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At an IAS Term, Part ECP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of October, 2002

P R E S E N T:

HON. DAVID SCHMIDT,
Justice.

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JOSEPH ADAM MILAZZO and DAWN MILAZZO,

Plaintiffs,

Index No. 15569/98
Action No. 1

- against -

PREMIUM TECHNICAL SERVICES CORP.,

Defendant.

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JOSEPH ADAM MILAZZO and DAWN MILAZZO,

Plaintiffs,

Index No. 48999/99
Action No. 2

- against -

WHECO CORP.,
Defendant.

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PREMIUM TECHNICAL SERVICES COW.,

Third-party Plaintiff,

Third-party
Index No. 75756/01

- against -

TOTAL SUPPORT INNOVATIONS, INC. and
WHECO CORP.,

Third-Party Defendants.

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WHECO CORP.,
Second Third-Party Plaintiff,

Second Third-party
Index No. 75770/01

- against -

PREMIUM TECHNICAL SERVICES COW.,

Second Third-Party Defendant.

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The following papers numbered 1 to 19 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-5 10-16
Opposing Affidavits (Affirmations)	6-8 17-18
Reply Affidavits (Affirmations)	9 19
_____ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this action seeking to recover damages for personal injuries, defendant third-party defendant Wheco *Corp*. ("Wheco") moves for summary judgment dismissing plaintiffs' complaint, the third-party complaint, and all cross claims as against it. Third-party defendant Total Support Innovations, Inc. ("TSI") cross-moves for summary judgment dismissing the third-party complaint of third-party plaintiff Premium Technical Services *Corp*. ("Premium") and all cross claims as against it or, in the alternative, for an order, pursuant to CPLR **603,** severing the third-party action as against it from the main action.

Plaintiff **Joseph Adam Milazzo ("plaintiff")** was employed by and **the vice-president** of **TSI,** a corporation in the business of foundation repair service. TSI also had a president, Joseph Borracci, and two employees, Joseph Lafond and Joseph Valenzano. Plaintiff had been previously employed by Hancock Dock Builders ("Hancock"), and, on April 20, 1995, Premium, a distributor, sold a helical pier installer ("the installer"), which was manufactured

by Wheco, to Hancock. When plaintiff and Joseph Borracci started the business of TSI in August 1996, they purchased Hancock's equipment, including this installer.

Plaintiff had a contractor's license and held a certification from A.B. Chance Company ("A.B. Chance") as a result of taking its certification course twice. That course had an instructor from A.B. Chance and a technical person from Premium, and trained plaintiff in using the installer to install helical piers. During his training, plaintiff received the A.B. Chance Underpinning Training Manual ("the A.B. Chance Training Manual"). Plaintiff was provided with safety instructions and was taught how to properly use the installer. Plaintiff also received instruction from Premium on helical pier installation at a field demonstration on a job site in Freeport, New York. There were two warnings on the drive head of the subject installer, which stated, "Warning. Safe secure both ends of the torque arm," and "Warning. Stay Clear of operation." The throttle override switch on the power pack that accompanied the installer was repaired by Premium in August 1996, and the drive head on the installer was repaired by Premium in January 1997. Plaintiff did not experience any problems with the functioning of the installer.

TSI, pursuant to a contract with Master Builders Construction, Inc. ("Master Builders"), was to install 28 helical piers in the performance of the construction of a swimming pool in a backyard at 159 Whitman Drive, in Brooklyn, New York. At 9:00 A.M., on March 28, 1997, TSI had already installed 14 helical piers and was on its third or fourth day of this job. On the previous day, plaintiff and his two employees, Joseph Lafond and

Joseph Valenzano, encountered a problem with buried debris which prevented them from driving a helical pier all the way into the ground. Therefore, after consulting the engineer, plaintiff decided to abandon this problematic pier and to add a new pier instead.

Although plaintiff and his workers had difficulty lifting the drive head of the installer off the problematic pier, plaintiff was able to successfully loosen the drive head collar on the stuck pier by tapping the foot pedal of the installer once or twice. Joseph Valenzano then stepped towards the next pier to prepare it for installation, and Joseph Lafond stepped towards the side of the drive head handle closest to a wall of dirt on which one side of the torque arm of the installer was resting. The other side of the torque arm was secured on an adjacent pier. At that point, plaintiff walked over to the drive head in order to remove it off the helical pier which was to be abandoned, to bring it to another helical pier. He does not know whether his foot was on the foot pedal, and he alleges that he did not intentionally activate the foot pedal. The installer was, however, activated, and the end of the torque arm hit plaintiff in the face, causing him to sustain serious injuries. The installer was thereafter used to complete the rest of the project at the job site, and continues to he used by Joseph Borracci, who has not complained of any problem with its functioning.

On May 8, 1998, plaintiff and his wife, plaintiff, Dawn Milazzo, commenced an action against Premium, Master Builders, and A.B. Chance. (This action was settled for $1,250,000 as against Masters Builders and discontinued as against A.B.Chance.) On December 21,1999, plaintiffs commenced an action against Wheco, alleging negligence and

strict products liability claims as against it. By order dated August 3, 2000, these actions were joined for purposes of trial. On June 29,2001, Premium commenced the third-party action as against **TSI** and Wheco, and, on June 3,2001, Wheco commenced a second third-party action as against Premium. The parties have also interposed cross claims.

In support of its instant motion, Wheco has submitted the expert affidavit of Ronald R. Anderson, an engineer, who provides specific evidentiary facts supporting his opinion that the cause of plaintiffs accident was unrelated to the design of the installer or the failure to warn, but, rather, that it was caused by operator error on the part of plaintiff. Wheco has additionally submitted the expert affidavit of William Robowski, an installer of helical piers, who also opines that the installer's design was not the cause of plaintiffs injuries, but that such injuries resulted from plaintiffs failure to properly secure the torque arm and to observe safely protocol. Thus, Wheco, by the foregoing submissions as well as the deposition testimony herein and other documentary evidence, has made a prima facie showing of its entitlement to summary judgment with respect to plaintiffs' claims ***(see Zuckerman*** v ***City of New York,*** **49** NY2d **557,** 562).

Plaintiffs, in opposition, have submitted the expert affidavit of George **A.** Snyder, a mechanical engineer, which contains only a bare, conclusory assertion, unsupported by germane foundational facts and data, that the foot control for the drive system of the installer was defectively designed because the foot plate was uncovered, unprotected, and unguarded, and, therefore, could be inadvertently activated ***(see Amatulli*** v ***Delhi Constr. Corp.***, 77

NY2d 525,533; ***Aghabi v Sebro,*** 256 AD2d 287,288; ***Pigliavento v Tyler*** *Equip.* ***Corp.,*** 248 AD2d 840, 842). To support his opinion, George **A.** Snyder relies upon the Occupational Safety and Health Administration **("OSHA")** standards. Specifically, he asserts that 29 CFR 1910.217 (b) (4) requires "[foot] pedal mechanism[s to] be protected to prevent unintended operation from falling or moving objects or by accidental stepping onto the pedal." Such reliance on this regulation, however, is misplaced since it applies to "[m]echanical [plower [p]resses" and specifically excludes machines that use "hydraulic [or] pneumatic power" (29 CFR 1910.217 [a] [5]). It is thus wholly inapplicable to the helical pier installer, which is hydraulic in nature and is not a mechanical power press. Moreover, "OSHA regulations are not applicable here, in any event, since these regulations generally govern employedemployer relationships, not strict products liability actions between employees and manufaciurers" ***(Jemmott v Rockwell Mfg. Co., Power Tools Div.,*** 216 AD2d 444,445; ***see also Merritt v Raven Co.,*** 271 AD2d 859, 862).

While George **A.** Snyder asserts that a safer product could have been designed and that **Wheco** should **have** employed **an** alternative **design, such** as controlling **the** system by buttons on a hand pendant control, Wheco complied with all applicable laws in the design of the installer, and it has not been shown that the installer was unreasonably safe as designed ***(see Merritt,*** 271 AD2d at 862; ***Pigliavento,*** 248 AD2d at 841; ***Starobin*** v ***Niagara Mach. & Tool Works Corp.,*** 172 AD2d 64, 66-67). Indeed, plaintiff had used the installer many times prior to the accident and the installer continues to be used, as designed, by the president of

TSI ***(see Pigliavento,*** 248 AD2d at 842). "Notably, 'a manufacturer has no duty to so design [its] procluct as to render it wholly incapable of producing injury [or] . . . to make it accident proof'" ***(Kelly v Academy Broadway Corp.,*** 206 AD2d 794, 795, quoting 86 NY Jur 2d, Products Liability § 46 at 449).

Furthermore, Ronald R. Anderson also asserts that sheer pins, which are discussed in the **A.B.** Chance Training Manual, are a safety device to prevent the application of excess torque to a helical pier. He states that sheer pins were not used by plaintiff, and that the use of sheer pins could have averted plaintiff's accident by preventing the torque arm from turning and striking plaintiff. Even if, as plaintiff alleges, the option to use sheer pins did not exist on the subject installer system, plaintiff must have been aware from the **A.B.** Chance Training Manual, which he received and reviewed during his training with **A.B.** Chance, that such an option was available on installers to prevent the subject accident from occurring, and elected to use the installer at issue which did not have this feature ***(see Merritt,*** 271 AD2d at 862; ***Pigliavento,*** 248 AD2d at 841). Thus, no triable issue of fact is raised by plaintiffs' expert's conclusory opinion that the proximate cause of plaintiff's injuries was the improper guarding of the foot pedal ***(Jemmott,*** 216 AD2d at 444).

With respect to plaintiffs failure to warn claim, plaintiffs expert, George **A.** Snyder, opines that Wheco was also negligent in that the installer system lacked effective warnings, including a specific warning about inadvertent activation, and that the warnings, training, and instructions given to plaintiff were inadequate. **As** noted above, however, the installer had

warnings to "secure both ends of the torque arm" and to "stay clear of operation." Furthermore, plaintiff was a licensed contractor, who had read the **A.B.** Chance Training Manual, received instruction, passed a test, and held a certification from **A.B.** Chance. It is undisputed that plaintiff was given safety warnings concerning the securing of the torque arm and operating the installer while standing in the radius of the torque arm when the foot pedal was in the radius of the torque arm. Plaintiff received specific training by **A.B.** Chance to stay away from the radius of the torque arm and the **A.B.** Chance Training Manual contains diagrams showing a shaded area, indicating a danger zone which must be avoided. Plaintiff testified at his deposition that he knew that the foot pedal should be 10 feet away and on the other side of the torque arm from the "pile drive" ***(see Terry*** v ***Erie*** *Foundry* Co., 23**5** AD2d 414, 4 16; ***Payne*** v ***Quality Nozzle*** Co., 227 AD2d 603,603).

"There is no duty to warn of a danger which is obvious and which the injured party either did or should have appreciated to the same extent as a warning would provide" ***(Terry,*** 235 AD2d 414,416, quoting ***Depasquale*** v ***Morbark Indus.***, 221 AD2d 409,409; ***see also*** *Bazerman* ***v*** *Gardall Safe* ***Corp.,***203 AD2d 56, 57), or **which** "can be recognized as a matter of common sense" ***(Pigliavento,*** 248 AD2d at **840; *see also Payne,*** 227 AD2d at 603; ***Bazerman,*** 203 AD2d at 57). Here, the potential for this injury and the risks and dangers associated with operating or activating the installer while within the radius of the torque arm were readily apparent and should have been perceived by plaintiff, who had been trained and received instruction with respect to these risks and dangers.

Plaintiffs argument that he received safety warnings only with respect to "operating" the drive system, and that he was not "operating" the drive system at the time of his accident, but merely attempting to move the drive head from one helical pier to another, is unavailing. Such distinction is without moment. Since plaintiff was aware of the risk of being hit with the torque arm while the installer was operating, he should have readily perceived the risks and dangers to his safety if he inadvertently activated the system while standing in the radius of the torque arm. Thus, inasmuch as no warning would have given plaintiff any greater knowledge of the obvious danger involved if he inadvertently activated the system while standing in the radius of the torque arm than he had already acquired through his own observations, prior experiences, training, and instruction in the years before his accident, the absence of a warning could not have proximately caused his injuries ***(see Barnes*** v ***Pine Tree*** *Much.*, 261 AD2d 295,295-296; ***Pigliuvento,*** 248 AD2d at 840). Consequently, summary judgment dismissing plaintiffs' complaint, the third-party complaint, and all cross claims as against Wheco is warranted ***(see*** CPLR 3212 [b]).

In addressing TSI's cross motion for summary judgment dismissing Premium':; third-party complaint and all cross claims as against it, the court notes that it is well settled that "where . . . a defendant asserts as an affirmative defense that any damages awarded to plaintiffs should be reduced due to the injured plaintiffs culpable conduct ***(see*** CPLR 1411), that defendant cannot also maintain a third-party action against the injured plaintiffs employer seeking to impute to the employer the very same negligence upon which the

culpable conduct defense is based" ***(Ruszkowski v Sears, Roebuck &*** Co., **188** AD2d **967, 968; *see also Kendall v Venture Dev.*, 206** AD2d **797, 798; *Lachhonna v Consolidated Edison*** Co. ***of New York*, 170** AD2d **191, 191).** "Th[is] principle . . . prevents a double counting of imputed culpable conduct in both a contributory negligence defense against an employee-plaintiff and a comparative negligence claim for contribution for the exact same acts against the employer based upon the doctrine of respondeat superior" ***(Kendall,* 206** AD2d at **799** n **3).**

In the case at bar, Premium has interposed as an affirmative defense to plaintiffs' action as against it that plaintiffs personal injuries and damages were caused by plaintiffs culpable conduct. Premium, in its third-party complaint as against TSI, alleges that TSI employed, controlled, supervised, and directed plaintiff in a negligent manner; failed to provide plaintiff with a safe place to work; and was careless, negligent, and reckless in the performance of its work at the subject premises. In support of its cross motion, TSI has submitted plaintiffs deposition testimony, which establishes that plaintiff was the only **person responsible for supervising the workplace** and **directing the manner** in **which** the injury-producing work was performed. It is also undisputed that the installer's drive head could not be activated unless pressure was applied to the foot pedal, and plaintiff was the only person on the job site at the time of the subject accident who operated the foot pedal, and who alleges that he may have inadvertently activated it, causing his accident.

Thus, TSI's culpable conduct, if any, was the conduct of the injured plaintiff, who was a principal and employee of TSI and the supervisor of the job, and, as such, there was only one wrong committed (see *Kendall,* 206 AD2d at **798;** *Ruszkowski,* **188** AD2d at **968;** *Lachhonna,* **170** AD2d at **191).** Under these circumstances, there is no difference between Premium's claim of negligence by plaintiff and the negligence it alleges as against TSI, as plaintiffs employer. Consequently, Premium is precluded from seeking to impute to TSI the very same negligence upon which **a** defense of its own culpable conduct is based (*Kendall,* 206 AD2d at **798;** *Ruszkowski,* **188** AD2d at **968).**

In opposition to TSI's motion, Premium argues that TSI is not entitled to summary judgment because TSI was run by its president, Joseph Borracci. Such argument is rejected. While Joseph Borracci was the president of TSI, it is undisputed that he was not present at the job site at the time of plaintiff's accident, and there is no evidence whatsoever that he was in any way involved with plaintiff's accident or that any negligence on his part could have contributed to or caused the accident.

Plaintiffs and Premium further contend that triable issues of fact exist concerning the involvement of other employees since plaintiff is uncertain as to how his accident occurred, and because there were two **TSI** employees, Joseph Lafond and Joseph Valenzano, present at the job site, along with plaintiff, at the time of the accident. Such contention is devoid of merit. While plaintiff may have been uncertain as to exactly how the installer became activated, he testified at his deposition that, at the time of his accident, Joseph Valenzano was

standing towards the next pier and Joseph Lafond was standing on the side of the drive head handle closest to a wall of dirt. He stated that neither of these two employees saw what had happened and that they did not press the foot pedal at the time of his accident. He also testified that these two TSI employees were only "occasional," not permanent employees, and that he was the supervisor of the job and acted in a supervisory capacity at the job site. Thus, there are no evidentiary facts that these two employees acted in a negligent manner, and the mere presence of these employees at the job site cannot support a separate claim of any negligent action by them that was distinct from Premium's claim against plaintiff (*compare* Pironi v City of New York, 233 AD2d 187, 188; Freeman v Diamond Chemical Co., 221 AD2d 413,414; Kendall, 206 AD2d at 799).

Premium's reliance upon *Pironi* (233 AD2d at 188), Freeman (221 AD2d at 414), and *Kendall* (206 AD2d at 799), in opposing TSI's cross motion, is misplaced. Unlike the case at bar, Pironi (233 AD2d at 188) and *Kendall* (206 AD2d at 799) involved absolute liability based upon nondelegable duties under Labor Law § 240, and there was also evidence raising triable issues as to independent acts of negligence of other employees. Freeman (221 AD2d at 414) is similarly inapposite to this case since, unlike here, triable issues of fact existed as to whether another employee of the corporate employer was separately negligent. Therefore, TSI's cross motion for summary judgment dismissing Premium's third-party complaint and all cross claims as against it is required (see CPLR 3212 [b]).

Accordingly, Wheco's motion for summary judgment dismissing plaintiffs' complaint, the third-party complaint, and all cross claims as against it is granted. **TSI's** cross motion for summary judgment dismissing Premiums third-party complaint and all cross claims as against it is also granted. In view of this disposition, it is unnecessary to address **TSI's** alternative cross motion for an order, pursuant to CPLR **603,** severing the third-party action as against it from the main action.

This constitutes the decision and order of the court.

J. .C.