Title: Elsner v. Uveges and OSHA into Evidence
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Elsner v. Uveges and OSHA into Evidence

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Representing workers injured on construction sites just became easier with the recent Supreme Court decision of Elsner v. Uveges (2004) 34 Cal.4th 915, where the issue of OSHA admissibility was placed directly before the Court. The Court, in a unanimous decision, held that (1) the 1999 amendments were intended to allow evidence of OSHA regulations and the Labor Code statutes into evidence as a standard of care for third-party actions; (2) the Labor Code could also be used to establish a duty on the part of a third-party defendant; and (3) failure to meet the standard of care identified in OSHA may result in a finding of negligence per se. This article examines the history of OSHA regulation use and prohibition as well as the current state of the law following Elsner.

A. Labor Code Safety Regulations (§ 6400 et sec.) Defined a Duty and Standard of Care Until 1971

Prior to 1971, parties in construction injury cases were allowed to use the safety regulations found in the Labor Code as a basis for holding a defendant negligent per se. However, this right was limited to a defendant who was a "statutory employer" of the injured worker so that a duty was owed to that injured employee.

Under then existing Labor Code section 6304 (all further statutory reference are to the Labor Code unless otherwise noted), an employer was defined as "... every person having direction, management, control, or custody of any employment, place of employment, or any employee." If a third-party defendant was found to be in control of the work, that defendant was a "statutory employer" and subject to the duties imposed by sections 6400, 6401, and 6402 to provide a safe place to work and all reasonable protections. The determination of whether a defendant is a statutory employer is generally a question for the jury to determine. (See Stilson v. Moulton-Niguel Water Dist. (1971) 21 Cal.App.3d 928, fn. 5.)

However, the Supreme Court in Kuntz v. Del Webb (1961) 57 Cal.2d 100 found that the Labor Code duty was not placed on every entity regardless of actual participation in the work. The Court noted that while "an employer-employee relationship" is not required to impose a statutory duty, no such duty will be imposed if the defendant retained only the mere "right to see that work is satisfactorily completed." (Id. at pp. 106-107.)

Third-party defendants who retained greater control than a mere interest in the final result owed a duty to employees of subcontractors to provide a safe place to work pursuant to the dictates of sections 6400 and 6401. (See, generally, Kuntz v. Del E. Webb Constr. Co., supra, 57 Cal.2d 100, 106; Atherley v. MacDonald, Young & Nelson (1967) 142 Cal.App.2d 575; Bickham v. Southern Calif. Edison Co. (1953) 120 Cal.App.2d 815; Snyder v. Southern Calif. Edison Co. (1955) 44 Cal.2d 793; Mula v. Meyer (1955) 132 Cal.App.2d 279, 283.) This rule prevented general contractors who remained in control from asserting the defense that even though they had knowledge of actual safety violations, they had no duty to stop the unsafe conduct. But if the defendant had control over the work that caused the injury, that defendant could be held negligent per se for violation of Labor Code safety rules. (De Cruz v. Reid (1968) 69 Cal.2d 217, 229.)

The Supreme Court extended the protection of the Labor Code even to persons who were not employees, so long as actual employees were exposed to the same Labor Code safety hazard. In Porter v. Montgomery Ward & Co. (1957) 48 Cal.2d 846, a patron of the store was injured in a stairway that lacked a handrail required by the Labor Code. The Court held that "[p]laintiff was entitled to the benefits of the safety order" since the store provided the stairway for plaintiff "as well as for employees." (Id. at p. 849.)

Therefore, prior to 1971, evidence of Labor Code violations was tantamount to the standard of care in the construction industry and also created a duty of reasonable care for third parties on construction projects.

B. In 1971, Any Use of OSHA Regulations or the Labor Code Was Prohibited in Personal Injury and Wrongful Death Cases

In 1971, the Legislature enacted a major change in the existing law by passing Labor Code section 6304.5, which states that "[n]either this division nor any part of this division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action." Additionally, the Legislature amended the definition of "employer" under section 6304 to remove the language concerning "direction" or "control" and simply defined an employer as being "[e]very person including any public service corporation, which has any natural person in service." (See § 3300(c).) This amendment limited an employer, who was subject to the Labor Code duties, to only a person’s direct employer, removing any Labor Code responsibility for any entity that controlled the work but did not actually employ the injured person.

In interpreting this section, the reviewing courts were uniform in their analysis that section 6304.5 prohibited any evidence of OSHA or the Labor Code for any purpose in a civil trial against a third-party defendant. (See Widson v. International Harvester Co. (1984) 153 Cal.App.3d 45, 52; Spencer v. G.A. MacDonald Constr. Co. (1976) 63 Cal.App.3d 836, 857; Felmlee v. Falcon Cable

TV (1995) 36 Cal.App.4th 1032, 1039.) Therefore, unless a lawsuit was against that person's own employer, no evidence of OSHA nor the Labor Code could be used for any purpose in a wrongful death or personal injury action.

There was a movement in the Legislature to repeal the 1971 legislation, but such attempts failed on three separate occasions. (See AB 1170 (1972-1973 session); AB 149 (1974-1975 session); and AB 467 (1975-1976 session).)

C. 1997 Amendments to Cal-OSHA Title 8 Regulations

Between 1971 and 1997, Cal-OSHA could not cite an employer, other than the direct employer, even if the other entity was the sole cause of as injury. This state of affairs arose from California's amendment of section 6304 in 1971 to define an employer solely as a person's direct employer. (See §§ 6304 and 3300.) This definition of employer was at odds with the federal OSHA rules existing since the early 1970s, which gave federal inspectors the clear authority to issue citations to parties other than the direct employer. A change in Cal-OSHA was prompted by a complaint issued by the U.S. Department of Labor charging that California did not meet the minimum federal requirements of OSHA enforcement by failing to have a remedy against controlling employers. (See AB 1127 Assem. Comm. on Lab. and Empl. (1999-2000 session), Assem. Bill Analysis, Apr. 14, 1999, p. 7; see also June 1, 1999, p. 5.)

In response to the complaint, Cal-OSHA adopted regulations in 1997 that mirrored the federal standard in California Code of Regulations, title 8, section 336.10, "Determination of Citable Employer." Under this regulation, any employer could be cited for violations who (1) had employees exposed to a hazard, (2) created the hazard, (3) was required to remedy the hazard, or (4) was the employer responsible, by contract or through actual practice, for safety and health conditions on the work site. The section specifically stated that the last three categories could be employers other than the person's direct employer.

Employers objected to any enforcement of this regulation since there was no statutory authority for it under either section 6304 or 3300. (See AB 1127 Assem. Comm. on Lab. and Empl. (1999-2000 session); Assem. Bill Analysis, April 14, 1999, p. 7, see also June 1, 1999, p. 5.)

D. AB 1127 Is Enacted by the Legislature

In 1999, the Legislature revisited the admission of OSHA regulations in personal injury and wrongful death cases with AB 1127, which was an omnibus Labor Code bill that dealt extensively with OSHA regulatory powers and liabilities of contractors. Rather than continuing the blanket ban on OSHA admissibility found in the former section 6304.5, the Legislature amended the section to read as follows:

It is the intent of the Legislature that the provisions of this division, and the occupational safety and health standards and orders promulgated under this code, are applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety. ¶ Neither the issuance of, or failure to issue, a citation by the division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer. ¶ Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation. The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards. It is the intent of the Legislature that the amendments to this section enacted in the 1999-2000 Regular Session shall not abrogate the holding in Brock v. State of California (1978) 81 Cal.App.3d 752.

Additionally, AB 1127 amended section 6400, and codified the title 8, section 336.10, requirements for multi-employer work sites. The codification of section 336.10 changes the definition of "citable employer" on a multi-employer work site to include "the employer who was responsible, by contract or through actual practice, for safety and health conditions on the work site; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected." This is similar to the original section 6304 definition of employer that was in use until 1971, but is more specific as to the exact control necessary to create a duty of care under these Labor Code sections.

The August 17, 1999, Senate Committee on Public Safety analysis also recognized the civil liability aspect of this bill, but denied that the bill imposed vicarious liability:

Opposition has expressed concern that the definition of "employer" in this bill would create vicarious liability for the action of a subcontractor.... ¶ In the current version of the bill, the author has adopted the exact language from the definition of multi-employer which already exists in OSHA regulations.... ¶ The definition in its wording does not create vicarious liability, it instead requires that if you are responsible for a hazard or the safety of the workplace you are responsible regardless of who the employee is. (Sen. Comm. on Pub. Safety, 1999-2000 session, Bill Analysis AB 1127, Aug. 17, 1999.)

AB 1127 was passed by the Legislature and signed into law by Governor Davis, with an effective date of January 1, 2000.

E. Court of Appeal in Elsner v. Uveges Holds That No Change in Law Was Intended

Almost three years later, the first published Court of Appeal decision interpreting these amendments to the Labor Code was issued. The case was Elsner v. Uveges, which came out of the Fourth District and essentially found that while a great deal of work was done by the Legislature in amended section 6304.5, there was no intent to actually change the admissibility rules of OSHA or the Labor Code.

The plaintiff in Elsner was injured when a carpenter employed by defendant Uveges constructed a temporary wood plank scaffold to assist his installation of plywood panels on the second story of a structure. Plaintiff injured his right ankle when the scaffold collapsed beneath him at the construction site.

At trial, plaintiff sought to use the amendments to section 6304.5 to introduce evidence of OSHA regulations as well as Labor Code duties of care. The Court agreed that the amendment allowed such evidence and gave special instructions based on duties created by sections 6400, 6401, and 6403 and Cal-OSHA regulations setting standards for the nailing, anchoring, size, and railing of scaffolds. (Cal. Code. Regs., tit. 8, §§ 1513, 1637, 1640.)

The jury returned a special verdict finding Uveges 100 percent negligent and his negligence a cause of Elsner's injuries. It found Elsner's employer not negligent. Defendant appealed to the Fourth District Court of Appeal, which overturned the verdict with a finding that in reviewing the legislative history, "[t]his sequence of [amendments] persuades us the Legislature, ultimately, decided to maintain the prohibition on the use of Cal-OSHA safety orders and standards in employee personal injury cases against third-party defendants." (Op., p. 9.)

Plaintiff then appealed to the Supreme Court, and review was granted upon the question of whether the amendment to section 6304.5 was limited as the Court of Appeal determined.

F. Supreme Court Affirms That OSHA Regulations May Be Used as a Standard of Care as Well as to Create a Duty

The Supreme Court exhaustively reviewed the legislative history of the amendments under AB 1127 and the statutory language to determine that not only does the amendment allow evidence of OSHA regulations or the Labor Code to be used as a basis for providing a standard of care, but such regulations also may be used as a basis for a duty under the Labor Code. The Court concluded:

[T]he amendments restore the common law rule and allow use of Cal-OSHA provisions to establish standards and duties of care in negligence actions against private third parties. (Elsner, supra, 34 Cal.4th at 924.)

The Elsner Court explained that the following jury instructions were given by plaintiff against the third-party defendant Uveges:

Every employer shall furnish employment and a place of employment ... that is safe and healthful for the employees therein....

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

No employer shall fail or neglect to do any of the following: [¶] (a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe. [¶] (b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe. [¶] (c) To do every other thing reasonably necessary to protect the life, safety, and health of employees. (Id. at 941, fn. 4.)

The Supreme Court stated "these instructions were consistent with section 6304.5 as amended," and they "imposed on Uveges [the third party defendant] the duty to furnish a safe place of employment, to use safe practices and procedures, and to provide and use appropriate safety devices and safeguards. (§§ 6400, 6401, 6403.)" (Id. at p. 937.) The Court clearly noted the above Labor Code sections "impos[e] broader duties on a defendant than existed under the common law expand[ing] the defendant's liability." (Ibid.)

Not only did the Court rule that OSHA regulations were admissible in such actions, but the Court also firmly decided that evidence of custom and practice in contradiction to OSHA regulations is prohibited. Elsner holds that "the current version of section 6304.5 ... require[s] the exclusion of custom and practice testimony at odds with Cal-OSHA provisions." (Id. at p. 940.) This ruling is based on the long-standing rule of law that "evidence of custom and practice may not be used to contravene a statutory duty of care." (Id. at p. 939 citing Hom v. Clark (1963) 221 Cal.App.2d 622, 650.)

However, the only limitation that the Supreme Court placed on these new duties or standards of care is that they may not be used in cases that arose prior to the enactment of section 6304.5 in 2000. Since the plaintiff in Elsner was injured prior to this date, he could not avail himself of these changes in the law. (Id. at. p. 940.)

G. Duty Analysis Under Elsner

With the Supreme Court's decision in Elsner, the following is the state of the law regarding use of OSHA regulations or Labor Code sections in third-party litigation:

Under Evidence Code section 669 (specifically applicable to the analysis under § 6304.5), a defendant can be found responsible under negligence per se only if he "violated a statute, ordinance, or regulation." For section 6304.5 to apply under negligence per se, a plaintiff must show that the OSHA regulations were applicable to that defendant.

Under the amended section 6400 (and existing Cal. Code. Regs., tit. 8, § 336.10), any employer has a duty who (1) exposes an employee to a hazard, (2) creates the hazard, (3) is required to remedy the hazard, or (4) "was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer)." (§ 6400(b).)

This standard is similar to that used to determine whether an employer was a "statutory employer" under pre-1971 law. (See Kuntz v. Del E. Webb Constr. Co., supra, 57 Cal.2d 100, 106; Atherley v. MacDonald, Young & Nelson, supra, 142 Cal.App.2d 575.) As before, this would generally be a question of fact for the jury. (See Stilson v. Moulton-Niguel Water Dist. (1971) 21 Cal.App.3d 928, fn. 5.)

If the plaintiff can produce evidence that the defendant had the authority to correct the hazardous condition, the defendant "violated" OSHA, and therefore, can be held negligent per se if the defendant knew or should have known of the hazard. If the status of a citable employer is determined as identified above under section 6400, then a defendant is subject to the duties as defined in sections 6400, 6401, and 6403, which were specifically approved by the Supreme Court in Elsner.

H. Relationship of Elsner and Common Law Duty of Care

Elsner clearly modifies the existing common law notions of duty and proof regarding standard of care on a construction site. Therefore, the interplay of Elsner with common law is important to understand.

1. Brief history of sixty years of common law duty

For the past fifty years, California followed the majority of states that apply the control doctrine found within Restatement of Torts section 414 to the work of subcontractors. Under this theory, "[o]ne who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability" for negligence in causing an injury. (See Rest.2d Torts, § 414(a).)

Three Supreme Court decisions (i.e., McDonald v. Shell Oil Co. (1955) 44 Cal.2d 785; Austin v. Riverside Portland Cement Co. (1955) 44 Cal.2d 225; and Kuntz v. Del E. Webb Constr. Co. (1961) 57 Cal.2d 100) and numerous court of appeal decisions (i.e., La Malfa v. Piombo Bros. (1945) 70 Cal.App.2d 840; Holman v. State of California (1975) 53 Cal.App.3d 317; Castro v. State of California (1981)

114 Cal.App.3d 502; and Morehouse v. Taubman Company (1970) 5 Cal.App.3d 548) affirmed the use of the control doctrine as a common law basis for a duty in California.

In 1991, the Supreme Court abrogated a related theory of liability referred to as the "peculiar risk doctrine" under Privette v. Superior Court, supra, 5 Cal.App.4th 689. Peculiar risk was based on Restatement Second of Torts, sections 413 and 416, and applied when a hirer failed to take precautions to protect employees of subcontractors from injuries. This liability could be based either upon negligence under section 413 or vicarious liability under section 416.

In Privette, the Court wrote that the purpose of the decision was "to prevent the anomalous result that a non-negligent person's liability for an injury is greater than that of the person whose negligence actually caused the injury...." (Privette, supra, 5 Cal.App.4th at 698; emphasis added.) The Privette decision clearly abrogated vicarious liability under section 416 that would hold a hirer liable for a subcontractor's failure to take special precautions without any negligence on the part of the hirer.

However, it was not until the Supreme Court decided Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253 that the Court made clear that liability under peculiar risk could not be premised upon either section 413 or 416. The Court stated in Toland:

We also observed in Privette that although the doctrine of peculiar risk is sometimes described as "a nondelegable duty" rule, it is in effect a form of vicarious liability. (Id. at pp. 261–262.)

Following the decisions of Privette and Toland, the Court clearly held that vicarious liability will not be allowed against a hirer regardless of what the theory is called.

In 2002, the Supreme Court determined the bounds of liability as established by the control doctrine found in section 414. The Supreme Court stated in McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal.4th 219 and Hooker v. Department of Transportation (2002) 27 Cal.4th 198 that if a hirer's conduct "affirmatively contributed to the injury of the contractor's employee," then a duty exists for that defendant. The Court in Hooker found that when a general contractor affirmatively contributes to the employment of unsafe methods or procedures, liability may be imposed:

Insofar as section 414 might permit the imposition of liability on a general contractor for mere failure to intervene in a subcontractor's working methods or procedures, without evidence that the general contractor affirmatively contributed to the employment of those methods or procedures, that section is inapplicable to

claims by subcontractors' employees against the general contractor. (Hooker, 27 Cal.4th at 209, citing Kinney v. CSB Construction, Inc. (2001) 87 Cal.App.4th 28.)

2. Duty under Elsner

The Court in Elsner was very clear that there is a distinction between the duty owed at common law and the duty owed under the statutory authority of the Labor Code. (Elsner, supra, 34 Cal.4th at 937.) The Court stated that "[sections 6400, 6401, and 6403] impose upon Uveges the duty to furnish a safe place of employment, to use safe practices and procedure, and to provide and use appropriate safety devices and safeguards." (Ibid.) The Court then contrasted the common law duty to provide safety equipment under McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal.4th 219, 225. In Elsner, the Court found that no duty was retroactively extended for the defendant Uveges because in Elsner the precise duty to not provide dangerous equipment existed in both the common law and new statutory Labor Code dictates.

The statutory duty, as described by the Court that exists under the Labor Code, is broader than the common law duty for other cases. Under the common law, a defendant has a duty to not provide defective equipment, and to avoid affirmatively contributing to an injury. (See decided McKown v. Wal-Mart Stores, Inc., supra, 27 Cal.4th 219 and Hooker v. Department of Transportation, supra, 27 Cal.4th 198.)

Under the statutory duty, if a defendant is within a class of "employers" as defined by section 6400, then a duty exists as a matter of law. The question then becomes whether or not that defendant breached the duty of care under the facts of the case. As the drafters of this bill stated, this is not vicarious liability, but it does place a duty of reasonable care on all employers at a job site to work together and avoid injuries. (Sen. Comm. on Pub. Safety, 1999-2000 session, Bill Analysis AB 1127, Aug. 17, 1999.)

I. Conclusion

With the 1999 amendments to section 6304.5 and the Supreme Court's decision in Elsner, the law has come full circle back to a duty of controlling employers to ensure that safe conditions exist on the work sites for all employees. It appears that the more things change, the more they stay the same.

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