

**S177075**

**SUPREME COURT COPY**

Case No.

IN THE

SUPREME COURT OF CALIFORNIA

OCTOVIANO CORTEZ,

Plaintiff and Appellant,

v.

LOURDES ABICH et al.,

Defendants and Respondents.

B210628

(Los Angeles County  
Super. Ct. No. GC038444)

**SUPREME COURT  
FILED**

OCT 13 2009

Frederick K. Ohlrich, Clerk

Deputy

After a Decision by the Court of Appeal,  
Second Appellate District, Division Four  
Case No. B210628

**PETITION FOR REVIEW**

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Case No.

IN THE  
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OCTAVIANO CORTEZ,

Plaintiff/Appellant,

v.

MIGUEL QUEZEDA ORTIZ, LOURDES ABICH and OMAR ABICH,

Defendants/Respondents

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## INTRODUCTION

Employers are required to comply with OSHA safety regulations for the safety of their employees, except when the employment is a “household domestic service.” Labor Code §§ 6303(b) and 6400(a). OSHA requires that:

[e]very employer shall furnish *employment* and a place of employment that is safe and healthful for the employees therein. (Labor Code § 6400(a)(italics added.))

“Employment” is defined as including:

the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, **demolition**, and **construction work**, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, *except household domestic service*. (Labor Code § 6303(b)(italics and bold added.))

In *Fernandez v. Lawson* (2003) 31 Cal.4th 31, this court defined the “household domestic service” exception within Labor Code 6303(b) to include a “tree trimmer” hired by a private homeowner finding that “[t]ree trimming is a service commonly performed by persons hired by homeowners to maintain residential premises.” (*Id.*, at p. 36.)

In stark contrast to *Fernandez*, the property owner defendants (Abiches) in this case acted as unlicensed general contractors using unlicensed workers and engaged in a year long extensive remodel of a home by adding a new master bedroom and new master bath, replacing the car port with a new garage, demolishing and adding a new roof, and adding over 750 square feet. This “demolition” and “construction work” is expressly deemed to be an “employment” activity under the Labor Code that requires compliance with safety regulations. Defendants did not comply with any safety regulations and

Plaintiff worker (Cortez) was seriously injured.

Nonetheless, the Court of Appeal concluded in a published opinion that the rationale of *Fernandez* applied to these facts and affirmed summary judgment for the Abich Defendants and against Cortez. (Opinion, p. 9) The Court of Appeal articulated a new exemption from OSHA regulations for home construction remodels that neither Defendants nor the trial court raised as a basis for summary judgment. The Court of Appeal held:

While we do not suggest that every project undertaken by a homeowner is exempt from the application of the OSHA the regulations, we conclude the remodel at issue is exempt because its purpose was personal – to enhance the owners’ enjoyment of their residence. (Opinion, p. 10)

Nonetheless, Cortez was not afforded an opportunity to engage in further discovery and briefing to establish whether or not “the work in this case satisfies the exemption.”

Review should be granted to settle these important questions of law. Property owners who act as unlicensed contractors performing extensive demolishing, construction and remodeling work should not be exempted from complying with very same safety regulations that would apply if they were licensed contractors. The phrase “household domestic service” cannot reasonably be construed to include a situation where a property owner himself acts as an unlicensed general contractor engaging in the extensive demolition and construction work performed here. Labor Code § 6303(b) cannot be rewritten to categorically exempt property owners, especially those that perform construction and demolition activities.

## ISSUES PRESENTED

1. Is a year long extensive remodel of a home by adding a new master bedroom and new master bath, replacing the car port with a new garage, demolishing and adding a new roof, and adding over 750 square feet a “household domestic service” under Labor Code § 6303(b)?
2. Where the Court of Appeal affirms summary judgment on the basis of a newly articulated exemption and a ground not raised by the moving party or the trial court, does C.C.P. § 437c(m)(2) require that opposing party be afforded an opportunity to engage in further discovery and briefing to establish whether or not the activity in this case satisfies the exemption?

## SUMMARY OF FACTS

### The Abich Defendants Perform an Extensive Year Long Demolition and Construction Project Through Unlicensed Workers and Without Complying with Safety Regulations

Defendants Omar and, his mother, Lourdes Abich sought to remodel their property by demolishing an old roof and adding a new roof, adding a new master bedroom and master bath, replacing the car port with a new garage, and adding over 750 square feet. [AA94, 95, 96, 97, 132, 161, 162, 168, 174, 223, 287] Omar Abich was the “owner-builder” of the project where Plaintiff was injured [AA223, 287]

Omar Abich obtained permits from the City of Pasadena to remodel the home. [AA163, 223, 287] But, he was not a general contractor and did not have a contractors license. [AA 133, 160, 223, 287] Omar Abich did not know if any of the people he hired (including Miguel Quezada Ortiz) had a



contractor's license. [AA167, 170, 224, 288] Ortiz was not a licensed contractor. [AA188, 224, 288 ]

The Abich Defendants did not supervise the details of the job assigned to Plaintiff or Ortiz [AA 102, 249]

There was a dispute between the parties as to what Ortiz was hired to do. Defendant Omar Abich claims that he only hired Ortiz to tear a wooden deck off in the back of the house. [AA100, 166] Plaintiff disputed this fact (pointing out there was no evidence to support this assertion other than Defendant Omar Abich's testimony) and stating he (Plaintiff) never went to the backyard to remove a patio deck, he never saw Ortiz remove any portion of a patio deck and that Ortiz was actually up on the roof removing portions of the roof. [AA152, 153, 212, 213, 234]

Plaintiff Cortez was told by Ortiz to gather up debris and continue knocking down the roof. [AA 225, 289] This was his first day on the job and he was to be paid \$80. [AA99, 230] When Plaintiff arrived at the house, half of the roof was missing as part of the project. [AA35, 99, 151, 153, 230] After about an hour of collection debris from the demolition, Plaintiff went up to the roof because "that's what we were there for" and "there was nothing else to do down there". [AA 99, 152, 153, 154, 230] Even though Plaintiff understood he was there to continue knocking down the roof [AA150, 225, 289], he was not given "specific instructions" to go up on the roof but went up because he thought it was convenient and he thought he was doing the right thing. [AA37, 38, 99, 152, 153, 154, 232]

Plaintiff took a step onto the roof with his left foot and it felt sturdy. He then took a step with his right foot and then it collapsed and went through the roof. [AA155, 156, 225, 289] Plaintiff fractured his spine as a result of the accident. [AA157, 226, 292]

Defendant Omar Abich never inspected the roof prior to placing on the new roof or letting workers go on the roof. [AA171, 226, 291] Defendant Omar Abich did not provide a code of safe practices for the project and did not provide fall protection. [AA173, 226, 291]

The work began on the project in October 2006 and continued through September 2007. [AA192 - 197, 223, 288]

### **PROCEDURAL HISTORY**

Plaintiff Cortez brought this personal injury action on January 25, 2007 seeking damages for injuries suffered when he fell through a roof at the premises. He brought two causes of action; general negligence and premises liability. He alleged that Defendants “were negligent in failing to properly supervise, warn, provide proper safeguards, provide proper tools, provide proper training, and/or make the area safe where the plaintiff was directed to perform certain work.” [AA1 - 5] He also alleged that Defendants “negligently owned, maintained, managed and operated the described premises.” [AA5] On March 26, 2007, Plaintiff amended his complaint and named Defendant Lourdes Abich as Doe 1 and Defendant Omar Abich as Doe 2. [AA6 - 7]

The Abich Defendants filed an Answer on April 29, 2007. [AA10 - 11]

On April 29, 2008, Defendants Lourdes and Omar Abich filed a Motion for Summary Judgment *arguing* that they owed no duty to Plaintiff. [AA17 - 97, 23] Plaintiff filed an Opposition [AA98 -255] and Defendants filed a Reply. [AA256 -294]

The trial court, in a minute order (issued after the hearing), granted summary judgment finding, in pertinent part to this Petition, that: 1) Plaintiff was not an employee of the Abich defendants pursuant to Labor Code § 2750.5 and 2) that the Abich defendants were not required to comply with

OSHA [AA295 - 297] The trial court sustained Plaintiff's evidentiary objections [AA254-255] to Defendants' evidence. [AA296]

Judgment in favor of the Abich Defendants was entered on August 4, 2008 [AA298] and notice of entry of judgment was served on August 6, 2008 [AA309] Timely notice of appeal from the judgment was filed on September 2, 2008. [AA318]

In affirming summary judgment for Defendants, the Second District Court of Appeal issued a published opinion concluding that Labor Code § "2750.5 makes the Abiches appellant's employer with respect to potential tort liability." (Opinion, p. 6) But, it then concluded that "the Abiches were not required to comply with OSHA as a matter of law." (Opinion, p. 10.) It further noted that "[w]hile we do not suggest that every project undertaken by a homeowner is exempt from the application of the OSHA the regulations, we conclude the remodel at issue is exempt because its purpose was personal – to enhance the owners' enjoyment of their residence." (Opinion, p. 10) In a concurring opinion, Justice Epstein stated:

I concur in the opinion but write separately to express my misgivings about the conclusion that homeowners are exempt from OSHA regulations when remodeling their residence where their purpose is personal, "to enhance the owners' enjoyment of their residence." It is one thing to conclude that the "household domestic service" exception in OSHA makes that statute inapplicable to tree trimming, as our Supreme Court held in *Fernandez v. Lawson* (2003) 31 Cal.4th 31, or even to the removal and replacement of a roof. It is another to say that the phrase is so broad as to encompass a home remodeling involving demolition of a roof, the addition of a new one, together with remodeling the master bedroom, bath and garage, adding over 750 square feet to the home. The exemption applies even to a project of such scale, we say,

because the owners are having it done to enhance [their] enjoyment of their residence. rather than for a commercial purpose. We decline to suggest that every project undertaken by a homeowner is exempt, but it is difficult to see where a reasonable line would be drawn if the work in this case satisfies the exemption. (Concurring Opinion., p.13.)

Plaintiff Cortez filed a petition for rehearing and a request for judicial notice, both of which were denied. Cortez argued that the Court of Appeal articulated a new exemption from OSHA regulations for home construction remodels that neither Defendants nor the trial court raised as a basis for summary judgment. Citing C.C.P. § 437c(m)(2), Cortez requested that he be given an opportunity to engage in further discovery and briefing to establish whether or not “the work in this case satisfies the exemption.”

Cortez argued that he would be able to show that the subject remodel was not personal in nature. He filed a separate motion asking the Court of Appeal to take judicial notice of the April 2008 Grant Deed (Exhibit A to Request for Judicial Notice) showing that Defendant Abich sold the subject home shortly after the subject project (which went through September 2007) [AA 192 - AA197, AA 223.] Cortez asserted that the fact that Defendants sold the home shortly after the extensive remodel shows that the remodel was not “personal - to enhance the owners’ enjoyment of their residence.” If allowed to conduct further discovery per C.C.P. § 437c(m)(2), the evidence was expected to show that the work in this case does not satisfy the Court of Appeal’s articulated exemption and, accordingly, Defendants would be subject to OSHA regulations. Cortez explained that this document was not obtained earlier or included below (or presented to the trial court) because the Court of Appeal’s distinction between a remodel done for personal enjoyment

(exempted) versus a remodel to sell or “flip” the home (not exempted) was not raised by Defendant or the Trial Court as a basis for determining whether the construction activity is exempted from OSHA regulations as a “household domestic service.”

### **WHY REVIEW SHOULD BE GRANTED**

I. **REVIEW IS NEEDED TO SETTLE AN IMPORTANT QUESTION OF LAW AS TO THE MEANING OF THE “HOUSEHOLD DOMESTIC SERVICE” EXEMPTION TO AN EMPLOYER’S OBLIGATION TO COMPLY WITH OSHA SAFETY REGULATIONS.**

Defendant property owners tried to cut corners and acted as their own unlicensed general contractors on the construction project [AA223,287], while ignoring their obligation to provide a safe place of employment. It has been one of our Maxims of Jurisprudence for over 200 years that “[h]e who takes the benefit must bear the burden.” Civil Code § 3521.

Labor Code §§ 6303(b), 6400(a) and 6401 are clear. § 6400(a) requires that:

*[e]very employer shall furnish employment and a place of employment that is safe and healthful for the employees therein. (italics added.)*

§ 6401 requires that:

*[e]very employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees. (Italics*

added.)

§ 6303(b) defines “Employment” as including:

the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, **demolition**, and **construction work**, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, *except household domestic service*. (italics and bold added.))

As statutory employers under Labor Code § 2750.5, the Abich Defendants owed a duty to Plaintiff to comply with OSHA safety regulations and provide a safe place of employment because they were engaging in “**demolition**” and “**construction work**.”

The rationale of this Court’s opinion in *Fernandez v. Lawson* (2003) 31 Cal.4th 31 should not apply here. In *Fernandez*, a homeowner hired a worker to trim his trees. *Here*, the property owner Defendant acted as an unlicensed contractor performing extensive demolition and construction activity through unlicensed workers.

Plaintiff asks this Court to simply apply the Labor Code as written. As written, Labor Code §§ 6303(b), 6400(a) and 6401 impose an obligation on *every* employer that engages in “demolition” and “construction work” to provide a safe place of employment, to furnish and use safety devices, and to do every other thing reasonably necessary to protect the safety of employees. Here, the Abich Defendants made a choice to act as unlicensed general contractors on an extensive construction project using unlicensed workers. With the benefit of using unlicensed workers to perform “demolition” and “construction work” when such work requires a license is the burden of complying with safety regulations.

The Contractors' State License Law (Bus. & Prof. Code § 7000, et seq.) provides a comprehensive scheme governing contractors doing business in California. A contractor is defined as follows:

The term contractor . . . is synonymous with the term 'builder' and . . . is *any person*, who undertakes to . . . construct, alter, repair, add to . . . any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith . . . . The term contractor includes subcontractor and specialty contractor." (Bus. & Prof. Code § 7026 (italics added).)

Further, contractors that demolish or remove structures must have a specialty license or Class C-21 designation. 16 C.C.R. 832.21. It is illegal (a misdemeanor) for "any person to engage . . .in the capacity of a contractor within this state without having a license..." (Bus. & Prof. Code § 7028(a).)

California Courts have long emphasized that the Contractors' State License Law "was enacted for the safety and protection of the public against imposition by persons inexperienced in contracting work. . ." (*Fraenkel v. Bank of America* (1953) 40 Cal. 2d 845, 848.) To obtain a contractor's license, an applicant must:

- take and pass an examination (Bus. & Prof. Code § 7065);
  - possess general knowledge of California's building, safety, health and lien laws (Bus. & Prof. Code § 7068);
  - have good character (Bus. & Prof. Code § 7069);
  - show financial solvency (Bus. & Prof. Code § 7067.5);
  - maintain workers compensation insurance (Bus. & Prof. Code § 7125); and
  - post a contractor's bond (Bus. & Prof. Code § 7071.6)
- (*Hunt Building Corp. v. Bernick* (2000) 79 Cal.App.4th 213, 218).

By not having the required contractor's license, the property owner Defendants in this case did not pass any examinations and did not establish that they have general knowledge of California's safety laws. The end result of the Court of Appeal's opinion is dangerous. Property owners can violate the law, take unsafe risks, expose workers to grave harm and avoid any real accountability by characterizing the extensive construction work as personal in nature. This Court should accept review to confirm that this type of "demolition" and "construction work" is not exempt from safety regulations as a household domestic service.

**II. REVIEW IS NEEDED TO SETTLE AN IMPORTANT QUESTION OF LAW AND THE DUE PROCESS IMPLICATIONS OF CODE OF CIVIL PROCEDURE SECTION 437c(m)(2) UNDER WHICH A REVIEWING COURT SHOULD REMAND A CASE TO ALLOW A PARTY TO ENGAGE IN FURTHER DISCOVERY WHERE IT AFFIRMS AN ORDER GRANTING SUMMARY JUDGMENT ON A GROUND NOT RELIED UPON BY THE TRIAL COURT**

This Court has yet to address C.C.P. § 437c(m)(2) which imposes strict requirements for cases in which an appellate court considers affirming summary judgment based on a ground not "relied on" by the trial court. Prior to 2002, appellate courts could affirm summary judgment if it was correct on any ground. (*Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 100.) This was "the rule until the Legislature amended the summary judgment statute in 2002." (*Ibid.*)

*But*, in 2002, subdivision (m)(2) was added to C.C.P. § 437c to address instances where the appellate court seeks to affirm a summary judgment ruling on grounds different from those relied on in the trial court. (*Id.* at pp. 100-101.)



C.C.P. § 437c(m)(2) provides that:

Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefing may include an argument that additional evidence relating to that ground exists, but that the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefing, a rehearing shall be ordered upon timely petition of any party. (underline added.)

There can be no serious dispute that Plaintiff's due process rights required that the matter be remanded and Plaintiff be given an opportunity to engage in discovery on the new issue or distinction articulated by the Court of Appeal. "If the dispositive ground of law was not asserted in the trial court by the moving party and the record fails to establish that the opposing party could not have shown a triable issue of material fact had the ground of law been asserted by the moving party, a reviewing court ordinarily cannot determine if the trial court's decision was correct" (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 70 - 71.) "[D]ue process of law requires that the party opposing the motion must be provided an opportunity to respond to the ground of law identified by the court and must be given a chance to show there is a triable issue of fact material to said ground of law." (*Id.*)

In viewing the evidence in a light favorable to Plaintiff as the losing party (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 769),

Defendants did not conclusively show that the subject extensive remodel was done only to enhance enjoyment of the home. Further, Plaintiff was not given an adequate opportunity to conduct discovery on the issue of whether or not Defendants' extensive remodel was personal in nature or whether it was done to sell or "flip" the home. This distinction was not raised by Defendants or the trial court. Rather, the exemption for remodeling for personal enjoyment is a distinction articulated for the first time by the Court of Appeal in its Opinion.

There is good reason to believe that, if he was afforded his statutory right to conduct discovery on this new issue, Plaintiff would have been able to show that the subject remodel was not personal in nature. Plaintiff filed a separate motion asking the Court of Appeal to take judicial notice of the April 2008 Grant Deed (Exhibit A) showing that Defendant Abich sold the subject home shortly after the subject project (which went through September 2007) [AA 192 - AA197, AA 223.]

The fact that Defendants sold the home shortly after the extensive remodel showed that the remodel was not "personal - to enhance the owners' enjoyment of their residence." The evidence was expected to show that the work in this case would not satisfy this Court's newly created exemption and, accordingly, Defendants would be subject to OSHA regulations. As explained in Appellant's motion for judicial notice, this document was not obtained earlier or included below (or presented to the trial court) because the Court of Appeal's distinction between a remodel done for personal enjoyment (exempted) versus a remodel to sell or "flip" the home (not exempted) was not raised by Defendant or the Trial Court as a basis for determining whether the construction activity is exempted from OSHA regulations as a "household domestic service."

This Court should accept review to affirm the important due process considerations within C.C.P. § 437c(m)(2) under which the Court of Appeal should have remanded this case to allow Plaintiff to engage in further discovery and briefing because it affirmed the order granting summary judgment on a ground not relied upon by the Trial Court.

**CONCLUSION**

This Court should grant review to settle these important issues of law.

DATED: October 12, 2009

Respectfully submitted,  
THE HOMAMPOUR LAW FIRM  
A Professional Law Corporation

By:

  
\_\_\_\_\_  
Arash Homampour, Attorneys for  
Petitioner/Appellant/Plaintiff,  
OCTAVIANO CORTEZ

CERTIFICATE OF COMPLIANCE

I hereby certify under CA Rules of Court, Rule 8.204(c)(1) that this brief is produced using 13-point Roman type including footnotes and contains 3,693 words, which is less than the 14,000 words permitted by the rule. I am relying on the word count of the computer word processing program (Word Perfect) used to prepare this brief.

DATED: October 12, 2009

Respectfully submitted,  
THE HOMAMPOUR LAW FIRM  
A Professional Law Corporation

By:

  
\_\_\_\_\_  
Arash Homampour, Attorneys for  
Petitioner/Appellant/Plaintiff,  
OCTAVIANO CORTEZ

Filed 9/2/09

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

OCTOVIANO CORTEZ,

Plaintiff and Appellant,

v.

LOURDES ABICH et al.,

Defendants and Respondents.

B210628

(Los Angeles County  
Super. Ct. No. GC038444)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Joseph F. De Vanon, Jr., Judge. Affirmed.

Homampour Law Firm, Arash Homampour; and Stuart Sherman for Plaintiff and  
Appellant.

Early, Maslach & Van Dueck, John C. Notti, Paul A. Carron, and James Grafton  
Randall; Greines, Martin, Stein & Richland, Robert A. Olson, and Alana H. Rotter for  
Defendants and Respondents.

Appellant Octoviano Cortez appeals from the judgment entered in favor of respondents Lourdes and Omar Abich (collectively the Abiches) following the trial court's order granting their motion for summary judgment. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

In 2006, the Abiches embarked on a remodeling project of their home in Pasadena. They wanted to add a new roof, master bedroom, master bath, and a garage to their home, adding over 750 square feet. The Abiches hired Miguel Quezada Ortiz, among others, to perform the remodel. Although what Ortiz was hired to do is in dispute, appellant claims Ortiz was hired to demolish the roof. Ortiz did not have a contractor's license, which the Abiches concede was required. The Abiches did not ask Ortiz if he had a license and were unaware that he did not have one. Omar Abich obtained the necessary permits from the City of Pasadena, but did not supervise the work. The Abiches moved out of the house, and the project started in October or November 2006.

Ortiz hired appellant.<sup>1</sup> On the first day of the job, believing he was supposed to help Ortiz demolish the roof, appellant went up on the roof without being given any specific instructions to do so. Appellant conceded he saw that half of the roof was gone. As he climbed on the roof, he observed Ortiz and another worker removing nails from the remaining portion. After taking two steps, he fell through the roof and suffered a fractured spine.

In January 2007, appellant sued Ortiz, alleging general negligence (failure to warn and failure to make work area safe) and premises liability (negligence in maintenance,

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<sup>1</sup> Omar Abich and Ortiz testified at their respective depositions that appellant was only supposed to remove a deck in the backyard, but appellant claimed he was hired to assist Ortiz in removing the roof.

management, and operation of premises).<sup>2</sup> In March 2007, he amended his complaint to add the Abiches as Doe defendants.

In April 2008, the Abiches filed a motion for summary judgment, contending they had no duty to warn appellant of the condition of the roof because he went up there on his own accord and any danger was open and obvious. They also argued that the work safety requirements of California Occupational Safety and Health Act (OSHA) contained in Labor Code section 6300 et seq. did not apply to the residential remodeling project.

Appellant responded that because they failed to hire a licensed contractor, the Abiches were his employer. As such, he alleged they had a duty to maintain a safe working environment as required by OSHA and failed to do so. Recognizing that OSHA does not apply to workers who provide “household domestic service” (Lab. Code, § 6303, subd. (d)), appellant asserted that the remodeling job did not fall within the definition of such services. He argued that even if OSHA did not apply to the Abiches, there was a triable issue of fact concerning whether his duties required him to get on the roof and whether the dangerous condition of the roof was open and obvious.

The trial court’s ruling granting summary judgment stated, inter alia, “The only disputed facts are immaterial to the legal issue to be decided. The court finds as a matter of law that plaintiff was not an employee of the Abich defendants. Pursuant to Labor Code [section] 3352[, subdivision] (h), plaintiff is excluded from being an employee of the Abich defendants, and pursuant to Labor Code 2750.5, plaintiff is the employee of defendant Ortiz. See CEDILLO V. WORKER’S COMPENSATION APPEAL BOARD (2003) 106 Cal.App.4th 227. [¶] It is undisputed that plaintiff was on the premises to perform work, that he was hired by defendant Ortiz, and that he was injured on the first day of work. [¶] There is a dispute concerning whether a license was required to

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<sup>2</sup> Ortiz’s default was entered in April 2007. He is not a party to this appeal.

perform the work plaintiff was hired to do. There is a dispute about whether plaintiff voluntarily went up on the roof or whether he believed it was his job to help Ortiz. Neither of these disputes of fact is material to the issue of whether plaintiff was employed by the Abich defendants. [¶] Plaintiff's contention that the Abich defendants were required to comply with OSHA requirements fails as a matter of law because they were not plaintiff's employer. Even if they were found to be his employer, this contention fails as it is unsupported by any citation to a California cas[e] in which OSHA compliance was imposed on a homeowner. [¶] To the extent plaintiff seeks to hold the Abich defendants liable as homeowners on a concealed danger theory, the court finds as a matter of law that the Abich defendants had no duty to inspect the roof for 'soft spots' in order to ensure the safety of the workers. The roof of a house undergoing a remodeling project does not present a concealed danger but an open and obvious one."

## DISCUSSION

### 1. Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

If a defendant establishes that one or more elements of a cause of action cannot be established or that there is a complete defense to that cause of action, the burden shifts to the plaintiff to show that a triable issue exists as to one or more material facts. (*Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828, 834, citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) If the trial court finds that no triable issue of fact exists, it then has the duty to determine the issue of law. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.)



On appeal, we review the trial court's decision de novo. (*Merrill v. Navegar, Inc.*, *supra*, 26 Cal.4th at p. 476.) We view the evidence in a light favorable to appellant as the losing party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 769.)

## II. Appellant's Theories of Liability

### A. *The Duty to Provide a Safe Workplace*

Appellant contends that the Abiches were his employer, even though they did not hire him directly, because Ortiz was an unlicensed contractor. He relies on Labor Code section 2750.5,<sup>3</sup> which provides a rebuttable presumption that a person who performs services for which a license is required is an employee rather than an independent contractor. Appellant argues that because Ortiz was unlicensed, both Ortiz and appellant were the Abiches' employees.

Relying on sections 2750.5 and 3352, subdivision (h) and *Cedillo v. Workers' Comp. Appeals Board*, *supra*, 106 Cal.App.4th 227 (*Cedillo*), the trial court found that the Abiches were not appellant's employer for any purpose. To the extent it believed the Abiches were shielded from potential tort liability because they were not appellant's employer, the trial court was incorrect.

In *Cedillo*, a homeowner hired an unlicensed and uninsured roofing contractor to repair his roof, and the contractor in turn hired another individual to perform the work. That individual, one Jaime Rodriguez, began work on the homeowner's roof and was injured while in the course of repairing it. (*Cedillo*, *supra*, 106 Cal.App.4th at p. 230.) After the workers' compensation judge found the homeowner was Rodriguez's employer, the homeowner and his insurer (the provider of homeowners insurance) filed a reconsideration motion with the Workers' Compensation Appeals Board (Board). Relying on section 3352, subdivision (h), the Board ruled that Rodriguez was not the

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<sup>3</sup> All further undesignated statutory references are to the Labor Code.

homeowner's employee.<sup>4</sup> Notwithstanding the presumption in section 2750.5, that an unlicensed contractor is not an independent contractor but an employee, it determined that for purposes of workers' compensation coverage, the contractor was Rodriguez's employer. As the contractor was uninsured, the Board ordered the Director of Industrial Relations (Director) to pay Rodriguez's benefits. The Director appealed on the contractor's behalf. (*Id.* at pp. 230-232.)

The appellate court agreed with the Board. It reasoned that if section 2750.5 were read in isolation, the contractor would escape liability under the workers' compensation law by being uninsured and escape liability in court because he was unlicensed. This would have the undesired effect of rewarding a contractor who flouted the law by being unlicensed and uninsured. Thus, the court found the Board correctly concluded that under section 2750.5, for workers' compensation purposes, a worker could be an employee of both the hiring party (the homeowner) and the unlicensed contractor. Because section 3352, subdivision (h) barred the homeowner from being Rodriguez's employer, the responsibility fell to the contractor to insure against any injury. (*Id.* at pp. 236-237.)

However, *Cedillo* is distinguishable because, unlike our case, it did not involve a negligence claim by an employee against a homeowner. The issue was whether the homeowner or the unlicensed contractor was the worker's employer for purposes of the workers' compensation law. (*Cedillo, supra*, 106 Cal.App.4th at p. 237.) Here, the question is whether section 2750.5 makes the Abiches appellant's employer with respect to potential tort liability. We conclude it does.

The court in *Rosas v. Dishong* (1998) 67 Cal.App.4th 815 (*Rosas*) examined this very issue. The Dishongs hired Rosas to trim a tree branch hanging over their house, a

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<sup>4</sup> For workers' compensation purposes, section 3352, subdivision (h) excludes from the definition of an employee a person who has worked less than 52 hours for an employer during a specified 90-day period.

service that required a license.<sup>5</sup> While attempting to trim the branch, Rosas fell and was injured. Rosas filed a workers' compensation claim, but the Dishongs' insurance carrier denied it because Rosas had not worked the requisite hours required by section 3352, subdivision (h). Thereafter, Rosas sued the Dishongs, alleging negligence. (*Id.* at pp. 817-819) He argued that section 2750.5 made the Dishongs his employer as a matter of law. The court agreed. It concluded that section 2750.5 was intended to provide a potential tort remedy to unlicensed workers who were not otherwise covered by the workers' compensation laws. (*Id.* at pp. 822-824.)

While the trial court in the instant case correctly found that the Abiches were not appellant's employer for purposes of the workers' compensation law, it erred when it reached the same conclusion with respect to his negligence suit against them.

As he did below, appellant asserts that the Abiches had a duty to provide him with a safe working environment pursuant to OSHA. The significance of this is that if he is correct with respect to duty and the Abiches violated an OSHA regulation, they would be deemed negligent as a matter of law and barred from asserting assumption of the risk or contributory negligence defenses. (§ 2801.)

We come to the heart of this appeal. The Abiches contend that even if they are deemed appellant's employer pursuant to section 2750.5, the OSHA regulations do not apply to their home remodeling project. The trial court agreed. So do we.

Our Supreme Court examined whether a homeowner who hired a tree trimmer was required to comply with OSHA regulations in *Fernandez v. Lawson* (2003) 31 Cal.4th 31 (*Fernandez*). The facts were virtually identical to those in *Rosas*. Lawson hired Fernandez, who did not possess the appropriate license, to trim his tree. In doing so, Fernandez was injured. Fernandez was barred by section 3352, subdivision (h) from being deemed an employee eligible for workers' compensation benefits. He then sued Lawson and asserted, as did appellant, various violations of OSHA safety regulations. The trial court granted Lawson summary judgment, finding that OSHA did not apply to

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<sup>5</sup> The tree in question exceeded 15 feet in height and the task of trimming it required a license under Business and Professions Code section 7026.1, subdivision (d).

noncommercial tree trimming performed at a private home. The Court of Appeal reversed the trial court, disagreeing with the contrary conclusion reached by the court in *Rosas*. (*Id.* at pp. 35-36.)

OSHA requires that “[e]very employer shall furnish employment and a place of employment that is safe and healthful for the employees therein.” (§ 6400, subd. (a).) As we have discussed, section 6303, subdivision (b) excludes “household domestic service” from the definition of employment. Thus, the Supreme Court considered whether the tree trimming that was performed fell within that exception.

The court noted that the OSHA statutes do not define “household domestic service” and the act’s legislative history offers no further guidance as to the meaning of that term. Reviewing the purpose of the 1973 overhaul of the OSHA regulations, which was to develop and enforce occupational safety and health standards throughout the state, it found that “household domestic service” likely refers to the performance of tasks in and outside a private residence and “implies duties that are personal to the homeowner.” (*Fernandez, supra*, 31 Cal.4th at p. 37.) The court concluded that “overwhelming public policy and practical considerations make it unlikely the Legislature intended the complex regulatory scheme that is OSHA to apply to a homeowner hiring a worker to perform tree trimming. . . . ‘Moreover, homeowners are ill-equipped to understand or to comply with the specialized requirements of OSHA.’ [Citation.]” (*Ibid.*) Finally, the court rejected the argument that a task requiring a license must always fall outside of OSHA’s “household domestic service” exclusion. (*Id.* at p. 38.) It held that OSHA did not apply to the tree trimming work performed and reversed the judgment of the Court of Appeal.

Appellant argues that “[e]ngaging in the difficult, complex and potentially dangerous task of remodeling a home through major construction (adding a new roof, new master bedroom, new master bath, etc.) while exposing yourself and others to death or great bodily harm is not the equivalent of gardening, house cleaning, cooking or caring for children.” As a result, he urges that OSHA regulations should apply to the Abiches’ remodeling of their private residence.

While we acknowledge that demolishing a roof is not the same as trimming or removing a portion of a tree, we nonetheless conclude that the rationale of *Fernandez* should apply here as well. Appellant contends that when determining whether OSHA regulations apply to a personal home project, the focus should be on the nature and complexity of the task at hand. The Court of Appeal in *Fernandez* accepted that concept when it stated that the test for determining whether tree trimming qualifies as a “household domestic service” should be whether the average member of the household has the skill and competence to perform the work. (*Fernandez, supra*, 31 Cal.4th at p. 38.) The Supreme Court disagreed, finding that the “Court of Appeal’s approach creates massive uncertainty for a homeowner as to when OSHA would apply. Homeowners are in no position to assess whether they are an ‘average’ homeowner in terms of their tree trimming competence.” (*Ibid.*)

In deciding whether OSHA applies to the Abiches’ project, the focus of the inquiry should be on the status of the hirer. Historically, OSHA regulations have been directed at commercial activities. (See *Rosas, supra*, 67 Cal.App.4th at p. 826.) The *Rosas* court found that “[c]ourts in other jurisdictions have concluded OSHA does not apply to homeowners,” citing cases from Washington and Minnesota.<sup>6</sup> (*Id.* at pp. 825-826.) We find it unlikely the Legislature intended a regulatory scheme addressed to commercial enterprises to apply to a homeowner who hires someone to remodel his personal residence. Homeowners are no better equipped to understand and comply with OSHA requirements simply because they decide to remodel their home instead of hiring someone to trim trees on their property.

Appellant contends that nothing in the OSHA regulations limits their application to businesses. Nor do they provide an exemption to homeowners. While he is technically correct, his analysis begs the question. We still must discern the meaning of

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<sup>6</sup> We recognize that the out-of-state cases are not directly on point because they did not discuss the meaning of the term “employment” in the OSHA statute. We mention them as they suggest a trend toward exempting the homeowner from the reach of OSHA regulations.

the exemption contained in OSHA that the regulations do not apply to “household domestic service.” (§ 6303, subd. (b).) While we do not suggest that every project undertaken by a homeowner is exempt from the application of the OSHA regulations, we conclude the remodel at issue is exempt because its purpose was personal—to enhance the owners’ enjoyment of their residence. We believe our conclusion tracks the goal of OSHA in that it directs its regulatory effect toward the intended target—business employers.<sup>7</sup>

There is another consideration that convinces us that it is appropriate not to apply the OSHA scheme to homeowners. Oftentimes an owner will hire a professional to perform work because he or she lacks the requisite expertise. It is only reasonable for that owner to assume the professional will understand the safety issues involved. A homeowner, especially one who is absent from the premises and does not supervise the work (like the Abiches), would not expect to be responsible for ensuring that safety regulations are enforced because the contractor he or she hired had violated the law by not possessing the necessary license. In determining that OSHA should not apply to the tree trimming at a private home, the Supreme Court stated: “Imputing OSHA liability to a homeowner under the circumstances of this case violates basic notions of fairness and notice.” (*Fernandez, supra*, 31 Cal.4th at p. 37.) We conclude the same here.

The trial court correctly ruled that the Abiches were not required to comply with OSHA as a matter of law.<sup>8</sup>

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<sup>7</sup> Although appellant asks us to look to federal regulations that define “domestic household service,” we are bound by the interpretation outlined by our Supreme Court in *Fernandez*.

<sup>8</sup> Given our conclusion, we need not discuss appellant’s claim that the trial court based its ruling on section 3352, subdivision (h) without giving the parties an opportunity to address its applicability.

*B. The Abiches' Duty to Warn Appellant of a Dangerous Condition*

The trial court found that the roof in question did “not present a concealed danger but an open and obvious one.” Appellant concedes that as a general rule an owner owes no duty to warn of obvious dangers on the property. However, he asserts he was not “on notice of there being anything wrong with the half of the roof that had not been taken down. In other words, there is no evidence that [he] was on notice of the specific danger — a soft roof spot — that caused [him] to fall so as to make it an open and obvious danger as a matter of law.” We are not persuaded.

“Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.” (*Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393.) Appellant testified at his deposition that his job was to help demolish the roof. When he got on the roof, his coworkers were removing nails from it. Appellant admitted he saw that half of the roof was gone. It strains reason to suggest that a partial roof in the midst of demolition is not an open and obvious dangerous condition. Appellant’s attempt to parse the specific flaw in the roof—the alleged soft spot—in order to claim he lacked notice is unavailing. Any reasonable person who sees a partial roof and *knows* that he or she is there to dismantle it is confronted with an open and obvious danger as a matter of law. This is no less so simply because he or she does not know *exactly why* the roof presents a danger.

The trial court properly found that the Abiches had no duty to warn appellant of the condition of the roof.

**DISPOSITION**

The judgment is affirmed. The Abiches are awarded their costs on appeal.

**CERTIFIED FOR PUBLICATION**

SUZUKAWA, J.

I concur:

MANELLA, J.



EPSTEIN, P.J.

I concur in the opinion but write separately to express my misgivings about the conclusion that homeowners are exempt from OSHA regulations when remodeling their residence where their purpose is personal, “to enhance the owners’ enjoyment of their residence.” It is one thing to conclude that the “household domestic service” exception in OSHA makes that statute inapplicable to tree trimming, as our Supreme Court held in *Fernandez v. Lawson* (2003) 31 Cal.4th 31, or even to the removal and replacement of a roof. It is another to say that the phrase is so broad as to encompass a home remodeling involving demolition of a roof, the addition of a new one, together with remodeling the master bedroom, bath and garage, adding over 750 square feet to the home. The exemption applies even to a project of such scale, we say, because the owners are having it done to “enhance [their] enjoyment of their residence” rather than for a commercial purpose. We decline to suggest that every project undertaken by a homeowner is exempt, but it is difficult to see where a reasonable line would be drawn if the work in this case satisfies the exemption.

Despite these misgivings, I join in the opinion in deference to *Fernandez*. While our Supreme Court found it unnecessary to decide whether homeowners are subject to OSHA for noncommercial home projects other than tree trimming, the rationale of the decision appears to be that they are not, and that it would be unfair and impractical to subject them to the intricacies of OSHA regulations for improvement work on their own home. (See discussion in *Fernandez v. Lawson, supra*, 31 Cal.4th at p. 37.)

EPSTEIN, P.J.

PROOF OF SERVICE

I am over the age of 18 and not a party to the within action. I am employed in the County of Los Angeles, State of California. My business address is 8383 Wilshire Boulevard, Suite 830, Beverly Hills, California 90211-2407.

On October 13, 2009, I served the following document(s) described as PETITION FOR REVIEW on the interested parties in said action, by placing the  original to the propounding party/  a true copy thereof to all other parties enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Correspondence so collected and processed is deposited with the United States Postal Service that same day with postage thereon fully prepaid at Beverly Hills, California in the ordinary course of business.

STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 13, 2009, at Beverly Hills, California.

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ISELA MORENO

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