



January 18, 2005

## WHITE PAPER ALERT

**Admissibility of CAL-OSHA Violations**

# Prout • LeVangie

2150 River Plaza Drive, Suite 420  
Sacramento, California 95833

t. 916.443.4849

f. 916.923.2151

e. Michael.levangie@proutlaw.com

**CONFIDENTIAL COMMUNICATION  
NOT FOR DISSEMINATION**

**Negligence - Admissibility of CAL-OSHA Violations**

### *Elsner v. Uveges*

California Supreme Court (December 20, 2004)

Cal-OSHA provisions are admissible to establish standards and duties of care in negligence actions against third parties.

In December 1998, Plaintiff Rowdy Elsner, a roofer employed by Hoffman Roofing, was injured when a scaffold collapsed beneath him. Defendant Carl Uveges was the general contractor for the project. The day before the accident, an employee of Uveges constructed the scaffolding. Elsner asserted several causes of action, including negligence and premises liability.

The case proceeded to trial in January 2001. Uveges moved in limine for an order excluding all reference to Cal-OSHA provisions. In ruling on the motion, the trial court was required to interpret 1999 amendments to California Labor Code section 6304.5. The trial court determined Cal-OSHA provisions were admissible in a third party action and allowed plaintiff's construction safety expert to testify as to how the scaffold violated Cal-OSHA provisions. Cal-OSHA regulations were also incorporated into the jury instructions. The jury returned a verdict in favor of Elsner.

On appeal, Uveges argued the admission of testimony concerning Cal-OSHA provisions and the issuance of jury instructions for negligence per se (violation of Cal-OSHA) was error. The Fourth Appellate District agreed with Uveges and reversed the trial court. The California Supreme Court then granted review and affirmed.

Interpreting section 6304.5, the Supreme Court first noted that until 1971, Cal-OSHA provisions were routinely admitted in workplace negligence actions to show the standard of care and their violation was treated as negligence per se. In 1971, the California Legislature enacted section 6304.5 to define when Cal-OSHA provisions and violations would be admissible. Section 6304.5 set forth, in pertinent part, that Cal-OSHA provisions would not be admissible in any personal injury or wrongful death action, except as between an employee and employer. Since then courts consistently held section 6304.5 barred introduction of Cal-OSHA provisions in actions between employees and third party tortfeasors.

In 1999, section 6304.5 was substantially amended. The statute still contained language indicating the issuance of a citation, for violating a Cal-OSHA provision is not admissible in a third party negligence action. However, there is seemingly conflicting language permitting proof of a statutory violation to create a presumption of negligence in a third party action. Uveges argued the absence of clear language admitting Cal-OSHA provisions in third party actions reflected a desire on the part of the Legislature to return to the pre-1999 rule of inadmissibility. The Supreme Court disagreed. In studying the legislative history of the statute, the court ruled **plaintiffs may use Cal-OSHA provisions to show a duty or standard of care in a third party action.**

The Supreme Court further ruled the amended section 6304.5, was not retroactive and only applied to accidents that occurred after the amended statute took effect, January 1, 2000. Elsner's accident occurred before January 1, 2000, so, the Supreme Court determined it was error for the trial court to apply amended section 6304.5 and the Supreme Court affirmed the Court of Appeal and remanded the case back to the trial court for further proceedings.

#### COMMENT

The California Supreme Court's decision is bad news for defendants in personal injury and wrongful death actions. Plaintiffs may now introduce Cal-OSHA provisions to establish a standard of care. A breach of a Cal-OSHA provision may be deemed negligence per se. Compounding the problem for defendants is the Supreme Court's further determination that defendants may not submit evidence that the California Division of Occupational Safety and Health investigated and issued no citation.

If you have any questions or desire further information on this, or any other topic, please contact:

Michael J. LeVangie  
Prout • LeVangie  
2150 River Plaza Drive, Suite 420  
Sacramento, California 95833  
t. 916.443.4849  
f. 916.923.2151  
e. Michael.levangie@proutlaw.com