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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) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is hereby ordered that the opinion filed on March 23, 2011 be modified as follows:

1. On the second line of page 3 add the following sentence.

A roofing company was doing work on the roofs. There is no evidence that California Village had any employees performing work on the roofs or air-conditioning units.

2. The first sentence of first full paragraph on page 11 is modified to read as follows:

There is no authority directly holding that Cal-OSHA and its regulations are applicable to an independent contractor without regard to its or anyone's employees.

3. Add after the first incomplete paragraph on page 12 the following paragraphs:

***Elsner, supra,* 34 Cal.4th at page 926, referred to cases such as *Porter v. Montgomery Ward & Co., Inc.* (1957) 48 Cal.2d 846 [business invitee consensually on the premises could rely on Cal-OSHA regulations in connection with a stairway for both employees and invitees, to raise a presumption of negligence] to indicate that prior to the 1971 enactment of section 6304.5, Cal-OSHA provisions "were routinely admitted in workplace negligence actions to show the standard of care, and their violation was treated as negligence per se." (*Elsner, supra,* 34 Cal.4th at p. 926.) The court in *Elsner* did not necessarily adopt the explicit holdings of each of those cases. In holding that the amendments to section 6304.5 restored the common law rule, the court did not state specifically that Cal-OSHA could be invoked by an independent contractor against an owner. (Cf. *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1349-1350 [*Elsner* did not restore prior cases so as to expand duty of care owed by general contractor to a subcontractor's employees beyond the limitations of *Privette v. Superior Court* (1993) 5 Cal.4th 689 and its progeny].)**

In *Kuntz v. Del E. Webb Constr. Co.* (1961) 57 Cal.2d 100, 106 (Kuntz), also cited in *Elsner, supra,* 34 Cal.4th at page 926, the court decided after (and referring to) *Porter v. Montgomery Ward & Co. Inc., supra,* 48 Cal.2d at pages 847-849 and prior to the enactment of section 6304.5, acknowledged that "an employer-employee relationship in the usual sense is not essential for application of the Labor Code." (*Kuntz, supra,* 57 Cal.2d at p. 106.) But the court went on, "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." (*Kuntz, supra,* 57 Cal.2d at p. 107.) The court also stated, "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 . . . ." (*Id.* at p. 106.) Thus, the common law to which the court in *Elsner, supra,* 34 Cal.4th at p. 926 referred did not impose upon an owner a duty to an independent contractor to assure that the premises are Cal-OSHA safety-regulation compliant.

4. Add the following citation to the second line on page 13 within the parentheses after the citation to Rothstein:

Porat, *Expanding Liability for Negligence Per Se* (2009) 44 Wake Forest L. Rev. 979.

5. After the first complete paragraph on page 13 add the following new paragraph.

In *Tverberg v. Fillner Construction, Inc.* (Feb. 24, 2011, A120050) __ Cal.App.4th __ [2011 WL 670247], an independent contractor hired by a subcontractor and injured on the jobsite sued the general contractor and the subcontractor for negligence and premises liability. The court said that in that case the "evidence of affirmative contribution is much stronger than a mere breach of duty." (*Id.* at p. * 6.) There, the defendant created the safety hazard. The court stated that a Cal-OSHA safety regulation was a non delegable duty that "may form the basis of direct liability." (*Id.* at p. * 5.) The court did not state, however, that

the failure to comply with the regulations by a passive owner of the premises allowed the injured plaintiff to assert a negligence per se theory against the owner based on such noncompliance.

The petition for rehearing is denied.

MOSK, J. KRIEGLER, J.

I would grant a rehearing.

TURNER, P. J.