Case No. **S177075**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OCTAVIANO CORTEZ,
Plaintiff and Appellant,

vs.

LOURDES ABICH, ET AL.,
Defendants and Respondents.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FOUR, NO. B210628.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California ("CJAC" or "amicus") welcomes the opportunity to address the important issue this case presents[1] — *viz.*, whether homeowners who hire unlicensed contractors to undertake extensive remodeling of their personal residences are liable in tort under the California Occupational Safety and Health Act (Cal-OSHA, Labor Code § 6300 *et seq.*) and Labor Code section 2750.5 to workers hired by the contractors for injuries they sustain while working on the remodel.

The Court of Appeal opinion answered "no" to this question on the ground that the remodels are within the liability exception "employers" owe their "employees" under Cal-OSHA for "household domestic service," but also stated by

[1] By separate application accompanying the lodging of this brief, CJAC asks the Court's permission that its brief be accepted for filing.

way of dicta that "section 2750.5[2] makes [homeowners] [the worker's] employer with respect to potential tort liability." (*Cortez v. Abich* (2010) 98 Cal.Rptr.3d 830, 833 (*Cortez*).) Thus, while holding correctly that under the circumstances of this case homeowners owe no duty to the plaintiff for injuries he sustained in the course of the remodel job, the appellate opinion unnecessarily injected a theory of potential liability that, unless expressly repudiated, will have profound and disturbing consequences: that homeowners who retain an unlicensed contractor to remodel their personal residences have "a duty to provide [workers hired by the contractor] . . . with a safe working environment pursuant to OSHA," and their failure to do so renders them liable in tort for injuries those workers suffer on the remodel job. (*Id.* at 834.) As the appellate opinion states, "[t]he significance of this is that . . . if . . . the [homeowners] violate an OSHA regulation, [they] would be deemed negligent as a matter of law and barred from asserting assumption of the risk or contributory negligence defenses. (§ 2801.)" (*Id.*) In essence, the homeowners will be strictly liable for on-the-job injuries sustained by workers of unlicensed contractors undertaking personal residential remodels.

The notion that homeowners can be held liable to workers hired by unlicensed contractors for remodel jobs is both bad law and poor public policy. As Justice Brown observed in her concurring opinion in *Fernandez v. Lawson* (2003) 31 Cal.4th 31 (*Fernandez*):

> [T]he ramifications of placing employer status on unsuspecting homeowners hiring workers to do a discrete

[2] Unless otherwise indicated, all statutory references are to the California Labor Code.

> task the homeowner might never suspect would require a contractor's license are dramatic. Presumably, in the absence of any exclusion under the applicable law, homeowners become potentially liable not only for OSHA compliance, but COBRA health coverage benefits, sexual harassment claims, collective bargaining agreement enforcement, and a myriad of other obligations they are ill-equipped to anticipate or comply with.[3]

CJAC, a non-profit organization whose members include hundreds of businesses, professional associations and local governments, believes imposition of Cal-OSHA requirements upon homeowners to injured third-party workers hired by unlicensed contractors for the homeowners' personal residence remodels is contrary to legislative intent, the purpose of Cal-OSHA and applicable contract licensing laws. It also runs afoul of the "unclean hands" or "*in pari delicto*" doctrine, a defense that should bar plaintiff's claim. Finally, language in the appellate opinion endorsing this unwarranted tort liability unwisely shifts the burden of loss from unlicensed contractors, where it properly belongs, onto homeowners, the very class of persons

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[3] *Id.* at 42. See also the remarks of a Kansas Supreme Court Justice who reacted similarly to Justice Brown about applying OSHA duties upon homeowners: "Residences are designed to please the homeowners and meet their needs and wants. A residence reflects the homeowners' individuality and is equipped and operated by the homeowners according to how they want to live. We live in the age of the do-it-yourselfer. Few homes would meet OSHA's standards, and few individuals would desire to live in such a home. Modern businesses do not have polished hardwood floors, throw rugs, extension cords, rough flagstone paths, stairways without handrails, unsupervised small children, toys on the floor, pets, and all the clutter of living–homes do. There are good reasons behind the old adage that most accidents occur in the home." *Jones v. Hansen* (Kan. 1994) 867 P.2d 303, 318 (McFarland, J., dissenting).

intended to be protected by contractor licensing laws. All of these effects are deleterious and implicate the principal purpose of amicus, which is to improve the fairness, efficiency and economy of laws that determine who gets how much, from whom and under what circumstances when injury is occasioned by the allegedly wrongful conduct of others.

SUMMARY OF SALIENT FACTS AND PROCEDURAL BACKGROUND[4]

In 2006, the Abiches embarked on a remodeling project of their home in Pasadena. They wanted to add a new roof, master bedroom, master bath, and a garage to their home, adding over 750 square feet. The Abiches hired Miguel Quezada Ortiz, among others, to perform the remodel. Although what Ortiz was hired to do is in dispute, appellant Octoviano Cortez claims Ortiz was hired to demolish the roof. Ortiz did not have a contractor's license, which the Abiches concede was required. The Abiches did not ask Ortiz if he had a license and were unaware that he did not have one. Omar Abich obtained the necessary permits from the City of Pasadena, but did not supervise the work. The Abiches moved out of the house and the project started in October or November 2006.

Ortiz hired plaintiff. On the first day of the job, believing he was supposed to help Ortiz demolish the roof, plaintiff went up on the roof without being given any specific instructions to do so. Plaintiff conceded he saw that half of the roof was gone. As he climbed on the roof, he observed Ortiz and another worker removing

[4] These facts, taken from the appellate opinion, are consistent with those stated in the briefs of the parties and are set forth here to provide a context from which to better understand the issue presented.

nails from the remaining portion. After taking two steps, he fell through the roof and fractured his spine.

In January 2007, plaintiff sued Ortiz, alleging general negligence (failure to warn and failure to make the work area safe) and premises liability (negligence in maintenance, management, and operation of premises).[5] In March 2007, he amended his complaint to add the Abiches as Doe defendants.

In April 2008, the Abiches filed a motion for summary judgment, contending they had no duty to warn plaintiff of the condition of the roof because he went up there on his own accord and any danger was open and obvious. They also argued that the work safety requirements of Cal-OSHA contained in Labor Code section 6300 *et seq*. did not apply to the residential remodeling project.

Plaintiff responded that because they failed to hire a *licensed* contractor, the Abiches were, under the literal language of section 2750.5, his employer. As such, he alleged they had a duty to maintain a safe working environment as required by OSHA and failed to do so. Recognizing that OSHA does not apply to workers who provide "household domestic service" (Lab. Code § 6303, subd. (d)), plaintiff asserted that the remodeling job did not fall within the definition of such services. He argued that even if Cal-OSHA did not apply to the Abiches, there was a triable issue of fact concerning whether his duties required him to get on the roof and whether the dangerous condition of the roof was open and obvious.

The trial court's ruling granting summary judgment explained (*inter alia*):

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[5] Ortiz's default was entered in April 2007. He is not a party to the appeal.

The only disputed facts are immaterial to the legal issue to be decided. The court finds as a matter of law that plaintiff was not an employee of the Abich defendants. Pursuant to Labor Code [section] 3352[, subdivision] (h), plaintiff is excluded from being an employee of the Abich defendants, and pursuant to Labor Code 2750.5, plaintiff is the employee of defendant Ortiz. (See *Cedillo v. Worker's Compensation Appeal Board* (2003) 106 Cal.App.4th 227.) [¶] It is undisputed that plaintiff was on the premises to perform work, that he was hired by defendant Ortiz, and that he was injured on the first day of work. There is a dispute concerning whether a license was required to perform the work plaintiff was hired to do. There is a dispute about whether plaintiff voluntarily went up on the roof or whether he believed it was his job to help Ortiz. Neither of these disputes of fact is material to the issue of whether plaintiff was employed by the Abich defendants. [¶] Plaintiff's contention that the Abich defendants were required to comply with OSHA requirements fails as a matter of law because they were not plaintiff's employer. Even if they were found to be his employer, this contention fails as it is unsupported by any citation to a California cas[e] in which OSHA compliance was imposed on a homeowner. [¶] To the extent plaintiff seeks to hold

> the Abich defendants liable as homeowners on a concealed danger theory, the court finds as a matter of law that the Abich defendants had no duty to inspect the roof for 'soft spots' in order to ensure the safety of the workers. The roof of a house undergoing a remodeling project does not present a concealed danger but an open and obvious one."[6]

THE APPELLATE OPINION

The appellate court in this case found, in accordance with *Cedillo*, *supra*, 106 Cal.App.4th 227, that while the trial court correctly ruled the Abiches were *not* plaintiff's employer for purposes of the workers' compensation law, it erred, according to *Rosas v. Dishong* (1998) 67 Cal.App.4th 815 (*Rosas*), when it reached the same conclusion with respect to his negligence suit against them.

In *Rosas*, the Dishongs hired Rosas to trim a tree branch hanging over their house, a service that required a license. While attempting to trim the branch, Rosas fell and was injured. Rosas filed a workers' compensation claim, but the Dishongs' insurance carrier denied it because Rosas had not worked the requisite minimal number of hours (52) required by section 3352, subdivision (h). Thereafter, Rosas sued the Dishongs, alleging negligence. (*Id.* at pp. 817-819.) He argued that section 2750.5 made the Dishongs his employer as a matter of law. The court agreed. It concluded that section 2750.5 was intended to provide a potential tort remedy to unlicensed workers who were not otherwise covered by the workers' compensation

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[6] *Cortez, supra*, 98 Cal.Rptr.3d at 831-832.

laws. (*Id.* at pp. 822-824.)

When it came to the "heart of th[is] appeal,"[7] however, the appellate court held that even if the Abiches are deemed plaintiff's employer pursuant to section 2750.5, the OSHA regulations do not apply to their home remodeling project based on the authority of *Fernandez, supra,* 31 Cal.4th 31. The facts in *Fernandez* were "virtually identical"[8] to those in *Rosas.* Lawson hired Fernandez, who did not possess the appropriate license, to trim his tree. In doing so, Fernandez was injured. Fernandez was barred by section 3352, subdivision (h) from being deemed an employee eligible for workers' compensation benefits. He then sued Lawson and asserted, as did plaintiff, various violations of Cal-OSHA safety regulations. The trial court granted Lawson summary judgment, finding that OSHA did not apply to noncommercial tree trimming performed at a private home. The Court of Appeal reversed the trial court, disagreeing with the contrary conclusion reached by the court in *Rosas.* (*Id.* at pp. 35-36.)

OSHA, the appellate opinion noted, requires that "[e]very employer shall furnish employment and a place of employment that is safe and healthful for the employees therein." (§ 6400, subd. (a).) But section 6303, subdivision (b) excludes "household domestic service" from the definition of employment. Thus, *Fernandez* considered whether the tree trimming that was performed fell within that exception and held that it did. Similarly, the appellate opinion herein held that the extensive remodeling of the Abiches personal residence was, though different in degree from

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[7] *Cortez, supra*, 98 Cal.Rptr.3d at 834.

[8] *Id.*

the tree trimming in *Fernandez*, not sufficiently different in kind to warrant a divergent outcome from it. The focus of the inquiry, according to the appellate opinion, should be on "the status of the hirer."[9] The opinion found "it unlikely the Legislature intended a regulatory scheme addressed to commercial enterprises, Cal-OSHA, to apply to a homeowner who hires someone to remodel his personal residence" because "[h]omeowners are no better equipped to understand and comply with OSHA requirements simply because they decide to remodel their home instead of hiring someone to trim trees on their property."[10]

Presiding Justice Epstein concurred but wrote separately to express his misgivings about equating the extensive remodeling in this case with the tree-trimming in *Fernandez* simply because both were undertaken "to enhance the owners' enjoyment of their residences."[11] He concluded that while "[w]e decline to suggest that every project undertaken by a homeowner is exempt, . . . it is difficult to see where a reasonable line would be drawn if the work in this case satisfies the exemption."[12]

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[9] *Cortez, supra*, 98 Cal.Rptr.3d at 835.

[10] *Id.*

[11] *Id.* at 270.

[12] *Id.*

ARGUMENT

I. HOMEOWNERS WHO ENGAGE IN NONCOMMERCIAL HOME REMODELING PROJECTS OF THEIR PERSONAL RESIDENCES BY HIRING UNLICENSED CONTRACTORS ARE NOT SUBJECT TO OSHA REQUIREMENTS, INCLUDING TORT LIABILITY TO THE CONTRACTOR'S EMPLOYEES WHO ARE INJURED ON THE REMODELING JOB.

A. Neither the Plain Language of Cal-OSHA or Section 2750.5 Makes Homeowners who Hire an Independent but Unlicensed Contractor the "Employer" for Purposes of Tort Liability to Workers Hired by the Contractor Who Sustain On-the-Job Injuries.

The starting point for ascertaining the scope and application of any statute is the *plain language* of the measure itself. "It is axiomatic that in the interpretation of a statute where the language is clear, its plain meaning should be followed." (*Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155.) Here plaintiff rests his case on two principal statutes, Cal-OSHA and section 2750.5, neither of which impose by their "plain language" liability upon homeowners as "employers" to third-parties who are hired by the independent contractor, licensed or not.

Cal-OSHA is, as plaintiff admits[13] and courts acknowledge,[14] modeled on the federal OSHA; and that law defines an "employer" as a "person" who engages in "a business affecting commerce who has employees." (29 U.S.C. § 652(5) (2000).) This definition would seem to facially exclude a homeowner whose home is not a

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[13] Appellant's Opening Brief on the Merits (AOB), p. 12.

[14] *E.g.*, *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 541.

"business affecting commerce" and who, as here, hires an unlicensed contractor for improvement of the homeowner's personal residence.

Similarly, Cal-OSHA does not define a homeowner in this situation as an "employer" of the contractor's workers, but instead makes clear that "general supervision of an independent contractor's work, without direction of operative detail, does not make an owner a statutory employer bound by safety regulations of the Labor Code." (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245.) Further, section 2750 defines the "contract of employment" as "a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person." Yet here the homeowners had no agreement with plaintiff, but only with Ortiz, an unlicensed contractor who hired plaintiff on his own. Thus section 2750.5 applies to the relationship between plaintiff and Ortiz, not plaintiff and defendant homeowners.

The "plain language" of section 2750.5 does not convert homeowners into "employers" of workers hired by unlicensed contractors the homeowners retain to remodel their personal residences. Indeed, as Justice Brown explains in her concurring opinion in *Fernandez*, it "seems unlikely the Legislature intended this result when it enacted section 2750.5." (*supra*, 31 Cal.4th at 42.) Thus at the very least, as respondent astutely remarks, "section 2750.5 is ambiguous about the role . . . a license plays in determining whether someone is an employee."[15]

[15] Answer Brief on the Merits (ABM), p. 12.

B. Reading Section 2750.5 in its Entirety and Harmonizing its Various Provisions with its Legislative History and Purpose Makes Clear That a Homeowner Engaged in Remodeling of His or Her Personal Residence Is Not an "Employer" of an Unlicensed Contractor's Workers for Purposes of Tort Liability for Their On-the-Job Injuries.

When the "plain language" of pertinent statues do not, as is obviously the case with Cal-OSHA and section 2750.5, clearly reveal their scope and application, courts must turn to canons of statutory interpretation to resolve ambiguities. One of these canons requires that the provisions of related statutes must be read *in pari materia*, "giv[ing] meaning to every word and phrase . . . to accomplish a result consistent with the legislative purpose." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.)

Since the "penultimate" paragraph of section 2750.5 seems, contrary to subsections (a) through (c) thereof, to make licensure a *sine qua non* instead of just one factor to be considered for a person to have "independent contractor" as opposed to "employee" status, the entirety of the statute must be harmonized and interpreted to give effect to other statutes with which it relates. "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal.3d 1379, 1387.)

For starters, homeowners in the position of defendants are expressly exempt from the contract licensing statutes.[16] This renders the penultimate paragraph of section 2750.5, which plaintiff claims requires a contractor to be licensed or else be deemed an "employee," irrelevant to this case. Defendant homeowners are not, as Bus. & Prof. Code § 7044 (c) provides, required to be licensed so *a fortiori* their failure to procure a license cannot make them an employer by operation of section 2750.5.

Next, construing section 2750.5 the way plaintiff argues it should be read turns the *purpose* of the contractor licensing laws on their head. "[I]f a statute is to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense."[17] "The *purpose* of the licensing law

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[16] Bus. & Prof. Code § 7044(c) provided, in pertinent part until its amendment and renumbering and lettering of subsections in 2009 that "[t]his chapter [concerning licensing of contractors] does not apply to . . . [a] homeowner improving his or her principal place of residence . . ., provided . . . all of the following conditions exist: (1) [t]he work is performed prior to sale; (2) [t]he homeowner has actually resided in the residence for the 12 months prior to completion of the work; [and] (3) [t]he homeowner has not availed himself or herself of the exemption in this paragraph on more than two structures more than once during any three-year period. (b) In all actions brought under this chapter, both of the following shall apply: (1) Except as provided in paragraph (2), proof of the sale or offering for sale of a structure by or for the owner-builder within one year after completion of the structure constitutes a rebuttable presumption affecting the burden of proof that the structure was undertaken for purposes of sale. (2) Proof of the sale or offering for sale of five or more structures by the owner-builder within one year after completion constitutes a conclusive presumption that the structures were undertaken for purposes of sale."

Plaintiff contends that defendant homeowners sold or "flipped" the house "shortly after" the project was completed in September 2007, but defendants are more specific and, accordingly, more credible in stating that they "transferred their house to a third party in April 2008 (some five or six years after they bought the residence and two years after the plaintiff's injury)." Compare AOB p. 18 with ABM p. 8.

[17] Karl Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed* (1950) 3 *VAND. L. REV.* 395, 400 (italics added), reprinted in Singer, *STATUTES AND STATUTORY CONSTRUCTION* §48A:08, p. 639 (2000 ed.).

is to protect the public from incompetence and dishonesty in those who provide building and construction services. [Citation.] The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995; emphasis added.)

Plaintiff's construction of section 2750.5 would, however, turn every unlicensed worker on a remodeling job into an *employee* entitled to all the rights of employees, including compensation for the labor they render. This is contrary to the legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. "Section 7031(a) [of the Bus. & Prof. Code] will be applied, regardless of equitable considerations, even when the person for whom the work was performed has taken calculated advantage of the contractor's lack of licensure. Thus, it matters not that the beneficiary of the contractor's labors knew the contractor was unlicensed. [Citations.]" (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 423-424.)

Third, and finally, ambiguity in statutes can sometimes be resolved by resort to the legislative history of the enactment. When the legislative history of section 2750.5 is examined it shows that "[t]here is *no* indication . . . the Legislature intended section 2750.5 to apply to a homeowner who hires an unlicensed contractor. (Sen. Floor Statement, Assem. Bill No. 3429 (1977-1978 Reg. Sess.) p. 2 ["This bill only

covers construction workers and doesn't cover other employers or employees"].) "Indeed, a contractor or construction worker would reasonably be expected to be familiar with licensing and safety law requirements, whereas the average homeowner would not." (*Fernandez, supra*, 31 Cal.4th at 43-44 (Brown, J., concurring opinion.).)

C. To Hold that Section 2750.5 Makes Homeowners the Employers of an Unlicensed Contractor's Workers and Imposes Cal-OSHA Requirements Applicable to Remodeling Projects by Homeowners is "Absurd."

Another canon of construction that aids in resolving the statutory ambiguity we have here is the one cautioning courts to avoid reaching "absurd" results. "We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.] (*San Diego County Employees Retirement Assn. v. County of San Diego* (2007) 151 Cal.App.4th 1163, 1174; *People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.)

What can be more absurd than to claim the Legislature voted to impose upon homeowners who seek to remodel their personal residences the many and often onerous requirements of Cal-OSHA? These requirements include, *inter alia*,

- Compliance with Proposition 65 warning requirements for any and all chemicals that may be hazardous if inhaled or touched. (Cal. Code Regs., tit. 8, § 5194(b)(6).)
- Placement of barricades around the exposed edges of an opening in the flooring or failure to place a cover over the opening capable of supporting 400 pounds. "This section shall apply to temporary or

emergency conditions where there is danger of employees or materials falling through floor, roof, or wall openings, or from stairways or runways," and requires, "[f]loor, roof and skylight openings . . . be guarded by either temporary railings . . . or by covers." (Title 8, section 1504 of the California Code of Regulations defines an opening as " 'an opening in any floor or platform, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladder-way floor openings, hatchways and chute floor openings.' ")

- Provide fire extinguishers to employees of a contractor hired to work near fuel tanks.
- When working on equipment that can be energized or has moving parts, ensure that it is brought to a zero mechanical state – a safe state – before performing any maintenance, adjustments, repair, or testing on the unit. The lock-out/tag-out standard must be written and specific to the equipment and activities the employer is engaged in, and the employees must be trained in it.
- Establishment of a "protective system" for excavations five feet or deeper. (Title 8, section 1541.1.)
- To neither require nor permit any employee to perform any function in proximity to energized high-voltage lines unless and until danger from accidental contact with said high-voltage lines has been effectively guarded against. (California Code of Regulations, title 8, section 2946, subdivision (a).)

- The "capping" of exposed rebar on work sites. (Cal. Admin. Code, tit.8, § 1712.)

These obligations are, of course, illustrative, not exhaustive of Cal-OSHA requirements properly imposed on "employers," especially those who are independent contractors, but not "homeowners" exempt from contract licensure. They provide the Court a strong sense of how difficult and expensive home remodeling jobs will become if these myriad Cal-OSHA duties are imposed on homeowners pursuant to the theory advanced by plaintiff that they become "employers" merely because they hire unlicensed contractors.

It's time for a reality check. If the Court agrees with plaintiff's spin on how section 2750.5 is to be construed and applied, then homeowners will be effectively prevented from engaging in remodels of their personal residences. This result is counter to common-sense and sound public policy. It is not a result the Legislature would foist upon California homeowners. "If," as Mr. Bumble reportedly said, plaintiff's view of the law were to prevail, "then the law is a ass – a idiot." (Dickens, *OLIVER TWIST* (1838).)

II. PLAINTIFF IS BARRED BY THE "UNCLEAN HANDS" AND "*IN PARI DELICTO* " DOCTRINES FROM PROSECUTING THE HOMEOWNER DEFENDANTS FOR INJURIES HE SUSTAINED WHILE WORKING ON THE REMODEL OF THEIR PERSONAL RESIDENCE.

"In California, the doctrine of unclean hands may apply to legal as well as equitable claims . . . and to both tort and contract remedies . . . ." (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 638 (citations omitted).) The unclean hands doctrine is synonymous with the *in pari delicto* doctrine in California.

(11 B.E. Witkin, *SUMMARY OF CAL. LAW, EQUITY* § 8 (9th ed. 1990).) Applications of the *in pari delicto* principle must respect equitable considerations and public policy. As the court explained in *Norwood v. Judd* (1949) 93 Cal.App.2d 276, 288-289: "The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy."

Plaintiff contends that the homeowner defendants are liable to him because they hired an unlicensed contractor, Ortiz, who in turn hired him, also an unlicensed worker. But the doctrine of *in pari delicto* or unclean hands bars him from prosecuting defendants in tort to compensate for his injuries. Plaintiff is at least as culpable as defendants; in fact, his culpability is greater than theirs in hiring a contractor they did not know was unlicensed because the law requires *contractors*, not homeowners,[18] to be licensed for the protection of consumers – *e.g.*, the homeowner defendants.

As *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141 explains:

> The class protected by the [Contractor Licensing Laws] includes those who deal with a person required by the statute to have a license. When the person required to have a license is a general contractor, then the protected class includes subcontractors, materialmen, employees, and owners dealing with the general contractor. However, when the person who was required to have a license but

[18] Bus. & Prof. Code §7044 (c)

> did not have one is himself a subcontractor, such as plaintiff in the present case, he of course is not to be protected from his own unlicensed activities. To allow him to recover would in fact destroy the protection of those who dealt with him, and they are in the class the Legislature intended to protect whether they are owners or general contractors. Cf. *Hedlund v. Sutter Medical Service Co.* (1942) 51 Cal.App.2d 327, 333; 2 Pomeroy, *EQUITY JURISPRUDENCE* 142 (5th ed. 1941) . . . Under the facts of the present case plaintiff is not in the class to be protected, and therefore, is not relieved from the imputation of being *in pari delicto*. [His] failure to obtain a license, and not any fault of defendant in this regard, made the transaction illegal.[19]

CONCLUSION

For all the reasons aforementioned, amicus urges the Court to affirm the judgment of the Superior Court.

Dated: June 24, 2010

By_____/s/_____
Fred J. Hiestand
General Counsel for *Amicus Curiae*
The Civil Justice Association of California

[19] *Id.* at 153-154.

CERTIFICATE OF WORD COUNT

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Date: June 24, 2010

/s/
Fred J. Hiestand

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I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is The Senator Office Building, 1121 L Street, Suite 404, Sacramento, CA 95814.

On June 24, 2010, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in Support of Defendants/Respondents in *Octaviano Cortez v. Lourdes Abich, et al.,* S177075 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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[X](BY MAIL) I am readily familiar with the practice of the Senator Office Building for the collection and processing of correspondence for mailing with the United States Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 24th day of June 2010 at Sacramento, California.

David Cooper