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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RAMTIN VAHEDY,

Plaintiff and Respondent,

v.

DYMOND FRAMING AND LUMBER CORPORATION et al.,

Defendants and Appellants.

G041679

(Super. Ct. No. 07CC07148)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

Jampol Zimet Skane & Wilcox, Alan R. Jampol and Scott G. Greene for Defendants and Appellants.

Kerr & Sheldon and Brian P. Trela for Plaintiff and Respondent.

Dymond Framing and Lumber Corporation, and Dymond, Inc. (hereafter collectively and in the singular "Dymond"), appeal from a judgment after a jury trial awarding Ramtin Vahedy damages for personal injuries sustained after he suffered a serious accident in his house as it was undergoing remodeling work. The jury was instructed on two theories of negligence: negligence per se based on violation of regulations and safety orders promulgated under California Occupational Safety and Health Act (Cal-OSHA) (Lab. Code, § 6300), and common law negligence. Dymond contends the evidence is insufficient to support a judgment on either theory. We disagree and affirm the judgment.

FACTS

In January 2007, Vahedy was remodeling his home. He did not hire a general contractor. Rather, Vahedy individually hired licensed subcontractors. Vahedy, who was generally away from home between the hours of 7:00 a.m. and 7:00 p.m., paid his friend, Kourosh Ghazioff, a painting subcontractor, to be his "eyes and ears" on the job and to coordinate the day-to-day activities at the worksite. Ghazioff was responsible for relaying Vahedy's directions to the various subcontractors and reporting to Vahedy on the progress of the remodel.

The two-story house contained an "L-shaped" staircase leading from the ground floor entryway up to the second floor. A series of stairs led to a landing situated roughly seven feet above the ground floor, yet approximately three feet shy of the second floor. To reach the second floor from the landing, it was then necessary to make a 90-degree turn to the right and ascend three more stairs. Located directly beneath the landing was a ground floor closet containing concrete steps leading down to a wine cellar. As part of the remodel, Vahedy contracted with Dymond to replace the existing "L-shaped" staircase with a circular staircase.

On January 17, 2007, Dymond employees removed the first set of stairs leading from the ground floor to the intermediate landing, as well as the landing itself.

At the close of the workday, all that remained was the exposed drywall ceiling, or lid, of the underlying closet. Vahedy and Ghazioff testified no railings or other barriers were placed around the exposed drywall lid. David Guerrero, Dymond's foreman on the job that day, testified a guardrail was placed on the second floor to prevent access to the removed landing area. However, Guerrero also testified he did not order the placement of a barricade on the edge of the drywall lid that dropped off seven feet to the ground floor because he determined it was inaccessible.

Throughout the day on January 17, Guerrero informed the other subcontractors on the worksite "it was very dangerous" in the area surrounding the stairs. Guerrero gave further instructions that everybody should use the "ladder outside on the deck" rather than the one inside the house to access the second floor.

Additionally, during the workday on January 17, Ghazioff reminded subcontractors to stay away from the staircase and to use the ladder outside the structure to access the second floor. Ghazioff informed Vahedy over the course of three or four telephone conversations the staircase had been removed. He did not specifically tell Vahedy the area surrounding the removed staircase was dangerous, and he did not inform Vahedy of the alternate method of reaching the second floor.

Vahedy visited the house almost daily to inspect the work being done. He regularly would come at night, and had met Rick Dymond, the Dymond official in charge of the staircase project, on two previous evenings at the house. The house was without electricity, so on those nights Vahedy met with Rick Dymond, and when he visited alone, he used a flashlight to navigate the dark structure.

During a telephone conversation on January 17, Vahedy told Ghazioff he was not required to wait for him at the jobsite after work ceased for the day. Ghazioff understood they would meet the following morning, although Vahedy never stated he would not come by the house that evening. Vahedy arrived at the house around 7:00 p.m.

that night after all the subcontractors had left. It was dark outside. He entered the house and used his flashlight to first inspect the ground floor.

Flashlight in hand, Vahedy scaled a ladder leading from the ground floor to the area where the intermediate landing once existed. Vahedy testified the ladder was already standing upright in this position when he arrived. Ghazioff testified there were ladders in the room when he left for the evening, though there was no ladder left in position leading to the intermediate landing area above the ground floor closet. Dymond personnel on the site that day testified they left no ladders standing upright inside the house. They further testified it was not their ladder that Vahedy used to access the intermediate landing.

Upon reaching the top of the ladder, Vahedy used his flashlight to illuminate the flat surface of the landing area. He saw no debris, and determined no wood or substructure had been put in place. Vahedy then shined his flashlight on the second floor area just above the intermediate landing and determined it was also free from debris. Structurally, the landing area appeared no different from the adjacent but elevated second floor to Vahedy. Unaware he was stepping onto drywall, Vahedy then removed his left foot from the ladder and placed it on the closet ceiling. He then removed his right foot from the ladder, and placed it on the drywall. The drywall lid could not support his bodyweight. It instantly gave way. Vahedy fell from the intermediate landing area, through the first floor closet, and down the steps leading into the subterranean wine cellar, severely injuring himself. When Vahedy's wife notified Dymond of her husband's accident, no Dymond employee or official ordered, or performed, a formal investigation of the accident scene.

Vahedy filed a complaint against Dymond alleging causes of action for both negligence and premises liability. A jury trial commenced at which Vahedy claimed Dymond violated California Code of Regulations, title 8, section 1632 ("section 1632"), a Cal-OSHA provision, by failing to place barricades of any form around the exposed

edges of an opening in the flooring or to place a cover over the opening capable of supporting 400 pounds. Section 1632, subdivision (a), provides, "[t]his 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." (§ 1632, subd. (b)(1).) 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.'"

Vahedy presented evidence Dymond's internal Injury and Illness Prevention Plan (IIPP) contained a "Code of Safe Practices" stating, "[i]t is our policy that everything possible will be done to protect employees, customers, and visitors from accidents . . . Supervisors shall insist that employees observe all applicable Company, State, and Federal safety rules and practices . . . ." Listed within the Code of Safe Practices is a set of "general practices" that employees must follow, including: "[g]uard floor openings by a cover, guardrail, or equivalent." Further, it defines an "opening" as a "gap or void 30 inches or more by 18 inches or more through which an employee can fall to a lower level." The IIPP also required written records be kept documenting each employee's safety training. Dymond provided no documented safety training to employees. There was conflicting evidence as to whether employees were given on the job safety training.

Over Dymond's objection, Vahedy's construction expert, Robert Harding, testified the removal of the intermediate landing area that exposed the drywall lid of the underlying closet created a floor opening as defined by Cal-OSHA provisions and Dymond's Code of Safe Practices, both of which require the safeguarding of such an opening on all exposed edges, or the installation of a load bearing cover to act as a

"temporary floor." Additionally, Harding testified it was the custom and standard of the industry to safeguard such openings in this manner.

Dymond presented expert testimony the removal of the landing area did not create a floor opening or void in the flooring. Dymond's expert opined Cal-OSHA provisions did not require the erection of a barricade across the edge of the drywall lid where the intermediate landing previously met the ground floor stairs because the area was not reasonably accessible from that direction. He explained that because the drywall closet ceiling was "not part of a continuous walkway or passageway" it did not constitute "a gap or a void" as defined in Dymond's Code of Safe Practices.

The trial court instructed the jury on general negligence, negligence per se, and contributory negligence. The jury returned a special verdict in favor of Vahedy, awarding $1,552,895 in total damages, though also finding him 65 percent at fault in the accident. A judgment on special verdict was entered granting a net award of $543,513 to Vahedy. Dymond's subsequent motion for judgment notwithstanding the verdict was denied.

DISCUSSION

*A. Negligence Per Se*

Dymond contends there is insufficient evidence to support the jury verdict on a negligence per se theory. In short, it contends negligence per se cannot be based on the alleged violation of the Cal-OHSA provisions because they apply only to protect workers on the construction site, not third persons, such as a homeowner, who might be injured on the jobsite. It also contends there is insufficient evidence to support the conclusion it violated the Cal-OSHA provisions. We disagree.[1]

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[1] In view of this conclusion, we need not consider whether Dymond's Code of Safe Practices stating its policy that everything possible "will be done to protect employees, customers, and visitors from accidents," and pledging to observe all "applicable Company, State, and Federal safety rules and practices" extended the protection of section 1632 to nonemployees.

To prevail on a negligence cause of action the plaintiff must demonstrate: "(1) defendant's obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks (duty); (2) failure to conform to that standard (breach of the duty); (3) a reasonably close connection between the defendant's conduct and resulting injuries (proximate cause); and (4) actual loss (damages)." (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 279.) In California, the Legislature has codified the common law doctrine of negligence per se in Evidence Code section 669, which allows plaintiffs under certain circumstances to utilize a statutory violation to raise a presumption of negligence. (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 927 (*Elsner*); *Hoff v. Vacaville Unified School Dist*. (1998) 19 Cal.4th 925, 938 (*Hoff*).)

Evidence Code section 669, subdivision (a), provides, "The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." Here, the trial court's negligence per se instruction (CACI No. 418) was based on section 1632. The court instructed the jury that if it found Dymond violated that provision, and the violation was a substantial factor in bringing about Vahedy's harm, it must find Dymond negligent unless it found the violation was excused.

The first two prongs of the negligence per se analysis, violation of a statute and proximate causation, relate to findings of fact and are reviewed under a substantial evidence standard. (*Norman v. Life Care Centers of America, Inc*. (2003) 107 Cal.App.4th 1233, 1247-1248.) Prongs three and four, whether the resulting harm was of the type the statute was designed to prevent, and whether the plaintiff is a member

of the statute's intended protected class, are questions of law reviewed de novo. (See *Hoff, supra,* 19 Cal.4th at p. 938; *Achene v. Pierce Joint Unified School Dist.* (2009) 176 Cal.App.4th 757, 765-766.) We consider first the questions of law.

*1. Harm to be Prevented and Class of Persons Protected: Questions of Law*

There is no dispute Vahedy's injuries were of the type section 1632 was designed to prevent—he sustained injuries as the result of a fall at a construction project. Rather, Dymond contends Vahedy is not within the class of persons Cal-OSHA provisions, and specifically section 1632, were adopted to protect. Thus, it urges violation of a Cal-OSHA provision cannot be the basis of liability on a negligence per se theory in an action brought by a nonemployee.

There was a time when Dymond would have been correct. In 1971, the Legislature enacted Labor Code section 6304.5, creating "an exception to the long-standing common law rule, codified in Evidence Code section 669, that statutes may be admitted to establish a standard or duty of care in negligence actions[]" (*Elsner, supra,* 34 Cal.4th at p. 923), making Cal-OSHA provisions inadmissible except in "proceedings against employers . . . ." (Stats. 1971, ch. 1751, § 3, p. 3780; see *Brock v. State of California* (1978) 81 Cal.App.3d 752, 756 (*Brock*).) But in 1999, Labor Code section 6304.5, was substantially amended to provide "[s]ections 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."[2]

[2] Labor Code section 6304.5 now provides: "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. [¶] 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

In *Elsner, supra,* 34 Cal.4th at page 925, plaintiff was an employee of a subcontractor and was injured on the job in a fall from faulty scaffolding built under the worksite general contractor's supervision. (*Id*. at p. 925.) In the subsequent negligence action, the general contractor sought to exclude "references to Cal-OSHA provisions and their alleged violation" on the grounds section 6304.5 made them "inadmissible for any purpose in an employee's third party action." (*Id.* at p. 924.) The Supreme Court held under the Labor Code section 6304.5 as amended "henceforth, Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in *all* negligence and wrongful death actions, including third party actions." (*Id.* at p. 928, italics added.) "[P]laintiffs may use Cal-OSHA provisions to show a duty or standard of care to the same extent as any other regulation or statute, whether the defendant is their employer or a third party. The lone exception arises when the state is the defendant based on actions it took or failed to take in its regulatory capacity; in such cases, Cal-OSHA provisions remain inadmissible to show liability based on breach of the statutory duty to inspect worksites and enforce safety rules." (*Id.* at pp. 935-936.)[3]

While acknowledging the holding in *Elsner*, Dymond nonetheless argues Cal-OSHA provisions and section 1632 specifically, by their own terms, apply only to

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occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation. The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards. 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*[*, supra,*] 8l Cal.App.3d 752."

[3] In *Elsner*, because the accident occurred prior to the amendment of Labor Code section 6304.5, the Supreme Court ultimately found reversible error due to the lower court's retroactive application of the burden-shifting component of the negligence per se analysis. (*Elsner, supra*, 34 Cal.4th at p. 938.) However, we are still bound by the Supreme Court's interpretation of the amendments.

contractors, their employees, and workers on the site. Thus, Vahedy, as the homeowner, does not fall within the protected class for negligence per se purposes. It is wrong.

Preliminarily, Dymond's reliance on *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, is misplaced. It held Cal-OSHA provisions inadmissible to establish duty absent an employee-employer relationship between plaintiff and defendant. (*Id.* at p. 1039.) But that case was based on the *original version* of Labor Code section 6304.5, not the current version. Similarly, Dymond's reliance on *Brock, supra,* 8l Cal.App.3d 752, another case holding Cal-OSHA regulations inadmissible in actions by a nonemployee, is misplaced. Although the amended Labor Code section 6304.5, states the Legislature intended the amendment would "not abrogate the holding in *Brock*" *Elsner*, *supra*, 34 Cal.4th at page 932, explained the reference to *Brock* was intended only to preserve the narrow exception to admissibility in "suits against the State of California based on the duty to inspect worksites and enforce safety rules . . . ." We, of course, are bound by that conclusion. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

Dymond points to Labor Code section 6300, which reads in part, "[Cal-OSHA] is hereby enacted for the purpose of assuring safe and healthful working conditions for all California working men and women . . . ." While there is no doubt California's workers were the primary group of persons the Legislature enacted Cal-OSHA to protect, given the 1999 amendments to Labor Code section 6304.5 that authorized use of Cal-OSHA provisions in all actions, we cannot read Labor Code section 6300 as anything more than a general statement of purpose of Cal-OSHA, not a limitation on use of its provisions.

Dymond also points to the first paragraph of the Labor Code section 6304.5, as amended, which reads in part, "[i]t 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." But, in *Elsner* the Supreme Court recognized a subject matter division between the first paragraph, relied upon by Dymond, and the second paragraph of Labor Code section 6304.5. "The first paragraph of [Labor Code] section 6304.5 addresses the applicability of Cal-OSHA provisions to administrative proceedings brought by the Division of Occupational Safety and Health against employers to enforce worker safety standards. The provisions of Cal-OSHA are broadly applicable to such proceedings. This paragraph has no bearing on [trial court personal injury] actions such as the one in this case. [¶] The second paragraph of [Labor Code] section 6304.5 catalogues the rules for the admissibility of Cal-OSHA provisions in trial court personal injury and wrongful death actions." (*Elsner, supra*, 34 Cal.4th at p. 935.) In other words, Dymond mistakenly relies on language that relates to the applicability of Cal-OSHA regulations in administrative proceedings that has no bearing on the use of Cal-OSHA regulations in private actions, like the one before this court.[4]

Although *Elsner* involved a worker's action for jobsite injuries against a third party, Dymond offers no compelling argument as to why its holding is not equally applicable to a negligence action by a nonworker who is on the premises. Indeed, *Cappa v. Oscar C. Holmes, Inc*. (1972) 25 Cal.App.3d 978, 982 (*Cappa*), is instructive in this regard. In *Cappa*, plaintiff parked on the second floor of a parking garage that was under construction in a section open for public use. He decided to take a shortcut through an "incompleted area" void of "fences or railings[,]" where he fell over the side and was

[4] Similarly, California Code of Regulations, title 8, section 1502, subdivision (a), mentioned in passing by Dymond, which provides, "[t]hese orders establish minimum safety standards whenever employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts" evidences Cal-OSHA's primary intent to protect workers, but does not limit the class of persons protected by Cal-OSHA to employees or contractors.

injured. (*Id*. at p. 980.) In the ensuing negligence action brought against the contractor, the trial court instructed the jury on negligence per se based on a prior version of section 1632 that read, "(a) If sheathing or any other surfacing provides a passageway that extends to any side of a floor or roof opening through which a man or material might fall, such opening shall be covered with planks or other secure covering of adequate strength to support any load that might be placed thereon, or it shall be fenced on all sides by a railing and toeboard." (*Cappa, supra,* 25 Cal.App.3d at p. 981, fn. 1.) On appeal, the court rejected defendant's argument the safety order was intended only for the protection of workers on the jobsite and was thus inadmissible to prove negligence per se. (*Cappa, supra,* 25 Cal.App.3d at p. 981.) The *Cappa* court held that although the primary purpose of the safety order was the protection of workers, "it has consistently been held, at least where the safety order does not indicate the contrary, that persons consensually on the premises to which a safety order applies also come within its protection." (*Id.* at pp. 981-982.)

Dymond offers no convincing argument as to why the rationale of *Cappa* does not apply here. Vahedy, the homeowner, is certainly a person consensually on the worksite. Dymond's contention modifications to section 1632 and Labor Code section 6304.5 made after *Cappa* eviscerate *Cappa*'*s* reasoning is unavailing. Dymond notes the version of section 1632 addressed in *Cappa* concerned "a floor or roof opening through which *a man or material* might fall" (*Cappa, supra*, 25 Cal.App.3d at p. 981, fn. 1, italics added), whereas section 1632 now applies in situations "where there is danger of *employees or materials* falling . . . ." (§ 1632, subd. (a), italics added.) But the exchange of the word "employee" for the word "man" suggests nothing more than a move toward gender neutrality in the provision's wording, not a change in the persons safeguarded by the safety regulation.

Furthermore, even if the 1971 enactment of Labor Code section 6304.5 restricting the use of Cal-OSHA regulations in third party negligence per se actions made

*Cappa's* reasoning obsolete,[5] the 1999 amendment revived it. As the Supreme Court in *Elsner* reasoned, "the most sensible explanation of the . . . amendment is . . . [it] restor[ed] the pre-1971 state of affairs, under which statutes could be admitted to establish a presumption of negligence only when the requirements of Evidence Code section 669 were met . . . ." (*Elsner*, *supra*, 34 Cal.4th at p. 931.) Indeed, *Elsner* cited *Porter v. Montgomery Ward & Co., Inc*. (1957) 48 Cal.2d 846 (*Porter*), in which a business invitee consensually on the premises relied on violation of a Cal-OSHA regulation to raise a presumption of negligence, as an example of the now restored pre-1971 use of Cal-OSHA regulations by third parties in negligence per se actions. (See *Elsner, supra*, 34 Cal.4th at p. 926.) The Supreme Court's citation of *Porter* indicates it recognized Cal-OSHA regulations were used prior to 1971 by nonemployees in negligence actions, and that it anticipated their continued use in this manner after the amendments to Labor Code section 6304.5, provided the specific regulation permitted such use. This view also is consistent with the sweeping language of Labor Code section 6304.5, "[s]ections 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*." (Italics added.)

We note further, the rationale expressed by the Supreme Court in *Porter* is equally germane here, "a distinction between a person who enters a department store at the direction of his employer and one who comes there for the same purpose on his own initiative would be unreasonable and productive of anomalous results." (*Porter, supra,* 48 Cal.2d at p. 849.) Refusing to extend the protection of a safety regulation to persons rightfully present at the worksite because they are not "employed by someone" would be nonsensical. (*Ibid*.) By refusing to adopt Dymond's interpretations of section 1632 and

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[5] Although *Cappa* was decided in 1972, plaintiff's injury and the trial occurred prior to the operative date of the original statute. (See *Cappa, supra*, 25 Cal.App.3d 978; previous Labor Code section 6304.5.)

Labor Code section 6304.5 we avoid producing precisely this sort of bizarre outcome. After considering the 1999 amendments to the Labor Code, it is difficult to conceive the Legislature intended something different.

*2. Violation of Statute and Proximate Cause: Questions of Fact*

Having concluded Cal-OSHA, and section 1632 specifically, were properly applied by the trial court within the negligence per se context of this case, we turn to whether a violation of the safety regulation was established and was the proximate cause of Vahedy's injuries. (See *Norman v. Life Care Centers of America, Inc*. (2003) 107 Cal.App.4th 1233, 1247 [violation of statute, ordinance, or regulation generally a question of fact].) There is no dispute as to the latter and there is substantial evidence of the former.

In applying the substantial evidence standard of review, "All conflicts in the evidence are resolved in favor of the prevailing party, and all reasonable inferences are drawn in a manner that upholds the verdict. [Citation.]" (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) "'When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Dymond contends substantial evidence could not support a finding that there was a "floor opening," or void in the floor, because there was no floor. It is Dymond's position, as its expert articulated at trial, that no "opening" could exist on a stairway or landing that was completely removed and therefore did not exist. Dymond does not challenge the jury's finding the area was not safeguarded according to the requirements of the regulation. It simply asserts no safeguarding was required because there was no "opening."

There is evidence Dymond removed the ground floor stairs leading to the intermediate landing and the landing itself. What remained just beneath where the landing area previously existed was the lid of the underlying ground floor closet, a flat drywall surface incapable of bearing a person's weight. Dymond left this drywall surface in place and unguarded precisely where just hours before there had been a load bearing floor. Vahedy's expert testified the removal of the landing created an "opening" as defined by California Code of Regulations, title 8, section 1504, which describes "an opening in any floor or platform, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladderway floor openings, hatchways and chute floor openings." Dymond's expert disagreed, but the jury was free to choose the more convincing opinion. The jury could reasonably conclude Dymond created an "opening" and was required to safeguard that opening pursuant to section 1632.

*B. Common Law Negligence*

Although we conclude substantial evidence supports the jury's verdict on a negligence per se theory, we also turn briefly to the alternate common law negligence theory. The jury was instructed on both statutory and common law negligence. The special verdict found Dymond 35 percent negligent and Vahedy 65 percent at fault but did not distinguish as to the theory used.

Dymond contends, as a matter of law, it had no duty to erect a barricade to prevent access to the landing area. "The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion [citations]. Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court. [Citations.]" (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.)

We have already concluded section 1632 is applicable. This regulation therefore is relevant to establish the standard of care for the framing industry in relation

to the safeguarding of fall hazards. The jury found Dymond breached that standard of care by failing to abide by the statutory requirements of section 1632. Dymond nonetheless asserts the harm suffered by Vahedy was simply too unforeseeable to impose a duty here. We disagree.

The day of the accident Dymond's supervisor on the jobsite, Guerrero, informed everyone on the jobsite the area surrounding the staircase project was "very dangerous." He gave instructions that all persons should use a ladder outside to access the second floor, rather than use one inside the house. Thus, Dymond personnel were quite aware of the dangerous conditions created by the staircase project. Specifically, they were conscious of the risks facing those attempting to access the second floor from inside the house.

Dymond asserts there was no reason to think Vahedy would visit the house on the night of the accident, let alone scale a ladder leading to an area of the home he knew was under heavy construction, in the dark, with only a flashlight illuminating his path. The evidence suggests otherwise. Dymond personnel knew Vahedy regularly visited the worksite in the evenings. He had personally met Rick Dymond at the house on at least two prior occasions. At both meetings, the two used flashlights because portions of the house were without electricity. Further, any person arriving at the worksite after Dymond left for the day, or any person not present the day before who beat Dymond to the worksite the next morning, would not immediately know to walk around the back of the house to access the second floor. Thus, it was foreseeable Vahedy, or some other person consensually on the premises, might encounter the dangerous conditions presented by the staircase project before Dymond resumed work the next day.

Dymond contends imposing a duty here is unwarranted because "tort law is not designed to protect people from their own stupidity[,]" and because no "reasonable

person in [Dymond's position] could or would have anticipated [Vahedy's act of] 'derring-do.'" Dymond goes on to caution against the costly consequences of "limitless obligations[.]" But the jury accounted for the degree to which it determined Vahedy's actions to be negligent by finding him 65 percent at fault, resulting in a reduction in the final damage award. Furthermore, no far-reaching policy considerations regarding increasing the costs of construction prevent imposing a duty here. All that was necessary for Dymond to avoid liability in this case was the erection of a simple barricade or guardrail in accordance with Cal-OSHA regulations.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.