CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Iverson v California Village Homeowner's Association (3/23/11)
Cal-OSHA violation; Negligence per se; Standard and Duty of Care

Defendant hired plaintiff, a licensed heating and refrigeration contractor, to service the air conditioner units on the roofs of several buildings at its condominium complex. A metal ladder was attached to each of the buildings on which plaintiff worked. After completing work on four buildings, plaintiff was ascending a ladder when he fell about 27 feet as he reached the ladder's top rung. The 26 ½ foot ladder did not contain a safety cage or other safety device. Cal-OSHA regulations, when applicable, require a cage or safety device for fixed ladders in excess of 20 feet. (Labor Code section 6300, et seq.)

Iverson sued California Village for his injuries, alleging it failed to provide a ladder complying with Cal-OSHA regulations. The defendant moved for summary judgment, contending it was not required to comply with Cal-OSHA because plaintiff was an independent contractor and plaintiff could not show it owed him a duty of care. The trial court granted the motion, barring plaintiff's claim because he could not use Cal-OSHA safety regulations to establish negligence, and therefore had not created a triable issue of material fact regarding duty, breach, or that the ladder created a dangerous condition.

In his complaint, plaintiff had alleged a negligence *per se* theory under his general negligence cause of action. Negligence *per se* is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence. (*Johnson v Honeywell Internat., Inc.* (2009) 179 Cal.App.4th 549) It does not have to be pleaded at all. (*Cragg v Los Angeles Trust Co.* (1908) 154 Cal. 663) On appeal, the Second District Court of Appeals stated that under the circumstances of this case, "the proper test to be applied is whether the landowner in the management of its property has acted as a reasonable man in view of the probability of injury to others." (*Rowland v*

Christian(1968) 69 Cal.2d 108) The possessor of the property is not an insurer of the invitee's safety, but must use reasonable care to keep the premises in a reasonably safe condition and warn of any latent or concealed peril. (*Ernest W. Hahn, Inc. v Superior Court* (1991) 1 Cal.App.4th 1448)

Under the negligence *per se* rule, a presumption of negligence arises from the violation of a statute that was enacted to protect a class of persons, of which the plaintiff is a member, against the type of harm which the plaintiff suffered as a result of violation of the statute. (*Padilla v Pomona College* (2008) 166 Cal.App.4th 661) The presumption arises if (1) the defendant violated a statute; (2) the violation proximately caused the plaintiff's injury; (3) the injury resulted from the kind of occurrence the statute was designed to prevent; and (4) the plaintiff was one of the class of persons the statute was intended to protect. (*Quiroz v Seventh Ave. Center* (2006) 140 Cal.App.4th 1256) The first two elements are normally questions for the jury and the last two are determined by the trial court as a matter of law. Thus, the trial court determines whether a statute or regulation defines the standard of care in a particular case. (*Jacob Farm/Del Cabo, Inc. v Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502)

Under Cal-OSHA, the place of employment provided to employees must be safe and healthful. In 1971, the Legislature provided that the statutes would be applicable only against employers. In 1999, the Legislature amended Labor Code section 6304.5. The Supreme Court interpreted the effect of the amendments in *Elsner v Uveges* (2004) 34 Cal.4th 915. In that case, plaintiff was employed by a roofing contractor retained by the defendant general contractor. The Supreme Court said that amendments to the statutes restored the common law rule that Cal-OSHA provisions could be used to establish the standard and duty of care in negligence actions against third parties, to the same extent as any other regulation or statute, whether the defendant is the plaintiff's employer or a third party. (*Elsner*, at p. 935-936)

Here, the Second DCA pointed out that the issue of whether an employee of an independent contractor can claim a violation of Cal-OSHA in a tort action against the property owner is unsettled. But an employment relationship, even if not directly with the owner, is a requirement under Cal-OSHA. The Majority Justices explained: "The difficulty with reading the court's language to allow negligence per se to result from the failure of an owner with no employees to comply with Cal-OSHA regulations is that the owner has not violated Cal-OSHA regulations. Those regulations only govern the employer's work place *vis-a-vis*

employees. The independent contractor is not a member of the class of person that Cal-OSHA was created to protect." The Court Majority inferred that Elsner meant that plaintiff must be an employee to be able to invoke Cal-OSHA.

Referring to Kuntz v Del E. Webb Constr. Co. (1993) 5 Cal.4th 689, the DCA relied on language that, "No cases have been found, however, holding that the mere right to see that work is satisfactorily completed imposes upon the one hiring an independent contractor the duty to assure that the contractor's work is performed in conformity with all safety provisions….These provisions of the Labor Code should not be construed as meaning that, where an owner of the premises does nothing more with respect to the work done by an independent contractor than exercise general supervision and control to bring about its satisfactory completion, it is his responsibility to assure compliance with all applicable safety provisions of the code and regulations issued thereunder." (Kuntz, at p. 106-107)

The Justices were careful to clarify that, to the extent there are defects or other unsafe conditions, the owner is subject to the normal laws of negligence. They added that, "Even if an owner might be liable to an employee of a contractor under the theory that there is a non-delegable duty imposed by the statute, that does not mean that there should be such liability to a nonemployee independent contractor. A licensed independent contractor is in a better position to assess the risk in any job and any defects in the premises than an employee….There may seem to be little distinction between the employee and the independent contractor. Nevertheless, Cal-OSHA regulations apply to employees. Accordingly, under the existing state of the law, Iverson cannot invoke Cal-OSHA to support his negligence *per se* theory."

The judgment is affirmed. Defendant is awarded its costs on appeal.

In dissent, Justice Turner stated there is a triable controversy whether defendant failed to provide a safe workplace, and a potential violation of Cal-OSHA can serve as a basis for a negligence finding. First, defendant, as plaintiff's principal, owed him a duty as an independent contractor to provide a safe work environment. (Torres v Reardon (1992) 3 Cal.App.4th 831) Plaintiff, as an independent contractor, may bring a direct action against the entity that employed him.

Second, there is no requirement defendant be plaintiff's employer for Labor Code section 6304.5 to apply. That section provides that sections 452 and 669 of the Evidence Code shall apply in the same manner as any other statute. There is

nothing in the statute to limit its applicability to the extremely narrow scope of possible personal injury actions between employers and employees.

Third, two appellate cases hold that in the peculiar risk context, the Labor Code can apply if the non-employer general contractor retains control of the premises and affirmatively contributes to the plaintiff's injuries. (See, *Millard v Biosources, Inc.* (2007) 156 Cal.App.4th 1338; *Madden v Summit View, Inc.* (2008) 165 Cal.App.4th 1267) Fourth, the peculiar risk decisional authorities cited by defendant are inapplicable to the question of plaintiff's right, as an independent contractor, to recover against it. This is not a peculiar risk case and the authorities cited by defendant concerning an employee of an independent contractor suing a general contractor are irrelevant. This case involves a direct action by an independent contractor against the defendant who employed him for workplace injuries.

Finally, the language of *Elsner*, is controlling. That case held that with the new amendments to the Labor Code, Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions. (See, *Elsner* at p. 928) "In general, plaintiffs may use Cal-OSHA provisions to show a duty or standard of care to the same extent as any other regulation or statute, whether the defendant is their employer or a third party. Justice Turner would thus find there is a triable issue of material fact whether defendant, the employer of an independent contractor, is liable for his injuries sustained in the workplace by reason of the alleged violation of a Cal-OSHA regulation.

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