Supreme Court Copy

SUPREME COURT
FILED
MAY 04 2010
Frederick K. Ohlrich Clerk
Deputy
CRC 8.25(b)

Case No. S177075

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

OCTOVIANO CORTEZ,

Plaintiff and Appellant,

vs.

LOURDES ABICH et al.,

Defendants and Respondents.

2d Civil No. B210628

(Los Angeles County
Super. Ct. No. GC 038444)

ANSWER BRIEF ON THE MERITS

EARLY, MASLACH & VAN DUECK
John C. Notti (Bar No. 109728)
Paul A. Carron (Bar No. 123012)
James G. Randall (Bar No. 126220)
700 South Flower Street, Suite 2800
Los Angeles, California 90017
Telephone: (213) 615-2500
Facsimile: (213) 615-2698

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson (Bar No. 109374)
Alana H. Rotter (Bar No. 236666)
Sheila A. Wirkus (Bar No. 251562)
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

Attorneys for Defendants and Respondents
OMAR ABICH and LOURDES ABICH

Case No. S177075

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

OCTOVIANO CORTEZ, Plaintiff and Appellant, vs. LOURDES ABICH et al., Defendants and Respondents.	2d Civil No. B210628 (Los Angeles County Super. Ct. No. GC 038444)

ANSWER BRIEF ON THE MERITS

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	4
A. The Facts.	4
1. Defendant homeowners seek to remodel their residence.	4
2. The homeowners hire a contractor to assist with the remodel; the contractor, in turn, hires plaintiff.	4
3. During his first day on the job, plaintiff climbs up on the half-removed roof, falls through it, and injures himself.	5
B. Procedural Posture.	5
1. Plaintiff sues the contractor and the homeowners.	5
2. The trial court grants summary judgment for the homeowners.	6
3. The Court of Appeal affirms based on *Fernandez v. Lawson* (2003) 31 Cal.4th 31.	6
4. The Court of Appeal denies rehearing and a post-opinion request for judicial notice.	8
ARGUMENT	9
I. THE HOMEOWNERS WERE NOT PLAINTIFF'S EMPLOYERS, AS THEY NEITHER HIRED HIM NOR DIRECTED OR CONTROLLED HIS WORK.	9
A. As A Matter Of Law, The Homeowners Weren't Plaintiff's Employers For Cal-OSHA Purposes Because They Didn't Supervise His Work.	9

TABLE OF CONTENTS
(Continued)

		Page
B.	Labor Code Section 2750.5 Did Not Transform The Homeowners Into Plaintiff's Employers Merely Because Plaintiff And The Contractor Who Hired Him Were Unlicensed.	10
	1. Section 2750.5 is ambiguous as to when an unlicensed worker may be an independent contractor.	11
	2. Established statutory interpretation rules require reading language in overall context; so read, plaintiff's unlicensed status did not make the homeowners his employers.	12
	3. Deeming an unlicensed contractor's crew to be a homeowner's employee would frustrate the purpose of the Contractor's State License Law, which is to protect those who deal with persons required to have a license.	16
	4. Nothing in the legislative history indicates an intent to make a homeowner the employer of an unlicensed contractor's workers.	20
C.	The *In Pari Delicto*/Unclean Hands Doctrine Bars Recognizing Duties Owed To Workers Who Themselves Violate The Licensing Statutes.	21
D.	No Other State Has Suggested That A Contractor's Workers Are A Homeowner's Employees for OSHA Purposes.	24
E.	The Court's Only Superficially On Point Decision, *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, Does Not Command A Different Result.	25
	1. Under *State Compensation*, section 2750.5 makes a homeowner the employer of an unlicensed contractor only for the purposes of workers' compensation benefits.	25

TABLE OF CONTENTS
(Continued)

Page

2. The public policy reasons for extending workers' compensation benefits to unlicensed workers do not suggest straining the rule to permit tort recovery. 27

3. Even if *State Compensation* were not limited to workers' compensation, it would not apply here because the homeowners didn't directly hire plaintiff. 29

a. *State Compensation* did not consider whether a homeowner was liable for injury to a worker in an unlicensed contractor's crew. 29

b. The Court of Appeal erred in relying on *Rosas v. Dishong* because *Rosas* did not involve a homeowner's liability for injury to a worker in an unlicensed contractor's crew. 30

4. Even on its facts, *State Compensation* was wrongly decided. 30

II. THE LEGISLATURE NEVER INTENDED CAL-OSHA TO APPLY TO HOMEOWNERS' NONCOMMERCIAL ENDEAVORS. 31

A. This Court Has Already Interpreted Cal-OSHA To Broadly Exempt Services Personal To Homeowners. 32

1. The domestic service exception is broad. 32

2. *Fernandez*'s rationale applies equally to roof removal in the course of homeowners remodeling their own homes as it does to trimming 50-foot trees. 35

TABLE OF CONTENTS
(Continued)

Page

3. Plaintiff suggests no rational line between *Fernandez* and the circumstances here; the rational line is between commercial or business conduct and a homeowner's personal projects. 37

B. No State Has Mandated That Homeowners Have To Comply With OSHA Laws; There Is No Indication That California Intended To Adopt A Contrary Rule. 39

1. State courts interpreting similar statutory language have consistently held that OSHA obligations do not apply to homeowners engaged in remodeling their own homes. 40

2. Federal law is not to the contrary. 45

C. Imposing The Boundless Duty That Plaintiff Proposes Would Be Bad Public Policy. 47

III. PLAINTIFF HAD AMPLE NOTICE AND OPPORTUNITY TO DISCOVER OR PURSUE A DIFFERENT CLAIM; HAVING NEVER SOUGHT TO DO SO IN THE TRIAL COURT, IT IS TOO LATE FOR HIM TO DO SO NOW. 50

A. The Ground On Which The Court Of Appeal Affirmed Was Presented In And Relied On By The Trial Court. 51

B. Plaintiff Never Sought Discovery On Nor Pursued A Claim That The Homeowners Were Engaged In A Commercial Enterprise Before The Far Too Late Appellate Rehearing Petition Stage. 52

C. Plaintiff's Factual Claim That The Homeowners Were "Flipping" Their Home Is Unsupported By The Record. 53

CONCLUSION 54

CERTIFICATION 56

TABLE OF AUTHORITIES

Page

Cases:

Alatriste v. Cesar's Exterior Designs, Inc.
(2010) 183 Cal.App.4th 656 — 22, 48

Camargo v. Tjaarda Dairy
(2001) 25 Cal.4th 1235 — 10

Camp v. Jeffer, Mangels, Butler & Marmaro
(1995) 35 Cal.App.4th 620 — 22

Cel-Tech Communications, Inc. v. Los Angeles
Cellular Telephone Co.
(1999) 20 Cal.4th 163 — 44

Cole v. Rush
(1955) 45 Cal.2d 345 — 44

Conroy v. Regents of University of Cal.
(2009) 45 Cal.4th 1244 — 52

Cortez v. Abich
(2009) 177 Cal.App.4th 261 — 6, 30

Costa v. Gaccione
(2009) 408 N.J.Super. 362, 975 A.2d 451 — 43, 44

CrossTalk Productions, Inc. v. Jacobson
(1998) 65 Cal.App.4th 631 — 21

Davis v. Nadrich
(2009) 174 Cal.App.4th 1 — 53

Diamond Multimedia Systems, Inc. v. Superior Court
(1999) 19 Cal.4th 1036 — 20

Elliott v. Contractors' State License Bd.
(1990) 224 Cal.App.3d 1048 — 49

TABLE OF AUTHORITIES
(Continued)

Page

Cases:

Elsner v. Uveges
(2004) 34 Cal.4th 915 — 12, 43

Fernandez v. Lawson
(2003) 31 Cal.4th 31 — 3, 7, 8, 13, 20, 21, 23, 28, 31-39, 41, 44, 46, 50, 51

Fillmore v. Irvine
(1983) 146 Cal.App.3d 649 — 19

Foss v. Anthony Industries
(1983) 139 Cal.App.3d 794 — 26

Frink v. Prod
(1982) 31 Cal.3d 166 — 17

Geiger v. Lawrence
(Wis. Ct. App. 1994) 188 Wis.2d 233, 524 N.W.2d 909 — 42

George v. Meyers
(2000) 169 Or.App. 472, 10 P.3d 265 — 24

Great West Contractors, Inc. v. WSS Indus. Const., Inc.
(2008) 162 Cal.App.4th 581 — 17

Griffin Dewatering Corp. v. Northern Ins. Co. of New York
(2009) 176 Cal.App.4th 172 — 52

Hays v. Wood
(1979) 25 Cal.3d 772 — 19

Hottmann v. Hottmann
(1997) 226 Mich.App. 171, 572 N.W.2d 259 — 42

Hunt v. Superior Court
(1999) 21 Cal.4th 984 — 12

Kelly v. Methodist Hospital of So. California
(2000) 22 Cal.4th 1108 — 32, 45

TABLE OF AUTHORITIES
(Continued)

Page

Cases:

Lewis & Queen v. N. M. Ball Sons
(1957) 48 Cal.2d 141 — 18, 22

Lopez v. University Partners
(1997) 54 Cal.App.4th 1117 — 9

Melican v. Regents of the University of California
(2007) 151 Cal.App.4th 168 — 52

Mendoza v. Brodeur
(2006) 142 Cal.App.4th 72 — 26

MW Erectors, Inc. v. Niederhauser Ornamental and
Metal Works Co., Inc.
(2005) 36 Cal.4th 412 — 22

People v. Jones
(1988) 46 Cal.3d 585 — 14

People v. Ledesma
(1997) 16 Cal.4th 90 — 44

People v. Morante
(1999) 20 Cal.4th 403 — 44

People v. Morse
(2004) 116 Cal.App.4th 1160 — 14

Ramirez v. Nelson
(2008) 44 Cal.4th 908 — 23, 25, 26, 29, 30, 34, 50

Reynolds v. Bement
(2005) 36 Cal.4th 1075 — 53

Rimoldi v. Schanzer
(App. Div. 1989) 537 N.Y.S.2d 839, 147 A.D.2d 541 — 24

TABLE OF AUTHORITIES
(Continued)

Page

Cases:

Rogers v. Irving
(1997) 85 Wash.App. 455, 933 P.2d 1060 37, 41, 42, 45

Rosas v. Dishong
(1998) 67 Cal.App.4th 815 6, 26, 30, 33, 39, 43, 44, 49

Salwasser Manufacturing Co. v. Occupational Saf. & Health Appeals Bd.
(1989) 214 Cal.App.3d 625 49

Slack v. Whalen
(2000) 327 N.J.Super. 186, 742 A.2d 1017 24

Smith v. ACandS, Inc.
(1994) 31 Cal.App.4th 77 10

Smith v. Myers
(2002) 90 Wash.App. 89, 950 P.2d 1018 42

Smith v. Superior Court
(2006) 39 Cal.4th 77 14, 15, 17

State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.
(1985) 40 Cal.3d 5 2, 21, 25-27, 29-31

Stenvick v. Constant
(Minn. Ct. App. 1993) 502 N.W.2d 416 41

Tripp v. Swoap
(1976) 17 Cal.3d 671 17

Vesely v. Sager
(1971) 5 Cal.3d 153 44

Woosley v. State of California
(1992) 3 Cal.4th 758 14

Zaragoza v. Ibarra
(2009) 174 Cal.App.4th 1012 38

TABLE OF AUTHORITIES
(Continued)

Page

Statutes:

29 C.F.R. § 1975.6	46
29 U.S.C. § 652	46
29 U.S.C. § 653	46
8 C.C.R., § 3203	47
8 C.C.R., § 3210	47
8 C.C.R., § 3212	47
Alaska Stat., § 18.60.105	40
Ariz. Rev. Stat. Ann., § 23-401	40
Ariz. Rev. Stat. Ann., § 23-901	40
Business & Professions Code, § 7000	16, 17
Business & Professions Code, § 7026.1	28
Business & Professions Code, § 7026.3	28
Business & Professions Code, § 7028	17, 23, 28
Business & Professions Code, § 7029	17
Business & Professions Code, § 7030	17
Business & Professions Code, § 7031	19, 22, 23, 48
Business & Professions Code, § 7044	15, 17, 21
Business & Professions Code, § 7053	19
Business & Professions Code, § 7071.6	17
Civil Code, § 3524	21

TABLE OF AUTHORITIES
(Continued)

	Page
Statutes:	
Code of Civil Procedure, § 437c	53
Code of Civil Procedure, § 1858	14
D.C. Code, § 32-1101	40
Haw. Rev. Stat., § 396-3 (2003)	40
Insurance Code, § 11590	28
Iowa Code. Ann., § 88.3	40
Labor Code, § 2750	29-31
Labor Code, § 2750.5	1, 2, 6, 10-17, 19, 20, 25, 26, 29
Labor Code, § 3202	27
Labor Code, § 3351	38
Labor Code, § 3600	27
Labor Code, § 3602	27
Labor Code, § 6303	2, 32, 44
Labor Code, § 6311	48
Labor Code, § 6312	48
Labor Code, § 6314	48
Labor Code, § 6321	49
Labor Code, § 6400	9, 32

TABLE OF AUTHORITIES
(Continued)

	Page
Statutes:	
Labor Code, § 6401.7	47
Labor Code, § 6408	47
Labor Code, § 6409.2	48
Labor Code, § 6423	48
Md. Code Ann., Lab. & Empl., § 5-101	40
Mich. Comp. Laws Serv., § 408.1002	40
N.C. Gen. Stat. Ann. § 95-127 (2002)	40
N.M. Stat. Ann. § 50-9-3	40
Or. Rev. Stat., § 654.005	40
P.R. Laws Ann. § 361	40
Tenn. Code Ann. § 50-3-104	40
Wis. Stat. Ann. § 103.001	40
Other Authorities:	
Lazo, House-Flipping Is Back In South L.A., L.A. Times (Apr. 25, 2010)	54

INTRODUCTION

Homeowners should owe no duty to protect a contractor's worker from the dangers of the very home improvement project that they hire the contractor to perform. Nor should they be held responsible for the contractor's or the worker's own unlicensed status. The opening brief advocates creating just such novel duties. There is no basis for doing so.

Here is what happened. Plaintiff and appellant Octoviano Cortez, a construction worker, was injured while helping a contractor remodel the defendants' home. He fell through a half-removed roof that he claims he was hired to continue removing. He sued the home's owners asserting that they owed him a duty to comply with California's Occupational Safety and Health Act (Cal-OSHA). The trial court granted summary judgment. Plaintiff's sole claim at this stage is that because he and the contractor were unlicensed, the homeowners should be deemed his employer and thereby required to have complied with Cal-OSHA.

The homeowners were not plaintiff's employer, a prerequisite to Cal-OSHA liability. They did not hire or supervise plaintiff; they hired a contractor who hired plaintiff. Plaintiff asserts that the homeowners were his employer because he and the contractor they hired were unlicensed. He relies on a statute, Labor Code section 2750.5, that this Court has interpreted as making a homeowner the employer *for workers' compensation purposes* of an unlicensed contractor whom the homeowner directly hired. But this Court has recently observed that employer status for workers' compensation purposes is not the same thing as employer status for tort liability purposes. Nor should it be. The public policy reasons for

extending workers' compensation benefits to unlicensed workers do not support extending tort recovery to them as well.

When read in context, as it must be, section 2750.5 does *not* make a homeowner the employer of an unlicensed contractor's work crew. Rather, it is limited to traditional employment relationships. Section 2750.5 does not allow unlicensed workers to hijack the licensing statutes and use them as a means of imposing liability on unsuspecting homeowners whom those statutes were intended to protect. Treating homeowners as employers merely because they hire an unlicensed contractor would expose them to substantial potential tort liability, as well as numerous other compliance obligations that they have no reason to know exist and that there is *no* indication that the Legislature intended to impose on them. Plaintiff would use the licensing statutes to put homeowners at risk rather than to protect them.

State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal.3d 5 (*State Compensation*) is not to the contrary. It considered whether homeowners were liable to unlicensed workers whom they directly hired. The parties here had no such direct relationship: The homeowners hired a contractor, who then hired plaintiff. Indeed, *State Compensation*'s reading of section 2750.5 itself is an illogical statutory interpretation, as several members of this Court have recognized.

In any event, even if the homeowners were deemed plaintiff's technical "employer," they were not bound by Cal-OSHA in remodeling their own home. Cal-OSHA does not apply to "household domestic service[s]." (Lab. Code, § 6303, subd. (b).) That phrase applies

expansively to "a broad category of workers performing tasks in and outside of a private residence" and is not limited to incidental household chores. (*Fernandez v. Lawson* (2003) 31 Cal.4th 31, 37 [contractor pruning 50-foot tree].) Remodeling one's own home falls well within the broad exemption. Plaintiff has cited no contrary authority and has provided no ground upon which to distinguish *Fernandez* or its rationale. There is simply no basis for the radical expansion of the law he proposes. In the end, forcing homeowners to comply with OSHA would impose onerous and unexpected obligations on them and transform constitutionally protected residential privacy zones into workplaces open to public inspection and regulation. That cannot be what the Legislature intended.

Plaintiff raises a final red-herring issue. He argues that the Court of Appeal affirmed summary judgment for the homeowners on a ground not raised in the trial court and that he therefore should be given an opportunity to engage in further discovery. He is wrong. The homeowners maintained from the beginning of this case that they were not subject to Cal-OSHA, specifically relying on *Fernandez* and its language regarding projects personal to the homeowner. Both the trial court and Court of Appeal ruled for them on that basis. Plaintiff did not dispute the personal nature of the project in the trial court. Nor did he request additional discovery until he sought rehearing in the Court of Appeal. He cannot advance a new hypothesis at such a late date.

This Court should affirm the judgment of the Court of Appeal and of the trial court.

STATEMENT OF THE CASE

A. The Facts.

1. Defendant homeowners seek to remodel their residence.

After owning their home for several years, defendant Lourdes Abich and her son, defendant Omar Abich, sought to remodel it. (1 AA 287 ¶¶ 1-3.) Omar Abich is a mortgage broker, not a contractor. (1 AA 236 ¶ 17.) He obtained the necessary permits from the City of Pasadena and then hired others to do the construction. (1 AA 287 ¶ 4; 288 ¶ 7.)

2. The homeowners hire a contractor to assist with the remodel; the contractor, in turn, hires plaintiff.

The homeowners hired Miguel Quezada Ortiz to remove part of the roof from their house. (1 AA 235 ¶ 13.)[1] Ortiz did not have a license for the work. (1 AA 288 ¶ 8.) Ortiz hired plaintiff Octoviano Cortez to help him. (1 AA 4.) The homeowners did not supervise the details of the job assigned to Ortiz or the work done by plaintiff. (1 AA 237 ¶ 20; 290 ¶ 17.)

---

[1] The parties dispute the nature of the work for which Ortiz was hired. As the trial court found, that dispute is immaterial to the disposition of the case. (2 AA 306.) For present purposes, although the homeowners and Ortiz assert that Ortiz was hired only to remove a deck in the backyard (1 AA 48, 55, 234 ¶ 12), we accept plaintiff's contention that Ortiz was hired to remove the roof.

3. During his first day on the job, plaintiff climbs up on the half-removed roof, falls through it, and injures himself.

When plaintiff arrived at the house on his first day of work, he saw that part of the roof was missing as part of the remodeling project. (1 AA 230 ¶¶ 1, 2.) The remaining roof was on an incline and looked old. (1 AA 233 ¶ 10 [plaintiff disputes whether the roof was actually old but not that it looked old or was on an incline].) According to plaintiff, Ortiz told him to gather up debris and then to continue knocking down the roof. (1 AA 289 ¶ 12.)

After plaintiff finished picking up debris, he climbed onto the portion of the roof that had not yet been removed. (1 AA 231 ¶ 5.) Plaintiff fell through the roof and was injured. (1 AA 289 ¶ 13; 292 ¶ 24.) Because he had worked less than 52 hours he was not eligible for workers' compensation. (Slip Op. 6 & fn. 4.)

B. Procedural Posture.

1. Plaintiff sues the contractor and the homeowners.

Plaintiff sued Ortiz, who hired him, and the Abiches, who owned the house, for general negligence and premises liability. (1 AA 1-9.) He premised his negligence claim on asserted violations of Cal-OSHA regulations. (1 AA 4, 240.) A default was entered against Ortiz. (2 AA 324.)[2]

---

[2] Ortiz was not a party to the appeal.

2. The trial court grants summary judgment for the homeowners.

The homeowners moved for summary judgment on several grounds including, as to premises liability, that they had no duty to warn plaintiff about the danger of climbing on a roof that was obviously under construction and, as to general negligence, that they were not subject to Cal-OSHA's worker safety requirements and, therefore, owed no duty to comply with those requirements. (1 AA 17-29.) Plaintiff opposed summary judgment, asserting that the homeowners were subject to Cal-OSHA and that they owed him a duty to provide a safe roof to remove. (1 AA 137-147.)

The trial court granted summary judgment for the homeowners. (2 AA 305-306.) It found that the homeowners were not plaintiff's employer for Cal-OSHA purposes and that even if they were plaintiff's employer, Cal-OSHA does not apply to homeowners remodeling their own residence. (*Ibid.*) The trial court further found that the homeowners owed no duty to warn plaintiff about the roof because the roof of a house undergoing remodeling is an open and obvious danger. (2 AA 306.)

3. The Court of Appeal affirms based on *Fernandez v. Lawson* (2003) 31 Cal.4th 31.

The Court of Appeal affirmed. Preliminarily, relying on *Rosas v. Dishong* (1998) 67 Cal.App.4th 815, it held that the homeowners were plaintiff's employer by virtue of Labor Code section 2750.5. (Slip Op. 5-7; previously published at 177 Cal.App.4th 261, 266.) Nonetheless, it held

that the homeowners owed no duty to comply with Cal-OSHA in light of that statute's "household domestic service" exception. (Slip Op. 7-10.) It applied the principles set forth in *Fernandez v. Lawson* (2003) 31 Cal.4th 31, to the facts at hand. (Slip Op. 7-8.)

As the Court of Appeal noted, *Fernandez*'s rationale included that homeowners are ill-equipped to understand and comply with Cal-OSHA regulations. (Slip Op. 9.) 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." (Slip Op. 10.) The appellate court adhered to *Fernandez*'s 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.) The Court of Appeal also affirmed summary judgment on the premises liability claim, finding the danger of a partially-removed roof to be open and obvious to any reasonable person who sees the roof and knows that he is there to dismantle it. (Slip Op. 11.) Plaintiff raised no issue for review as to that holding.

Concurring Justice Epstein agreed that the result 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. 13.) Justice Epstein did not question *Fernandez*'s result or rationale. (*Ibid.*) He just observed that the logical implication of *Fernandez* is a bright-line rule that homeowners do not owe Cal-OSHA obligations to workers performing work on their residence for their personal benefit. (*Ibid.*) Although he

expressed misgivings about such a broad rule, he found it "difficult to see where [else] a reasonable line would be drawn" in light of *Fernandez*'s rationale. (*Ibid.*)

4. The Court of Appeal denies rehearing and a post-opinion request for judicial notice.

Plaintiff petitioned for rehearing asserting that the appellate court had articulated a new Cal-OSHA exemption for homeowners without giving him an opportunity to present additional evidence or to 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 (some five or six years after they bought the residence and two years after plaintiff's injury). (Motion for Judicial Notice 1-2.) The appellate court summarily denied both rehearing and the judicial notice request. (Docket, Court of Appeal Case No. B210628, September 22 and 23, 2009.)

This Court granted review.

ARGUMENT

I.

THE HOMEOWNERS WERE NOT PLAINTIFF'S EMPLOYERS, AS THEY NEITHER HIRED HIM NOR DIRECTED OR CONTROLLED HIS WORK.

The California Occupational Safety and Health Act of 1973 obligates *employers* to furnish "a place of employment that is safe and healthful for the employees therein." (Lab. Code, § 6400, subd. (a).) As Appellant's Opening Brief on the Merits emphasizes, this obligation applies only to employers. (Opening Brief on the Merits ("OBM"), p. 9 [quoting statutes, italicizing word "employer]".)[3] As we shall explain, Cal-OSHA imposed no duties on the homeowners here because they were not plaintiff's employers.

A. As A Matter Of Law, The Homeowners Weren't Plaintiff's Employers For Cal-OSHA Purposes Because They Didn't Supervise His Work.

Cal-OSHA "imposes a duty to provide a safe workplace only on a worker's immediate employer or those who contract for the services of the immediate employer, but retain sufficient control over the work to justly be held responsible for unsafeness in the workplace." (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1125-1126.) It does not impose

---

[3] Plaintiff's own emphasis of the necessary predicate employer status belies his assertion that the homeowners' status as employers is not fairly within the grant of review.

duties upon a property owner who only exercises general supervision and control over a project. (*Smith v. ACandS, Inc.* (1994) 31 Cal.App.4th 77, 91, disapproved on another ground in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245 ["The 'right to see that work is satisfactorily completed does not impose upon one hiring an independent contractor the duty to assure that the contractor's work is performed in conformity with all safety provisions. . . . (Citation.)'"].) "As a matter of law, general supervision of an independent contractor's work, without direction of operative detail, does not make an owner a statutory employer bound by safety regulations of the Labor Code. (Citation.)" (*Ibid.*)

It is undisputed that the homeowners here did not supervise the details of the job assigned to plaintiff or Ortiz, the contractor who employed plaintiff. (1 AA 237.) The homeowners did not even hire plaintiff; they contracted with Ortiz. The homeowners therefore were not plaintiff's employer under any standard definition.

B. Labor Code Section 2750.5 Did Not Transform The Homeowners Into Plaintiff's Employers Merely Because Plaintiff And The Contractor Who Hired Him Were Unlicensed.

Plaintiff does not contend that the homeowners were his employers under the standard definition set forth above. Rather, plaintiff predicates the homeowners' employer status solely on Labor Code section 2750.5. He argues that his own failure and the contractor's failure to obtain the

requisite licenses make the homeowners his statutory employers under section 2750.5 thereby triggering OSHA obligations.

1. Section 2750.5 is ambiguous as to when an unlicensed worker may be an independent contractor.

Section 2750.5 creates "a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required [under the Contractor's State License Law], or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor." (Lab. Code, § 2750.5.) The statute does not say of whom the worker is an employee, just that the worker himself is presumed not to be an independent contractor.

The statute lists various factors as refuting employee status. They include that one "has the right to control and discretion as to the manner of performance," "the individual is customarily engaged in an independently established business," and the "independent contractor status is bona fide and not a subterfuge to avoid employee status." (Lab. Code, § 2750.5.)

Evidence of bona fide independent contractor status is based on "cumulative factors," which include "bargaining for a contract to complete a specific project for compensation rather than by time," "control over the time and place the work is performed," and "holding a license pursuant to the Business and Professions Code." (Lab. Code, § 2750.5, subd. (c).)

Confusingly, the statute's penultimate paragraph is apparently at odds with the rebuttable presumption established in the opening paragraph:

> In addition to the factors contained in subdivision (a), (b), and (c), any person performing a function or activity for which a license is required pursuant to [the Contractor's State License Law] shall hold a valid contractor's license as a condition of having independent contractor status.

(Lab. Code, § 2750.5.)

On its face, section 2750.5 is ambiguous about the role that a license plays in determining whether someone is an employee. Subsection (c) states that a license is one of many factors to consider in determining whether someone is an independent contractor; by contrast, the penultimate paragraph suggests that a license is *required* before someone can have independent contractor status.

2. Established statutory interpretation rules require reading language in overall context; so read, plaintiff's unlicensed status did not make the homeowners his employers.

The first step in interpreting any statute is to look at its plain language, *reading all parts of the statute together*. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 933 [components of statute should be read together so as to achieve the overriding purpose of the entire legislation].)

As just discussed, the body of section 2750.5 and its penultimate paragraph are inconsistent when each is read in isolation. But reading the penultimate paragraph in the context of the rest of the statute reveals a different meaning that harmonizes these apparently contradictory provisions: a *worker's* lack of a license does not, per se, turn the hirer of that worker into an "employer"; a *contractor's* lack of a required license turns *the contractor* into an employer. Here's how that harmonized meaning emerges.

First, the penultimate paragraph is set apart from subsections (a), (b), and (c), which contain the factors for rebutting the presumption. (Lab. Code, § 2750.5.) This suggests that it addresses a somewhat different topic. Indeed, it states that its formulation is "[*i*]*n addition* to the factors contained in subdivisions (a), (b), and (c)." (Lab. Code, § 2750.5, emphasis added.) As concurring Justices Brown and Baxter observed in *Fernandez,* the plain language coupled with its placement make "[i]t seem[] unlikely the Legislature nevertheless singled out this factor as a kind of 'trump card,' the absence of which renders a worker an employee despite any other evidence of independent contractor status." (*Fernandez*, *supra*, 31 Cal.4th at pp. 42-43, conc. opn. of Brown, J.) "[I]f the Legislature had intended the penultimate paragraph to be part of the criteria for rebutting the presumption a worker was an employee, it presumably would have made 'having a license' factor (d), along with the other three factors, not listed it in a different paragraph. Further, it would have deleted the reference in subdivision (c) to licensing." (*Ibid.*)

Second, if the absence of a license conclusively establishes that a worker is an employee, then that would render meaningless both the opening paragraph's reference to a rebuttable presumption and subsection (c)'s reference to a license as one of many *factors* indicating bona fide independent contractor status. That, in turn, would violate the rule that statutes are construed so as to give effect to the entire statute, including every word, phrase or constituent part, avoiding a construction that renders any part of the statute meaningless or extraneous. (Code Civ. Proc., § 1858; *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83; *Woosley v. State of California* (1992) 3 Cal.4th 758, 775-776.)

So, how can section 2750.5 be construed simultaneously to give its opening paragraph, subdivision (c), and its penultimate paragraph meaning and effect? First, there are slight differences in wording between the opening and penultimate paragraphs. The opening paragraph addresses a "worker" performing "services" for which a license is needed. By contrast, the penultimate paragraph addresses "any persons" performing "any function or activity" for which a license is needed. "[W]hen different language is used in the same connection in different parts of a statute it is presumed the [L]egislature intended a different meaning and effect." (*People v. Morse* (2004) 116 Cal.App.4th 1160, 1165, citations and internal quotation marks omitted; accord, *People v. Jones* (1988) 46 Cal.3d 585, 596 ["when *different* words are used in contemporaneously enacted, adjoining subdivisions of a statute, the inference is compelling that a difference in meaning was intended," original emphasis].)

The logical reading of these differences in language is that when the *worker's* licensed status is at issue, there is a rebuttable presumption of employee status (the first portion of the statute); whereas when the *employer* has to be licensed, those working for the employer are conclusively presumed to be employees if the employer is not licensed (the penultimate paragraph). But a homeowner improving his or her own residence, as here, is *exempt* from the licensing statutes. (Bus. & Prof. Code, § 7044, subd. (c).) And so, the penultimate paragraph of section 2750.5 is irrelevant in this case.

What remains is section 2750.5's rebuttable presumption. But the factors listed there are the traditional factors for determining an employment relationship. As discussed above, it is undisputed that under the traditional test the homeowners were not plaintiff's employers.

Further, section 2750.5's placement within the Labor Code suggests that the statute is limited to defining the relationship between the worker and the person who *directly* hires the worker. It appears in Chapter 2 (Employer and Employee), Article 1 (Contract of Employment) in the Labor Code. Section 2750.5 must be read in that context. Its "language must be construed in the context of the statute as a whole and the overall statutory scheme, . . . [Citation.] In other words, '[it cannot be] construe[d] . . . in isolation, but rather [must be] read . . . with reference to *the entire scheme of law of which it is part* so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*Smith v. Superior Court*, *supra*, 39 Cal.4th at p. 83, internal quotation marks omitted, emphasis added.)

In its statutory context, the immediately preceding Code section, Labor Code section 2750, defines the "contract of employment" as "a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person." The homeowners here had no contract with plaintiff. They did not hire or engage plaintiff. Rather, plaintiff's contract relationship was with Ortiz, the person who hired him. Read in its statutory context then, section 2750.5 defines the relationship between plaintiff and Ortiz – the person who hired him. It does not define nor purport to define the relationship between plaintiff and those who did not contract with him, did not hire him, and effectively were strangers to his employment relationship, i.e., the homeowners.

Thus, when read to harmonize its own language and in its statutory context, as it must be, section 2750.5 does not make homeowners the employers of an unlicensed contractor's workers.

3. Deeming an unlicensed contractor's crew to be a homeowner's employee would frustrate the purpose of the Contractor's State License Law, which is to protect those who deal with persons required to have a license.

To the extent section 2750.5 might be applicable, its fulcrum is "services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and

Professions Code. . . ." (Lab. Code, § 2750.5) The referenced Chapter 9 is the Contractor's State License Law. (Bus. & Prof. Code, § 7000.)

Section 2750.5 must be read "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness," not construed in isolation. (*Smith v. Superior Court*, *supra*, 39 Cal.4th at p. 83 [citation and internal quotation marks omitted].) "Where as here two codes are to be construed, they 'must be regarded as blending into each other and forming a single statute.'" (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 679, citation omitted, disapproved on another ground by *Frink v. Prod* (1982) 31 Cal.3d 166, 180.) Consequently, section 2750.5 must be interpreted in light of the statutory purpose behind the Contractor's State License Law.

The Contractor's State License Law aims "to protect the public from incompetence and dishonesty in those who provide building and construction services. [Citation.] The licensing requirements provide minimal assurance that all persons *offering such services* in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [Citation.]" (*Great West Contractors, Inc. v. WSS Indus. Const., Inc.* (2008) 162 Cal.App.4th 581, 587, internal quotation marks omitted, emphasis added.) Contractors have to be licensed. (Bus. & Prof. Code, §§ 7028-7030.) Homeowners do not. (Bus. & Prof. Code, § 7044, subd. (c).) Licensed contractors must post a bond to protect *homeowners*. (Bus. & Prof. Code, § 7071.6.) Nothing bars a homeowner (or anyone else) from hiring an unlicensed person. The Contractor's State License Law aims to

deter those who *offer* unlicensed services, *not* those who ultimately consume such services.

The statutorily protected class encompasses "those who deal with a person required by the statute to have a license." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 153.) As this Court articulated decades ago, a person who should be licensed but is not should not be afforded a benefit from his own failure to comply with the law:

> When the person required to have a license is a general contractor, then the protected class includes subcontractors, materialmen, employees, *and owners* dealing with the general contractor. However, when the person who was required to have a license but did not have one is himself a subcontractor, such as plaintiff in the present case, *he of course is not to be protected from his own unlicensed activities*. To allow him to recover would in fact destroy the protection of those who dealt with him, and they are in the class the Legislature intended to protect whether they are owners or general contractors.

(*Ibid.*, emphasis added.) In short, when a homeowner deals with an unlicensed contractor, subcontractor, or worker the homeowner is in the protected class and the contractor, subcontractor or worker is not.

Plaintiff's reading of the statute protects the unlicensed contractor or worker by elevating him to employee status and punishes the homeowner who deals with him – a result directly contrary to both the Contractor's State License Law and this Court's precedent. That result doesn't change

whether the homeowner hires a general contractor or hires separate trades (e.g., roofer, plumber, etc.).

There is another problem. Making unlicensed workers employees would subject them to wage laws thereby defeating the prohibition on paying unlicensed contractors for their services. "[I]f section 2750.5 were applied to determinations under [Business & Professions Code] sections 7031 and 7053, every unlicensed person performing work on a job would be characterized as an employee and not an independent contractor. This result would repeal by implication section 7031's ban on recovery by an unlicensed contractor." (*Fillmore v. Irvine* (1983) 146 Cal.App.3d 649, 657.) Reading section 2750.5 as endowing unlicensed contractors and workers with employee status would gut substantial portions of the Contractor's State License Law. But "'there is a presumption against repeals by implication; they will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier; the courts are bound to maintain the integrity of both statutes if they may stand together.'" (*Ibid.*, quoting *Hays v. Wood* (1979) 25 Cal.3d 772, 784.) There's a simple harmonizing solution here: Section 2750.5 does not apply to homeowners and those within the class of persons the Contractor's State License Law was intended to protect.

There is no indication that the Legislature intended section 2750.5 to trump the consumer/homeowner protective nature of the Contractor's State License Law; no such intent can be assumed.

4. Nothing in the legislative history indicates an intent to make a homeowner the employer of an unlicensed contractor's workers.

As several members of this Court have recognized, section 2750.5's legislative history supports the homeowners' interpretation. (See *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055 [looking at legislative history where statutory language unclear].)

First, the legislative history explains that "'[t]hree basic factors would have to be proved to show independent contractor status under this bill. . . .' [Citation.] The analysis then summarizes the factors currently in section 2750.5, subdivisions (a) through (c)." (*Fernandez*, *supra*, 31 Cal.4th at p. 43, conc. opn. of Brown, J.) Nothing suggests that the Legislature intended to make the absence of a license the trump factor in determining whether a worker is an independent contractor or an employee, let alone the employee of someone with whom the employee did not contract. (*Ibid.*)

Second, the legislative history shows that "the Legislature was concerned *contractors* were improperly characterizing those they hired as independent contractors instead of employees and thereby denying them union scale pay, and workers' compensation and unemployment insurance benefits. [Citations.] There is no indication in the legislative history that the Legislature intended section 2750.5 to apply to *a homeowner* who hires an unlicensed contractor. [Citation.]" (*Id.* at pp. 43-44, emphases added.)

Therefore, the only logical reading of section 2750.5 is that it precludes an unlicensed contractor, as opposed to a homeowner, from

asserting a worker's independent contractor status. (*Id.* at p. 42; *State Compensation*, *supra*, 40 Cal.3d at p. 18, dis. opn. of Lucas, J.)

C. The *In Pari Delicto*/Unclean Hands Doctrine Bars Recognizing Duties Owed To Workers Who Themselves Violate The Licensing Statutes.

Plaintiff advocates liability on the theory that the homeowners acted as their own general contractors and as a result they had to comply with the Contractor's State License Law. He is wrong. Nothing requires a homeowner remodeling his own home to be licensed. (Bus. & Prof. Code, § 7044, subd. (c).) Nothing requires a homeowner – or any owner – to retain a general contractor as opposed to contracting with different trades (e.g., plumber, electrician) for their particular specialized services. But even assuming for argument's sake that the homeowners somehow violated the licensing statutes by hiring an unlicensed contractor, it does not follow that a tort obligation should result in favor of the unlicensed contractor or the unlicensed contractor's workers.

It is a fundamental principle that "[b]etween those who are equally . . . in the wrong, the law does not interpose." (Civ. Code, § 3524.) This unclean hands or *in pari delicto* doctrine '"closes the door of a court of equity to one tainted with the inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. [Citation]." (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 647.) It "appl[ies] to legal as well as equitable claims [citation] and to both tort and contract remedies.

[Citations.]" (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 638.)

If, as plaintiff argues, the homeowners somehow had to comply with the licensing scheme, then both parties have violated the statute. They would be *in pari delicto* and the courts should leave them as they find them.

But the reality is that the parties are not equally at fault. The primary fault lies with the unlicensed contractor and the unlicensed worker, not with the homeowner who hired them. The licensing scheme entitles the *hiring parties* not to pay for unlicensed workers' services even when they *know* the worker is unlicensed. (*Alatriste v. Cesar's Exterior Designs, Inc.* (2010) 183 Cal.App.4th 656, [2010 WL 1293823] at p. * 7.) No penalty is imposed on a person hiring an unlicensed worker. The statutory scheme protects nonprofessionals dealing with those representing themselves as competent in professions and trades that require licensing. It prefers homeowners to those of whom a license is required. It "represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*" by favoring customers. (*MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 423, original emphasis.) The one-sided preference applies "[r]egardless of equitable considerations.'" (*Id.* at p. 424; *Lewis & Queen v. N. M. Ball Sons*, *supra*, 48 Cal.2d at p. 152 ["the courts may not resort to equitable considerations in defiance of section 7031"].)

The licensing obligation falls on the *worker* who is not licensed and wants to pursue a trade requiring a license. The *worker* must ensure that he

or she is either licensed or employed by a licensed contractor who can provide the proper supervision. Failing to do so is not only reckless, it is criminal. (Bus. & Prof. Code, § 7028.) As between the worker and the unlicensed contractor, the worker may well have a tort claim. But as between the worker and a homeowner, the worker is more at fault.

Plaintiff's argument that the homeowners should be deemed culpable for not enforcing the licensing requirements strips them of the very protections the Legislature intended to provide. Whatever label plaintiff affixes to the homeowners doesn't change the fact that the statutes protect the consumer of an unlicensed person's services. (Bus. & Prof. Code, § 7031.) The recovery plaintiff seeks here would do the opposite: It punishes the homeowner and rewards the worker for the worker's unlicensed status. It affords the worker a benefit that he could not have obtained had he been properly licensed. The statutory scheme should not be read to impose liability on the homeowner in favor of the unlicensed contractor or worker who violates the statute. (Cf. *Ramirez v. Nelson* (2008) 44 Cal.4th 908, 920 [worker who violates statute barring use of tool within six feet of power line cannot seek tort recovery against homeowner based on that violation]; *Fernandez*, *supra*, 31 Cal.4th at p. 44, conc. opn. of Brown, J.) Plaintiff's approach would turn the statutory licensing scheme on its head.

At a minimum, the unlicensed contractor and unlicensed worker are equally in the wrong with a homeowner who uses their services. More properly, the homeowner is less at fault. In either circumstance, the law

leaves the parties where it finds them, rather than creating new obligations owed by one party to another.

D. No Other State Has Suggested That A Contractor's Workers Are A Homeowner's Employees for OSHA Purposes.

Many states have OSHA statutes comparable to California's. Yet, we have found no case anywhere that suggests that a homeowner is the employer of a contractor's workers for OSHA purposes. For example:

- *Rimoldi v. Schanzer* (App. Div. 1989) 537 N.Y.S.2d 839 [147 A.D.2d 541]: The homeowners hired a contractor to install a pool and the excavation collapsed, killing the contractor's workers. The court dismissed a New York OSHA claim because the decedents weren't the homeowners' employees. Rather, they were hired by the contractor.
- *George v. Meyers* (2000) 169 Or.App. 472, 482-485 [10 P.3d 265, 272-273]: The defendant was building a house to sell to the public. The court found that he was not an indirect employer because he did not personally hire or supervise the injured employee. The mere fact that the defendant was a property owner or general contractor, did not make him an "employer" within the meaning of the state's OSHA analog. Therefore, the court held that the defendant couldn't be negligent per se for failing to comply with the OSHA regulations.
- *Slack v. Whalen* (2000) 327 N.J.Super. 186, 193-194 [742 A.2d 1017, 1021]: Homeowners acted as general contractors for their own

remodel. They owed no OSHA duty to their subcontractor's employee because they didn't have a contractual arrangement to oversee his work and their relationship with the worker didn't implicate worker-safety concerns or suggest that they could control the worker's performance.

Although it is not clear whether these cases involved unlicensed contractors or their workers, *no* case has suggested that a homeowner should be considered for OSHA purposes to be the employer of the contractor's work crew.

E. The Court's Only Superficially On Point Decision, *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, Does Not Command A Different Result.

1. Under *State Compensation*, section 2750.5 makes a homeowner the employer of an unlicensed contractor only for the purposes of workers' compensation benefits.

As this Court recently observed, its only decision superficially on point, *State Compensation*, does not address whether section 2750.5 saddles homeowners with employer status for tort liability purposes. (*Ramirez v. Nelson*, *supra*, 44 Cal.4th at p. 916.) *State Compensation* interpreted section 2750.5 as making a homeowner the employer for workers' compensation purposes of an unlicensed worker whom the homeowner

directly hired. (40 Cal.3d at p. 15.) Several Court of Appeal opinions have stretched *State Compensation* beyond the workers' compensation context to make a contractor a statutory employee for the purposes of tort liability. (*Mendoza v. Brodeur* (2006) 142 Cal.App.4th 72; *Rosas v. Dishong*, *supra*, 67 Cal.App.4th 815; *Foss v. Anthony Industries* (1983) 139 Cal.App.3d 794, 796-798.) Even so, none addresses a contractor's employee and tort liability.

Just two years ago, however, this Court held that *State Compensation* was limited to "the specific context of determining whether, for policy reasons, an unlicensed contractor hired to remodel a homeowner's house, who became injured on the job, should be deemed the homeowner's employee at law for purposes of rendering him eligible for workers' compensation benefits under the homeowner's insurance policy." (*Ramirez*, *supra*, 44 Cal.4th at p. 916.) "The homeowner's potential exposure to tort liability for the contractor's injuries was neither an issue nor considered in *State Compensation*." (*Ibid.*) Given its limited application, *State Compensation* is *not* controlling on the tort duty issue: "The question whether an unlicensed contractor's worker must be deemed a homeowner-hirer's employee under Labor Code section 2750.5 for purposes of tort liability is neither an easy nor settled one." (*Ibid.*) The Court of Appeal cases that have expanded *State Compensation* beyond its banks to tort liability, thus, have done so without basis. As we shall explain, there is no reason to expand *State Compensation*'s narrow holding to cover the facts of this case.

2. The public policy reasons for extending workers' compensation benefits to unlicensed workers do not suggest straining the rule to permit tort recovery.

State Compensation determined – for policy reasons – that an unlicensed worker hired directly by a homeowner and injured on the job should be deemed the homeowner's employee and thereby entitled to workers' compensation benefits. (*State Compensation*, *supra*, 40 Cal.3d at p. 15; *Ramirez*, *supra*, 44 Cal.4th at p. 916.) But the policy reasons for conferring employee status upon an injured worker are unique to the workers' compensation context. Workers' compensation is a fault-free system providing limited, exclusive recoveries. (See, e.g., Lab. Code, §§ 3600, 3602.) Its statutory scheme is supposed to be liberally construed to protect workers. (Lab. Code, § 3202.)

In contrast, tort liability is not. Tort liability is premised on the concept that the person held liable is in a better position to avoid the harm and so should be adjudged responsible. Homeowners are not in such a position. Rather, those representing themselves to homeowners as experienced in construction should be the ones charged with the necessary skill and knowledge to avoid the injury. The worker necessarily looks to the hiring contractor – not to the customer – to provide training, equipment, and other safety measures. And, unlike workers' compensation, fault-based tort remedies are not limited.

The extension of the workers' compensation duty is further justified by the statutory requirement that all homeowner's policies cover such workers' compensation. (*State Compensation*, *supra*, 40 Cal.3d at pp. 13-

14; see Ins. Code, § 11590.) Any homeowner with homeowner's insurance is assured of coverage for the limited amounts that might be owed. Again, that is not necessarily the case for injuries to outside workers whom might be deemed "employees" but not covered by workers' compensation. Nothing prevents carriers from excluding coverage for such injuries.

Common sense also dictates that the statute shouldn't apply to homeowners for practical reasons. The average homeowner would not "reasonably be expected to be familiar with licensing and safety law requirements." (See *Fernandez*, *supra*, conc. opn. of Brown, J., 31 Cal.4th at pp. 43-44.) Yet, that's what plaintiff's rule would require. Homeowners, upon threat of tort liability, would need to know what tasks require licenses and to confirm whether a contractor, handyman or other service provider is properly and currently licensed.

Saddling a homeowner with generic employer status would also create "potential[ ] liab[ility] not only for OSHA compliance," but also for "COBRA health coverage benefits, sexual harassment claims, collective bargaining agreement enforcement, and a myriad of other obligations [homeowners] are ill-equipped to anticipate or comply with." (*Fernandez*, *supra*, 31 Cal.4th at p. 42, conc. opn. of Brown, J.) Under plaintiff's theory of the case, these potential liabilities could be triggered by nothing more than hiring a plumber, carpet installer, or air conditioning installer without realizing that these activities require a license. (See Bus. & Prof. Code, §§ 7026.1, 7026.3, 7028.) One would think that if the Legislature intended such a result it would not have done so cryptically, but would have been

explicit. The intermediate appellate cases extending *State Compensation* to tort claims, thus, go too far and should be disapproved.

3. Even if *State Compensation* were not limited to workers' compensation, it would not apply here because the homeowners didn't directly hire plaintiff.

a. *State Compensation* did not consider whether a homeowner was liable for injury to a worker in an unlicensed contractor's crew.

There is another key distinction that makes *State Compensation* inapplicable here. In *State Compensation*, the homeowners directly hired the injured worker. By contrast, here, the homeowners hired the contractor, Ortiz, who then hired plaintiff. So in this case, there was no direct relationship between the homeowners and plaintiff. This Court distinguished *State Compensation* on this same ground in *Ramirez*. (*Ramirez*, *supra*, 44 Cal.4th at p. 916 ["Nor was a homeowner's liability for injury to a worker in an unlicensed contractor's work crew an issue considered in *State Compensation*"].) As discussed above, when section 2750.5 is read within the context of the immediately preceding section 2750, it is clear that section 2750.5 only applies as between a worker and the party who directly hires the worker.

b. The Court of Appeal erred in relying on *Rosas v. Dishong* because *Rosas* did not involve a homeowner's liability for injury to a worker in an unlicensed contractor's crew.

In holding that the homeowners in this case were plaintiff's employers, the Court of Appeal relied on *Rosas v. Dishong*, *supra*, 67 Cal.App.4th 815. It found that *Rosas* "examined this very issue" and concluded that section 2850.5 "was intended to provide a potential tort remedy to unlicensed workers who were not otherwise covered by workers' compensation laws." (Previously published at 177 Cal.App.4th 261; Slip. Op. 6-7.)

But the Court of Appeal was wrong: *Rosas* is not applicable. *Rosas*, like *State Compensation*, involved an injured worker hired directly by the homeowners from whom he sought recovery. And, *Ramirez* in holding that the issue remains open, implicitly rejected the much-earlier *Rosas* as deciding the issue. (44 Cal.4th at p. 916.)

4. Even on its facts, *State Compensation* was wrongly decided.

In any event, on its own facts, *State Compensation* is wrong. It misconstrued section 2750.5. (*State Compensation*, *supra*, 40 Cal.3d at p. 15.) As we explained in Section I.B., section 2750.5 cannot properly be read as making an unlicensed worker a hiring homeowner's employee, rather than an independent contractor. *State Compensation* is premised on

reading section 2750.5's penultimate paragraph in isolation and ignoring the language and context of the rest of the statute and statutory scheme.

State Compensation's construction overlooks the rules that statutes must be interpreted so as to give effect to the entire statute and within the context of the entire statutory scheme. That is exactly why the concurring opinion in *Fernandez* correctly concluded that "*State Compensation* was wrongly decided and section 2750.5 has no such effect." (*Fernandez*, *supra*, 31 Cal.4th at p. 40, conc. opn. of Brown, J.)

State Compensation misconstrued section 2750.5. It should not be followed, and certainly not expanded.

* * *

Plaintiff was not the homeowners' employee. As such, the predicate to Cal-OSHA liability does not exist.

II.

THE LEGISLATURE NEVER INTENDED CAL-OSHA TO APPLY TO HOMEOWNERS' NONCOMMERCIAL ENDEAVORS.

Even assuming for argument's sake that the homeowners might be deemed plaintiff's employer, Cal-OSHA does not impose duties on them. Cal-OSHA was never intended to apply to homeowners improving their own residences.

A. This Court Has Already Interpreted Cal-OSHA To Broadly Exempt Services Personal To Homeowners.

1. The domestic service exception is broad.

Cal-OSHA is limited to "[e]mployers" (Lab. Code, § 6400, subd. (a)); it defines "employment" to exclude "household domestic service" endeavors (Lab. Code, § 6303, subd. (b)). *Fernandez v. Lawson* construed that exception broadly to include services personal to the homeowner's residence, there, pruning a 50-foot tree on the property. (31 Cal.4th at p. 36.)

That construction is correct. Nothing suggests that the Legislature intended to impose Cal-OSHA duties on homeowners. (*Id.* at p. 37.) Rather, Cal-OSHA's legislative history supports a broad interpretation of exempted workers. (*Ibid.*) A 1972 Cal-OSHA overhaul excepted broad categories of workers, i.e., "[f]ederal government agencies [workers], maritime workers, household domestic service workers, and railroad workers. . . ." (*Ibid.*) The broad exceptions for federal agency, maritime, and railroad workers make it "likely the term 'household domestic service workers' similarly encompassed a broad category of workers performing tasks in and outside of a private residence." (*Ibid.*; see *Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1121 [meaning of "religious" corporation to be understood by reference to broad categories, e.g., charitable or comparable organizations to which it was originally co-joined].)

This all-inclusive understanding is reflected in California's Industrial Welfare Commission's definition of the comparable phrase "'household

occupations'" as including "'all services related to the . . . maintenance of a private household or its premises by an employer of a private householder. . . ." (*Fernandez. supra*, 31 Cal.4th at p. 36.) Critically, "OSHA and its predecessors have operated for 90 years primarily in the commercial setting. . . ." (*Ibid.*)

Accordingly, *Fernandez* inferred that "'household domestic service[s]' . . . personal to the homeowner" are to be treated differently than "those which relate to a commercial or business activity on the homeowner's part." (*Ibid.*) This was consistent with policy considerations suggesting a broad exception as "homeowners are ill-equipped to understand or to comply with the specialized requirements of OSHA." (*Ibid.*, citation and internal quotation marks omitted.)

Fernandez rejected many of the same arguments and distinctions that plaintiff advocates here. Plaintiff argues that Cal-OSHA should apply to any activity that requires a contractor's license (OBM 12), and that any exception should be limited to activities that "can be performed by the average homeowner" and should not encompass "the difficult, complex and potentially deadly task of demolition and construction." (OBM 13.) But the 50-foot tree pruning at issue in *Fernandez* required a license and was undoubtedly a difficult, dangerous, and complex task. *Fernandez* expressly rejected such factors as sufficing to create Cal-OSHA coverage. (31 Cal.4th at p. 38; see also *Rosas v. Dishong*, *supra*, 67 Cal.App.4th at p. 826.)

As *Fernandez* observed, a "contractor's license is generally required for a variety of activities, including maintaining or servicing air

conditioning, heating, or refrigeration equipment or installing carpet." (31 Cal.4th at p. 38.) That does not suffice to conclude that "such activities could never be considered household domestic services." (*Ibid.*) It likewise held that the test could not be "whether an average member of the household has the skill and competence to undertake the activity." (*Ibid.*) Such a test is not "rational and predictable," and would "create[] 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.*) or in this case do-it-yourself remodeling.

The homeowners' remodeling here is conceptually no different than the tree-pruning in *Fernandez*. Both require a license and some skill. *Fernandez* establishes that neither of those factors suffices to move the remodeling outside the purview of the Cal-OSHA household services exception. Indeed, the precise task here – removing a roof – does not require great skill. It requires just some care and manual labor.

Plaintiff tries to distinguish *Fernandez* by focusing on the "potentially deadly task of demolition and construction." (OBM 13.) But trimming a 50-foot tall tree, which fell within the exception in *Fernandez*, is just as dangerous – maybe more so – as climbing on a roof. (31 Cal.4th at p. 33 [worker seriously injured when he fell from tree]; see also *Ramirez v. Nelson*, *supra*, 44 Cal.4th at p. 913 [tree trimmer killed when his saw hit an electric power line].) If perilousness were the decisive factor then replacing an electrical outlet, servicing an air conditioner or gas appliance, applying

pest control, or even using common household cleaners might not be household domestic services.

Finally, plaintiff argues that domestic household services should be limited to the three "Cs," "cleaning, cooking and caring for children." (OBM 13.) Again, *Fernandez* implicitly rejects that same view. The activity at issue there was far beyond mere "cleaning, cooking, and childcare." It was forestry, not gardening – a complicated task requiring specialized equipment and knowledge and a license. Yet, *Fernandez* rejects all of those factors as sufficing to impose Cal-OSHA liability on the hiring homeowner.

2. *Fernandez*'s rationale applies equally to roof removal in the course of homeowners remodeling their own homes as it does to trimming 50-foot trees.

In holding that Cal-OSHA did not cover a homeowner hiring others for complicated and dangerous tree trimming on his own residential property, *Fernandez* reasoned 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. It is doubtful the average homeowner realizes tree trimming can require a contractor's license, let alone 'expect[s] that OSHA requirements would apply when they hire someone to trim a tree for their own personal benefit and not for a commercial purpose . . . . Moreover, homeowners are ill-equipped to understand or to comply with

the specialized requirements of OSHA. [Citation.]' Imputing OSHA liability to a homeowner under the circumstances of this case violates basic notions of fairness and notice." (31 Cal.4th at p. 37.)

The same rationale applies to homeowners who hire someone to assist with specific tasks – here removing a roof – in the course of remodeling their own home.[4] Like the tree-trimming in *Fernandez*, the construction here was personal to the homeowners, updating a property they had lived in for several years. (See *id.* at pp. 36-37.) The work undeniably dealt with their private residence. And like a homeowner hiring a tree-trimmer, homeowners hiring construction workers are ill-equipped to comply with Cal-OSHA. (*Id.* at p. 37.) Although homeowners may expect that they need a permit for a home addition, they do not expect that they have to be licensed to hire persons to work on their own home or that the contractor licensing statutes intended to protect them instead impose duties and liabilities on them.

Indeed, in an indistinguishable factual scenario – a claim against the homeowners by a roofing contractor's employee injured in a fall, the Washington Court of Appeal applied the *same* rationale set forth in *Fernandez* to find no OSHA duty – e.g., homeowners "are typically ill-equipped to assume the duties" plaintiff would impose; "[t]hey are unlikely to know how to provide features such as fall arrest systems, or how to contract for indemnity"; they would become potentially liable for

---

[4] There is no indication in *Fernandez* as to whether the tree-trimming was an isolated task or part of a larger re-landscaping or remodeling project. What matters is the task – here roof removal – not the size of the homeowner's ultimate vision or goal.

administrative remedies and fines. (*Rogers v. Irving* (1997) 85 Wash.App. 455, 463 [933 P.2d 1060. 1064].)

3. Plaintiff suggests no rational line between *Fernandez* and the circumstances here; the rational line is between commercial or business conduct and a homeowner's personal projects.

As concurring Justice Epstein observed, "it is difficult to see where a reasonable line [c]ould be drawn" between *Fernandez* and this case. (Slip Op. 13.) Plaintiff has proposed none.

Fernandez established a rational, knowable line: "[T]he term 'household domestic service' implies duties that are personal to the homeowner, not those which relate to a commercial or business activity on the homeowner's part." (31 Cal.4th at p. 37.) That is a workable test for determining whether a homeowner falls outside of Cal-OSHA. It is a test that the Court of Appeal could and did apply, focusing on the status of the hirer to determine whether OSHA duties should apply. (Slip Op. 9.) As the Court of Appeal majority held, "the remodel at issue [here] 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." (Slip Op. 10.)

The Court of Appeal here is not alone in its conclusion. Just three months earlier, another Court of Appeal observed that "California courts have consistently held that [Cal-]OSHA . . . [was] *not* meant to apply to

homeowners, but to traditional places of industry and business." (*Zaragoza v. Ibarra* (2009) 174 Cal.App.4th 1012, 1022, emphasis added [Cal-OSHA does not apply to homeowner's garage remodel].)

This is consistent with *Fernandez*'s observation that a homeowner who doesn't directly supervise the work would not expect to be responsible for ensuring that OSHA regulations are enforced merely because his contractor violated the law by not having a license. (Slip Op. 10.) As in *Fernandez*, "[i]mputing OSHA liability to a homeowner under the circumstances of this case violates basic notions of fairness and notice. (Slip Op. 10.)

Plaintiff does not like the result here. But he proposes no workable test consistent with *Fernandez* or Cal-OSHA's intent. His attempt to limit Cal-OSHA to cleaning, cooking, and childcare is both contrary to *Fernandez* and to Cal-OSHA's historically understood reach. So, if that is not the line, where is it? Is there the threat of Cal-OSHA liability any time a homeowner hires a plumber, electrician, or roofer? Under *Fernandez*, clearly not. Should upgrading one's personal residence make the difference? That, too, is an indeterminate line. After all, is an "upgrade" remodeling a kitchen or bathroom, adding square feet, replacing old windows? (See *Zaragoza v. Ibarra*, *supra*, 174 Cal.App.4th at p. 1020 [divining "no bright line between 'repairs' and 'remodeling'" for purposes of related workers' compensation statute, Lab. Code, § 3351].)

The one, recognizable line is the one that *Fernandez* draws: projects "personal to the homeowner, not those which relate to a commercial or business activity on the homeowner's part." (31 Cal.4th at p. 37.)

Homeowners can and should expect that if they venture into a commercial or business realm, they might be governed by the rules – including OSHA – that generally govern business and commercial activities. But when homeowners are merely improving their own residence, that is beyond Cal-OSHA's purview. We submit that even if a homeowner is having their established residence painted or a bath or kitchen remodeled in order to better sell that home, that is a personal enterprise, so long as the homeowner is not generally in the business of fixing up and selling homes. And, here, plaintiff admitted *as undisputed* that the homeowners were *not* in the business of being general contractors. (1 AA 236 ¶ 17.)

The undisputed facts here are that the project was personal to the homeowners – adding a modest amount of additional living space to their home which they had owned for several years. That should not subject them to OSHA duties. Nothing suggests that the Legislature ever contemplated it would. "Had the Legislature intended that OSHA apply as [plaintiff] suggests, it could have so provided." (*Rosas v. Dishong*, *supra*, 67 Cal.App.4th at p. 826.)

B. No State Has Mandated That Homeowners Have To Comply With OSHA Laws; There Is No Indication That California Intended To Adopt A Contrary Rule.

Not only is the Court of Appeal's result consistent with *Fernandez* and the historical understanding of Cal-OSHA, it is consistent with the uniform interpretation of similar statutes throughout the country.

1. State courts interpreting similar statutory language have consistently held that OSHA obligations do not apply to homeowners engaged in remodeling their own homes.

Many state OSHA statutes, like Cal-OSHA, incorporate the concept of a business requirement or a household domestic services exception.[5]

---

[5] E.g. Alaska (Alaska Stat., § 18.60.105, subd. (b)) [(1) "'Employee' means a person who works for an employer, but not in a place used primarily as a personal residence"; (2) "'employer' means a person . . . who has one or more employees working in a place not used primarily as a personal residence"]; Arizona (Ariz. Rev. Stat. Ann., § 23-401, subds. (6) & (7) ["Employee" means any person performing services for an employer, including any person defined as an employee pursuant to (Ariz. Rev. Stat. Ann.), § 23-901, except employees engaged in household domestic labor"; employer "does not include employers of household domestic labor"]; District of Columbia (D.C. Code, § 32-1101, subd. (5)) [Employee "does not include domestic servants"]; Hawaii (Haw. Rev. Stat., § 396-3 (2003)) ["Employment" excludes domestic service "in or about a private home"]; Iowa (Iowa Code. Ann., § 88.3, subds. (4) & (5)) ["employee" is someone "employed in a business of the employer"; "Employer" means "a person engaged in a business who has one or more employees . . ."]; Maryland (Md. Code Ann., Lab. & Empl., § 5-101, subds. (c)(1)) ["Employee" means "an individual whom an employer employs . . . in the business of the employer"; (d)(1) "Employer" means: (i) . . . a person who is engaged in commerce, industry, trade, or other business in the State and employs at least one employee in that business]; Michigan (Mich. Comp. Laws Serv., § 408.1002, Sec. 2. (1)) ["This act shall apply to all places of employment in the state, except in domestic employment . . ."]; New Mexico (N.M. Stat. Ann. § 50-9-3) ["Employee" "does not include a domestic employee"]; North Carolina (N.C. Gen. Stat. Ann. § 95-127 (2002)) ["employer" excludes someone who employs "domestic workers" in their "place of residence"]; Oregon (Or. Rev. Stat., § 654.005, subd. (8)(b) ["Place of employment" does not include: (A) Any place where the only employment involves nonsubject workers employed in or about a private home"]; Puerto Rico (P.R. Laws Ann. § 361, subds. (a)(b) (2003)) ["Place of employment" excludes "the premises of private residences or dwellings where persons are employed in domestic service"; "Employment" excludes domestic service]; Tennessee (Tenn. Code Ann. § 50-3-104, subd. (5)) [standards and regulations apply to all employers and employees except "domestic workers"]; Wisconsin (Wis. Stat. Ann. § 103.001, subds. (7) & (12))

(continued...)

Seven years ago, this Court observed that "of the 24 states that have federal Occupational Safety and Health Administration approved state plans (including California), 'no state ha[d] published an opinion finding that a homeowner who is not conducting business out of his home is nonetheless responsible for complying with OSHA in the process of home construction, work, or maintenance.'" (*Fernandez*, *supra*, 31 Cal.4th at pp. 37-38.) Plaintiff hasn't identified any new cases so holding and we have found none. Rather, repeatedly, other states have rejected the claim that OSHA obligations should apply to homeowners remodeling their own homes.

- *Stenvick v. Constant* (Minn. Ct. App. 1993) 502 N.W.2d 416: A homeowner was remodeling the house next door that he owned and intended to rent or sell. He hired an acquaintance to assist with the remodeling, and that man fell and later died from his injuries; the widow filed a wrongful death action. The court held that Minnesota OSHA was not intended to cover an individual's personal pursuits, and that the legislature could not have intended OSHA to apply to such "casual contracting."
- *Rogers v. Irving*, *supra*, 85 Wash.App. 455 [933 P.2d 1060]: A carpenter/owner was building a house for himself. He hired a roofing contractor. One of the contractor's employees fell. The court inferred that the Legislature meant "employer" to be

---

[5] (...continued)
["employment" excludes private domestic service as does not involve the use of mechanical power. . . . "place of employment" excludes "any place where persons are employed in private domestic service which does not involve the use of mechanical power or in farming"].

synonymous with "business entity." (*Id.* at p. 1063.) The statute didn't apply to a homeowner engaged in a personal project because it was not an activity for gain or livelihood. (*Ibid.*) OSHA statutes were never intended to cover homeowners' noncommercial endeavors as to their own property. (Accord, *Smith v. Myers* (2002) 90 Wash.App. 89, 950 P.2d 1018.)

- *Hottmann v. Hottmann* (1997) 226 Mich.App. 171, 179 [572 N.W.2d 259]: The plaintiff fell and injured himself while helping his brother put a new roof on the brother's house. The Michigan Court of Appeal held that its state's OSHA statute (MIOSHA) was "designed to ensure that employers in business, industry, and government keep their employees' work sites free of recognized hazards. [Citation.] Nothing in the language of the MIOSHA suggests that it should be applied to homeowners' do-it-yourself projects, nor is it reasonable to expect the average homeowner engaging in such a project to be familiar with and comply with the MIOSHA regulations." (*Hottman* at p. 179.)
- *Geiger v. Lawrence* (Wis. Ct. App. 1994) 188 Wis.2d 233 [524 N.W.2d 909]: A telecommuting homeowner's home was not a place of employment under Wisconsin's Safe-Place statute. "We agree with [plaintiff] that the work that [defendant] engaged in at his home was related to his law practice. However, we are not persuaded that every infrequent business-related activity in the home subjects a homeowner to potential liability under the safe-place statute."

California follows the same logic. It has always been understood that one building (or remodeling) one's own home is not engaged in commerce or business or trade so as to be subject to CAL-OSHA. "California, as well as much of the nation, has historically emphasized business, industry and trade in defining OSHA coverage, while at the same time excluding coverage for household domestic services. It is unlikely average homeowners expect that OSHA requirements would apply when they hire someone to [perform a task] for their own personal benefit and not for a commercial purpose." (*Rosas v. Dishong*, *supra*, 67 Cal.App.4th at p. 826 [tree trimming].)

The closest that any state has come to applying an OSHA statute to homeowners is *Costa v. Gaccione* (2009) 408 N.J.Super. 362 [975 A.2d 451]. There, a New Jersey intermediate appellate court held that OSHA regulations could be considered *a factor* in determining whether a homeowner owed a duty of care to a construction worker, but the regulations alone would not suffice to create such a duty. (*Id.* at pp. 457-458, cf. *Elsner v. Uveges*, *supra*, 34 Cal.4th 915 [in California violation of Cal-OSHA regulations constitutes negligence per se].) *Costa* held that genuine issues of material fact existed as to whether in that instance the property owner was a de facto general contractor based on evidence (none of which is present here) that he visited the site daily and oversaw operations, purchased materials requested by the builders and actively discussed building plans with workers that he hired, performed many duties of a general contractor, and had experience and a general understanding of the building process having built several homes before. By contrast it is

undisputed here that the homeowners did *not* supervise work and were *not* in the construction business. (1 AA 236-238.)

Even with *Costa*, the overwhelming weight of authority across the country is that homeowners are not subject to OSHA obligations in remodeling or adding on to their own home. Most of these decisions predate the Legislature's amendments to Cal-OSHA as does the Court of Appeal's *Rosas* decision that both presaged *Fernandez* and pointed out the consistent out-of-state authority. (See Lab. Code § 6303, last amended effective Sept. 5, 2002.) If the Legislature had thought that California should chart a new course contrary to that uniformly followed by other states, one would expect that it would have said so explicitly. (Cf. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 178 [declining to overrule a judicial interpretation after decades of legislative inaction]; *People v. Ledesma* (1997) 16 Cal.4th 90, 100-101 [failure to change statute raised the presumption of the Legislature's acquiescence]; *Cole v. Rush* (1955) 45 Cal.2d 345, 355, overruled in part on other grounds by *Vesely v. Sager* (1971) 5 Cal.3d 153, 160-161 ["The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended"].)

We recognize that the Legislature's failure to act in light of judicial interpretations is not always the strongest inference of legislative intent. (See, e.g., *People v. Morante* (1999) 20 Cal.4th 403, 429.) But here plaintiff is arguing for a radical statutory interpretation that conflicts with

both the construction uniformly applied in California and other states and with what a reasonable legislator would have understood he or she was voting for. Is there any question that if the Legislature intended to impose broad and onerous duties on millions of homeowners in California, there would have been some mention, some debate on the topic? In this area of the law, the only logical presumption must be that the Legislature did not intend to entrap unsuspecting homeowners. Thus, "[i]n the absence of an unambiguous indication from the Legislature that it intended to include home building and repair projects under [a state OSHA statute] . . . the definition of 'employer' . . . does not include a homeowner contracting for work done on his personal residence." (*Rogers v. Irving*, *supra*, 933 P.2d at p. 1063.)

The out of state authority consistently supports that California's Legislature has never contemplated that Cal-OSHA would apply to homeowners.

2. Federal law is not to the contrary.

In arguing that OSHA should apply to homeowners, plaintiff asserts that Cal-OSHA was modeled on the analogous federal statute. Perhaps so, but there are also important differences. Cal-OSHA expressly exempts homeowners' domestic activities. The federal *statute* is silent on that subject (plaintiff relies on a regulation which does not purport to be an exclusive interpretation). To the extent that the federal statute's language differs, it is inapposite. (See *Kelly v. Methodist Hospital of So. California*, *supra*, 22 Cal.4th 1108, 1118-1119 [declining to interpret religious

exception in Fair Employment and Housing Act comparably to religious exception in parallel federal statute because of differences in wording].)

Furthermore, *Fernandez* implicitly rejects plaintiff's argument. The federal regulation that plaintiff cites nonexclusively exempts domestic services including "house cleaning, cooking, and caring for children"; it does not address other homeowner activities pursued for personal purposes. (29 C.F.R. § 1975.6.) *Fernandez* establishes that Cal-OSHA's "household domestic service" exception goes well beyond the limited cleaning, cooking, and childcare that plaintiff advocates. (*Fernandez*, *supra*, 31 Cal.4th at p. 38 [household domestic service exception applies to pruning a 50-foot tree].)

Indeed, our research reveals *no* instance in which even the federal OSHA requirements have been applied to individual homeowners remodeling their own residence. That's not surprising, as the federal statute defines an "employer" as "a person engaged in a *business* affecting commerce who has employees. . . ." (29 U.S.C. § 652(5), emphasis added.)

Plaintiff's reliance on the federal statute is also ironic because that statute expressly mandates that it is *not* to be used to "enlarge . . . the common law or statutory rights, duties or liabilities of employers. . . ." (29 U.S.C. § 653(b)(4).) Enlarging a homeowner's duties is exactly what plaintiff seeks here.

C. Imposing The Boundless Duty That Plaintiff Proposes Would Be Bad Public Policy.

Applying Cal-OSHA to homeowners as plaintiff urges would be a radical change in the law. Plaintiff has not cited any case so broadly interpreting Cal-OSHA or *any* comparable statute anywhere. There appears to be no such case in California and we have not uncovered a case in any other jurisdiction either.

In truth, as so many courts have found, plaintiff's position would impose duties on homeowners that they have no reason to expect and are ill-equipped to handle – a substantial burden on already-strapped homeowners. To illustrate, a homeowner who hired someone (including a neighbor or local handyman) to install carpet, change out windows or add a sink might be required to:

- Post Cal-OSHA Notice of Employee Protections and Obligations (Lab. Code, § 6408);
- "[E]stablish, implement and maintain an effective injury prevention program" (Lab. Code, § 6401.7, subd. (a));
- Maintain a log of instructions provided to employees with respect to hazards unique to the employees' assignment (8 C.C.R., § 3203, subd. (b));
- Provide guardrails on any enclosed work location more than 30 inches above the ground (8 C.C.R., § 3210, subd. (a)); and
- Provide a cover or guardrail for every floor and roof opening (8 C.C.R., § 3212, subd. (a)(1)).

Violations of OSHA standards or reporting duties would expose homeowners to *criminal* liability. (Lab. Code, § 6423.) Any public fire or police department called to a serious accident involving an unlicensed employee would be *required* to immediately notify OSHA, which, in turn, would then be *required* to immediately notify a prosecuting authority. (Lab. Code, § 6409.2.)

Plaintiff's position would give rise to other inequities too. The unlicensed worker would be able to refuse to work if he encountered any "real and apparent hazard," and the homeowner would be required to pay the refusing unlicensed worker (Lab. Code, § 6311) even though an unlicensed contractor is not legally entitled to payment. (Bus. & Prof. Code, § 7031; see also Lab. Code, § 6312 [employee may file a complaint with the Labor Commissioner for alleged discrimination for raising safety issue].) Thus, an unlicensed worker agreeing to replace windows or install carpet or a new sink at a residence for a fixed fee, could refuse to work if he encountered an "apparent hazard," and might still demand his agreed to fee – a fee to which he would not otherwise be entitled. (Cf. *Alatriste v. Cesar's Exterior Designs, Inc.*, *supra*, (2010) 183 Cal.App.4th 656 [homeowner may recover fee paid to unlicensed contractor].)

Finally, this radical change would impinge on homeowners' constitutional privacy rights in their homes. An OSHA violation – real or perceived – can give rise to a complaint and a subsequent inspection warrant. (Lab. Code, § 6314, subd. (b) [An inspection warrant for a place of employment can be issued on the basis of a complaint of an OSHA violation or "specific neutral criteria contained in a general administrative

plan for the enforcement of this division"].) Advance warning of an inspection or investigation is prohibited. (Lab. Code, § 6321 ["No person or employer shall be given advance warning of an inspection or investigation by any authorized representative of the division unless authorized under provisions of this part"].)

Significantly, the probable cause required for an inspection warrant is less than the criminal probable cause standard. (*Salwasser Manufacturing Co. v. Occupational Saf. & Health Appeals Bd.* (1989) 214 Cal.App.3d 625 [criminal probable cause standard did not apply to inspection warrant based on employee complaint; rather a lesser administrative probable cause standard applied].) So any homeowner who hires an unlicensed plumber, carpet installer, handyman, neighbor or carpenter could thereby sacrifice the right to privacy in his or her home and be faced with a warrant for inspection with no notice and minimal cause.

All these onerous obligations would be imposed on homeowners for failing to assure that those whose services they are using have complied with licensing statutes directed at persons *offering* services. That would be the ultimate in turning statutory intent on its head. "The Contractors' State License Law was enacted to protect the public from dishonesty and incompetence in the business of contracting" (*Rosas v. Dishong*, *supra*, 67 Cal.App.4th at p. 826, citing *Elliott v. Contractors' State License Bd.* (1990) 224 Cal.App.3d 1048, 1055); it was not enacted to protect unlicensed workers from themselves or to impose a *caveat emptor* duty on homeowners to police the licensing status of contractors. It is neither a crime nor any statutory violation to *hire* an unlicensed person. Yet, plaintiff

would foist on the homeowners here the responsibility for his own licensing violation. (See *Ramirez v. Nelson*, *supra*, 44 Cal.4th at pp. 919-920 [statute requiring persons not to use tools within six feet of power lines did not create liability on part of homeowner-employer to worker who violated statute by using tool in that manner].)

* * *

Cal-OSHA was never intended to apply to homeowners improving their own residences. There is no basis – no rational line – to distinguish this case from *Fernandez* or from the consistent out-of-state authority rejecting imposing OSHA duties on homeowners.

III.

PLAINTIFF HAD AMPLE NOTICE AND OPPORTUNITY TO DISCOVER OR PURSUE A DIFFERENT CLAIM; HAVING NEVER SOUGHT TO DO SO IN THE TRIAL COURT, IT IS TOO LATE FOR HIM TO DO SO NOW.

In his opening brief, plaintiff complains that at least the matter should be remanded so that he can conduct "further discovery on the new issue as it was not a ground relied upon by the trial court." (OBM 16, capitalization normalized and emphasis omitted.) The "new issue" is supposedly whether the homeowners were pursuing a commercial or business rather than personal purpose under *Fernandez*. (OBM 16.) Nonsense.

A. The Ground On Which The Court Of Appeal Affirmed Was Presented In And Relied On By The Trial Court.

The ground upon which the Court of Appeal affirmed the trial court's holding – that Cal-OSHA does not apply to homeowners undertaking to enhance the enjoyment of their own residence – was briefed, argued, and decided in the trial court. Plaintiff pleaded that the homeowners were simply remodeling their residence; he did not plead any special commercial purpose. (1 AA 235-237, 239-240.) The homeowners argued in the trial court that they were exempt as homeowners from Cal-OSHA. Their summary judgment papers discussed *Fernandez* and other cases holding that OSHA's scope is limited to commercial projects. (1 AA 28, 260-261.) The trial court held, in granting the homeowners' motion for summary judgment, that plaintiff'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 *Fernandez* standard for homeowner duties was undoubtedly at issue.

The Court of Appeal decided the case on the same ground that the homeowners had argued all along: The homeowners fell within Cal-OSHA's household domestic service exception under *Fernandez* because they were seeking to enhance the enjoyment of their own residence. (Slip Op. 9-10.) The Court of Appeal implicitly concluded as much when it denied plaintiff's petition for rehearing.

B. Plaintiff Never Sought Discovery On Nor Pursued A Claim That The Homeowners Were Engaged In A Commercial Enterprise Before The Far Too Late Appellate Rehearing Petition Stage.

Plaintiff claims that if he is allowed to engage in further discovery, he might show that the homeowners were remodeling their home for commercial purposes. (OBM 18-19.) But he never pleaded that. He pleaded simply that the defendants were remodeling their own residence. (1 AA 4-5.) It was *undisputed* that the homeowners were remodeling their own residence and were not in the business of acting as general contractors. (1 AA 223, 235-236.)

In their summary judgment motion, the homeowners had the burden to negate "only those theories of liability as alleged in the complaint and [were] not obliged to refute liability on some theoretical possibility not included in the pleadings. . . ." (*Conroy v. Regents of University of Cal.* (2009) 45 Cal.4th 1244, 1253-1254, citations omitted; see also *Melican v. Regents of the University of California* (2007) 151 Cal.App.4th 168, 182 ["We do not require the (moving party) to negate elements of causes of action plaintiffs never pleaded"]; cf. *Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 178-179 [judgment could not be affirmed on basis of oral promise theory not pleaded in complaint; "absent an amendment to the complaint, the . . . Oral Promise could not serve as a basis for recovery. It is elementary that a party cannot recover on a cause of action not in the complaint"].)

Plaintiff had ample notice and opportunity to pursue a different claim. But he never did. He never amended his complaint to allege facts showing that the project wasn't personal. Nor did he seek discovery about the nature of the remodel. He *agreed* that the homeowners were *not* in business as general contractors.

In opposing summary judgment he never requested additional discovery as the Code requires. (Code Civ. Proc., § 437c, subd. (h) [requiring *request* for continuance for further discovery]; *Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 8 [party foreclosed on appeal from contending more discovery was necessary where no request was made in trial court].) He said nothing about any hypothesized commercial purpose or seeking additional discovery opportunities until seeking rehearing in the Court of Appeal. That clearly was too late. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1092 [failure to raise issue before rehearing petition waives issue].) Having failed to timely pursue a completely speculative commercial purpose theory, he cannot seriously argue that there is any legal or equitable basis for giving him another post-appeal opportunity to resurrect his moribund claim now.

C. Plaintiff's Factual Claim That The Homeowners Were "Flipping" Their Home Is Unsupported By The Record.

Plaintiff claims that he now has evidence that the defendants were preparing their house for resale and inferentially were somehow in the business of remodeling and reselling properties. There is no such evidence. There is no evidence in the record that the house was sold at all. Not until

after the Court of Appeal issued its opinion did plaintiff seek judicial notice of a grant deed assertedly showing a transfer in 2008. The Court of Appeal denied his request, and so the purported deed is not in the record.

In any event, the speculated sale that plaintiff emphasizes does not suggest that the homeowners were "flipping" the house or otherwise pursuing a commercial enterprise. The record shows only that the homeowners bought the house in 2002 or 2003 (1 AA 94, 162, 179) and first had the idea of remodeling it two or three years later in 2005 (1 AA 180). Plaintiff does not claim that they sold it until 2008, after this litigation commenced. In short, they owned the home for five years, and didn't conceive of remodeling it until at least two years after they bought it. It is undisputed that they were not in business as contractors. That is not indicative of someone in the business of turning over residential properties. (See Lazo, *House-Flipping Is Back In South L.A.*, L.A. Times (Apr. 25, 2010) p. A1 ["MDA DataQuick, the real estate research firm, ranked Southern California ZIP Codes by frequency of flips, which it defined as homes resold within three weeks to six months of purchase"].)

CONCLUSION

The Contractor's State Licensing Law is supposed to protect homeowners, not create novel ways to foist liability on them. And, it is inconceivable that the Legislature intended Cal-OSHA to apply to homeowners. Its language, history, and context as well as this Court's precedent are all to the contrary. Homeowners are not, and should not be,

burdened with onerous OSHA obligations just because a contractor that they have hired violates the law by being or becoming unlicensed.

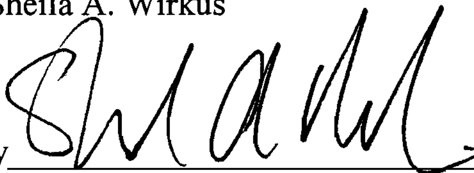
The Court of Appeal's judgment should be affirmed.

Dated: May 3, 2010

Respectfully submitted,

EARLY, MASLACH & VAN DUECK
John C. Notti
Paul A. Carron
James G. Randall

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Alana H. Rotter
Sheila A. Wirkus

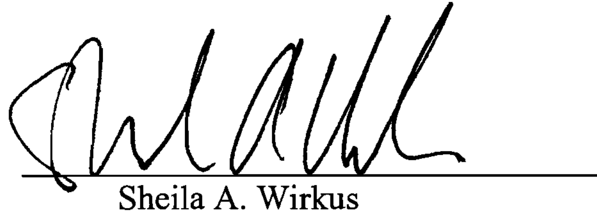


By______________________
Sheila A. Wirkus

Attorneys for Defendants and Respondents
OMAR ABICH and LOURDES ABICH

CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **ANSWER TO BRIEF ON THE MERITS** contains **13,062** words, not including the tables of contents and authorities, the caption page, and this Certification page.



Dated: May 3, 2010

Sheila A. Wirkus

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 90036-3697.

On May 3, 2010, I served the foregoing document described as: **ANSWER BRIEF ON THE MERITS** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Arash Homampour
The Homampour Law Firm
8383 Wilshire Boulevard, Suite 830
Beverly Hills, California 90211-2407
[Attorneys for plaintiff and appellant Octoviano Cortez]

Stuart M. Sherman
30961 W. Agoura Road
Suite 215
Westlake Village, California 91361
[Attorneys for plaintiff and appellant Octoviano Cortez]

Clerk
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, California 90012
[LASC Case No. GC038444]

California Court of Appeal
Second District, Division Four
300 South Spring Street
Los Angeles, California 90013
[2d Civil Case No. B210628]

I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on May 3, 2010, 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.

ANITA F. COLE