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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

EL REY ENSCH, Plaintiff and Appellant, v. CHU ZOU, Defendant and Respondent.	E029403 (Super.Ct.No. SCV55818) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Frank Gafkowski, Jr., Judge. (Retired Judge of the Mun. Ct. for the L.A. Jud. Dist., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Wilson, Kenna & Borys and Garth Goldberg for Plaintiff and Appellant.

The Arns Law Firm, Morgan C. Smith and Robert S. Arns for Consumer Attorneys of California as Amicus Curiae on behalf of Plaintiff and Appellant.

Parker & Stanbury and Graham J. Baldwin for Defendant and Respondent.

A jury found that defendant and respondent Chu Zou aka Cathy Zou, individually, and dba Cathy Zou Apiaries (collectively, defendant) was not negligent or liable for the

personal injuries of plaintiff and appellant El Rey Ensch. Plaintiff appeals from the verdict contending that: (1) the trial court erred in granting a motion in limine, and thereby excluding evidence of Labor Code section 6304.5[1] and its 1999 amendments, which allegedly made safety regulations promulgated under the California Occupational Safety and Health Act (CAL/OSHA) or the Act) admissible in evidence in this case; (2) the trial court erred in failing to allow any expert testimony regarding the applicability of such safety regulations; and (3) the trial court erred in failing to instruct the jury that a violation of the safety regulations constituted negligence per se. We find no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

Defendant owned and operated a beekeeping business, manufacturing honey and other bee products. Defendant and plaintiff were married in 1991 and divorced in 1997. They remained on friendly terms, and plaintiff helped defendant with her business, even after they divorced. Plaintiff was employed as an electrician by the City of Burbank. Plaintiff was not an employee of defendant.

On November 28, 1998, plaintiff was at defendant's beekeeping business building, doing some repairs. The building was very cold. Both plaintiff and defendant noticed that the building was not heating up, even after the heater was turned on. Plaintiff asked defendant if he could close the ridge vents, which were vents that were located along the

[1] All further statutory references will be to the Labor Code section, unless otherwise noted.

ridge (peak) of the roof of the building. The ridge vents were 10 feet long and had dampers, which were mechanisms that closed the vents. The vents were located approximately 18 feet above the concrete floor of the building.

Plaintiff found an extension ladder on the premises and placed it at the south end of the building, near the southernmost vent. Before placing the ladder, plaintiff visually inspected the floor, but did not notice any large debris or anything that appeared to be slippery. He placed the ladder on the ground and extended it up, so that the top of the ladder touched the purlin (a steel beam running the length of the building, that extended downward from the roof about seven and three/quarter inches), on the underside of the roof. Plaintiff climbed to the top of the ladder, "secured the top of the ladder off with the wire," reached over to the vent and pulled it shut. Plaintiff moved the ladder over to the next location to close the next vent. He followed the same procedure, however, when he was about to secure the top of the ladder by tying if off to the purlin, the ladder "went out from under" him. Plaintiff fell to the ground. He sustained the loss of an eye and a tooth, a fractured left foot, and partial loss of his senses of smell and taste.

Plaintiff filed a complaint on March 22, 1999, alleging causes of action for premises liability and negligence against defendant, and causes of action for product liability, negligence, and breach of express and implied warranty against Davidson Ladders, Inc. (Davidson).[2] The matter was set for trial.

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[2] Davidson Ladders, Inc. is not a party to this appeal.

On the first day of the trial, the court heard motions in limine. One of the motions was brought by Davidson to exclude evidence or reference to CAL/OSHA safety regulations. In its motion, Davidson pointed out that one of plaintiff's expert witnesses had improperly relied upon CAL/OSHA regulations in his deposition testimony. Davidson argued that, under section 6304.5, CAL/OSHA regulations were not applicable to, and should not be admissible evidence in, any personal injury action, except as between an employee and his or her own employer.

Plaintiff filed an opposition and pointed out that section 6304.5 had been amended; whereas the statute formerly prohibited any application of CAL/OSHA safety regulations to personal injury cases that were not brought by an employee against his or her own employer, the statute now only prohibited the applicability or admissibility into evidence of the issuance of, or failure of the Division of Occupational Safety and Health to issue, a citation, in such action. Plaintiff further noted that the amendment provided that any violation of a CAL/OSHA safety regulation constituted negligence per se. The matter was argued before the court. The court granted the motion as to Davidson, since the court found that the safety orders had nothing to do with the ladder, but denied the motion as to defendant.

The next day, defendant filed points and authorities in support of Davidson's motion in limine, basically requesting that the court reconsider its ruling on the in limine motion. Defendant pointed out that the amended section 6304.5 specifically stated that it was the intent of the Legislature that the amendments "shall not abrogate the holding in

Brock v. State of California (1978) 81 Cal.App.3d 752." In oral argument, the parties discussed section 6304.5, in light of *Brock*, and the trial court reversed itself and granted the motion in limine with regard to defendant.

The matter was then tried to a jury. The jury returned a special verdict finding that defendant was not negligent and that plaintiff was comparatively negligent and 100 per cent at fault.

Plaintiff now appeals.

ANALYSIS

I. Standard of Review

The trial court's exclusion of the subject evidence and failure to instruct the jury on negligence per se were based on its interpretation of section 6304.5. Statutory interpretation is a question of law which we determine de novo.[3] Thus, the question on review becomes whether or not section 6304.5 granted the trial court any discretion to admit the evidence.

II. The Trial Court Properly Excluded the Evidence

Plaintiff contends that the trial court erred in failing to allow any evidence at trial of the applicability and alleged violations of CAL/OSHA safety regulations. Defendant argues that: (1) section 6304.5, as amended, does not permit the admissibility into evidence of CAL/OSHA standards in a third party civil action; and (2) the statute was

[3] *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1176.

amended *after* the accident occurred, and the statute would not apply retroactively to this case. We agree with defendant.

A. Section 6304.5 Does Not Permit the Admissibility into Evidence of CAL/OSHA Safety Standards in Cases Brought by Non-Employees

Plaintiff sought to have an expert witness testify to the applicability of Title 8 of California Code of Regulations, section 3270, in order to show that California "has a defined standard of care for industrial premises that would reduce the risk of portable ladder accidents involving a risk of fall from height." (Italics omitted.) Section 3270 essentially requires that every permanent elevated location, where there is material that is frequently repaired or adjusted, must be provided with a safe platform or maintenance runway, and that "[a]ccess shall be by means of either fixed ladders or permanent ramps or stairways." However, because of the trial court's ruling on the motion in limine, plaintiff was not allowed to present any such evidence.

Before it was amended, section 6304.5 provided: "It is the intent of the Legislature that the provisions of this division[4] shall only be applicable to proceedings against employers brought pursuant to the provisions of Chapter 3 (commencing with Section 6500) and 4 (commencing with Section 6600) of Part 1 of this division for the exclusive purpose of maintaining and enforcing employee safety. [¶] Neither this division nor any part of this division shall have any application to, nor be considered in,

[4] "Division" means the Division of Occupational Safety and Health. Section 6302.

nor be admissible into, evidence in any personal injury or wrongful death action arising after the operative date of this section, except as between an employee and his own employer." (Fns. omitted.)

Section 6304.5 now provides:

"It is the intent of the Legislature that the provisions of this division * * *, and the occupational 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. . . . 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."[5]

1. Interpretation of the Statute

In interpreting a statute, a court should first "examine the actual language of the statute, giving the words of the statute their ordinary, everyday meaning. [Citation.] If

[5] Asterisks indicate omissions from the earlier version; underscore indicates new text.

the meaning is without ambiguity, doubt, or uncertainty, then the language controls, and there is nothing to 'interpret' or 'construe.' [Citation.]"[6] In other words, "[w]here statutory language is clear and unambiguous, there is no need to construct the statute, and resort to legislative materials or other external sources is unnecessary. [Citation.]"[7]

Plaintiff argues that the trial court should have applied section 6304.5 to this case and thereby should have admitted evidence of defendant's alleged violation of CAL/OSHA provisions to show that defendant was negligent per se. We disagree.

Section 6304.5 begins with the following language: "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." (Italics added.) The statute formerly provided that it was "the intent of the Legislature that the provisions of this division *shall only be applicable to proceedings against employers brought pursuant to the provisions of Chapter 3 (commencing with Section 6500) and 4 (commencing with section 6600)* of Part 1 of this division for the exclusive purpose of maintaining and enforcing employee safety." (Italics added, fns. omitted.) Plaintiff argues that the deletion of the words "shall only" shows the Legislature's intent to expand the statute and allow evidence of CAL/OSHA safety orders in actions against non-employers, as well as employers. The problem with plaintiff's reading of the statute

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[6] *Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 875.

[7] *McLaughlin v. State Bd. of Education* (1999) 75 Cal.App.4th 196, 215.

is that he isolates and focuses on the deletion of the words "shall only," without considering the rest of the sentence that was deleted by the amendment. The amended statute unambiguously sets forth the Legislature's intent that the safety standards and regulations "are applicable to proceedings *against employers* for the exclusive purpose of maintaining and enforcing *employee* safety." (Italics added.) It is undisputed that plaintiff was not an employee of defendant.

Moreover, in its second paragraph, section 6304.5 states that the issuance or failure to issue a citation is not admissible in evidence "in any personal injury or wrongful death action, *except as between an employee and his or her own employer*." (Italics added.) Plaintiff points out that the statute only prohibits *the admissibility of evidence of the issuance or failure to issue a citation* in actions not involving employers. Thus, he infers that evidence of a CAL/OSHA safety regulation *would be* admissible in actions not involving employers (i.e., to simply show that a defendant violated a CAL/OSHA regulation, regardless of whether or not a citation was issued). However, we cannot read the second paragraph without reference to the first paragraph. In construing the statute, the words "must be read *in context*, considering the nature and purpose of the statutory enactment. [Citations.]"[8] The first paragraph of the statute clearly sets out the Legislature's intent to make CAL/OSHA standards "applicable to proceedings *against employers* for the exclusive purpose of maintaining and enforcing employee safety."

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[8] *Nahrstedt v. Lakeside Village Condominium Assn*. (1994) 8 Cal.4th 361, 378-379, italics added.

(Italics added.) Nothing in the language of the statute attempts to expand the applicability of CAL/OSHA standards and orders to third party lawsuits not involving employers.

Section 6304.5 next provides that Evidence Code section 452 (judicial notice) and 669 (negligence per se) "shall apply to this division" and to CAL/OSHA safety and health standards, "in the same manner as any other statute, ordinance, or regulation." Plaintiff argues that it is significant that the amendments included these references to sections 452 and 669 since these sections allegedly "can only apply in actions involving a defendant other than the direct employer." (Underscore in original.) Plaintiff assumes that an employee's sole remedy against his or her employer is a workers' compensation proceeding, before the Workers' Compensation Appeals Board (WCAB). He thus claims that because the rules of evidence do not apply in a worker's compensation proceeding (against an employer), "[n]egligence per se . . . can only have meaning in the context of a third-party [civil] suit in a trial court." (Underscore in original.) Therefore, plaintiff reasons, because section 6304.5 applies the rules of evidence, it must include personal injury actions against third party defendants that are not employers of the complainants.

Plaintiff's reasoning is faulty. He incorrectly assumes that an employee's sole remedy against an employer is a workers' compensation proceeding, before the WCAB. However, an employee may bring an action against an employer in superior court if the employer fails to carry compensation insurance, if the employee's injury is proximately caused by a willful physical assault by the employer, where the employee's injury "is

aggravated by the employer's fraudulent concealment of existence of the injury and its connection with the employment," and where the employee's injury is proximately caused by a defective product manufactured by the employer.[9] That means that, contrary to plaintiff's contention, the rules of evidence *can* apply in an action against a direct employer. Furthermore, the WCAB and the superior court are two different jurisdictions that abide by different rules.[10] Thus, plaintiff's conclusion that section 6304.5 must include personal injury actions against third party defendants that are not employers, is simply not logical or tenable.

Finally, the last sentence of the amended section 6304.5 provides that: "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." (Italics added.) In *Brock*, the plaintiffs filed a personal injury action against the State of California following an explosion at a paper plant, at which several employees were killed or injured. Although the state was not an employer at the paper plant, the plaintiffs brought an action against the state alleging that the state failed to comply with the mandatory safety inspection provisions of CAL/OSHA and, as a result, dust accumulated in the plant and created an ultra hazardous and dangerous condition.[11]

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[9] Section 3601, subdivision (b) and Section 3706; *see also*, *Jones v. Brown* (1970) 13 Cal.App.3d 513, 522.

[10] *Jones v. Brown*, *supra*, 13 Cal.App.3d 513, 520.

[11] *Brock v. State of California* (1978) 81 Cal.App.3d 752, 754-755.

The state demurred on the ground that section 6304.5 "prohibits reliance upon the Labor Code Occupational Safety and Health Act provision as a basis for a personal injury or wrongful death action except as between an employee and his employer."[12] The trial court sustained the demurrer. On appeal, the court affirmed the judgment and dismissed the action stating that "[t]he fact that the state has a mandatory duty to inspect and to enforce CAL/OSHA provisions is *irrelevant* to the issue of whether those provisions can be relied upon in a personal injury action against the state when the state is not the employer. *It is evident that the purpose of section 6304.5 is to prevent the technical CAL/OSHA safety provisions from enlarging the personal injury liability of third parties beyond basic common law liability*."[13] (Italics added.) The court further stated that "the Legislature sensibly limited the applicability of the CAL/OSHA safety provisions to actions *involving employers alone*."[14] (Italics added.) Contrary to plaintiff's contention that the court in *Brock* did not directly address the issue currently raised by this appeal, the court specifically determined that CAL/OSHA provisions are not to be applied to actions against third parties.

Plaintiff makes the nonsensical argument that "since *Brock* was decided long before the amendments [to section 6304.5] were made . . ., that case cannot be looked to for guidance as to what the [L]egislature intended in 1999." The Legislature specifically stated that the holding in *Brock* was not to be abrogated by the amendments to section

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[12] *Brock v. State of California*, *supra*, 81 Cal.App.3d 752, 755.
[13] *Brock v. State of California*, *supra*, 81 Cal.App.3d 752, 757.

6304.5. *Brock* thus continues as a valid expression of the law. Plaintiff relies on an opinion by the Legislative Counsel to the effect that, in the Legislative Counsel's view, the Legislature's statement of intent in the amended section 6304.5 regarding the holding in *Brock* referred to the narrow holding that the state may not be held liable for a breach of its statutory duty under CAL/OSHA to inspect places of employment. [15] "While we give due deference to the opinions of the Legislative Counsel, in this case the opinion is not persuasive. . . . [W]e note that the opinion in question is not part of the legislative history of section [6304.5]; it was issued after the statute was adopted, and hence could not have been considered by the Legislature when it was debating the bill that enacted section [6304.5]. It is, rather, a *post hoc* expression of the Legislative Counsel's opinion of what the Legislature meant when it adopted section [6304.5]."[16]

In sum, section 6304.5 plainly precludes the admissibility into evidence of CAL/OSHA's standards and orders in any personal injury action, except as between an employee and his or her own employer. Thus, the trial court properly excluded the evidence.

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[14] *Brock v. State of California*, *supra*, 81 Cal.App.3d 752, 758.

[15] On June 5, 2002, plaintiff requested that this court take judicial notice of this Legislative Counsel opinion. As well, on May 10, 2002, defendant requested that this court take judicial notice of excerpts from the legislative history of Assembly Bill 1127 for the 1999-2000 regular session of the California Legislature. We reserved ruling on these requests. The requests are denied.

[16] *Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 922.

B. The Amendment to Section 6304.5 Cannot Be Applied Retroactively

Even if the amended section 6304.5 did allow the admissibility of evidence of CAL/OSHA's provisions in actions between a plaintiff and a non-employer defendant, the amendments to section 6304.5 did not become operative until *after* the subject accident occurred.

Section 6304.5 was amended during the regular legislative session of 1999 and became operative on January 1, 2000. Plaintiff was injured on November 28, 1998. "It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent. [Citations.]"[17] Section 6304.5 says nothing about retrospective operation.

Plaintiff attempts to circumvent this general principle by characterizing the application of the section 6304.5 amendments to this case as "prospective" rather than "retrospective." He asserts that section 6304.5 applies to this case "since its application concerns only evidentiary rules to be applied to a trial yet to occur," and is therefore only procedural in nature. (Italics omitted.) Plaintiff states that "a statute which concerns only the conduct of a trial 'addresses conduct in the future' even though the occurrence which gives occasion to the trial took place before the effective date of the statute."

Plaintiff opposed defendant's motion in limine because he wanted to have an expert witness testify that the condition of defendant's premises were in violation of a CAL/OSHA safety order which required that there be either fixed ladders or permanent

ramps or stairways in place to access elevated areas. Plaintiff was essentially trying to establish that since defendant allegedly violated a CAL/OSHA safety order, she was negligent per se, pursuant to the amendment providing that Evidence Code sections 452 (judicial notice) and 669 (negligence per se) apply to CAL/OSHA provisions. Contrary to plaintiff's contention, applying section 6304.5 to this case would not simply be procedural and merely concern the conduct of a future trial; it would effectively create a new duty of care owed by defendant to plaintiff under CAL/OSHA standards and entitle plaintiff to have the benefit of a negligence per se jury instruction.

The application of the amendments would not be prospective, but rather retrospective. "'A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.' [Citations.]"[18] Under plaintiff's interpretation of the statute, the CAL/OSHA standards only applied to proceedings between an employee and his or her employer; the amendments allegedly expanded the applicability to include proceedings against non-employer third parties. Thus, the application of the amendments to section 6304.5 to this case would significantly affect the rights and obligations of defendant that existed prior to the amendments. However, because the amendments to section 6304.5 did not become operative until over one year *after* plaintiff's accident, plaintiff's claim fails. "It is well established that statutes not in effect at the time of an accident have no relevance to a

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[17] *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393.

defendant's statutory duty of care."[19] Moreover, there is no indication that the Legislature intended to give these amendments a retrospective operation.

Plaintiff further argues that the specific CAL/OSHA safety order at issue was first made effective in 1976, and was therefore applicable to defendant *as an employer* at the time of the accident. Plaintiff asserts that there is no question that if one of defendant's employees had been injured, rather than plaintiff, the safety order would have been applicable. He further states that since his cause of action against defendant was based on negligence in the management of her premises, his cause of action "was not created or altered by the existence of the safety orders . . . or the amendments," since defendant was *always* subject to the safety order. (Italics omitted.) Plaintiff's glib argument overlooks the crux of this appeal. There is no dispute that the CAL/OSHA standards applied to defendant's work premises, or that she was an employer, or that plaintiff was not an employee of defendant. The question is whether or not the CAL/OSHA safety provisions could be admitted as evidence in an action against defendant by a non-employee, pursuant to the section 6304.5 amendments. The answer to that question is no.

C. Plaintiff's Argument Regarding Defendant's Duty as a Landowner Has Been Waived on Appeal

Plaintiff finally adds the argument that he is not seeking to impose "a new duty" on defendant, but rather he is simply showing that defendant owed him a duty of due care

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[18] *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal.2d 388, 391.

in the management of her premises. He argues that the purpose of allowing evidence of CAL/OSHA safety provisions is simply to set a standard of care for defendant "as an employer and as a land possessor." Plaintiff appears to be mixing legal arguments, as well as raising an argument that was not raised in his opposition to the motion in limine below. "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal. [Citations.]"[20]

[footnote continued from previous page]

[19] *Salinero v. Pon* (1981) 124 Cal.App.3d 120, 132.

[20] *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Ward
J.

We concur:

/s/ McKinster
Acting P. J.

/s/ Gaut
J.