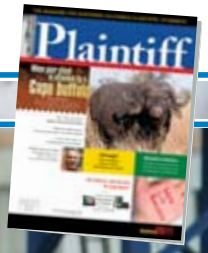

Civil success through OSHA: *Suarez v. Pacific Northstar Mechanical* creates a new tort duty

On multiemployer worksites, it is important to establish the duty of reporting non-obvious hazards to all workers

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The First Appellate District (Justice Ruvolo's panel) has issued yet another opinion useful in multiemployer worksite practices, and has set a new tort duty that is actionable when violated. In *Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 445 (review denied March 10, 2010), the court held that each employer on a multiemployer worksite has a duty "to report all nonobvious hazards about which the employer learns because its employees were exposed to them during the course of their work, even if the employer in question did not create the hazard."

Suarez v. Pacific Northstar Mechanical

Miguel Suarez and Luis Avila worked for All Bay Contractors, Inc., the general contractor on a building remodel project. (*Suarez*, *supra*, 180 Cal.App.4th at 434.) All Bay hired Pacific Northstar Mechanical, Inc. (PNM) as a subcontractor to install the heating, ventilation, and air conditioning (HVAC) components of the project. (*Ibid.*)

Before Suarez and Avila began working on the project, someone installed an ungrounded light fixture on the project premises. (*Ibid.*) The fixture constituted a hazard under Cal-OSHA regulations. (*Id.*, fn 4.)

Neither All Bay nor any of the subcontractors on the project had been hired to work with the ungrounded fixture, and PNM did not install it. (*Id.* at 434) But while working around the fixture, PNM's employees learned of its dangerous condition – a PNM employee suffered an electric shock – and failed to warn anyone about the problem or correct it. (*Id.* at 435.)

About three weeks later, on January 14, 2005, Suarez climbed to the top of a ladder to mark a ceiling, and grabbed a bolt to steady himself, while Avila stood on the floor below and held the ladder. (*Id*. at 434) The ungrounded light fixture hung from the bolt, and when Suarez grabbed it, he immediately received an electric shock, fell off the ladder, and landed on Avila. (*Ibid*.)

Suarez and Avila brought a negligence action against PNM, who moved for summary judgment. PNM argued it did not owe Suarez and Avila a duty to report or correct the dangerous condition, because PNM neither created the condition nor contracted to protect against it.

First, the *Suarez* court considered whether PNM owed Suarez and Avila a common-law duty to warn about or fix a latent hazard that PNM did not create. The Court held that PNM did not owe a common-law duty to report or correct the hazard, based on the "no duty to aid rule." (*Id*. at 437-438 [citing, *Seo v. All-Makes Overhead Doors* (2002) 1193, 1202-1203.)

Next, the court considered whether a contract, statute, or government regulation created a special relationship between PNM and All Bay's employees, such that PNM had a duty to warn. The court held that although the contract between PNM and All Bay did not create a duty to warn, a duty arose under safety laws and regulations. (*Id*. at 439, 441.)

The Court reaffirmed that a plaintiff may use Cal-OSHA safety rules to show a duty or standard of care, whether the defendant is the plaintiff's employer or a third party. (*Id*. at 440, citing Lab. Code §6304.5, and *Elsner v. Uveges* (2004) 34 Cal.4th 915, 926, 935-936.) The Court held that PNM incurred a duty to report a known nonobvious hazard to All Bay, under Labor Code sections 6403.5 and 6400, and Title 8, California Code of Regulations, section 336.11. (*Suarez*, *supra*, 180 Cal.App.4th at 445.)

The *Suarez* court recounted that Labor Code section 6304.5 was amended in 1999 to provide that safety laws and regulations, including Cal-OSHA regulations, are admissible to establish duties and standards of care in negligence actions, to promote safe work environments and reduce injuries. (*Suarez*, *supra*, 180 Cal.App.4th at 440, 442-444, citing *Elsner*, *supra*, 34 Cal.4th at 935-936.) And, Labor Code section 6400 requires every employer to provide a safe place to work. The law establishes four categories of employers: "(1) The employer whose employees were exposed to the hazard" (the "exposing employer"); "(2) The employer who actually created the hazard" (the "creating employer"); "(3) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite" (the "controlling employer"); and "(4) The employer who had the responsibility for actually correcting the hazard" (the "correcting employer"). Each type of employer on a multiemployer worksite must comply with Labor Code 6400.

The *Suarez* court then examined the interplay between Labor Code section 6400(b) and Title 8, C.C.R., section 336.11. Under Labor Code section 6400(b), when Cal-OSHA has evidence that *an* employee was exposed to a hazard on a multiemployer worksite, OSHA is authorized to cite the employer whose employees were exposed to the hazard (the exposing employer). But under Title 8, C.C.R., section 336.11, the exposing employer can avoid a citation if the exposing employer can show that it notified the creating, correcting or controlling employer of the hazard.

Reading these rules together, the *Suarez* court held that PNM had a duty to report the ungrounded light fixture to All Bay. (*Suarez*, *supra*, 180 Cal.App.4th at 441-442.) The court reasoned that PNM's employees were exposed to the hazard, so under Labor Code section 6400(b), OSHA could have cited PNM as an exposing employer, unless PNM demonstrated that it notified All Bay – the correcting or controlling employer – of the hazard, and met the other requirements of 8 C.C.R. 336.11. (*Id*. at 441.) As an exposing employer, PNM incurred an implied duty to report the hazard to All Bay, or be subject to citation under Labor Code 6400. The *Suarez* court interpreted Labor Code section 6304.5 "as creating a tort duty on the part of employers to comply with the safety standards codified in section 6400, subdivision (b)." (*Id.* at 445.)

PNM argued that Labor Code section 6400 only applies to an employer's own employees who are exposed to a hazard, and not to other employers' employees who are later exposed to the hazard. In rejecting this argument, the *Suarez* court found significant the fact that section 6400 applied to exposures to "an" employee, not just to the employees of the exposing, creating, controlling or correcting employer. (*Id*. at 441.)

Application

Under *Suarez*, any subcontractor on a multiemployer worksite is subject to tort liability for failure to report a known nonobvious hazard that injures a worker on the site. So discovery in multiemployer worksite cases should endeavor to establish a subcontractor's exposing-employer status, and corresponding duty to warn.

The *Suarez* decision begs the question whether plaintiffs have a new weapon against general contractors and the *Privette-Toland-Hooker* line of cases. In *Privette v. Superior Court* (1993) 5 Cal.4th 689, 698-702, the California Supreme Court held that a non-negligent hirer was not vicariously liable for injuries to a subcontractor's employee under the peculiar-risk doctrine. Subsequently, in *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 264, the court held that *Privette* applies regardless of whether recovery is sought under the theory that the hirer failed to provide for special precautions in the contract (Rest.2d Torts, § 413), or the hirer is liable for the contractor's negligence in spite of providing in the contract that the contractor take special

precautions (Rest.2d Torts, § 416). Later, in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210, the court held that "the imposition of tort liability on a hirer should depend on whether the hirer exercised the control that was retained in a manner that affirmatively contributed to the injury of the contractor's employee." (See Anthony Label's May 2010 article *Those hiring independent contractors are on the hook for nondelegable duties* in Plaintiff Magazine for further discussion about these cases.)
[ED: <hyperlink article - http://tinyurl.com/6xp2xkv>]

In 2005, the California Supreme Court in *Kinsman v. Unocal Corp.* held that a landowner who hires a contractor may be liable for the contractor-employee's on-the-job injury if: (1) the landowner knew – or should have known – of a hidden preexisting hazardous condition on its property; (2) the contractor did not know and could not have reasonably discovered this condition; and (3) the landowner failed to warn the contractor about this condition. (37 Cal.4th 659, 675 (2005).) So under *Kinsman* and *Suarez*, an exposing employer, including a hirer, may be liable for negligently failing to warn about a known nonobvious danger that injures a contractor's employee on a multiemployer worksite.

Conclusion

The *Suarez* case demonstrates that OSHA regulations remain a fertile source for new tort theories.[1] The case is just one example of how thoughtful attorneys – Bradley Corsiglia and Jeffry Lochner in *Suarez* – can mine safety laws and regulations to develop new tort theories of liability in civil actions.


Vallejo

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Endnote:

[1] OSHA rules also provide discovery tools that plaintiffs can use in personal injury cases. To learn how to conduct discovery through OSHA, see Isaac Nicholson's January 2009 article "Alternative forums for discovery in third-party workplace injury cases" in Plaintiff Magazine.