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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KURT IVERSEN, Plaintiff and Appellant, v. CALIFORNIA VILLAGE HOMEOWNERS ASSOCIATION, Defendant and Respondent.	B220863 (Los Angeles County Super. Ct. No. LC080387)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bert Glennon, Jr., Judge. Affirmed.

Law Offices of Gene J. Goldsman, Gene Goldsman, Arik Shafir; The Ehrlich Law Firm and Jeffrey Isaac Ehrlich for Plaintiff and Appellant.

Mark R. Weiner & Associates and Kathryn Albarian for Defendant and Respondent.

INTRODUCTION

Defendant and respondent California Village Homeowner's Association (California Village) hired plaintiff and appellant Kurt Iversen (Iversen), an independent contractor, to service air conditioner units on the roofs of several of the buildings at its Tarzana, California condominium complex. Iversen fell from a ladder attached to one of those buildings and brought an action against California Village alleging theories of premises liability and negligence for injuries sustained in the fall. Iversen alleged negligence per se because the ladder was not equipped with the safety mechanism provided for by California Occupational Safety and Health Act (Lab. Code, § 6300 et seq.[1]) (Cal-OSHA) regulations. California Village moved for summary judgment, inter alia, on the ground that Iversen could not rely on Cal-OSHA to support a negligence action because he was an independent contractor and not California Village's employee. The trial court granted California Village's summary judgment motion.

On appeal, Iversen contends that he can use Cal-OSHA regulations to establish negligence per se because those regulations do not apply just to employees. We hold that the Cal-OSHA regulations do not apply to an independent contractor and that Iversen cannot use those provisions to establish negligence per se or negligence in this case. We therefore affirm the judgment**.**

BACKGROUND

A. Factual Background

The facts are undisputed. In February 2006, California Village hired Iversen, a licensed heating and refrigeration contractor, to service the air conditioner units on the roofs of several of the buildings at its condominium complex in Tarzana. The parties

[1] All further statutory references are to the Labor Code unless otherwise specified.

agree that Iversen was an independent contractor while performing work at the condominium complex.

Iversen worked on the roof air conditioner units on four buildings at the condominium complex before beginning work on the air conditioner units on the building in question.[2] A metal ladder over 20 feet was attached to each of the buildings on which Iversen worked.

While ascending the metal ladder attached to a building, Iversen fell about 27 feet to the ground as he reached for the ladder's top rung. Iversen had climbed the metal ladder attached to that building about six times prior to the date of the accident. Although Iversen believed that it was difficult to thrust his body over the threshold of the upper part of the ladder, he never complained about the ladder to California Village prior to his fall. The rungs and side rails on the metal ladder attached to the building remained intact and did not fail. The 26-1/2 foot fixed ladder from which Iversen fell did not contain a safety cage or other safety device. Cal-OSHA regulations, when applicable, require a cage or another safety device for fixed ladders in excess of 20 feet, such as the one from which Iversen fell. (Cal. Code of Regs., tit. 8, § 3277, subds. (f) & (g).)

B. Procedural Background

Iversen filed a first amended form complaint for negligence and premises liability against California Village. He alleged that California Village failed to provide a ladder that complied with Cal-OSHA regulations and the Federal Occupational Safety and Health Act of 1970, 29 U.S.C. sections 651 et seq. (OSHA) regulations.[3] California Village moved for summary judgment or, alternatively, for summary adjudication of

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[2] The first time Iversen accessed a roof at the condominium complex, he used an extension ladder owned by a roofing company that was also doing work at the complex.

[3] In his complaint, Iversen invoked the Federal OSHA regulations (29 C.F.R. §§ 1926.1053 and 1910.27(d)(l)(ii)) and "other regulations." Iversen did not contend in his opposition to California Village's summary judgment motion or on appeal that these federal OSHA allegations defeated California Village's summary judgment motion.

issues. California Village contended that it was not required to comply with Cal-OSHA regulations because Iversen was an independent contractor and Iversen could not establish it owed him a duty of care or breached a duty of care. In addition, California Village also contended that Iversen could not show that its failure to install safety equipment caused him to fall. Finally, California Village argued that Iversen voluntarily used the ladder knowing of its condition, thereby assuming any risk associated with the ladder.

The trial court granted California Village's summary judgment motion. In its order, the trial court cited the undisputed facts in California Village's separate statement and ruled, "Under these facts, [Iversen's] action is barred because [Iversen], an independent contractor, cannot use alleged non-compliance with Cal-OSHA safety regulations to establish negligence, and therefore has not created a triable issue of material fact regarding (1) [California Village] not owing [Iversen] a duty of care to prevent his fall; (2) [California Village's] lack of a breach of duty of care owed; and/or (3) that the subject ladder did not constitute a dangerous condition. (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267.)"

DISCUSSION

Iversen, in his form complaint, alleges "general negligence" and "premises liability." In his description of the claim, he specifies a "negligence per se theory" and in the form for "General Negligence" he added "Per se Negligence." Negligence per se is a theory of negligence, that raises a presumption of negligence. (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547.) 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, 555.) It does not have to be pleaded at all. (See *Cragg v. Los Angeles Trust Co.* (1908) 154 Cal. 663, 669-670.) As we discuss, Iversen relies only on his negligence per se theory in support of his claims based on negligence and premises liability.

A. Standard of Review

"We review the grant of summary judgment de novo. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19 [17 Cal.Rptr.2d 356].) We make 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222 [38 Cal.Rptr.2d 35].) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 853 [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1216-1217.) We must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 843.)

B. Relevant Principles

1. Negligence

"All persons are required to use ordinary care to prevent injury to others from their conduct. (Civ. Code, § 1714, subd. (a); *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561].) This general rule requires a property owner to exercise ordinary care in the management of his or her premises in order to avoid exposing persons to an unreasonable risk of harm. (*Rowland, supra,* at p. 119; *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371 [178 Cal.Rptr. 783, 636 P.2d 1121]; BAJI No. 8.00 (7th ed. 1986).)" (*Scott v. Chevron U.S.A.* (1992) 5 Cal.App.4th 510, 515.) The elements of a negligence cause of action are a legal duty to use due care, a

breach of that duty, and the breach is the proximate or legal cause of the resulting injury. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, disapproved on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5; see *Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619.)

"'Once the existence of a legal duty is found, it is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform.' (Rest.2d Torts, § 328B, com. f, p. 153. [¶] The formulation of the standard of care is a question of law for the court. [Citations.] Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether the defendant's conduct has conformed to the standard. [Citations.]" (*Ramirez v. Plough, Inc., supra,* 6 Cal.4th at p. 546.) Stated otherwise, "[t]he existence of a duty of care is a separate issue from the question whether (on the basis of foreseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498.)

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,* [*supra*], 69 Cal.2d [at p.] 119 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496].) Insofar as an invitee is concerned, the applicable general principle is that 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, 1450.)

"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 the violation of the statute. [Citation.]" (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 675; *Johnson v. Honeywell Internat., Inc., supra,* 179 Cal.App.4th at p. 558.) "The presumption of negligence 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, 1284-1285 [45 Cal.Rptr.3d 222] (*Quiroz*), citing Evid. Code, § 669, subd. (a).) The first two elements are normally questions for the trier of fact and the last two are determined by the trial court as a matter of law. (*Quiroz, supra,* at p. 1285.) That is, the trial court decides whether a statute or regulation defines the standard of care in a particular case." (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1526.)

2. Cal-OSHA

"Under Cal-OSHA, the employment and place of employment provided to employees must be safe and healthful. (§ 6400, subd. (a).) Among other things, the employer must 'furnish and use safety devices and safeguards,' adopt methods and practices that are 'reasonably adequate to render such employment and place of employment safe and healthful,' and 'do every other thing reasonably necessary to protect the life, safety, and health of employees.' (§ 6401.)" (*Cortez v. Abich* (2011) 51 Cal.4th 285, 291-292.)

"The provisions of Cal-OSHA are intended to 'assur[e] safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for . . . enforcement in the field of occupational safety and health.' (§ 6300.) Until 1971, these provisions were routinely admitted in workplace negligence actions to show the standard of care, and their violation was treated as negligence per se. [Citations.]" (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 926 (*Elsner*).)

"In 1971, the Legislature enacted section 6304.5, which originally provided: 'It is the intent of the Legislature that the provisions of this division shall only be applicable to proceedings against employers brought pursuant to the provisions of Chapter 3

(commencing with Section 6500) and 4 (commencing with Section 6600) of Part 1 of this division for the exclusive purpose of maintaining and enforcing employee safety. [¶] Neither this division nor any part of this division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action arising after the operative date of this section, except as between an employee and his own employer.' (Stats.1971, ch. 1751, § 3, p. 3780.) Thereafter, both [the California Supreme Court] and the Courts of Appeal consistently held that section 6304.5 barred the introduction of Cal-OSHA provisions in actions between employees and third party tortfeasors. (See, e.g., *Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 588 [153 Cal.Rptr. 213, 591 P.2d 503]; *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1039 [43 Cal.Rptr.2d 158].)" (*Elsner, supra*, 34 Cal.4th at p. 926.)

In 1999, the Legislature substantially amended section 6304.5. (*Elsner, supra*, 34 Cal.4th at p. 926 citing Assem. Bill No. 1127 (1999-2000 Reg. Sess.).) As amended, section 6304.5 provides:

"It is the intent of the Legislature that the provisions of this division, and the occupational safety and health standards and orders promulgated under this code, are applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety. [¶] Neither the issuance of, or failure to issue, a citation by the division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer. Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation."

3. Application of Cal-OSHA

In *Elsner, supra*, 34 Cal.4th 915, the Supreme Court interpreted the effect of the 1999 amendments to section 6304.5. In that case, the plaintiff was employed by a roofing contractor retained by the defendant general contractor. The plaintiff sued the defendant for negligence in connection with the plaintiff's injury while working on the

roof. The defendant moved in limine for an order excluding references to Cal-OSHA regulations. The trial court admitted the evidence. The Supreme Court affirmed the Court of Appeal decision reversing the trial court's admission of the Cal-OSHA material. The Supreme Court said that amendments to section 6304.5 restored the common law rule that Cal-OSHA provisions could be used to establish the standard and duty of care in negligence actions, including as against third parties, but, in affirming the Court of Appeal decision, held that the amendments could not be applied retroactively. Nevertheless, the court explained that "[t]he second paragraph of section 6304.5 catalogues the rules for the admissibility of Cal-OSHA provisions in trial court personal injury and wrongful death actions. 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." (*Elsner, supra,* 34 Cal.4th at pp. 935-936.) The sole exception applies to certain types of actions against the State. (*Id.* at p. 936.)

The court in *Elsner, supra,* 34 Cal.4th 915 observed that the key sentence in the amendment was the sentence in the second paragraph that provides: "'Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation.'" (*Id.* at p. 927.) The court stated that subdivision (a) of Evidence Code section 452[4] provides for judicial notice of state statutes and regulations and Evidence Code section 669[5] allows proof of a statutory violation to create a

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[4] Evidence Code section 452, subdivision (a) provides:

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: [¶] (a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state."

[5] Evidence Code section 669, subdivision (a) provides:

"(a) The failure of a person to exercise due care is presumed if:

presumption of negligence in certain circumstances. (*Elsner, supra,* 34 Cal.4th at p. 927.) The court said that Evidence Code section 669 "codifies the common law doctrine of negligence per se, pursuant to which statutes and regulations may be used to establish duties and standards of care in negligence actions." (*Elsner, supra,* 34 Cal.4th at p. 927, fn. omitted.) The court noted that in addition to the language referring to Evidence Code sections 452 and 669, the amendments deleted language from section 6304.5 that precluded the admission of Cal-OSHA provisions in third party actions. (*Elsner, supra,* 34 Cal.4th at pp. 927-928, citing Stats.1971, ch. 1751, § 3, p. 3780 & Stats.1999, ch. 615, § 2.) Thus, the Supreme Court concluded, under the 1999 amendments, "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." (*Id.* at p. 928.) The court in *Elsner* observed that the admissibility of Cal-OSHA regulations does nothing to expand the general common-law duty of care. (*Id.* at p. 937; see *Padilla v. Pomona College, supra,* 166 Cal.App.4th at p. 673, fn. 14.)

The issue of whether an employee of an independent contractor can claim a violation of Cal-OSHA in a tort action against the owner is one that is unsettled. (Cf. *Cortez v. Abich, supra,* 51 Cal.4th at p. 291.)[6] But an employment relationship (*Cortez v.*

"(1) He violated a statute, ordinance, or regulation of a public entity;

"(2) The violation proximately caused death or injury to person or property;

"(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

"(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted."

[6] The Supreme Court has granted review in *Seabright Ins. Co. v. U.S. Airways, Inc.* (June 9, 2010, S182508), which concerns the issue of whether the hirer of an independent contractor may be liable for an injury to contractor's employee based on the hirer's noncompliance with Cal-OSHA.

Abich, supra, 51 Cal.4th at p. 291), even if not directly with the owner, is a requirement under Cal-OSHA. Section 6304.5, which Iversen invokes, is applicable only to employees in the workplace. That section specifies that "the occupational safety and health standards and orders promulgated under this code, are applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety." Also, that section is in the same division that defines "employer" (§ 6304) and "employee" (§ 6304.1). Moreover, part of that same division is section 6400, subdivision (a), which provides, "(a) Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein" and section 6300, which provides, inter alia, that its purpose is to encourage "employers to maintain safe and healthful working conditions."

There is no authority directly holding that Cal-OSHA and its regulations are applicable to an independent contractor with no employees. The court in *Elsner, supra,* 34 Cal.4th at pages 935-936 suggests the applicability of Cal-OSHA to actions against an employer, as well as third party actions, and, in this connection, refers to Evidence Code section 669, which provides that a statutory violation may result in negligence per se. 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-à-vis employees. The independent contractor is not a member of the class of persons that Cal-OSHA was created to protect. However the Supreme Court's language in *Elsner* can be read with regard to "third party actions," there is no third party in this case. An example of a third party action might be a "negligence action by [an] injured subcontractor's employee against general contractor." (Wegner, Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2010) ¶ 8:749, p. 8C-100.8.)[7]

[7] *Madden v. Summit View, Inc., supra,* 165 Cal.App.4th at page 1280 "refused to read into *Elsner* or amendments to the Labor Code any intent to bring a 'sweeping enlargement of tort liability of those hiring independent contractors by making them

The court in *Elsner*, in saying that plaintiffs may use Cal-OSHA provisions "to the same extent as any other regulation or statute, whether the defendant is their employer or a third party" (*Elsner*, *supra*, 34 Cal.4th at pp. 935-936), likely permitted the plaintiff, as an employee, to use Cal-OSHA in an action against the employer or a third party, such as the general contractor or owner.[8] This would suggest that plaintiff must be an employee to be able to invoke Cal-OSHA. Thus, we conclude that *Elsner* does not impose on California Village a duty to Iversen, who was not an employee of anyone, by virtue of Cal-OSHA. As the court in *Elsner* stated, a violation of Cal-OSHA cannot create a duty when no duty otherwise existed. (*Id.* at p. 937.)

Professor Dobbs has suggested that even if a statute applies only to workers, a nonworker might be able to rely upon the requirements of the statute. (1 Dobbs, The Law of Torts (2001) § 138, p. 327 (Dobbs).) Otherwise, if a statute protecting workers required covering an elevator shaft and "a firefighter or a person making a delivery to the premises falls into an open shaft, he enjoys none of the statute's protections." (*Ibid.*) Dobbs asserts that courts, in order to avoid this distinction, have "at least four approaches (1) . . . protect all persons who would naturally and forseeably be injured by a violation of the statute . . . . (2) protect 'anyone who is endangered by the open shaft that the legislature has forbidden'; [or] 'reject the class of person and risk limitations altogether'; or 'reject negligence per se when the statute does not cover persons like plaintiff or harms like those suffered, but can nevertheless treat violations of the statute as some evidence of

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civilly liable for Cal-OSHA or other safety violations resulting in injuries to the contractors' employees.' Thus, expressed the court of appeal, safety regulations are only admissible where evidence establishes that the general contractor *affirmatively contributed* to the injuries." (8 Miller & Starr, Cal. Real Estate (3d ed. 2010-2011 Supp.) § 22:57, p. 39.)

[8] As stated in *Madden v. Summit View, Inc.*, *supra*, 165 Cal.App.4th at page 1279, "In Elsner . . . the plaintiff was attempting to impose direct liability on the general contractor for its own affirmative conduct in providing unsafe equipment, not vicarious liability based on its failure to act."

negligence.'" (*Id.* at pp. 327-328; see generally Rothstein, Occupational Safety and Health Law (2011) § 21:13, pp. 699-708.)

There are difficulties with each of those suggestions, especially in this case. Many commercial and industrial buildings have owners without employees. Those owners should not be expected to be familiar with and utilize all the provisions of Cal-OSHA.[9] To the extent there are defects such as open shafts or other unsafe conditions, the owners are subject to the normal laws of negligence. A premises owner owes a duty to an independent contractor to provide safe work conditions. (See 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 126, pp. 170-172; Rest.2d Agency, § 470 ["principal is subject to the same liability to an agent for his own conduct as he is to third persons for similar conduct . . ."].)

Even if an owner might be liable to an employee of a contractor under the theory that there is a nondelegable 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 defects in the premises than an employee. Here, any hazard was not latent to the independent contractor. California Village did not affirmatively contribute to plaintiff's injury. (See *Madden v. Summit View, Inc.*, *supra*, 165 Cal.App.4th at pp. 1276-1281.) The employee is covered by worker's compensation insurance, but the contractor generally has the protection of insurance to cover injuries. 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, Iversen cannot invoke Cal-OSHA to support his negligence per se theory.

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[9] We do not reach the question of whether an owner who uses independent contractors with employees or has tenants with employees has greater obligations.

4. General Negligence

Even if theoretically a statute could be used either by an expert or otherwise to establish a breach of the standard of care when the plaintiff, as in this case, is not one who was to be protected by the statute (see Dobbs, *supra,* at p. 328), such a possibility is of no help to Iversen here. Iversen, in his pleading specified that he is relying only on a negligence per se theory. Moreover, in a written response to an inquiry from this court as to whether Cal-OSHA can be used as evidence concerning the standard of care in a general negligence case, Iversen's attorney again invoked only the negligence per se theory.

California Village's expert declared that the ladder was not dangerous or defective and complied with all applicable building and municipal codes. Iversen's expert relied entirely on the lack of a safety device as provided for in OSHA and Cal-OSHA. He did not opine on general negligence or on whether there was a breach of the standard of care. There is no evidence that California Village played an active role in the accident. Because California Village is entitled to summary judgment, we do not reach the other issues discussed by the parties: the domestic household service exclusion in Cal-OSHA (§ 6303, subd. (b)) and the defense of assumption of risk.

DISPOSITION

The judgment is affirmed. California Village Homeowners Association is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION

MOSK, J.

I concur:

KRIEGLER, J.

I respectfully dissent. In my view, there is a triable controversy as to whether defendant, who employed plaintiff as an independent contractor, negligently failed to provide a safe workplace. And the potential violation of a California Occupational Safety and Health Act regulation 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, 836-837; Rest.2d Agency, §§ 470[1] & com. c, illus. 4[2], 471[3].) The workers' compensation remedy (and immunity from suit for an employer) is inapplicable because plaintiff is an independent contractor. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349; *Torres v. Reardon*, *supra*, 3 Cal.App.4th at pp. 836-837.) Thus, plaintiff, as an independent contractor, may bring a *direct* action to recover for his injuries against the entity that employed him.

Second, there is no requirement defendant be plaintiff's employer for Labor Code section 6304.5 to apply. This is the essence of defendant's argument. The admissibility of evidence portion of Labor Code section 6304.5 states in part, "Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance,

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[1] Section 470 of the Restatement Second of Agency states in part, "A principal is subject to the same liability to an agent for his own conduct as he is to third persons for similar conduct . . . ."

[2] Illustration No. 4 to comment c of section 470 of the Restatement Second of Agency states: "P employs A, a real estate broker, to sell his house, and drives A to the premises. While upon the premises, A is hurt by a hidden defect in a stairway, the presence of which P should have known. In taking A to the hospital in his car, P negligently collides with another car, further harming A. P is subject to liability to A for both harms."

[3] Section 471 of the Restatement Second of Agency states, "A principal is subject to liability in an action of tort for failing to use care to warn an agent of an unreasonable risk involved in the employment, if the principal should realize that it exists and that the agent is likely not to become aware of it, thereby suffering harm."

or regulation." There is nothing in the text of the admissibility of evidence portion of Labor Code section 6304.5 which limits its applicability to the extremely narrow scope of possible personal injury actions between employers and employees.

Any ambiguity in that regard is resolved by reference to the Legislative Counsel's Digest and committee reports prepared when Assembly Bill No. 1127 (1999-2000 Reg. Sess.) was enacted. Nothing in the Legislative Counsel's Digest and committee reports prepared when Assembly Bill No. 1127 was enacted states that Labor Code section 6304.5 applies *only* when an employee sues an employer. The Legislative Counsel's Digest for Assembly Bill No. 1127 states in part: "Existing law provides that the provisions of the California Occupational Safety and Health Act of 1973 (hereafter the act) have no application to, may not be considered in, and may not be admitted into, evidence in any personal injury or wrongful death action arising after January 1, 1972, except as between an employee and his or her employer. [¶] . . . The bill also would provide that Sections 452 and 669 of the Evidence Code would apply to the act and the occupational safety and health standards and orders promulgated under the Labor Code in the same manner as any other statute, ordinance, or regulation." Note Evidence Code section 669 applies in civil actions of all types, not merely the rare circumstances where an employee sues her or his employer.

Moreover, committee reports make it clear the admissibility of evidence portion of Labor Code section 6304.5 applies to personal injury actions. For example, one series of pre-enactment reports states, "Provides that OSHA standards and orders may be admitted into evidence in a personal injury or wrongful death action." (Assem. Com. on Labor and Employment, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for Apr. 14, 1999 hearing, p. 1; Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for May 11, 1999 hearing, p. 1; Assem. Com. on Appropriations, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for May 26, 1999 hearing, p. 2; Assem. Floor Analysis, 3d reading analysis of Assem. Bill No. 1127 (1999-2000 Reg. Sess.) as amended May 18, 1999, p. 2.) According to a report prepared for the Assembly public

safety committee, "Presumes that OSHA standards are reasonable and proper requirements of safety and are, therefore, admissible in any civil or criminal matter." (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for May 11, 1999 hearing, p. 1.) An Assembly third reading report states, "Provides that OSHA standards and orders may, in the same manner as other statutes and regulations, be admitted into evidence in a personal injury or wrongful death action." (Assem. Floor Analysis, 3d reading analysis of Assem. Bill No. 1127 (1999-2000 Reg. Sess.) as amended June 1, 1999, p. 2.)

A report submitted to the Senate industrial relations committee indicates: "Admissible Evidence [¶] - repeals the prohibition of admitting OSHA standards and orders as evidence in negligence and wrongful death actions[.]" (Sen. Com. on Industrial Relations, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for Jun. 23, 1999 hearing, p. 5.) Two Senate public safety committee reports note in part: "This bill . . . changes the admissibility rules to allow the admission of this division and the occupational safety and health standards and orders promulgated under the Labor Code to be admitted into evidence in a personal injury or wrongful death action . . . ." (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for Jul. 6, 1999 hearing, p. 9; Sen. Com. on Public Safety, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for Jul. 13, 1999 hearing, p. 9.) Another Senate public safety committee report relates: "Existing law prohibits the admissibility of OSHA regulations and statutes in personal injury or wrongful death [actions]. This is contrary to the usual rule of admissibility of statutes and regulations in court proceedings. . . . [¶] This bill provides that OSHA standards, statutes and orders are admissible in proceedings against employers." (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for Aug. 17, 1999 hearing, p. 23; Sen. Com. on Public Safety, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for Jul. 13, 1999 hearing, p. 23.) Two Senate third reading reports state, "The bill provides that Sections 452 and 669 of the Evidence Code [apply] to the act and the occupational safety and health standards and

orders promulgated under the Labor Code in the same manner as any other statute, ordinance or regulation." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1127 (1999-2000 Reg. Sess.) Sep. 5, 1999, p. 8; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1127 (1999-2000 Reg. Sess.) Sep. 7, 1999, p. 7.)

After the Senate approved the bill, one Assembly report referring to the new admissibility of evidence provision was prepared. The report noted that when originally passed in the Assembly, "Provided that OSHA standards and orders may, in the same manner as other statutes and regulations, be admitted into evidence in a personal injury or wrongful death action." (Assem. Floor Analysis, Conc. in Sen. Amends. to Assem. Bill No. 1127 (1999-2000 Reg. Sess.) as amended Sep. 3, 1999, p. 4.) The report explained the effect of the Senate amendments, "Clarify that OSHA statutes and regulations, but not citations or orders, may be admitted into evidence, in the same manner as other statutes and regulations." (Assem. Floor Analysis, Conc. in Sen. Amends. to Assem. Bill No. 1127 (1999-2000 Reg. Sess.) as amended Sep. 3, 1999, p. 1.)

No Assembly or Senate committee report states the admissibility of evidence provision of Labor Code section 6304.5 applies only when an *employee* sues an employer. Only two Senate public safety committee reports even state Labor Code section 6304.5 permits "OSHA standards, statutes and orders are admissible in proceedings against employers" but they *never* limit its effect to suits where the other litigant is an employee. (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for Aug. 17, 1999 hearing, p. 23; Sen. Com. on Public Safety, Rep. on Assem. Bill No. 1127 (1999-2000 Reg. Sess.) for Jul. 13, 1999 hearing, p. 23.) No language of the committee reports states Labor Code section 6304.5 is inapplicable when the plaintiff is an independent contractor acting as the defendant's agent as occurred here. And herein is the greatest weakness of defendant's position—it finds no support in the express language of Labor Code section 6304.5 nor in a single sentence of any committee report.

Third, a pair of cases, *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1348-1352, and *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1279, hold, in the peculiar risk context, Labor Code section 6304.5 can apply if the non-employer general contractor retains control of the premises and affirmatively contributes to the plaintiff's injuries. In *Millard v. Biosources, Inc., supra,* 156 Cal.App.4th at page 1352, the Court of Appeal explained, "Under amended section 6304.5, safety regulations may be admissible in actions by employees of subcontractors brought against general contractors that retain control of safety conditions, but only where the general contractor affirmatively contributed to the employee's injuries." In *Madden v. Summit View, Inc., supra,* 165 Cal.App.4th at page 1280, the Court of Appeal agreed with the analysis in the *Millard* opinion, "Thus, notwithstanding [*Elsner v. Uveges* (2004) 34 Cal.4th 915], safety regulations are only admissible in actions by employees of subcontractors brought against general contractors where other evidence establishes that the general contractor affirmatively contributed to the employee's injuries. (*Millard* [*v. Biosources, Inc.*], *supra,* 156 Cal.App.4th at p. 1352. . . .)" Even though neither defendant in those two cases was the employer of the plaintiff, *Millard* and *Madden* hold Labor Code section 6304.5 can be applicable.

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. The peculiar risk rules arise when an employee of an independent contractor (or another third person) seeks to hold the hirer (the owner or general contractor) of the independent contract liable for his or her injuries. The peculiar risk doctrine is characterized as a rule of vicarious liability—the plaintiff is seeking to hold the hirer of her or his employer (the independent contractor) liable. (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 525; *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 261-262.) Moreover, the 1999 amendment to Labor Code section 6304.5 did not alter peculiar risk jurisprudence unless the owner, general contractor or hirer of a subcontractor has control of the premises. (*Madden v. Summit View, Inc., supra,* 165 Cal.App.4th at p. 1279;

Millard v. Biosources, Inc., supra, 156 Cal.App.4th at pp. 1348-1352.) But as noted, if the owner, general contractor or hirer of a subcontractor has control of the premises, then Labor Code section 6304.5 can apply. (*Millard v. Biosources, Inc., supra*, 156 Cal.App.4th at p. 1352.) This is not a peculiar risk case and the authorities cited by defendant concerning an employee of an independent contractor (or as in *Tverberg* the independent contractor himself) 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.

Fifth, the language of our Supreme Court in *Elsner v. Uveges, supra*, 34 Cal.4th at pages 928 and 935-936 is in my view controlling. The initial part of the discussion portion of *Elsner* involves a detailed interpretation of the second sentence of the second paragraph of Labor Code section 6304.5.[4] At one point, our Supreme Court held in *Elsner*: "In combination, the new language and the deletion indicate that henceforth, 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." (*Elsner v. Uveges, supra*, 34 Cal.4th at p. 928.) Our Supreme Court concluded its statutory interpretation analysis in a similar vein: "The second paragraph of section 6304.5 catalogues the rules for the admissibility of Cal-

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[4] Labor Code section 6304.5 provides in its entirety: "It is the intent of the Legislature that the provisions of this division, and the occupational safety and health standards and orders promulgated under this code, are applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety. [¶] Neither the issuance of, or failure to issue, a citation by the division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer. *Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation.* The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards. It is the intent of the Legislature that the amendments to this section enacted in the 1999-2000 Regular Session shall not abrogate the holding in Brock v. State of California (1978) 8l Cal.App.3d 752." (Italics added.)

OSHA provisions in trial court personal injury and wrongful death actions. 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. The lone exception arises when the state is the defendant based on actions it took or failed to take in its regulatory capacity; in such cases, Cal-OSHA provisions remain inadmissible to show liability based on breach of the statutory duty to inspect worksites and enforce safety rules." (*Id*. at pp. 935-936.) We are bound by the foregoing language in *Elsner*. For these reasons, I would hold there is a triable controversy as to whether defendant, who employed plaintiff as an independent contractor, is liable for his injuries which were sustained in the workplace by reason of the alleged violation of a California Occupational Safety and Health Act regulation.

TURNER, P. J.