Court of Appeal, Fourth Appellate District, Division Two
Kevin J. Lane, Clerk/Executive Officer
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MAURO ROSALES,	
Plaintiff and Appellant,	E066686
v.	(Super.Ct.No. CIVDS1501482)
PETER BECKENDAM,	OPINION
Defendant and Respondent.	

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Law Offices of Carlson & Johnson and Steven F. Carlson for Plaintiff and Appellant.

Horvitz & Levy, Lisa Perrochet, Allison W. Meredith; Law Offices of McCarthy & Beavers and Glenn K. Pohl for Defendant and Respondent.

This appeal arises out of a common situation. A would-be independent contractor agrees to perform household work (here trimming very tall trees) that requires a license he does not possess and suffers an injury while performing the job. Such a worker is deemed an employee under section 2750.5 of the Labor Code, but when the worker has worked fewer than 52 hours in the 90 days prior to the accident, any claim the worker has against the homeowner for the injury is excluded from the workers' compensation system. Instead, the worker may bring a claim against the homeowner—and statutory employer—to recover under ordinary negligence principles under section 2800 of the Labor Code. In this case, however, undisputed facts show there wasn't any negligence. We therefore conclude the trial court properly granted summary judgment and affirm.

I

FACTUAL BACKGROUND

A. *The Injury*

In February 2013, Bekendam called Rosales because he needed someone to perform yard work at his Upland home. About a year earlier, Rosales had given Bekendam his business card, which featured a simple drawing of a palm tree and advertised, among other things, that he performed tree services. When they met, Bekendam described the work he wanted Rosales to do, which included trimming six palm trees in his backyard. Rosales said he could do the job, and Bekendam and Rosales agreed on a flat price of $950 for the entire job. He didn't tell Bekendam he had never performed such work before.

Bekendam's palm trees stood at least 30 or 40 feet tall. Under Business and Professions Code sections 7026.1, subdivision (a)(4) and 7028, subdivision (a), a would-be tree trimmer must get a license to trim trees over 15 feet tall. Violating the statute is a misdemeanor, punishable by a fine of up to $5,000 and six months in jail. (Bus. & Prof. Code, § 7028, subd. (b).) Rosales didn't have a license, nor had he used overhead tree trimming equipment. Bekendam did not ask whether Rosales had a license or insurance, and Rosales did not tell him he didn't.

Rosales and an assistant began the job on February 8, 2013. Rosales brought his own ladder, rake, and other gardening equipment. Rosales understood he could take breaks without first checking with Bekendam. At some point, Bekendam did some sweeping outside while Rosales did other work, and he gave some direction about which fronds to cut, but there is no evidence Bekendam involved himself in other details of Rosales's tasks.

Rosales and his assistant worked until about noon and then left to pick up climbing spikes, a belt, a rope, and a chainsaw from an acquaintance, because Rosales did not have his own. Rosales said he rented the equipment from his acquaintance for $100 a day. Rosales didn't bring any safety equipment. He used the borrowed equipment and the ladder he brought to trim five of the six palm trees. Late in the afternoon, Rosales began climbing the sixth tree. Rosales said he knew he could have trimmed the last tree the next day, but he decided to try to finish the job that day.

Rosales didn't use the ladder to climb the sixth tree, only the borrowed climbing equipment. He was still climbing when he slipped and fell from 30 or 40 feet. Bekendam hadn't been outside for an hour or two, but he came outside and called the paramedics after the fall. When they arrived, Rosales reported his safety belt and spikes hadn't grabbed onto the tree, and he slid down and landed on his feet. He said he couldn't get up because he had injured his leg.

B. *The Lawsuit*

On February 6, 2015, Rosales sued Bekendam for negligence and premises liability.

In the negligence cause of action, Rosales alleged Bekendam was his statutory employer under Labor Code section 2750.5 because Rosales was not licensed to perform the work for which he was hired. (Bus. & Prof. Code, §§ 7026.1, subd. (a)(4) & 7028, subd. (a).) He also alleged Bekendam, as his employer, owed a duty "to provide, inter alia, a safe place to work" under Labor Code section 6400. Finally, he alleged Bekendam breached that duty by "negligently conduct[ing] [himself] to allow such workplace . . . to become and remain unsafe, in that, inter alia, a ladder which was defective, or otherwise inadequate and/or insufficient for the task intended, was provided to Plaintiff by Defendant."

In the premises liability cause of action, Rosales alleged Bekendam "provided [Rosales] a ladder to perform the work and tasks [Rosales] was hired to perform. Said ladder was defective, inadequate and insufficient to meet [Rosales's] needs [to]

competently, adequately and safely complete the tasks for which he was hired and employed."

The focus on the ladder proved incorrect. In discovery, it became clear Rosales had brought his own ladder and hadn't been using it when the accident occurred. Bekendam moved for summary judgment on the ground there was no evidence he was negligent or caused Rosales's fall, not only because Rosales himself brought the allegedly defective ladder, but also because Rosales testified he was not using any ladder when trimming the sixth palm tree. Bekendam also pointed out there was no evidence of any other dangerous condition on the property. He argued Rosales was an independent contractor under the common law, and, even if he were deemed Bekendam's employee under Labor Code section 2750.5, Bekendam owed Rosales no additional duties or workers' compensation insurance benefits.

Rosales opposed the motion on the ground he should be deemed Bekendam's employee under Labor Code section 2750.5, which imposed on Bekendam special duties owed by an employer to an employee. Thus, he argued, Bekendam was required to supervise the tree trimming as would an experienced tree trimmer and was negligent for failing to do so. He also argued he was entitled to a presumption of negligence, because Bekendam did not maintain workers' compensation insurance that would cover Rosales.

Rosales's argument relied on an expert declaration, which assumed Rosales was Bekendam's employee and opined on the duties Bekendam would owe Rosales in virtue

of that relationship. Bekendam objected to the declaration as inadmissible opinion on the legal question of duty.

The trial court held a hearing on Bekendam's summary judgment motion. The court allowed the expert's testimony, but granted Bekendam summary judgment on all claims and entered judgment in his favor. The minute order codifying the ruling says only, "The court grants the motion for summary judgment in its entirety, on the grounds that defendant has met his burden of demonstrating there are no triable issues of material fact regarding the allegedly defective ladder which purportedly caused plaintiff's injuries." Rosales filed a timely appeal.

II

DISCUSSION

We begin by recognizing Rosales does not appeal the substance of the trial court's ruling. He does not contend there was evidence Bekendam supplied a defective or inadequate ladder to Rosales. He does not argue the trial court erred by granting summary judgment to the extent his claims are based on the allegation Bekendam breached a duty of care to Rosales by providing "a ladder which was defective, or otherwise inadequate and/or insufficient for the task intended." Because he has not briefed that issue on appeal, we deem it abandoned. (*People v. Tanner* (1979) 24 Cal.3d 514, 518, fn. 2.)

What Rosales does argue is—his complaint and the way the parties litigated the case left room for him to identify other acts or omissions that constituted breaches. He

points out his negligence cause of action alleged Bekendam breached his duty of care by providing him a defective or inadequate ladder, *among other things.* Though the complaint does not specify what those other things might be, he contends the language was sufficient to put Bekendam on notice that other acts or omissions may have constituted breaches. He also argues Bekendam responded to the complaint in his answer and in his motion for summary judgment as if the alleged breaches reached beyond merely providing the ladder to Rosales. We assume, without deciding, that Rosales is correct and therefore turn to the merits of his argument.

Summary judgment is appropriate only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The proponent of summary judgment must show one or more elements of the other party's cause of action cannot be established or there is a complete defense. (*Id.*, subd. (p)(2).) The proponent must establish no material facts are in dispute, whereupon the burden shifts to the opponent to produce admissible evidence showing a triable issue of material fact exists. (*Ibid.*; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 842.)

A. *Rosales is Deemed an Employee Under Labor Code Section 2750.5*

Rosales's argument begins with the premise that, though he entered the relationship with Bekendam as an independent contractor, Labor Code section 2750.5 (Section 2750.5) requires he be treated as an employee.

The statute provides "any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status." Rosales and Bekendam agree Rosales was required to have a license to trim trees over 15 feet high. (Bus. & Prof. Code, § 7026.1, subd. (a)(4).) Thus, because Rosales was an unlicensed contractor hired to trim trees in a manner that required a license, he cannot be an independent contractor, and must be deemed an employee of Bekendam. (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 12-16 (*State Compensation*); *Rosas v. Dishong* (1998) 67 Cal.App.4th 815, 826 (*Rosas*).)

Bekendam argues Section 2750.5 applies only to workers' compensation cases, not tort cases. In support, he cites the Supreme Court's discussion of the issue in *Ramirez v. Nelson* (2008) 44 Cal.4th 908, 916. "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. This court in *State Compensation* construed the penultimate paragraph of section 2750.5 to mean that contractors injured on the job, who prove to be unlicensed, cannot be independent

contractors in the eyes of the law, and are instead deemed employees of the party who hired them by operation of law. [Citation.] But that holding was reached in 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. [Citation.] The homeowner's potential exposure to tort liability for the contractor's injuries was neither in issue nor considered in *State Compensation.*" (*Ibid.*) Ultimately, the court concluded the issue was moot, however, and did not resolve it.

Despite the Supreme Court's note of caution, we conclude the penultimate paragraph of Section 2750.5 applies to tort cases as well as workers' compensation cases. Section 2750.5 appears in Division 3 of the Labor Code (§§ 2700-3098), which covers the employer-employee relationship and the obligations of employees and employers to each other. Among those provisions is section 2800, which provides for tort liability on the part of employers. "An employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care." (Lab. Code, § 2800.) The workers' compensation statute, by contrast, appears in Divisions 4 and 4.5 of the Labor Code. Thus, it is more natural to conclude the Legislature intended Section 2750.5 to apply in tort cases than in workers' compensation cases. As the Fourth Appellate District, Division One has pointed out, to agree the provision applies only to workers' compensation cases and not tort cases, "we would have to assume the Legislature did not

realize the scope of the division in which it placed the . . . section, an assumption we cannot make." (*Foss v. Anthony Industries* (1983) 139 Cal.App.3d 794, 798.)

The *State Compensation* decision itself lends support to our conclusion. There, the parties argued workers' compensation cases were exempt from the general rule Section 2750.5 establishes. The Supreme Court rejected that argument, concluding the provision applies to workers' compensation cases despite appearing in a separate Division of the Labor Code and requires—absent an exclusion—that would-be independent contractors be treated as employees to the extent they are unlicensed though their work requires a license. (*State Compensation, supra*, 40 Cal.3d at pp. 10-13.) We note also the Supreme Court pointed out the language of the statute "does not reflect legislative intent that a contractor lacking the requisite license shall be an independent contractor for some purposes but not for others." (*Id.* at p. 15.)

Accordingly, we conclude Rosales must be deemed an employee for purposes of evaluating his tort claims.

B. *Rosales is Not an Employee Under the Workers' Compensation Statute*

As we have discussed, Division 4 of the Labor Code (Lab. Code, § 3200 et seq.) sets out a system to ensure employees receive "medical benefits and compensation for work-related injuries by eliminating the need to prove negligence and abolishing the common law defenses of contributory negligence, assumption of the risk and fault of a fellow employee." (*Le Parc Community Assn v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1171.) In turn, the statute immunizes employers from liability in civil

actions for damages. (*Jones v. Kaiser Industries Corp.* (1987) 43 Cal.3d 552, 562 ["the workers' compensation system represents a balance between the advantage to the employer of immunity from liability at law and the advantage to the employee of swift and certain compensation"].)

Under Labor Code section 3602, subdivision (a), subject to certain exceptions, the right to workers' compensation benefits is the exclusive remedy of an injured employee against their employer for a work-related injury. (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 984.) However, "[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy" or homeowner's policy that covers workers' compensation claims. (*Hernandez v. Chavez Roofing, Inc.* (1991) 235 Cal.App.3d 1092, 1095.) Employers who choose not to pay that price do not get the benefit of immunity from liability.

Thus, Labor Code section 3706 creates one of the principal exceptions to the Workers' Compensation Act's exclusive remedy rule. An employee injured on the job may pursue a tort lawsuit if the "employer fails to secure the payment of compensation." (Lab. Code, § 3706; see also *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1177.) In such a case, "any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply." (Lab. Code, § 3706.) What's more, in recognition of the importance of such compensation, the statute places the burden on the *employer* to prove there was no negligence. "[I]t is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer,

and the burden of proof is upon the employer, to rebut the presumption of negligence." (Lab. Code, § 3708.)

Rosales argues these provisions of the workers' compensation statute allow him to bring a tort suit and shift the burden to Bekendam to show he was not negligent. As we have seen, Rosales is correct that an employee's status as a deemed employee generally applies under the provisions of the workers' compensation statute. (*State Compensation*, *supra*, 40 Cal.3d at pp. 12-13.) However, Rosales ignores the fact that another provision of the statute bars his treatment as an employee under the workers' compensation act. Under Labor Code section 3352, subdivision (a)(8), any person employed by the owner or occupant of a residential dwelling who was employed or contracted to be employed for less than 52 hours in the 90 days preceding the injury is excluded from employee status. (Lab. Code, §§ 3351, subd. (d) & 3352, subd. (a)(8); *Fernandez v. Lawson* (2003) 31 Cal.4th 31, 34-35.) The parties agree Rosales had not worked 52 hours in the 90 days preceding the injury—he had worked only one day. Thus, though deemed an employee by Section 2750.5 generally, section 3352, subdivision (a)(8) excludes him from that status for purposes of the workers' compensation statute, which includes sections 3706 and 3708. We therefore conclude Rosales is not entitled to a presumption of negligence.

C. *Rosales's Causes of Action Arise Under General Negligence Principles*

Our conclusion does not end the analysis, however, as our Supreme Court long ago held "[a]n employee not covered by the [workers' compensation] act may bring an action for damages under sections 2800-2801 of the Labor Code, in which action the

burden of proof of negligence is on the employee." (*Devens v. Goldberg* (1948) 33 Cal.2d 173, 176-177 (*Devens*).) Since Rosales's status as an employee under Section 2750.5 applies in tort, we must look to Bekendam's obligations as an employer under sections 2800 and 2801.

"An employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care." (Lab. Code, § 2800.) An injured employee not covered by the workers' compensation act (Lab. Code, § 3200 et seq.) may bring an action for damages based on his employer's want of ordinary or reasonable care under Labor Code section 2800. (*Devens*, *supra*, 33 Cal.2d at pp. 176-177.) That principle covers cases, like this one, where the worker contracts to work as an independent contractor, but was not licensed to perform work for which a license is required and is therefore a deemed employee for civil tort purposes. (*Mendoza v. Brodeur* (2006) 142 Cal.App.4th 72, 79-81; *Rosas*, *supra*, 67 Cal.App.4th at p. 821.)

Rosales argues the trial court erred by failing to determine whether there was a genuine issue of material fact as to whether Bekendam breached a duty to provide a safe workplace by failing to take other actions that would have forestalled his injury. On appeal, he asks us, in undertaking our independent review (*Benavidez v. San Jose Police Dept*. (1999) 71 Cal.App.4th 853, 859), to hold evidence supports finding such breaches, making summary judgment inappropriate.

As an employer, Rosales argues, Bekendam had duties to provide a safe place to work, which, he says, incorporates a duty to provide proper safety equipment and adopt safe practices and procedures to make the workplace safe. In short, he argues Bekendam should have done everything a professional and licensed tree services employer would be required to do for its employees. Rosales argues Bekendam breached his duty as an employer because it is uncontested he did not train Rosales in how to trim a tall palm tree, did not instruct him in the hazards of the job or the proper use of safety equipment, and did not provide safety equipment that would have allowed Rosales to perform the job safely.

In his opening brief, Rosales locates the duties he says Bekendam breached in the California Occupational Safety and Health Act of 1973 (Cal-OSHA), specifically sections 6400, 6401, 6403, and 6404. Those provisions require employers to train employees, adopt safe practices and procedures, and furnish safety equipment. Rosales points out the evidence shows he had no experience trimming palm trees and didn't have safety glasses, a helmet, ear protectors, a slip line, or a safety rope. He says the evidence also shows the job was very dangerous and Bekendam nevertheless told him to do the job if he wanted to. These, he argues, are facts which establish a triable issue of fact as to whether Bekendam breached the duties set out for employers in Cal-OSHA.

In his reply brief, however, Rosales concedes the California Supreme Court has foreclosed his reliance on the standards of Cal-OSHA. In *Fernandez v. Lawson* (2003) 31 Cal.4th 31, 33-34 (*Fernandez*), the court addressed whether "a homeowner who is an employer solely by virtue of section 2750.5 [must] comply with OSHA tree trimming regulations, or is such tree trimming a 'household domestic service' excluded from OSHA." (*Id.* at p. 34.) The court held a tree trimmer, like Rosales, hired for a noncommercial purpose, is engaged in a "household domestic service" and therefore the relationship is exempt from the requirements of the Cal-OSHA statute under section 6303, subdivision (b).[1] (*Fernandez*, at pp. 36-38; see also *Rosas*, *supra*, 67 Cal.App.4th at p. 826 ["Legislature intended to exclude private residence yard maintenance work, including tree trimming, from OSHA coverage under the 'household domestic service' exclusion"].) We conclude Rosales cannot rely on the provisions of Cal-OSHA as imposing duties beyond the general duty to exercise ordinary care.

Rosales argues *Fernandez* is not dispositive, however, and that we can locate the same duties to provide adequate safety equipment and job training in the general duty of an employer to provide employees with a safe work environment. Rosales relies principally on *Devens*, *supra*, 33 Cal.2d 173, where the California Supreme Court recognized an employer has a duty to inspect household conditions to protect domestic

[1] That subdivision defines "employment" to include "the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, *except household domestic service*." (Lab. Code, § 6303, subd. (b), italics added.)

workers from injury. From *Devens*, Rosales attempts to extract a general duty to maintain a safe workplace that would encompass a duty to train, provide safety equipment, and maintain safe working conditions generally—in other words, the exact duties imposed by the provisions of Cal-OSHA, which the Supreme Court has held inapplicable. *Devens* does not support imposing such duties.

The *Devens* court recognized only the well-established rule that "an employer is under a duty to furnish a safe working place for his employees." It explained that "duty requires the employer to exercise *ordinary care* and 'to make a reasonably careful inspection at reasonable intervals to learn of dangers, not apparent to the eye.'" (*Devens*, *supra*, 33 Cal.2d at p. 178, italics added.) In other words, the California Supreme Court held employers—including employers of workers providing domestic services—have a duty to conduct reasonable inspections to identify and repair latent defects in the workplace. This is not a latent defect case. The danger of trimming very tall trees is open and obvious, as is the need for special equipment.

Far from creating a heightened standard of care for employers, the *Devens* court simply applied standard ordinary care principles governing property owners' duties to their invitees. "The applicable general principle is that the owner of the property, insofar as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed peril. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care." (*Florez v. Groom*

Development Co. (1959) 53 Cal.2d 347, 355.) The invitor may assume an invitee will perceive dangers that would be obvious through ordinary use of the senses. (*Neuber v. Royalty Realty Co.* (1948) 86 Cal.App.2d 596, 612-616, overruled on other grounds by *Porter v. Montgomery Ward & Co.* (1957) 48 Cal.2d 846.) These same principles apply to Rosales's negligence and premises liability causes of action.

Rosales did not raise a triable issue of material fact as to Bekendam's negligence under these principles. Rosales never identified any negligent act by Bekendam other than the disproven claim he provided a ladder inadequate to the job. Bekendam provided no equipment and did not require Rosales to carry out the job in any specific fashion. (Cf. *Florez v. Groom Development Co.*, *supra*, 53 Cal.2d at p. 355 [holding employer negligent where foreman directed employees to use a four-by-six-inch plank to cross a ditch, knowing the plank was too small and not commonly used for such purposes].) Nor does Rosales identify any defects or dangers Bekendam could have identified and warned Rosales about by exercise of reasonable care. The danger of climbing and trimming palm trees over 30 feet high was present and obvious to both Rosales and Bekendam, and Bekendam was entitled to rely on Rosales's assurance that he knew how to perform the job. (See *Zaragoza v. Ibarra* (2009) 174 Cal.App.4th 1012, 1023 [no employer liability where employee "simply engaged in a maneuver from a height of nine feet that any ordinary adult person would know posed significant risk"].)

Accordingly, we conclude the trial court did not err by granting summary judgment in Bekendam's favor, and will therefore affirm.

III

DISPOSITION

We affirm the judgment. Respondent shall recover costs on appeal.

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SLOUGH
J.

We concur:

MILLER
Acting P. J.

FIELDS
J.