or the nature of the consultations. In any event, the person or persons consulted before the suit is served cannot be parties to the litigation (§ 411.35, subd. (b)(1).)

licensed to practice and practicing in California or in any other state, (2) that Mr. Pringle was in the same discipline as LAN, or (3) that Mr. Sabongui had “received an opinion” from Mr. Pringle, and on the basis of that opinion and his consultation with Mr. Pringle, concluded there was a reasonable and meritorious cause for filing the cross-complaint against LAN. (§ 411.35, subd. (b)(1).)

5. Analysis of the County’s Claims

The County claims it was deprived of its fundamental due process right to notice and an opportunity to be heard on the question of whether it complied with the requirements of the statute by obtaining the expert opinion of Mr. Pringle, before the cross-complaint was served, that LAN was negligent in designing the detour route for the County. (§ 411.35, subd. (b)(1).) The County points out that LAN did not claim in its motion that the County’s counsel, Mr. Sabongui, failed to obtain an opinion from Mr. Pringle or another professional engineer that LAN was negligent in designing the detour route. (*Ibid.*)

Instead, the County argues, “LAN’s motion was based solely on arguments that the engineer should have reviewed additional documents, and based on a review of those additional documents should have determined that LAN had no obligation to prepare a [traffic-engineered] detour and traffic management plan” Thus, the County argues, its opposition was “properly limited” to the issue LAN raised in the motion—whether the County’s consulting engineer reviewed documents that would have shown LAN’s scope of work did not encompass designing a traffic-engineered detour route—and

appropriately did not address “the details of discussions,” or whether Mr. Sabongui “received an opinion” from Mr. Pringle that LAN was negligent in designing the detour route. (§ 411.35, subd. (b)(1).)

We find the County’s due process argument wholly without merit. In opposition to the motion, the County argued that “proof of compliance is filed in camera with this opposition”—namely, the in camera declaration of Mr. Sabongui. The County specifically argued that it “fully complied” with section 411.35, subdivision (b)(1) because, as Mr. Sabongui stated in his camera declaration, he “conferred” with Mr. Pringle before the cross-complaint was served, and based on that consultation concluded there was a reasonable and meritorious basis for the cross-complaint. (See *Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 860 [plaintiff opposing summary judgment had notice and opportunity to be heard on the issue the trial court relied on in granting summary judgment, because the plaintiff addressed the issue in its opposition even though the defendant did not expressly raise it].)

The County thus had notice and ample opportunity to demonstrate in opposition to the motion that Mr. Sabongui “received an opinion” from Mr. Pringle, before the cross-complaint was served, that LAN was negligent in designing the detour route. (§ 411.35, subd. (b)(1).) But as the trial court found, the County failed to make this showing in the certificate of merit or in Mr. Sabongui’s in camera declaration, which the County argued demonstrated its full compliance with the statute.

As the court also pointed out in ruling on the motion, section 411.35 was amended in 1995 to add the requirement that the attorney for the plaintiff or cross-complainant “receive an opinion from” the person consulted that the design professional was negligent or not negligent in its performance of the applicable professional services. (Stats. 1995, ch. 241, § 1, p. 843 (S.B. 934).) Before the 1995 amendment was enacted, the statute only required the attorney to “consult with” the expert. (*Ibid.*)

In its opposition to the motion, the County submitted an analysis of the Assembly Committee on Judiciary on S. B. 934 (1995-1996 Reg. Sess.) as amended May 16, 1995. The analysis includes a statement by the sponsor of the 1995 bill, the Consulting Engineers and Land Surveyors of California. According to the sponsors, “current law permits a certificate to be based upon casual consultation, commonly referred to as ‘cocktail consultation,’ where a plaintiff’s attorney casually asks whether a proposed action ‘has any merit.’ Therefore, the law should also require that the consultation produce the opinion of the professional as to whether the defendant was negligent.” (Assem. Com. on Judiciary, Analysis of S.B. 934 (1995-1996 Reg. Sess.) as amended May 16, 1995, p. 4.)

The trial court went on to point out that: “By omitting any statement that the required opinion was received, Mr. Sabongui’s declaration suffers from the same defect which the legislature sought to cure by the 1995 amendment.” The court accordingly found that “the conditions for ordering payment of ‘any reasonable expenses, including attorney’s fees,’” were established, and determined “in the exercise of its discretion that it

is fair, just, and reasonable to order such attorney's fees and reasonable expenses.”

(§ 411.35, subd. (h).)

The County claims the court erroneously awarded LAN its attorney fees based on the “defective wording” of the certificate of merit, rather than on a factual determination that the County failed to comply with section 411.35, subdivision (b)(1). Not so. Based on the County's failure to show that its counsel received an opinion from Mr. Pringle, before the cross-complaint was served, that LAN was negligent in designing the detour route, the court reasonably determined that no such opinion was rendered. (See *Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates* (1996) 45 Cal.App.4th 913, 917 [determination of compliance with § 411.35 reviewed for abuse of discretion].)

Nor did the court abuse its discretion in awarding LAN its attorney fees based on the County's failure to comply with section 411.35, subdivision (b)(1). (*Guinn v. Dotson* (1994) 23 Cal.App.4th 262, 268 [Fourth Dist., Div. Two] [attorney fee award pursuant to § 411.35, subd. (h) reviewed for abuse of discretion].) The court reasonably determined that LAN incurred its attorney fees in defending the cross-complaint “as a result of” the County's failure to comply with the statute. (§ 411.35, subd. (h).)

Lastly, we note that the trial court *did not* award LAN its attorney fees based on LAN's claim that the certificate of merit was a “sham” because the County's consultant could not have reviewed various documents showing that the scope of LAN's work did not include designing a traffic-engineered detour route. This was proper, because section

435.11 does not require the consultant to conduct an extensive document review before rendering an opinion that the design professional was negligent. Nor does section 411.35 permit the court to inquire into the nature or basis of the opinion in verifying compliance with the statute. The legislative history of the statute bears these points out.

As originally proposed in 1995, S.B. 934 would have required the consultant to review contract documents and change orders before rendering an opinion, and also would have required the consultant to issue a written report. (S.B. 934 (1995-1996 Reg. Sess.) § 1.) But the original version of S.B. 934 was amended to eliminate the document review and written report requirements, and they never became law. (Sen. Amend. to S.B. 934 (1995-1996 Reg. Sess.) Mar. 16, 1995, § 1.) As the County points out, the elimination of these requirements strongly indicates that section 411.35 should not be construed to incorporate them. (See *Federal National Mortgage Assn. v. Bugna* (1997) 57 Cal.App.4th 529, 540.)

In 2002, a similar bill failed passage in the state Assembly. (Assem. Bill No. 2713 (2001-2002 Reg. Sess.) § 1.) Assembly Bill No. 2713 would have allowed the trial court to verify compliance with section 411.35 by requiring the attorney filing a certificate of merit to divulge privileged information regarding the presuit consultations with experts. (See Assem. Bill No. 2713, *supra*, § 1.) As explained in the analysis of the bill by the Assembly Committee on Judiciary, the bill would have “authorize[d] a court to interrogate the plaintiff’s attorney about the information relied upon by the attorney in preparing the certificate of merit, including the ‘opinions relied upon by the attorney,’ as

well as ‘the facts, studies or other data reviewed by those persons.’ . . . While existing law appears to permit a judge to inquire into the name, address and telephone number of the consultant, which are otherwise privileged under existing section 411.35[, subdivision] (e), it is quite another matter to force an attorney to disclose opinions and information exchanged with an expert. . . .”

B. The Attorney Fee Award Was Not Excessive

The County further claims that the award of \$245,949 in attorney fees to LAN was excessive for two reasons. First, the County maintains that section 411.35 only applies to equitable indemnity claims, not contractual indemnity claims. Thus the County argues that, because the court dismissed the County’s equitable indemnity causes of action in June 2008, nearly two years before the cross-complaint was tried in May 2010, none of the attorney fees LAN incurred after June 2008 should have been awarded to LAN. We reject this claim.

Subdivision (a) of section 411.35 states that a certificate of merit must be filed “[i]n every action, including a cross-complaint for damages or indemnity, arising out of the professional negligence of a person . . . holding a valid registration as a professional engineer” Subdivision (i) of the statute provides that, for purpose of the statute, “‘action’ includes a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms ‘professional negligence’ or ‘negligence.’”

(§ 411.35, subd. (i).)

The County maintains that subdivision (i) limits the application of the statute to equitable indemnity claims, and excludes contractual indemnity claims. Not so. The words of a statute are not considered in isolation, but in the context in which they appear and in view of the nature and purpose of the statute. (*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1107.) In view of the language of the statute as a whole and its purpose of discouraging frivolous professional negligence lawsuits against design professions (*Guinn v. Dotson, supra*, 23 Cal.App.4th at p. 271), the statute applies to contractual as well as equitable indemnity claims arising out of the negligence of a design professional. If the Legislature had intended to limit the statute's application to equitable indemnity claims, it would have made that clear in section 411.35, subdivision (a). Subdivision (i) merely clarifies that the statute applies to equitable indemnity claims arising out of the rendition of professional design services, regardless of whether the complaint or cross-complaint uses the terms professional negligence or negligence. (§ 411.35, subd. (i).)

Second, the County claims the trial court abused its discretion in awarding LAN \$245,949 in attorney fees because many of the fees were incurred in defending both the complaint and cross-complaint, and in responding to actions by Yeager and Zurich. The County raised this issue in the trial court and the court rejected it. We find no abuse of discretion.

Section 411.35 authorizes the trial court to award a party its reasonable expenses, including attorney fees, incurred by the party "as a result of" another party's failure to

comply with the statute. (§ 411.35, subd. (h).) The statute thus requires a causal relationship between the failure to comply and the expenses incurred. (*UDC-Universal Development, L.P. v. CH2M Hill, supra*, 181 Cal.App.4th at pp. 28-29; see also *On v. Cow Hollow Properties* (1990) 222 Cal.App.3d 1568, 1577-1578 [causal relationship between offending action and expenses incurred must be shown to recover attorney fees pursuant to § 128.5].) A sufficient causal relationship was shown here.

LAN adduced the declaration of its attorney, together with detailed billing records, showing it incurred attorney fees of \$245,949 in defending the cross-complaint. As the County points out, some of LAN's attorney fees were incurred in defending the complaint and in reviewing or responding to actions by Yeager and Zurich. But many, if not all, of the legal and factual issues raised by the complaint, and by Yeager and LAN, were relevant to the issues raised by the cross-complaint. (See, e.g., *On v. Cow Hollow Properties, supra*, 222 Cal.App.3d at p. 1576.) Thus, the trial court did not abuse its discretion in awarding LAN \$245,949 in attorney fees. (*McFarland v. City of Sausalito* (1990) 218 Cal.App.3d 909, 913 [amount of attorney fees awarded is left to sound discretion of trial court].)

C. The Expert Witness Fees and Related Costs Were Properly Awarded

The County next claims LAN was awarded excessive costs for the services of its expert traffic engineer, Dale Dunlop, and for related services rendered by Mr. Dunlop's firm, Krueper Engineering & Associates, Inc. LAN incurred and sought a total of \$21,946.24 in costs for Mr. Dunlop and his firm, but the court deducted \$2,560 from this

amount and awarded LAN \$19,386.24. We find no abuse of discretion in awarding the \$19,386.24 sum.

Except as provided by statute, a prevailing party “is entitled as a matter of right to recover costs” (§ 1032, subd. (b).) Costs awarded must be “reasonable in amount” and can only be for items “reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.” (§ 1033.5, subd. (c)(2), (3).)

“A costs award is reviewed on appeal for abuse of discretion.” (*El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 617.) An abuse of discretion is shown when the amount awarded shocks the conscience or is unsupported by the evidence. (*Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 549-550.)

The County argues that the entire \$19,386.24 sum was unreasonable because Mr. Dunlop’s testimony during the trial on the cross-complaint was irrelevant to the issues; the amount paid for his services and those of his firm was excessive; and most of the \$19,386.24 sum was incurred while LAN was still defending the complaint. None of the County’s arguments are persuasive.

Mr. Dunlop’s testimony showed that LAN’s detour and traffic management plan, though poorly named as a “traffic management plan,” was not intended to be used to construct a fully traffic-engineered detour, but only to obtain an encroachment permit. Mr. Dunlop’s testimony was helpful to the trial court in determining whether LAN was liable on the County’s cross-complaint. Lastly, all the fees incurred to Mr. Dunlop’s firm

were supported by detailed billing records., and the County has not shown that any part of the fees were excessive.

D. The Video Equipment Costs Were Properly Awarded

Lastly, the County claims the court abused its discretion in awarding LAN costs of \$21,500 for computerized graphics services LAN provided to the parties and the court for use during the trial on the cross-complaint. Again, we find no abuse of discretion. The computerized graphics services included providing computer monitors for LAN, the County, and the court to use during the trial on the cross-complaint, and allowed the parties and the court to quickly retrieve deposition transcripts, trial transcripts from the trial on the complaint, and numerous documents, including oversized plans, Caltrans manuals, bulky bid packages, and contracts. The services apparently saved considerable court time, and were supported by detailed billing records.

V. ANALYSIS/ZURICH'S APPEAL

Zurich appeals from the order denying its motion to intervene in the cross-action, claiming the trial court erroneously denied its motion as untimely and prejudicial to LAN—even though the motion was made after the bench trial on the cross-complaint had concluded. We conclude that the motion was properly denied.

A. Background

1. Zurich's Motion to Intervene

In June 2010, after the bench trial on the cross-complaint had concluded in May 2010 but before the trial court issued its statement of decision and entered judgment on

the cross-complaint in favor of Yeager and LAN, Zurich moved to intervene in the cross-action for the sole purpose of adjudicating LAN's *duty to defend* the County against plaintiffs' claims. Zurich was Yeager's comprehensive general liability (CGL) insurer, and the County was named an additional insured on Yeager's CGL policy. Zurich defended the County against plaintiffs' claims under a reservation of rights, and paid \$377,183.24 in attorney fees and costs defending the County. Throughout the litigation, LAN refused to provide a defense to the County on the ground it had no obligation to do so because plaintiffs' claims did not arise from LAN's work for the County, and the indemnity provision of LAN's "on-call" agreement with the County only required LAN to indemnify or defend the County against claims arising from LAN's work.

In its motion to intervene, Zurich claimed it was subrogated to the County's right to recover the County's defense costs from LAN pursuant to LAN's indemnity agreement with the County. In its cross-complaint against LAN, the County sought a judicial declaration that LAN had an obligation to both defend and indemnify the County against plaintiffs' claims. But during the trial on the cross-complaint, the County did not pursue the defense costs claim. Zurich claimed the County dropped the defense costs claim without notifying Zurich's counsel, who believed the County would pursue the defense costs claim. Instead, the County only sought to recover from LAN the \$500,000 settlement amount the County paid plaintiffs.

Zurich also claimed it had a mandatory right to intervene in the cross-action, because the disposition of the cross-action could impair or impede its ability to protect its

right to recover the County's defense costs from LAN. (§ 387, subd. (b).) Although Zurich maintained that LAN's duty to defend and duty to indemnify the County were separate rights, and Zurich would not be splitting the County's duty-to-defend cause of action from the duty-to-indemnify claim in a subsequent suit against LAN to recover the County's defense costs, Zurich argued that the mere possibility LAN would assert as a defense that Zurich was splitting a cause of action was sufficient to give Zurich the right to intervene. (*Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 552 (*Hodge*) [subrogated insurer's right to intervene should not depend on a predetermination of whether the defense of splitting a cause of action will succeed; it is enough that the defense will be available in a second lawsuit by the subrogated insurer and may "as a practical matter, impair or impede" (§ 387, subd. (b)) the subrogated insurer's ability to protect its rights].) Zurich claimed that LAN "refused to enter into a stipulation that would eliminate" the cause of action splitting problem, and pointed out that a separate trial on the defense costs claim, which had not taken place, involved "some separate evidence and the rest of the evidence has already been admitted"

In opposition, LAN conceded that Zurich was subrogated to the County's defense costs claim, but argued the motion to intervene was nonetheless untimely. LAN pointed out that it gave Zurich written notice in March 2010 that the defense costs claim would be litigated during the upcoming trial on the cross-complaint, which commenced and concluded in May 2010, but Zurich did not seek to intervene in the cross-action. LAN also argued the defense costs claim had been fully litigated and "fully embraced" by the

evidence presented in the cross-action, because LAN's duties to defend and indemnify the County both depended on whether plaintiffs' claims arose from LAN's work, and LAN had demonstrated that its scope of work did not encompass designing a traffic-engineered detour route for the County, free of dangerous conditions. LAN thus argued that, "to try to unring the evidentiary bell of the duty to defend that's already been tried and found wanting is prejudicial to LAN."

In reply, Zurich argued that LAN's duty to defend the County did not depend on "what actually happened" or what work LAN agreed to perform or did perform for the County, but instead turned on the allegations of plaintiffs' complaint, regardless of whether the allegations were true, and *that* issue had not been briefed. (*Crawford, supra*, 44 Cal.4th at pp. 557-558 [duty to defend may turn on *alleged facts* that would give rise to a duty to indemnify, and not on whether indemnity is actually owed]; Civ. Code, § 2778, cl. (4).) Zurich accordingly asked the court to grant its motion to intervene so that Zurich and LAN could brief the issue whether LAN had a duty to defend the County based on the allegations of plaintiffs' complaint, and there was no prejudice to LAN in allowing the briefing and decision.

2. The Trial Court's Ruling

Following a lengthy hearing and after taking the matter under submission, the trial court denied Zurich's motion to intervene as untimely and prejudicial to LAN. In its ruling, the court pointed out that Zurich was fully aware of the litigation from its inception, the parties agreed to sever the trial of the cross-complaint from plaintiffs'

action, and the issue of LAN's duty to defend was pleaded in the cross-complaint. Still, Zurich did not seek to participate in the trial of the cross-complaint until after trial had concluded, even though Zurich "received no confirmation from the County that [the County] would proceed as Zurich desired. . . ."

The court also explained that, "[a]llowing Zurich to intervene at this unreasonably late date would unnecessarily and unreasonably delay finalization of litigation started over five years ago. The underlying personal injury action was barely brought to trial within five years. Notwithstanding Zurich's statements, allowing intervention could result in requiring consideration of additional coverage issues or theories which were the subject of resolution at the trial already concluded. Zurich had only to call any attorney, check a court website, or check court calendars, to determine the dates of the indemnity trial. Armed with that information, Zurich could have attended, asked to participate, join[ed] with County as co-counsel, or otherwise taken action to protect its interests. . . .

"Under these circumstances, the burden which would be imposed upon [LAN] would be unreasonable. Given the high degree of sophistication of the parties and counsel, the burden of inaction and unreasonable failure to inform and act, must reasonably be placed on Zurich. The relative hardships fall heavily in favor of [LAN]. It should not suffer the further expense, time, and burden of litigation, when the matter could have so easily . . . been dealt with by Zurich."

B. Analysis

Section 387 governs a third party's right to intervene in a pending action between other parties. (*Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386.) "Intervention is mandatory (as of right) or permissive." (*Hodge, supra*, 130 Cal.App.4th at p. 547.)

Mandatory intervention is governed by section 387, subdivision (b). Pursuant to the statute, a nonparty has a right to intervene in a pending action "if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties." (*Hodge, supra*, 130 Cal.App.4th at p. 547, fn. omitted.) If the person seeking intervention meets these criteria, "the court shall, *upon timely application*, permit that person to intervene." (§ 387, subd. (b), italics added.)

Permissive intervention is governed by section 387, subdivision (a), which provides that: "[*U*]pon *timely application*, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. . . ." (Italics added.) When intervention is permissive, a court has discretion to permit a nonparty to intervene if it has a direct and immediate interest in the litigation, the intervention will not enlarge the issues in the case,

and the reasons for intervention outweigh any opposition by the existing parties. (*City of Malibu v. California Coastal Com.* (2005) 128 Cal.App.4th 897, 902.)

Zurich argues it had a mandatory right to intervene in the cross-action in order to brief and have the court determine whether LAN had a duty to defend the County against the allegations of plaintiffs' complaint pursuant to LAN's indemnity agreement with the County. (See *Hodge, supra*, 130 Cal.App.4th at pp. 548-555 [partially subrogated property damage insurer had mandatory right to intervene in insured's construction defect action for property damages covered by insurer].) And, given its mandatory right of intervention, Zurich further argues that the denial of its motion to intervene is erroneous as a matter of law, and is accordingly subject to de novo review. (See *Redevelopment Agency v. Commission on State Mandates* (1996) 43 Cal.App.4th 1188, 1197-1198 [suggesting that permissive intervention is discretionary, but whether statutory requirements for mandatory intervention are met is a question of law].)

We agree that the issue of whether Zurich had a mandatory right to intervene is a question of law, but it does not follow that the applicable standard of review of the order denying the motion is de novo. The motion was denied *not* because Zurich did not have a mandatory right to intervene, but because the motion was untimely, and the denial of a motion to intervene *as untimely* is reviewed for an abuse of discretion.

As indicated, section 387 expressly requires all motions to intervene to be timely. (§ 387, subs. (a), (b).) Further, unless a statute imposes a specific deadline for intervention, and none does here, the determination of whether the motion is timely or

untimely “ultimately rests in the court’s discretion.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 2.439, p. 2-75; *Fireman’s Fund Ins. Co. v. Gerlach* (1976) 56 Cal.App.3d 299, 302 [whether intervention should be allowed ““is best determined by a consideration of the facts of that case”” and is ordinarily left to the sound discretion of the trial court].)¹¹

As Zurich concedes, the critical question regarding timeliness is whether a party to the litigation would be prejudiced by the late intervention. (See *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838, 843; *Truck Ins. Exchange v. Superior Court* (1997) 60 Cal.App.4th 342, 350-351.) Further, a motion to intervene is unlikely to be considered timely if made after trial has commenced or, as here, after trial has concluded. (2 Cal. Civil Procedure Before Trial (Cont.Ed.Bar 4th ed. 2012) Intervention, § 31.37, p. 1352; but see *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 437 [“intervention is possible, if otherwise appropriate, at any time, even after judgment.”].)

Here, the court did not abuse its discretion in denying Zurich’s motion to intervene as untimely and prejudicial to LAN.

¹¹ Under the abuse of discretion standard, we will not disturb the court’s exercise of discretion unless it has resulted in a miscarriage of justice. “[O]ne of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. [Citations.] Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.’ [Citations.]” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

First, substantial evidence shows that Zurich was aware of the litigation from its inception but made no attempt to intervene until after the trial on the cross-complaint had concluded—even though it received no assurances from the County that the County would pursue Zurich’s subrogated defense costs claim against LAN. (*Allen v. California Water & Tel. Co.* (1947) 31 Cal.2d 104, 108 [“[T]he general rule that a right to intervene should be asserted within a reasonable time and that the intervener must not be guilty of an unreasonable delay after knowledge of the suit.”].)

Further, substantial evidence supports the court’s finding that allowing Zurich to intervene several weeks after the trial on the cross-action had already concluded would have been prejudicial to LAN. At the hearing on its motion, Zurich asked the court to allow it to intervene, not to present any additional evidence, but to brief the question of whether LAN was required to defend the County against plaintiffs’ allegations. Zurich stressed that the issue was not addressed during the trial on the cross-complaint, and briefing it would require little time and effort on the part of LAN.

But as the court pointed out in denying the motion, allowing Zurich to intervene at such an “unreasonably late date” could require “consideration of additional coverage issues or theories which were the subject of resolution at the trial already concluded.” The defense costs issue that Zurich sought to address by intervention substantially overlapped with the indemnity claim that the County pursued in the trial on the cross-complaint against LAN.

Finally, and contrary to Zurich’s claim, the late intervention would have imposed additional costs on LAN, and would have substantially delayed resolution of the cross-action. Given these circumstances, the court reasonably determined that LAN “should not suffer the further expense, time, and burden of litigation, when the matter could have so easily . . . been [earlier] dealt with by Zurich.”

Truck Ins. Exchange v. Superior Court, supra, 60 Cal.App.4th 342 does not assist Zurich’s claim that there was an insufficient showing of prejudice to LAN. There, an insurer, Truck, sought to intervene in an action by two other insurers of the same insured. (*Id.* at pp. 344, 346.) The other insurers were seeking to rescind their policies of insurance on the ground the policies were procured by fraud. (*Id.* at p. 345.) The insured was a suspended corporation and prohibited by law from defending the rescission action. (*Id.* at p. 346.) If the other insurers were able to rescind their policies by obtaining a default judgment against the insured, then Truck would have been unable to pursue an equitable contribution claim against the other insurers for expenses it incurred in defending the insured against construction claims. (*Id.* at pp. 346-347, 349.)

The court in *Truck Ins. Exchange* rejected the other insurers’ claims that Truck’s motion to intervene was untimely because it was made when the other insurers were “on the eve of obtaining a default judgment.” (*Truck Ins. Exchange v. Superior Court, supra*, 60 Cal.App.4th at p. 350.) The court reasoned that the other insurers’ rights had not been “materially impaired” by the intervention, and there was no showing that the late intervention would impair their ability to prove their rescission claims. (*Id.* at p. 350.)

Moreover, the court pointed out that “timeliness is hardly a reason to bar intervention when a direct interest is demonstrated and the real parties in interest have not shown any prejudice *other than being required to prove their case*” of rescission against the insured. (*Id.* at p. 351, italics added.)

Thus, in *Truck Ins. Exchange* there was no showing that the two insurers seeking rescission would have suffered any prejudice as a result of Truck’s intervention. But here, the court reasonably determined and substantial evidence shows that Zurich’s unreasonable and unnecessary late motion to intervene, if granted, would have caused LAN to incur additional expenses in defending Zurich’s theory of the case, and would have substantially delayed resolution of the cross-action. In *Truck Ins. Exchange*, Truck sought to intervene before the other insurers had proven their rescission claim against their insured. (*Truck Ins. Exchange v. Superior Court, supra*, 60 Cal.App.4th at p. 350.)

Given Zurich’s unreasonable delay in seeking intervention and the prejudice that late intervention would have imposed upon LAN, the court did not abuse its discretion in denying Zurich’s motion to intervene as untimely and prejudicial to LAN.

VI. DISPOSITION

The judgment in favor of Yeager and LAN on the County’s cross-complaint for contractual indemnity is affirmed, and the postjudgment orders awarding LAN its attorney fees, expert witness fees, and costs are affirmed. The order denying Zurich’s motion to intervene is also affirmed. Yeager shall recover its costs on appeal from the County. The County, LAN, and Zurich shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.