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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MARIA DOLORES RAMIREZ et al., Plaintiffs and Appellants, v. THOMAS NELSON et al., Defendants and Respondents.	2d Civil No. B179275 (Super. Ct. No. CIV217462) (Ventura County)

In this wrongful death case, a worker trimming trees was electrocuted. His parents sued the homeowners in whose trees their son was working. The jury found the homeowners were negligent, but that their negligence was not a substantial factor in the worker's death. We conclude the trial court erred in refusing a jury instruction based on Penal Code section 385.[1] Section 385 makes it a misdemeanor for any person, either personally or through an employee, to move any tool or equipment within six feet of a high voltage overhead line. We reverse.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS

Maria Dolores Ramirez and Martin Flores ("the Floreses") are the parents of the decedent, Luis Flores.

Thomas and Vivian Nelson are homeowners. Their backyard has a number of trees, including a eucalyptus tree. Every two or three years, Southern California Edison has the eucalyptus tree trimmed so that its branches do not reach the high-voltage electrical lines that run above the tree. The electrical lines are visible to everyone.

On January 15, 2002, Southern California Edison's tree trimmers gave the Nelsons notice they would trim the eucalyptus tree the next day, but they did not do so. About three weeks later, the Nelsons orally contracted with Julian Rodriguez to trim trees in their backyard, including the eucalyptus tree. The Nelsons had used Rodriguez four or five times in the past to trim trees. Their neighbor had used him for years. The Nelsons believed Rodriguez did exceptional work trimming trees.

Rodriguez arrived at the Nelsons' home on February 14, 2002. He had a crew of four men, including Flores. Flores worked on the eucalyptus tree while other crew members worked on other trees in the Nelsons' backyard. The Nelsons neither supervised the trimming, nor did they provide the tools. The eucalyptus tree is more than 15 feet in height.

Vivian Nelson could see Flores working about half-way up in the eucalyptus tree from her kitchen window. He was working above his shoulders with a pole. She could not tell from her kitchen window from what material the pole was made.

Around noon, Vivian Nelson heard men shouting in Spanish. She looked out the kitchen window, and saw men running to the eucalyptus tree. She went out onto her deck, and saw Flores hanging in the eucalyptus tree from his safety harness. She called her husband, who called 911.

Flores had been killed by electrocution. No one saw the accident happen. After the accident, Vivian Nelson noticed that the pole Flores had been using was made of aluminum and wood.

The Nelsons did not know that Rodriguez was not licensed and had no workers compensation insurance. The Floreses' safety expert admitted, however, that the license required for tree trimming did not require the applicant to take an examination. The expert acknowledged that to obtain a license, Rodriguez "wouldn't have been required to demonstrate knowledge of any particular subject matter pertaining to tree trimmers, whether it be techniques, tools, [or] anything[]."

DISCUSSION

I

The Floreses contend the trial court erred in refusing to instruct the jury that a violation of section 385 is negligence per se.

A statutory violation is presumed negligence per se. (Evid. Code, § 669.) The presumption arises because the statute sets the standard of care. (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 383.)

Section 385, subdivision (b), provides: "Any person who either personally or through an employee or agent, or as an employee or agent of another, operates, places, erects or moves any tools, machinery, equipment, material, building or structure within six feet of a high voltage overhead conductor is guilty of a misdemeanor."[2]

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[2] Section 385, subdivision (d), contains exceptions which are not relevant here. Subdivision (d) provides: "The provisions of this section shall not apply to (1) the construction, reconstruction, operation or maintenance of any high voltage overhead conductor, or its supporting structures or appurtenances by persons authorized by the owner, or (2) the operation of standard rail equipment which is normally used in the transportation of freight or passengers, or the operation of relief trains or other emergency railroad equipment by persons authorized by the owner, or (3) any construction, reconstruction, operation or maintenance of any overhead structures covered by the rules for overhead line construction prescribed by the Public Utilities Commission of the State of California."

The Floreses argue section 385, subdivision (b), applies because Flores was an employee of the Nelsons under Labor Code section 2750.5. Labor Code section 2750.5 creates a rebuttable presumption that a contractor performing work for which a license is required pursuant to section 7000 et seq. of the Business and Professions Code is an employee rather than an independent contractor. Labor Code section 2750.5 sets forth factors in subdivisions (a), (b) and (c) that must be proved to rebut the presumption.

The penultimate paragraph of Labor Code section 2750.5 provides: "In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status." The Business and Professions Code requires to be licensed any person who contracts to trim trees 15 feet in height and above. (Bus. & Prof. Code, § 7026.1, subd. (c).) The tree that Flores was trimming at the time of his death was over 15 feet in height.

In *State Compensation Insurance Fund v. Workers Compensation Appeals Board* (1985) 40 Cal.3d 5, 15 (*State Compensation*), our Supreme Court held that the meaning of the penultimate paragraph of Labor Code section 2750.5 is clear: "[T]he person lacking the requisite license may not be an independent contractor." The court also stated: "[T]he section purports to determine status of persons as independent contractors or employees, and the language of the section does not reflect legislative intent that a contractor lacking the requisite license shall be an independent contractor for some purposes but not for others." (*Ibid.*)

Under *State Compensation*, Flores was an employee of the Nelsons for the purpose of section 385, subdivision (b). (See *Rosas v. Dishong* (1998) 67 Cal.App.4th 815, 821-825 [unlicensed tree trimmer injured in a fall is employee of homeowner under Lab. Code, § 2750.5].) It does not mean, however, that workers compensation is Flores's exclusive remedy. Because Flores worked less than 52 hours for the Nelsons during the

90 calendar days immediately preceding his death, he is excluded from workers compensation. (Lab. Code, § 3352, subd. (h).) Thus the Nelsons may be liable in tort. (See *Rosas, supra,* at p. 821, fn. 4.)

The Nelsons' reliance on *Fernandez v. Lawson* (2003) 31 Cal.4th 31, is misplaced. There an employee of an unlicensed tree trimmer sued a homeowner for injuries he received when he fell from a 50-foot tree. The parties assumed the injured worker was an employee of the homeowner by operation of Labor Code section 2750.5. (*Fernandez, supra,* at p. 34.) The question was whether the homeowner is required to comply with the California Occupational Safety and Health Act of 1973 (Cal-OSHA). (Lab. Code, § 6300 et seq.) The court held that such noncommercial tree trimming comes within the "household domestic service" exception to Cal-OSHA. (Lab. Code, § 6303, subd. (b).)

Section 385, however, contains no such exception. Contrary to the Nelsons' argument, section 385 is not a part of Cal-OSHA. Section 385 was enacted in 1947, long before Cal-OSHA. (Stats. 1947, ch. 1229, § 1.) The Nelsons point out that portions of Cal-OSHA and its implementing regulations refer to section 385. (See, e.g., Lab. Code, § 6302 & Cal. Code Regs., tit. 8, § 330, subd. (h) [exempting from reporting requirements any injury, illness or death caused by a Penal Code violation except a violation of § 385].) But reference to section 385 does not make it part of Cal-OSHA.

Nor does the unanimous opinion in *Fernandez* determine that Labor Code section 2750.5 does not apply to homeowners. The parties there simply assumed Labor Code section 2750.5 applied under *State Compensation*. At best, *Fernandez* contains a concurring opinion by Justice Brown. The concurring opinion criticizes *State Compensation* for failing to consider the ramifications of placing employer status on unsuspecting homeowners. (*Fernandez v. Lawson*, *supra*, 31 Cal.4th at p. 42 (conc. opn. of Brown J., Baxter J. conc.).) It urges that the penultimate paragraph of Labor Code section 2750.5 means only that the unlicensed contractor, as opposed to the homeowner, is precluded from asserting independent contractor status. (*Ibid.*; see

also *State Compensation, supra*, 40 Cal.3d at pp. 16-18 (conc. opn. of Mosk, J. & dis. opn. of Lucas, J.).) Although *State Compensation* has been criticized, it is still the law, and we are bound to follow it. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The Nelsons cite *Fernandez* in support of their argument that the trial court has discretion to decide whether a criminal statute imposes civil liability. But *Fernandez* decided that as a matter of law noncommercial tree trimming comes within the "household domestic service" exception to Cal-OSHA. It does not purport to give the trial court discretion to decide whether a criminal statute imposes civil liability.

The Nelsons point out that a statutory violation simply creates a rebuttable presumption of negligence per se. (Citing *Casey v. Russell, supra,* 138 Cal.App.3d at p. 383.) The presumption is rebutted if the actor can show some justification or excuse for violating the statute. (*Ibid.*) Violation of a statute may be justified or excused where the actor neither knows nor should know of the occasion for compliance. (*Id.* at p. 384.) The Nelsons believe that *Fernandez* stands for the proposition that knowledge of Cal-OSHA is not to be imputed to homeowners. But *Fernandez* is based on the "household domestic service" exception to the application of Cal-OSHA, not the homeowners' lack of knowledge. Moreover, as we have stated, section 385 is not part of Cal-OSHA. There is no reason why knowledge of section 385 should not be imputed to homeowners.

The Nelsons argue that the Floreses did not prove a violation of section 385 occurred. The Nelsons' argument is based on the theory that there is no evidence Flores moved his saw within six feet of the power line.

In determining whether an instruction should be given, the question is not whether the proponent of the instruction has carried a burden of proof. Instead, the question is whether the instruction is supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) Here no one saw the accident occur. But the jury could reasonably conclude that the Legislature established six feet as the prohibited zone because anything outside the six-foot zone is safe. Thus the jury could

reasonably conclude from the fact of Flores's electrocution, that he moved his saw within six feet of the high voltage line. This circumstantial evidence supports the instruction. Of course, on retrial the parties may introduce expert evidence on this question.

The Nelsons claim that the failure to give the instruction was harmless. They point out that the jury found them negligent without an instruction on section 385. But without an instruction on section 385, the jury would not know the Nelsons were negligent in employing Flores to move a tool within six feet of a high-voltage line. There is a reasonable probability that had the jury been so instructed, it could have found causation. Thus the error was not harmless. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 438, p. 484.)

It follows from what we have said that the trial court also erred in refusing to allow the Floreses to refer to Flores as the Nelsons' employee.

II

The Floreses contend that under *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, 769-775, the burden shifted to the Nelsons to prove their negligence was not the proximate cause of the accident. We consider this contention to aid the court and parties in the event of a retrial.

In *Haft*, a father and son were found drowned in a hotel swimming pool. There were no witnesses to their deaths. The hotel violated a statute by failing to provide a lifeguard or post a warning. The court held that the failure to provide a lifeguard to observe occurrences in the pool area deprived the plaintiffs of a means of establishing the facts leading to the drownings. Under the circumstances, the burden shifted to the defendant to prove its statutory violation was not the cause of the victims' deaths.

But here, assuming the Nelsons violated section 385, the violation did not prevent the Floreses from establishing the cause of Flores's death. In fact, nothing the Nelsons did prevented anyone from observing Flores. That no one saw the accident occur, does not by itself shift the burden of proof. The Floreses retain the burden of proof as to causation in the event of a retrial.

The judgment is reversed and remanded for further proceedings.

Costs on appeal are awarded to appellants.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Vincent J. O'Neill, Judge

Superior Court County of Ventura

William L. Veen, Kevin Lancaster and Mary Anne Bendotoff for Plaintiffs and Appellants.

Henderson & Borgeson, Daniel E. Henderson, III, and Jill L. Friedman for Defendants and Respondents.