No. S177075

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

OCTOVIANO CORTEZ,

Plaintiff and Appellant,

vs.

LOURDES ABICH et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal
Second Appellate District, Division Four
Case No. B210628
Los Angeles County Superior Court Case No. GC038444

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

No issue raised in the petition warrants this Court's review. The petition complains, at most, about the application of established principles to particular facts and a procedural misstep that did not actually occur.

In *Fernandez v. Lawson* (2003) 31 Cal.4th 31, this Court held that the California Occupational Safety and Health Act ("Cal-OSHA") does not apply to homeowners who hire contractors, licensed or unlicensed, to perform residential, noncommercial tree-trimming services. It observed that "OSHA and its predecessors have operated for 90 years primarily in the commercial setting," and that "homeowners are ill-equipped to understand or comply with the specialized requirements of OSHA." (*Id.* at p. 37.) *Fernandez* involved trimming a homeowner's 50 foot tree. As the Court of Appeal held here, however, its rationale applies equally to noncommercial home remodeling. There is no reason to revisit the rule that homeowners do not have to comply with Cal-OSHA in having work performed on their own residences.

The other proffered review issue, whether an appellate court must remand for additional discovery before affirming summary judgment on a ground not relied on by the trial court, is simply not present in this case. The Court of Appeal affirmed on a basis relied on by the trial court: Cal-OSHA does not apply to homeowners remodeling their own home. There thus was no new ground requiring additional discovery.

Review should be denied.

STATEMENT OF THE CASE

A. An Injured Worker Sues Homeowners For Failing To Comply With Cal-OSHA In Remodeling Their Own Home.

The relevant facts are simple. The defendant homeowners were remodeling their home. (Court of Appeal Slip Opinion ("Slip Op.") 2.) Unbeknownst to the homeowners, the worker they hired to demolish their roof did not have a required license. (*Ibid.*) That worker, in turn, hired petitioner Octoviano Cortez. (*Ibid.*) On his first day of work, Cortez climbed up on the partially-removed roof. (*Ibid.*) He took two steps, fell through the roof, and injured himself. (*Ibid.*) Cortez sued the homeowners, asserting among other things that by hiring an unlicensed worker, they became liable for complying with Cal-OSHA. (*Id.* at p. 3.)

B. The Trial Court Grants Summary Judgment, Holding Cal-OSHA Inapplicable To Homeowners.

The homeowners moved for summary judgment. They argued in relevant part that under *Fernandez*, Cal-OSHA did not apply to a remodel undertaken for their noncommercial benefit. (1 Appellant's Appendix (AA) 27-28, 260-261.) The trial court granted summary judgment for the homeowners. (Slip Op. 3.) It held, in part, that the Cal-OSHA claim "'fails as it is unsupported by any citation to a California cas[e] in which OSHA compliance was imposed on a homeowner.'" (*Id.* at pp. 3-4.)

C. The Court of Appeal Affirms Based On *Fernandez v. Lawson.*

The Court of Appeal affirmed, holding that the homeowners had no duty to comply with Cal-OSHA in light of that statute's "household

domestic service" exception. (Slip Op. 7-10.) It reached that result by applying the principles set forth in *Fernandez*, *supra*, 31 Cal.4th 31, to the facts at hand. (Slip Op. 7-8.)

The Court of Appeal expressly relied on *Fernandez*'s rationale that homeowners are ill-equipped to understand and comply with Cal-OSHA regulations. (Slip Op. 9.) It observed that homeowners cannot be expected to know that they must comply with Cal-OSHA simply because the contractor they hire "violated the law by not possessing the necessary license." (*Id.* at p. 10.) And it adhered to the *Fernandez* rationale that imposing Cal-OSHA liability on homeowners would "'violate[] basic notions of fairness and notice.'" (Slip Op. 10, quoting *Fernandez, supra*, 31 Cal.4th at p. 37.)[1]

In a concurrence, Justice Epstein expressed misgivings with the specific result but agreed that it followed from *Fernandez*, which he described as concluding that it would be "unfair and impractical to subject [homeowners] to the intricacies of OSHA regulations for improvement work on their own home." (Slip Op., final page.) Justice Epstein did not question the decision in *Fernandez*. (*Ibid.*) He just observed that the logical implication of *Fernandez* is a bright-line rule that homeowners do not owe a Cal-OSHA obligation to workers performing work on the homeowners' residence for the homeowners' personal benefit. (*Ibid.*)

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[1] The Court of Appeal also affirmed summary judgment on a premises liability claim, finding that the danger of a partially-removed roof is open and obvious to any reasonable person who sees the roof and knows that he is there to dismantle it. (Slip Op. 11.) Petitioner raises no issue for review as to that holding.

D. The Court Of Appeal Denies Rehearing And A Post-Opinion Request For Judicial Notice.

Cortez petitioned for rehearing, asserting that the appellate court had articulated a new exemption to Cal-OSHA without giving him an opportunity to present additional evidence or conduct discovery on the issue. (Petition for Rehearing 1-2.) He concurrently sought judicial notice of a grant deed that he said showed that the homeowners transferred their house to a third party in April 2008. (Motion for Judicial Notice 1-2.) The appellate court summarily denied both the rehearing petition and the request for judicial notice. (See docket for Court of Appeal Case No. B210628.)

WHY REVIEW IS NOT WARRANTED

Neither of the issues that Cortez presents for review warrants this Court's attention. This case presents no important, unsettled question of law or lack of uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).) Rather, the Court of Appeal's opinion merely applied the rationale of *Fernandez* to a different set of facts. The resulting conclusion is the same as the one briefed in and reached by the trial court.

A. This Court Has Already Decided That Cal-OSHA Does Not Apply To Homeowners Hiring Contractors To Perform Work At Their Own Residences For Noncommercial Purposes.

Cal-OSHA expressly does not apply to "household domestic service." (Lab. Code, § 6303, subd. (b).) This Court held in *Fernandez* that a homeowner who hires an unlicensed tree-trimmer to trim tall trees at his residence falls within the household domestic service exception. (31 Cal.4th at p. 34.) In so holding, it observed that Cal-OSHA's legislative history supports a broad interpretation of the exception, that "OSHA and its predecessors have operated for 90 years primarily in the commercial setting," and that "homeowners are ill-equipped to understand or to comply with the specialized requirements of OSHA." (*Id.* at p. 37.)

As the Court of Appeal held, *Fernandez*'s rationale is unqualified. There is no principled way to distinguish the underlying facts here—homeowners remodeling their own residence—from the tree-trimming at issue in *Fernandez*. As the Court of Appeal concluded, "[h]omeowners 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." (Slip Op. 9.)

Cortez's only response is that *Fernandez* should not apply because that case involved tree-trimming while this case involves "extensive demolition and construction activity through unlicensed workers." (Petition for Review 9.) He does not explain why this distinction matters. It doesn't. The use of unlicensed workers is not a distinction, as the worker in *Fernandez* also needed a license but did not have one. (31 Cal.4th at pp. 38-39.) And tree-trimming may be a distinct activity from construction, but as far as *Fernandez*'s rationale, the difference is of no import.

Cortez emphasizes that Labor Code section 6303, subdivision (b) includes "demolition" and "construction" as activities covered by Cal-OSHA. (Petition for Review 9.) But section 6303 also covers "any trade, enterprise, project, industry, business, occupation, or work . . . . " (Lab. Code, § 6303, subd. (b).) The statute's household domestic service exception applies to all of these categories, including demolition and construction. (*Ibid.*) Plaintiff suggests no uncertainty or inconsistency in the law as to the scope of that exception.

The issue is not whether Cal-OSHA applies to construction and demolition generally. It is whether a homeowner who undertakes a project for his personal benefit falls within Cal-OSHA's household domestic service exception. *Fernandez* answered "yes," focusing on Cal-OSHA's historically commercial role. The court in this case followed *Fernandez*. That routine application of precedent—which is consistent with case law from across the country (Slip Op. 9)—does not create any *unsettled* question of law or lack of uniformity in decision that this Court might review.

B. The Court Of Appeal Decided The Case On A Ground Briefed In And Decided By The Trial Court.

Cortez's second issue is a red herring. He claims that the Court of Appeal relied on a new ground for affirmance, thereby requiring a remand for additional discovery. (Petition for Review 12-13.) This fact-specific claim not only presents no unsettled legal issue or lack of uniformity in decision, its factual premise is baseless. The ground that the Court of Appeal relied on—that Cal-OSHA does not apply to homeowners undertaking a noncommercial project—was briefed, argued, and decided in the trial court.

Cortez was well aware in the trial court of the homeowners' argument that they were exempt from Cal-OSHA because their home remodel was noncommercial:

- The homeowners' summary judgment motion discussed *Fernandez* and quoted this Court's statement that most homeowners would not realize that "'OSHA requirements would apply when they hire someone to trim a tree *for their own personal benefit and not for a commercial purpose*.'" (1 AA 28, emphasis added.)

- The homeowners' reply in support of summary judgment asserted that "[t]his was not a business or commercial venture" and that "[i]t is undisputed Defendants were not engaged in a business enterprise that was in any way connected with the work being performed. Defendants were not in the business of roofing, construction, or general contractor-type work. They just owned the home that they were trying to remodel." (1 AA 260-261.) The reply emphasized *Fernandez* and other cases suggesting that OSHA's scope is limited to commercial projects.

- The trial court held that Cortez's Cal-OSHA claim failed in part because "it is unsupported by any citation to a California case in which OSHA compliance was imposed on a homeowner." (2 AA 306.)

The Court of Appeal decided the case on the same ground that the homeowners had been arguing all along: The homeowners fell within Cal-OSHA's household domestic service exception because they were remodeling their own home, a noncommercial project. (Slip Op. 9-10.) There was nothing new or surprising about this conclusion.

The Court of Appeal relied on one of the same grounds that the trial court relied on. The Court of Appeal implicitly concluded as much when it denied Cortez's petition for rehearing, which was virtually identical to the argument in his petition for review. (Compare Petition for Rehearing 2-5 with Petition for Review 11-13.) This case simply does not present any question regarding when a plaintiff is entitled to additional discovery before the Court of Appeal affirms on a ground not relied on by the trial court. That question therefore is not properly before this Court.

CONCLUSION

Review should be denied for the reasons set forth above.

Dated: October 27, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.504(d)(1), I certify that this **Answer to Petition for Review** contains 1,784 words, not including the tables of contents and authorities, caption page, signature blocks, or this Certification page.

Dated: October 27, 2009

Alana H. Rotter

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **October 28, 2009**, I served the foregoing document described as **Answer To Petition For Review** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes as stated below.

XX **BY MAIL**

I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid as follows:

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I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **October 28, 2009**, at Los Angeles, California.

X (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Rebecca E. Nieto