New developments in California wildfire law

Presbyterian Camp and Conference Centers clarifies vicarious liability as it relates to causing wildfires

By Janine Sperandeo and Lexi Myer

With wildfire seasons continuing to expand in California, attendant legal liability issues surrounding the associated costs of fire suppression have been at the forefront of wildfire litigation. The Supreme Court of California has now clarified the reach of such issues as they relate to corporate liability for fire suppression costs.

Facts

In June 2016, a chimney malfunctioned in a cabin on property owned by petitioner Presbyterian Camp and Conference Centers, Inc. (Presbyterian), operating as Rancho La Sherpa in rural Santa Barbara County. An employee of Presbyterian overseeing operations of the camp and conference site responded to the malfunction and removed a smoldering log from the fireplace at issue. In transporting the log to an outdoor firepit, burning embers fell onto dry vegetation outside of the cabin and ignited a fire. The fire – named the Sherpa Fire – spread rapidly to adjoining properties and ultimately burned 7,474 acres of land, destroying one structure, before it was contained and extinguished.

Following an investigation, real party in interest, the California Department of Forestry and Fire Protection (CalFire), determined various forms of negligence and misdemeanor fire safety violations were responsible for the ignition and uncontrolled spread of the Sherpa Fire. CalFire incurred about $12.2 million in costs to suppress the Sherpa Fire, investigate its origins and pursue reimbursement for its expenses to do so.

CalFire sought recovery against Presbyterian, the employee overseeing the camp and various Doe defendants under California Health and Safety Code sections 13009 and 13009.1, which authorize recovery of fire suppression costs from "[a]ny person…who negligently…sets a fire, allows a fire to be set, or allows a fire kindled or attended by the person to escape." Presbyterian demurred, arguing that vicarious liability was not contemplated in these code sections and direct liability was not an appropriate basis for liability, where Presbyterian did not fail to act, or authorize or ratify the employee's

actions. Presbyterian relied on *Dep't of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154 (*Howell*), asserting CalFire could seek recovery costs only from Presbyterian's employee who directly ignited the fire.

Howell involved a wildfire, named the Moonlight Fire, in Plumas County that burned 65,000 acres over the course of multiple weeks. CalFire's investigation of the fire determined that the blaze started when two employees of a licensed timber operator struck a rock with a bulldozer, causing heated metal fragments to ignite plant matter. CalFire and other plaintiffs brought claims against the landowners and timber operator for recovery of fire suppression and investigation costs and monetary damages, based on Health and Safety Code sections 13009 and 13009.1. The *Howell* court found that sections 13009 and 13009.1 do not provide for vicarious liability and CalFire was barred from "pursuing claims against any defendant based on common law theories of negligence that have not been expressly included in sections 13009 or 13009.1." (*Howell*, 18 Cal.App.5th at 182.)

The Presbyterian trial court overruled petitioner's demurrer, concluding *Howell* disallowed vicarious liability premised upon the actions of independent contractors, but did not reach the issue of whether vicarious liability could arise because of actions by employees or agents. Instead, the trial court held that the law *did* contemplate liability in these circumstances.

The appellate court denied petitioner's writ of mandate challenging the trial court's order. (*Presbyterian Camp & Conference Centers., Inc. v. Superior Court* (2019) 42 Cal.App.5th 148, 152 (*Presbyterian I*).) Recognizing the "deeply rooted sentiment" behind vicarious liability in this state and engaging in a comprehensive analysis of the legislative history of California's fire liability statutes, it found no evidence that the California Legislature intended to abrogate a company's liability for an employee's negligent or illegal acts in this context. (*Presbyterian I*, 42 Cal.App.5th at 155-162.)

Holding

The Supreme Court of California granted review to resolve any conflict between *Howell* and *Presbyterian I* and establish whether sections 13009 and 13009.1 incorporated common law theories of vicarious liability.

Addressing the question of whether a corporation could be held vicariously liable for fire suppression costs solely on the basis of its employees' or agents' negligent or unlawful actions, the court affirmed the judgment of the appellate court and remanded for further proceedings. (*Presbyterian Camp & Conference Centers., Inc. v. Superior Court* (2021) 12 Cal.5th 493, 498 (*Presbyterian II*).) With Presbyterian unable to show clear and unequivocal legislative intent to the contrary, the court held that sections 13009 and 13009.1 incorporate the common law theory of respondeat superior.

The court made clear that its holding was limited to the theory of respondeat superior, disapproving *Howell* to the extent it found otherwise.

Analysis

The Health and Safety Code ascribes a separate chapter relevant to wildfire litigation, titled "Liability in Relation to Fires." Sections 13007 and 13008 impose liability for damages caused by fires, while section 13009 allows recovery of fire suppression costs and section 13009.1 allows recovery of investigation and accounting costs in connection with funds collected under section 13009.

Section 13007 states: "Any person who personally or through another willfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another, whether privately or publicly owned, is liable to the owner of such property for any damages to the property caused by the fire."

Section 13008 states: "Any person who allows any fire burning upon his property to escape to the property of another, whether publicly or privately owned, without exercising due diligence to control such fire, is liable to the owner of such property for the damages to the property caused by the fire."

Section 13009 states, in relevant part: "Any person…who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by the person to escape onto any public or private property…is liable for the fire suppression costs incurred in fighting the fire and for the cost of providing rescue or emergency medical services, and those costs shall be a charge against that person. The charge shall constitute a debt of that person, and is collectible by the person, or by the federal, state, county, public, or private agency, incurring those costs in the same manner as in the case of an obligation under a contract, expressed or implied."

Building on section 13009, section 13009.1 makes "[a]ny person…who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by the person to escape onto any public or private property" liable for "[t]he cost of investigating and making any reports with respect to the fire" and "[t]he costs relating to accounting for that fire and the collection of any funds pursuant to Section 13009, including, but not limited to, the administrative costs of operating a fire suppression cost recovery program." (Health & Saf. Code, § 13009.1, subd. (a)(1), (2).)

Presbyterian took the position that corporations could be held directly liable where a fire is started by an authorized or ratified act of a corporation's employees or agents, or by a corporation's failure to act. However, Presbyterian claimed that a legislative amendment to section 13009 in 1971 implicitly eliminated respondeat superior liability for fire suppression costs. Accordingly, Presbyterian argued it could not be held liable for the acts of its employee.

In making this argument, Presbyterian focused on the fact that the 1971 amendment of section 13009 deleted a

reference to section 13007, which imposes liability on any person who sets a fire "personally or through another." By failing to replicate this phrase in section 13009, Presbyterian contended that the Legislature intended to abolish an employer's liability for the actions of its employees.

To counter the traditional canons of statutory interpretation, Presbyterian also argued that, when section 13009 and predecessor statutes were enacted, there was no common law allowing a government entity's recovery of firefighting costs or any service funded by taxes. (See generally, *California Assn. of Health Facilities v. Dep't of Health Services* (1997) 16 Cal.4th 284, 297.) Therefore, according to Presbyterian, there was no need to reconcile section 13009 with the common law doctrine of respondeat superior, nor was there a need to show "clear and unequivocal" legislative language and intent to abrogate the doctrine from section 13009.

"Difficult to apply on a practical basis"

Generally, the court found that Presbyterian's theory was one that was "difficult to apply on a practical basis." (*Presbyterian II,* 12 Cal.5th at 501.) The court further pointed out that "[e]ven when a statute does not expressly mention relevant common law principles, where the Legislature creates new tort liability, background tort principles will often be incorporated." (*Presbyterian II*, 12 Cal.5th at 504.) The court found that a showing of clear and unequivocal legislative intent would be necessary to exclude respondeat superior liability from section 13009.

The court first based its conclusion on the plain language of section 13009. Contrary to Presbyterian's suggestion, the court refused to presume that the key phrase "through another" referred to the theory of respondeat superior. Instead, noting that "person" was defined to include corporations (Health & Saf. Code, § 19.), the court also indicated that the phrase lacked legal terms of art typically associated with the doctrine, such as "servant," "agent," "employee" and "master," and the "common use" of the phrase in situations where liability is imposed at the direction of another to act. (*Presbyterian II*, 12 Cal.5th at 506-507.) The court also identified an inconsistency, stating that if Presbyterian's suggestion was accepted, the Legislature's omission of the phrase "through another" from section 13009 would eliminate both respondeat superior and direct corporate liability – in direct contravention of Presbyterian's position. In any event, the court found that "whatever 'personally or through another' may mean in section 13007, we cannot conclude that the mere deletion of section 13009's cross-reference to section 13007 evinces a 'clear[] and unequivocal[]' legislative intent to eliminate respondeat superior liability." (*Id.* at 508.)

Next, the court evaluated the legislative history of section 13009 and the 1971 amendment. The 1971 amendment was predicated on responding to *People v. Williams* (1963) 222 Cal.App.2d 152, which interpreted section 13009 to prohibit recovery of fire suppression costs if a fire burned only on the land of the person who started it. The 1971 amendment's focus was on expanding liability in response to the *Williams* decision by holding property owners liable regardless of whether fires escaped their property lines. Abolishing respondeat superior would have curtailed any expansion of liability.

Presbyterian countered that the 1971 amendment restricted recovery by narrowing the application of section 13009 to only fires that escaped onto non-residential lands and limiting liability for firefighting expenses if a person was not involved in starting the fire. (A subsequent amendment to section 13009 in 1982 broadened its application again to fires on "any public or private property." See Stats. 1982, ch. 668, § 1, p. 2738.) Acknowledging Presbyterian's position, the court called attention to the Legislature's explicit reference to those particular restrictions and its notable silence as to vicarious liability generally or respondeat superior liability specifically, the abrogation of which would have been a significant change in the law. Ultimately, the court found that "we do not think an amendment principally aimed at *expanding* liability simultaneously effectuated a significant curtailment of corporate liability without a single comment or any explanation." (*Presbyterian II*, 12 Cal.5th at 511.)

Policy goals of the fire-liability statutes

Finally, the court considered the policy goals of the fire liability statutes. The court noted that the central objective of the statute is to reimburse government agencies for firefighting costs. In addition, the court found that the Legislature expressed a commitment to avoid having taxpayers subsidize negligence by absorbing suppression costs and to prevent recurrence of tortious conduct by stimulating precautionary behaviors. (See *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208-209 [one of central rationales behind doctrine of respondeat superior is to prevent recurrence of tortious conduct].)

The court concluded that adopting Presbyterian's position would undermine established policies relating to fire liability by substantially exempting corporations from the statute's application. Accounting for the difficulty associated with proving a corporation directly liable for its employee's actions, the court explained that respondeat superior liability acted to equitably shift costs from taxpayers to businesses that benefit from risky endeavors that cause wildfires and incentivize employers to prevent employee negligence that can cause wildfires. "Through section 13009, the Legislature intended to compensate taxpayers for the cost of suppressing fires that were negligently started, so the eradication of a long-standing method of establishing corporate liability would have been inconsistent with that legislative purpose." (*Presbyterian II*, 12 Cal.5th at 515.)

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