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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JOSEPH ROYSE,

Plaintiff and Appellant,

v.

PACIFIC GAS AND ELECTRIC  
COMPANY et. al,

Defendants and Respondents.

A125829

(Humboldt County  
Super. Ct. No. DR050078)

In this sixth appeal relating to personal injuries Joseph Royse sustained in an accident on property known as the Lost Coast Ranch, Royse appeals from a judgment on a jury verdict entered in favor of Pacific Gas and Electric Company (PG&E), JLG Industries, Inc. (JLG), and Darr-B, Inc., doing business as Don's Rent-All. He also appeals from several of the trial court's prejudgment orders. We affirm the judgment in favor of JLG, but otherwise reverse.

**I. FACTUAL BACKGROUND**

Many of the underlying facts concerning this case have previously been set forth in *Royse v. Lexington Ins. Co.* (Nov. 26, 2008, A117798, A117875 [nonpub. opn.] (*Royse I*)). We have also addressed several issues that arose in Royse's lawsuit against other defendants in his personal injury action. (See *Royse v. Phelps* (April 15, 2009, A121487) [nonpub. opn.] (*Royse II*)); *Royse v. DC3-E, LLLP et al.* (May 18, 2011, A125620) [nonpub. opn.] (*Royse III*)); *Royse v. Phelps* (Jan. 10, 2012, A125621)

[nonpub. opn.] (*Royse IV*)); and *Royse v. Heartworks Studios, LLC* (Jan. 10, 2012, A126132) [nonpub. opn.] (*Royse V*)).

In the present case, the following evidence was presented at trial<sup>1</sup>: Kathleen Wells testified that in April 2004, she worked as the innkeeper of the Lost Coast Ranch and hired Royse and Asa Martin to work there. Their duties included weeding, mowing the fields, and washing outside windows. At some point, in preparing the ranch to be ready for guests, Wells directed Royse and Martin to clean the gutters of the ranch house, a three-story structure. She rented a boom lift from Don’s Rent-All for the job. Wells knew she would be on vacation on the day the boom lift was to be delivered so she directed George Enos to supervise Royse and Martin in her absence.

Enos and his wife were caretakers at the ranch and resided there. On August 3, 2004, Enos was working at the ranch when Joshua Schaafsma, the delivery person from Don’s Rent-All, dropped off the boom lift. Upon delivery of the boom lift, Schaafsma gave Royse, Martin, and Enos about five minutes of instructions on operating it. Schaafsma spoke briefly about the controls and pointed out the harnesses at the bottom of the basket. Schaafsma testified that he thought he showed them where the safety manual was located, but Martin and Enos claimed that he did not. Schaafsma was a “fairly new employee” and had not participated in a training class on how to operate the boom lift. Another employee instructed him on the boom lift. Schaafsma wrote a report about the instructions he gave to employees at the Lost Coast Ranch after the accident. The instructions did not include a description of the decals on the machine, advisements about

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<sup>1</sup> Our review of this case was made extremely difficult due to Royse’s failure to set forth a complete statement of facts supported by adequate citations to the record. In particular, many of his assertions of fact are either supported by a reference to large blocks of pages or to no citations at all. We remind counsel for Royse that an appellant has a duty to provide adequate record citations including cites for *every* statement of fact. (Cal. Rules of Court, rule 8.204(a)(1)(C) [“Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears”]; see also *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.) The problem in this case was especially acute considering the length of the record and the repeated failures throughout Royse’s briefs to cite to the record.

the electrical hazards on the property, or an inquiry into the training levels of Royse, Martin, or Enos. Nor did Schaafsma conduct an inspection of the work site during his delivery of the boom lift. Schaafsma moved the boom lift to the area behind the house before leaving the ranch. Enos could not recall the specifics of any instructions that were given; he was not going to be operating the unit so he assumed that the directions were meant for Royse and Martin.

Royse got into the basket of the boom lift and began cleaning the gutters. He had a five gallon bucket with him in the basket and would fill it with debris and then lower the boom lift and hand it to Enos. As Royse approached the back of the house in the boom lift, he was unable to get further in toward the back of the house because of a curb. Royse was positioned in the basket just above a rhododendron bush. Royse then raised the boom lift to the level of the gutter. After cleaning the gutter on the north corner of the house's chimney, Royse then pivoted the boom lift and rotated the basket about two to three feet from the house, and lowered the lift to just above the rhododendron bush. Royse, presumably in an attempt to avoid damaging the rhododendron bush, pivoted the boom lift again resulting in him coming into contact with the overhead high voltage power lines. The back of Royse's head came in contact with the wire resulting in severe injuries.<sup>2</sup> (*Royse I, supra*, A117798, A117875 at p. 2.)

Russell Biasca was the manager of Don's Rent-All at the time of the accident. Don's Rent-All obtained the lift that was eventually delivered to Lost Coast Ranch from a broker; it did not purchase it directly from JLG, the manufacturer. After it was acquired, Don's Rent-All repainted it and replaced the decals on it to make it appear "brand new." The decals were ordered and received from JLG. Generally, a Don's Rent-All employee would replace the decals in accordance with the photographs in the parts book.

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<sup>2</sup> Enos was aware that there had been prior problems with the high voltage power lines at the ranch. On one occasion, a professional tree trimmer caused a branch to fall onto the power lines. On another occasion, a power line broke and fell across a car and a truck that were parked at the ranch. There was an additional incident involving a broken high voltage line near the barn on the property.

PG&E owned and maintained the power line with which Royse came into contact. It was a twelve thousand volt line that was constructed in 1953. The ranch house was not built until 1983 or 1984. Jack Foster, a former electric compliance supervisor at PG&E, testified that General Order 95 (GO 95) sets forth the state's requirements for construction of overhead power lines. He testified that GO 95 sets the minimum distances that are suggested in order to maintain safety to the general public and those people working around power lines.

Thomas Shefchick, a forensic electrical engineer, investigated the accident scene and concluded that there were several safety hazards. He testified that the power lines were too close to the side of the ranch house which would require periodic maintenance. As a result, "it would be virtually impossible to safely perform work on the exterior of the building." He observed that the power lines were below the roof line and the gutters of the ranch house. Shefchick opined that Royse was traveling with his back to the power line at the time he made contact with the line. Shefchick concluded that it was PG&E's responsibility to maintain the power lines a safe distance away from the house.

Shefchick further testified that the accident would not have occurred if the power lines had been de-energized prior to commencement of the work. He also suggested that professionals should have planned and performed the work due to the presence of high voltage power lines in close proximity to the ranch house. Royse would not have been injured had the job been properly planned as he would not have been performing the work that he was doing.

Dr. T.C. Cheng, the director of the electric power program at the University of Southern California, testified that the power lines at the site of the accident exceeded the minimum height requirements of GO 95, opining that the minimum legal height of the line over a pedestrian area was 17 feet. He further opined that the location of the power lines from the ranch house was safe.

Edward Karnes, a human factors engineer, testified concerning the design safety hierarchy approach to the design process which involved a three step process. The first step is to change the design of the product to eliminate the hazard. If that cannot be

accomplished for technical or economic reasons, the second approach is to guard against the hazard by some method of preventing access to the hazardous situation. The third approach and least desirable is to provide warnings of the hazard. He opined that electrocution was one of the identifiable hazards of an aerial man lift due to the potential to come into contact with high voltage power lines.

We will address further evidence in the record as it pertains to our discussion of the issues raised on appeal.

## II. DISCUSSION

### *A. Royse's Claims against PG&E*

Royse first contends that the trial court erroneously granted PG&E's motion for summary adjudication on his cause of action for negligence per se. In its motion, PG&E argued that it was in compliance with the Public Utilities Commission's (PUC) Rule 37 of GO 95 because the 12,000 volt (12kV) electrical line had a 20 feet, 3 inches ground clearance at the point of contact and thus exceeded the 17 feet vertical ground clearance required by GO 95, Table 1, Case No. 5E. Royse, in turn, urged that the correct GO 95 applicable requirement was that provided in Table 1, Case No. 4E, because he was injured in an area " 'capable of being traversed by vehicles or agricultural equipment' " and therefore the minimum height requirement for the electrical conductor was 22 feet, 6 inches.<sup>3</sup> The court found that GO 95, Rule 37, Case 5E was applicable and that the electrical line was required to have a minimum height of 17 feet because Royse was injured in an area that was only accessible to pedestrians. "The fact that the boom lift was parked on the driveway, and at that location the line may have been in non-conformance to the 25 foot height requirement, is not evidence of negligence per se at the accident site."

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<sup>3</sup> GO 95 provides an allowance of 10 percent for the minimum clearances of wires as specified in Table 1, Cases 2-6, to account for "temperature and loading" or other conditions. Thus, although Table 1, Case 4E provides for an allowable vertical clearance of 25 feet, deducting the 10 percent allowance yields a 22 feet, 6 inches minimum allowable vertical clearance.

At the time of the accident, GO 95, Rule 37 provided, in pertinent part, as follows: “Clearances between overhead conductors, guys, messengers or trolley span wires and tops of rails, surfaces of thoroughfares or other generally accessible areas across, along or above which any of the former pass; also the clearances between conductors, guys, messengers or trolley span wires and buildings, poles, structures, or other objects, shall not be less than those set forth in Table 1, at temperature of 60 [degrees] F. and no wind. [¶] The clearances specified in Table 1, Case 1, Columns A, B, D, E and F, shall in no case be reduced more than 5 [percent] below the tabular values because of temperature and loading as specified in Rule 43. . . . The clearances specified in Table 1, Cases 2 to 6 inclusive, shall in no case be reduced more than 10 [percent] below the tabular values because of temperature and loading as specified in rule 43 . . . . [¶] . . . [¶] All clearances of 5 inches or more shall be applicable from the center lines of conductors concerned.” Table 1 of Rule 37 sets forth the basic minimum allowable vertical clearance of wire above railroads, thoroughfares, ground or water surfaces, poles, buildings, structures or other objects. As relevant here, Table 1 provided that the minimum clearance for supply conductors and supply cables of 750 to 22,500 volts that were “[a]bove ground along thoroughfares in rural districts or across other areas capable of being traversed by vehicles or agricultural equipment” was 25 feet. The minimum clearance for the identical conductors over vertical ground in areas accessible to pedestrians only was 17 feet.

On January 13, 2005, the PUC amended GO 95, Rule 37 and added the following language: “When measuring the minimum allowable vertical conductor clearances in a span, the minimum clearance applies to the specific location under the span being measured and not for the entire span.” (PRC No. 33-GO 95, Rule 37, p. A-92.) The PUC explained its rationale for instituting the rule change as a clarification of Rule 37: “The current rule does not clearly state the principle that the required minimum clearance of a given span is specific to the location where the clearance is measured. This proposal will clarify Rule 37 so as to ensure that the minimum clearance for a span which passes over a variety of ground, water, or building configurations will be determined based upon the configuration at the location where the clearance is measured, and not another location

where the minimum clearance is greater or lesser.” (PRC No. 33-GO 95, Rule 37, p. A-90.) The PUC’s decision revising GO 95, Rule 37 was “effective one year after the date of today’s decision” or January 13, 2006. (Cal.P.U.C., Decision 05-01-030 (Jan. 13, 2005), p. 48.) Thus, in August 2004, when Royse was injured, Rule 37 did not contain the language requiring that the minimum clearance for a span be based on the specific location where the clearance was measured as opposed to the clearance for the entire span.

PG&E, however, relied on the revisions to Rule 37 as if they applied at the time of the accident and argued that Rule 37 is site specific. It urged that the height requirements of GO 95 are based on the nature of the surface area under the span being measured and not the entire span, and therefore whether the basket of the boom lift could extend beyond any given surface area into the line was irrelevant. Further, it contended that to the extent there was any ambiguity about whether Rule 37 was site specific, the “ambiguity was eliminated when the PUC clarified its rules in 2005 and set forth that the vertical conduct or clearance is measured from the specific location under the span being measured and not the entire span.” The trial court adopted this interpretation in determining that the applicable minimum height of the line was that directly over the accident site. The court hence erroneously considered the rule as it was amended instead of the version as it existed at the time of accident.

PG&E contends that this court should consider the revisions to Rule 37 in interpreting the meaning of the rule as it existed at the time of the accident. It relies on the proposition that an amendment that merely clarifies a law may be given retroactive effect. (See *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 (*Carter*); 7 Witkin, Summary of Cal. Law (10th ed. 2005) Const. Law, § 624, p. 1018.) The question of whether a statute should apply retrospectively or only prospectively is, in the first instance, however, a policy question for the legislative body enacting the statute. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206.) And, California courts have long followed the general rule that statutes are to be given a prospective operation and are not retroactive unless the Legislature expresses a different intention. (*Id.* at

pp. 1207-1208.) We note, too that the *Carter* court acknowledged that “a statute might not apply retroactively when it substantially changes the legal consequences of past actions, or upsets expectations based in prior law.” (*Carter, supra*, 38 Cal.4th at p. 922.)

Here, the PUC not only has not indicated that its revisions to GO 95 are retroactive, but it has expressly declared that the revisions are not effective until a year after the date of the decision of January 13, 2005. The PUC thus clearly intended that the amendment to Rule 37 apply prospectively and not to existing clearance requirements for overhead lines. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 [“statutes do not operate retrospectively unless the Legislature plainly intended them to do so”].) As applied to this case, Rule 37 at the time of the accident required that the overhead power lines be a minimum of 22 feet and 6 inches because the line was both above a thoroughfare in a rural district and in an area capable of being traversed by agricultural equipment and also above ground in an area accessible to pedestrians. Indeed, PG&E admitted in its response to Royse’s statement of undisputed facts that the base of the boom lift was both on the driveway and “also in the bushes that separated the driveway from the adjacent landscaped area.” Because at the time of the accident, Rule 37 had not been amended to require that the minimum clearance be applied to a specific location under the span as opposed to entire span, PG&E was required to measure the minimum allowable vertical clearance for the line at the point where it was capable of being traversed by agricultural equipment, not simply the point that might have been accessible to pedestrians. The overhead power line hence was required to be a minimum of 22 feet, 6 inches.

Our interpretation of Rule 37 is consistent with the rationale for the revision as stated in the PUC’s decision adopting the changes: “The current rule does not clearly state the principle that the required minimum clearance of a given span is specific to the location where the clearance is measured. This proposal will clarify Rule 37 so as to ensure that the minimum clearance for a span which passes over a variety of ground, water, or building configurations will be determined based upon the configuration at the location where the clearance is measured, and not another location where the minimum

clearance is greater or lesser.” (PRC No. 33–GO 95, Rule 37, p. A-90.) Inasmuch as Rule 37 was ambiguous prior to the accident, PG&E was required to maintain the power line at the requisite height “from the center lines of conductors concerned.”<sup>4</sup> As Royse notes “[t]his interpretation is entirely consistent with Rule 14 of [GO] 95 which states, ‘in cases where two or more requirements establish limiting conditions the most stringent condition shall be met, thus providing compliance with the other applicable conditions.’ ”

Irrespective of our interpretation of Rule 37, the trial court also erred in deciding the question of whether the area of the accident was accessible only by pedestrians or could be traversed by a vehicle or agricultural equipment as a matter of law. (See *Aguirre v. City of Los Angeles* (1956) 46 Cal.2d 841, 844.) Rule 37 of GO 95 requires a basic minimum vertical clearance of 25 feet above the ground along thoroughfares in rural districts or across other areas capable of being traversed by vehicles or agricultural equipment. The record here shows that Royse was not a pedestrian at the time of the accident but in a boom lift, a piece of equipment also known as a cherry picker, i.e. a piece of agricultural equipment. Hence, while some of the evidence showed that Royse was positioned in the basket of the boom lift above a pedestrian area, it is also true that the area was *actually* being traversed by the boom lift at the time of the accident. This created a factual dispute as to whether Case 5 was even applicable.

Additionally, it was undisputed that the base of the boom lift was parked on a driveway over which the minimum height requirement was 22 feet, 6 inches, and the electrical line did not conform to that requirement. The fact that PG&E was not in compliance with GO 95 over the driveway could very well have been a proximate cause

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<sup>4</sup> Rule 37 requires “[a]ll clearances of 5 inches or more shall be applicable from the center lines of conductors concerned.” (PRC No. 33-GO 95, Rule 37, p. A-91.)

of the accident.<sup>5</sup> Had the line been at its required height of 22 feet, 6 inches (i.e. three and one-half feet higher), it is likely that the line at the point of contact, in close proximity to the driveway, would also have been higher, preventing the accident that occurred. Causation was a question of fact for the jury. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 463.) The trial court thus erred in prohibiting Royse from telling the jury that PG&E was in violation of the regulation at the location where the boom lift was parked, not far from where the accident occurred.

PG&E relies on *Nevis v. Pacific Gas & Electric Co.* (1954) 43 Cal.2d 626 (*Nevis*) to support its contentions with respect to GO 95. In *Nevis*, the plaintiff was injured while he was operating a boom on a hay derrick on ranch land. (*Id.* at p. 628.) He came into contact with high voltage wires “some 600 feet on past the house” on the property. (*Ibid.*) The hay derrick “was mounted upon a carriage fitted with wheels, was drawn about and operated by [the] jeep” which was equipped with the boom. (*Id.* at pp. 627-628.) Plaintiff, who was in the jeep, was injured when he pulled the derrick into a different position to facilitate loading of hay, and swung the boom into contact with the overhead wires. (*Id.* at p. 628.) The boom in its upright position could swing to the right or to the left when it was being moved. The plaintiff was not aware of the contact, until he stopped the jeep and stepped out of it, and grounded the current through the jeep and his body. (*Ibid.*) The jury found that PG&E was negligent in its maintenance of the high voltage wires on the property. (*Id.* at pp. 627, 630.)

In *Nevis*, the court addressed an instructional error and did not interpret GO 95, as it existed at the time of Royse’s accident. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599,

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<sup>5</sup> The trial court thus erred in concluding as a matter of law that the vertical clearance requirements for the line over the driveway were not “designed to protect against the occurrence that we have here.” The court ruled that the violation of GO 95 over the driveway was irrelevant on the issue of negligence and even if the evidence had some relevance or probative value, it was more prejudicial than probative of whether PG&E was negligent at the accident site. Other than a reference to the court’s discretion under Evidence Code 352, PG&E cites no authority to support the court’s ruling. As we explain, the question was one for the jury.

613 [appellate decisions are not authority for points not actually involved and decided].) Rather, Rule 54.4-A(2), subparagraph (b) then allowed for a “reduction of the clearance [from the minimum clearance of 25 feet of Rule 37] to 18 feet ‘for lines across areas capable of being traversed by agricultural equipment and along roads where no part of the line overhangs any traversable portions of a public or private roadway.’ ” (*Nevis, supra*, 43 Cal.2d at p. 629, quoting GO 95, rule 54.4-A (2).)<sup>6</sup> Thus, at the time of the accident in *Nevis*, the overhead lines were permitted to be reduced to 18 feet where the boom contacted the wires because it was in an area “ ‘capable of being traversed by agricultural equipment’ ” but were subject to the 22 feet requirement over the private roadway surrounding the area where the accident occurred. (*Nevis, supra*, 43 Cal.2d at p. 629.) The court determined that it was error to instruct the jury that PG&E was required to maintain its power lines at 22 feet since the accident occurred in an area capable of being traversed by agricultural equipment. (*Id.* at p. 630.)

*Nevis* does not apply because it construes a rule that has been superseded. Nonetheless, this is a case where, as in *Nevis*, the boom lift, arguably a piece of agricultural equipment, was operating in a specific area that the evidence suggests was an area capable of being traversed by that type of equipment. While PG&E maintains all the evidence shows that the surface area under the 12kV conductor at the point at which Royse made contact with it was accessible only to pedestrians, the fact that Royse was there in a “cherry picker” is itself evidence that he was in an area capable of being traversed by agricultural equipment. Additionally, as we have noted, the trial court failed

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<sup>6</sup> Rule 54.4-A(2), subparagraph (a), as it read in 1954, also permitted reduction of the clearance to 22 feet in rural districts, “for conductors crossing or overhanging traversable portions of public or private roads or driveways.” (Rule 54.4-A (2)(a); see *Nevis, supra*, 43 Cal.2d at p. 629.) Rule 54.4-A was revised on January 21, 1992 to delete the entirety of subdivision (2). (Resolution SU-10 to GO 95.) The PUC provided the following rationale for the rule change: “Due to increased height changes in agricultural equipment and increased electrical contacts with supply lines, minimum conductor to ground clearance requirements should be increased in rural agricultural areas for public safety.” (*Id.* at p. 48.) Thus, at the time of Royse’s accident, the language of rule 54.4-A addressed in the *Nevis* opinion no longer existed.

to apply the correct clearance requirements of GO 95, Rule 37 to Royse's case because the area-specific minimum clearance rules it applied were not then in effect. A triable issue of fact therefore existed with respect to the clearance requirements of GO 95 that were implicated, and the trial court should not have granted summary adjudication.

*Dunn v. Pacific Gas & Electric Co.* (1954) 43 Cal.2d 265, cited by PG&E is of similar import. *Dunn* also involved GO 95 and Rule 37, but as in *Nevis*, the case turned on the application of the 18 foot height requirement of subparagraph (b) of rule 54.4-A “ ‘for lines across areas capable of being traversed by agricultural equipment.’ ” (*Id.* at p. 272.) In any event, the language of rule 54.4-A(2) at issue in *Dunn* lends support to Royse's interpretation of Case 4E of Rule 37, since, like the accident site in *Dunn*, Royse was at least arguably injured in an area capable of being traversed by agricultural equipment.

In sum, the trial court erroneously granted summary adjudication on Royse's negligence per se claim. Royse should be given an opportunity to prove that PG&E's violation of the minimum clearance requirements for the 12kV power line evidenced negligence per se, both in the location of the accident and in the location where the boom lift was parked. In light of the court's erroneous rulings on PG&E's summary adjudication motion and the motion in limine, Royse's negligence cause of action against PG&E must be retried as the court's rulings permeated Royse's entire action against PG&E.<sup>7</sup>

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<sup>7</sup> The court in *Nevis* also recognized that regardless of whether PG&E complied with the applicable GO 95 requirements, that compliance did “not establish as a matter of law due care by the power company, but merely relieve[d] it ‘of the charge of negligence *per se*.’ . . . [Citation.] Since the boom on the derrick here involved could be raised to a height of 23 feet 2 inches and since that type of derrick was in common use in the community the jury may have based its verdict on a finding that defendant was negligent in not having maintained its high voltage wires at a height over the fields sufficient to permit safe operations, including moving of such derricks.” (*Nevis, supra*, 43 Cal.2d at p. 630.) This theory of liability might also be relevant to Royse's case upon retrial.

***B. Royse's claims against JLG and Don's Rent-All***

***1. Pre-trial rulings***

***(a). Twelfth Cause of Action for Failure to Warn of a Safer Alternative Design***

Royse alleged four causes of action against both JLG and Don's Rent-All.<sup>8</sup> Royse's twelfth cause of action alleged that JLG and Don's Rent-All were strictly liable because they failed to warn that a safer, alternative design of a boom lift was available that would have prevented an injury arising from contact with high voltage power lines while using the lift. In his thirteenth cause of action, Royse alleged that JLG and Don's Rent-All failed to warn or instruct him about the proper use of aerial work platforms around high voltage power lines. Finally, in his fourteenth cause of action, Royse claimed that JLG and Don's Rent-All knowingly maintained a defective aerial work platform design on the market that was not properly insulated. JLG moved for summary adjudication on these causes of action, contending that it had no duty to warn Royse regarding the safety features of products manufactured by others; that it provided adequate warnings regarding the proper use of its equipment around high voltage power lines, and that its aerial work platform was designed and manufactured in conformance with applicable safe practices in the industry. Don's Rent-All joined in the motion. The trial court granted the motion for summary adjudication.<sup>9</sup>

We review a trial court's grant of summary adjudication de novo. (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 388-389.) "In performing our de novo review, we must view the evidence in a light favorable to [the] plaintiff as the losing party, [citation], liberally, construing [his] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or

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<sup>8</sup> Royse alleged two additional causes of action against only Don's Rent-All—negligent entrustment and negligent failure to warn and instruct.

<sup>9</sup> Royse's eleventh cause of action against JLG and Don's Rent-All for strict liability based on a design defect was tried before the jury and is discussed, *infra*.

ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769.)

A defendant seeking summary judgment "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) California law requires that "a defendant moving for summary judgment [ ] present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id.* at p. 854, fn. omitted.)

Royse argues that JLG and Don's Rent-All were required to inform him of the availability of a safer alternative design manufactured by others. He alleges that warnings would have afforded him the opportunity to choose a safer insulated work platform that would have prevented him from injury.

"[A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors . . . the benefits of the challenged design do not outweigh the risk of danger inherent in such design." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418.) "[I]n evaluating the adequacy of a product's design pursuant to this latter standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, *the mechanical feasibility of a safer alternative design*, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." (*Id.* at p. 431, italics added.) While the feasibility of a safer alternative design is relevant to the analysis of whether a product is defective, strict liability for duty to warn of design defects focuses on whether a manufacturer knew or should have known that its product was dangerous and failed to give warnings to ensure safe use. (See *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 996.)

Royse has not cited to any authority to support his theory that JLG and Don's Rent-All were subject to strict liability for failing to warn him that other manufacturers produced a safer alternative design. And, while manufacturers have a duty to warn consumers about the hazards in their own products, we have found no authority imposing a duty on them to warn consumers that a safer alternative design exists elsewhere. (See *Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564, 577.) "Other manufacturers cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or evaluate." (*Id.* at p. 576.) As JLG argues, for example, Royse's theory would impose a duty upon Ford Motor Company to warn customers that Mercedes-Benz offers safety features that are not available on its automobiles. JLG and Don's Rent-All did not have a duty to warn Royse of a safer alternative design; the court properly granted summary adjudication on the twelfth cause of action.

***(b). Thirteenth Cause of Action for Failure to Warn of Proper Use  
Around Power Lines***

In his thirteenth cause of action, Royse alleged that JLG and Don's Rent-All failed to warn or instruct about the proper use of aerial work platforms around high voltage power lines. The trial court granted summary adjudication on this claim, finding that JLG and Don's Rent-All provided adequate and sufficient warnings.

Strict liability for product defects can be based on the failure to give adequate warnings or instructions of the product's dangerousness. (*Taylor v. Elliot Turbomachinery Co. Inc.*, *supra*, 171 Cal.App.4th at p. 577.) "Our law recognizes that even ' "a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning" [Citation.] [Citation.] . . . Thus, manufacturers have a duty to warn consumers about the hazards inherent in their products. [Citation.] The purpose of requiring adequate warnings is to inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Ibid.*, fn. omitted.)

*(i). Summary of evidence*

JLG provided an operator's manual and sent warning decals for placement on the boom lift to Don's Rent-All. JLG identified power lines as a hazard and provided a decal labeled "danger" which also stated the electrocution hazard. The decal, addressing various hazards associated with improper use of the machine, is ordinarily placed below the platform control box on the work platform of the boom lift. Don's Rent-All failed to affix that decal on the control panel. The missing decal was approximately two feet wide by a foot and a half in length. It was undisputed that JLG provided an operator's manual for the boom lift and that it was in the work platform at the time of the accident. It, however, was in an unlabeled plastic box on the work platform, and there were no decals or other notices advising an operator as to the location of the manual. JLG did not manufacture insulated boom lifts as its machines were not intended to be used in the vicinity of power lines.

Don's Rent-All rented the boom lift that was involved in the accident.<sup>10</sup> Schaafsma delivered the boom lift and gave Royse, Enos, and Martin brief instructions on the use of the boom lift and its safety features. In his deposition, he stated that he told them to "stay clear of power lines; if you have to operate near them, be aware of where they are and stay X amount of distance. And I'm unable to remember the distance . . . ." He further averred that if he "remembered correctly," he showed them where the instruction manual for the boom lift was located.

Enos, in turn, declared, that he did not discuss the high voltage lines with either Royse or Martin prior to the accident and had no knowledge that Royse should stay "X amount" of feet away from the power lines. Enos also stated that Schaafsma gave them no specific safety instructions about the use of the boom lift but simply showed them how to turn it on and off and how to move it around. According to Enos, Schaafsma did not inspect the area where Royse was to be working. Martin declared that Schaafsma "went

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<sup>10</sup> Don's Rent-All did not purchase the boom lift from JGL, but from a third party. It replaced the radiator and repainted the machine before putting it into service as a rental unit. It also ordered the decals from JGL for placement on the boom lift.

over a little bit about the lift and showed us . . . the turn-off button on the side and then kind of what the controls did,” spending two to five minutes. Martin recalled that Schaafsma also mentioned the harnesses<sup>11</sup> and the emergency turn-off button before he left. Schaafsma did not point out any documents on the machine or the box where the manual was located. Martin, who operated the boom lift a short time before Royse took control of it, declared that he did not see any of the warnings and decals that were on the body of the machine from the work platform. Martin stated that you would have to be on the ground to see the decals on the machine.

*(ii). Analysis*

The evidence before the court at the time of the summary adjudication motion demonstrated there was a triable issue of fact as to whether Don’s Rent-All failed to give adequate warnings or instruct Royse about the use of the boom lift around high-voltage power lines, particularly in light of the evidence that Don’s Rent-All’s failed to affix the two feet by one-and-a-half feet decal concerning the electrocution hazard and other dangers in the work platform. (See *Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 772 [strict liability may attach to a supplier of an unreasonably dangerous product if appropriate and conspicuous warning is not given].) Further, the issue of what instructions were given when the boom lift was delivered was in dispute. Schaafsma’s recollection of his instructions that he warned Royse, Martin, and Enos of the hazards of the power lines and showed them where the manual was located was in stark contrast to that of Martin and Enos who declared that no warnings or safety instructions were given. The question of whether Don’s Rent-All exercised due care in providing adequate warnings and instruction about the use of the boom lift was one for the jury. (*Maneely v. General Motors Corp.* (9th Cir. 1997) 108 F.3d 1176, 1179 [although question of whether duty exists is one of law, question of whether risk is obvious or generally known is one of fact that should be decided by the jury].)

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<sup>11</sup> Martin averred that he and Royse tried the harnesses but that the harness did not fit over Royse’s legs.

In light of our resolution of this issue, we must also reverse the judgment on Royse's negligent entrustment and negligent failure to warn and instruct causes of action. Due to the court's summary adjudication ruling, Royse was precluded from introducing evidence of the lack of a missing warning decal on the control panel of the boom lift. Thus, Royse was unable to present the testimony of Edward Karnes, an expert witness in human factors engineering at trial on this issue. This testimony might have been pivotal on the issue at trial. Karnes testified during an Evidence Code section 402 hearing, that the missing decal "was a very prominent warning [ordinarily] located in front of the operator's station in the platform that dealt with various hazards associated with use of the lift. Very prominent information was provided about an electrocution hazard along with a pictogram that's very useful in terms of providing, alerting people to warning situations or messages . . . . [T]he electrocution hazard . . . would have been very adequately and prominently displayed in front of the operator at the operator's station platform . . . ." Karnes opined that the warning of the electrocution hazard was inadequate as it was not available to the operator at the time of the incident. He explained that a warning should be conspicuous and located in a position where it will be seen by the person at risk. He further opined that an entity providing the boom lift to a consumer without the warning provided by the manufacturer would have breached its standard of care. The court ruled that Karnes could not testify as to the adequacy of the warnings at trial because the issue was not before the jury due to the earlier ruling on summary adjudication that the warnings were adequate. Royse is entitled to a trial on his theory that the warnings on the boom lift, as provided by Don's Rent-All, were inadequate.

The trial court properly granted summary adjudication in favor of JLG on the thirteenth cause of action. Royse failed to present any evidence that the warnings and manual provided by JLG with the boom lift were inadequate. Nor was there any evidence that JLG was remiss in not instructing Don's Rent-All on the placement of the warnings. On the record before us, we cannot conclude that there is a triable issue on the

question of whether JLG failed to warn of the hazards associated with using the boom lift.

*(c). Fourteenth cause of action for design defect*

In his fourteenth cause of action, Roysse alleged that JLG and Don's Rent-All were strictly liable because they failed to provide a boom lift that was insulated against electrical shock. He also sought punitive damages claiming that their defective design of the boom lift demonstrated a conscious and careless disregard of public safety sufficient to show malice. The trial court granted summary adjudication on this claim, finding that the evidence showed that the boom lift was designed and manufactured in conformance with applicable safe practices in the industry and was safe for its intended use.

JLG presented evidence that the boom lift was designed and manufactured in accordance with industry standards,<sup>12</sup> that it was not intended for use around power lines and that both the manual and the warnings on the machine stated that the operator must maintain a clearance of at least 10 feet between any part of the machine and any electrical line. JLG also presented the deposition testimony of Stephen Forgas, JLG's director of product safety and reliability, who averred that while the boom lift could be used in the process of cleaning house gutters, it was not electrically insulated as it was not intended to be used in the vicinity of power lines. Forgas declared that a different machine is available for use around power lines and a specific industry exists that manufactures those machines. JLG's boom lift was built to be used in construction and maintenance where damage and contamination from paint, dirt, Gunitite<sup>13</sup> and water might occur upon the platform or on the boom itself. An insulated machine would not be proper in that setting, and could suffer damage due to the contaminants thus reducing its insulated properties.

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<sup>12</sup> The boom lift was manufactured in accordance with the American National Standards Institute (ANSI) Standard A92.3-1992 for boom-supported elevating work platforms.

<sup>13</sup> Gunitite is the trademark name for a product used for a mixture of cement, sand and water sprayed onto a mold. (Webster's 11th New Collegiate Dict. (2004) p. 556.)

Forgas additionally opined that proximity warning devices<sup>14</sup> were unreliable. In its moving papers, JLG argued that it was safer to use a warning decal to warn operators that the boom lift was not insulated and to avoid contacting power lines rather than create a *false sense of security* with insulation or a proximity warning device.

Royse presented several declarations from experts in opposition to the motion. Donald Berman, a design safety engineer, averred that proximity warning devices and insulated work platforms had been available for decades to protect against the dangers associated with using equipment near overhead high voltage lines. He also opined that “[t]he fact that [insulated work platforms for boom type lifts] are manufactured and marketed within the industry is an indication by itself that cost considerations are not an impediment to incorporating insulated work platforms into the design of a man lift of the type represented by JLG Model 450A.” He further concluded that JLG’s reasons for not utilizing an insulated platform and not providing a proximity safety device were not valid. Berman was not aware of any studies that concluded that owners of aerial lifts would not be able to properly maintain a work platform to maintain its insulated properties. He referred to a report published in March 2002 which analyzed the hazards associated with power line contacts by boom equipment. The study concluded that there was no “ ‘false sense of security’ ” created by providing safety features on boomed equipment. Berman thus opined that “relying upon the ‘false sense of security’ hypothesis as a justification for not incorporating insulated work platforms on aerial man lifts is a conscious disregard of the safety of the operator and it is foreseeable that the man lifts will be used around high power electric lines.”

Shefchick, an expert in electrical engineering, declared that the severity of Royse’s electrical shock injury would have been significantly reduced or entirely eliminated had he used an insulated work platform.

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<sup>14</sup> Proximity or electrostatic warning devices give warning sounds when a platform is too close to a high voltage power line.

Karnes, Royse's expert, also opined that the false sense of security theory had found no reliable support in the scientific literature and cited various articles. He noted that as to operators of aerial work platforms, there was no credible evidence that operators were more careless regarding contact with power lines if their platforms were insulated. Further, he opined that "[t]he false sense of security rationalization, when used to justify a failure to provide a safety accommodation, runs counter to the widely accepted safety/engineering principal of the 'safety hierarchy.'" Karnes concluded that JLG's failure to incorporate known safety components in the boom lift's design to eliminate or greatly reduce the likelihood of serious injury was in conscious disregard for the safety of the users of the equipment.

Royse suggests that there is a triable issue on whether JLG acted maliciously because it failed to design an insulated boom lift knowing that it was foreseeable that an uninsulated boom lift might be used near a high-voltage power line. In order to prove that the boom lift was defective as manufactured, however, Royse was required to show that it failed to perform as safely as an ordinary consumer would expect when used in a foreseeable manner or that the benefits of the design did not outweigh the risks of danger inherent in the design. (See *Barker v. Lull Engineering Co.*, *supra*, 20 Cal.3d at pp. 418.) Further, in order to prove malice, Royse was required to show that JLG acted "with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) An award of punitive damages for the manufacture and sale of a defective product is proper where the " 'defendant was aware of the probable dangerous consequence of his conduct, and [] he [willfully] and deliberately failed to avoid those consequences.' [Citation.]" (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 402.)

Here, the trial court, given the competing theories concerning the feasibility of designing a safer boom lift, concluded there were no triable issues of fact because the boom was designed in accordance with applicable industry safety standards and was safe for its intended use. The court accepted JLG's defenses that its boom lift was manufactured in accordance with industry standards and that it was not intended to be

insulated but rather to be used in manufacturing and maintenance and away from power lines.

Royse challenges the court's ruling, but he has failed to provide an adequate record for review. An appellant intending "to raise any issue that requires consideration of the oral proceedings in the superior court" must include a reporter's transcript of the proceedings or an agreed or settled statement in the record on appeal. (Cal. Rules of Court, rule 8.120(b).) " " "A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." . . . [Citation[.]]' . . . 'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' " (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) While Royse's evidence supported an argument that an insulated boom lift and a proximity warning device would likely have prevented his injuries, there appears to have been no basis for the court to conclude that JLG's product was defectively designed. The evidence supported JLG's position that its product was not manufactured for or intended

to be used near power lines.<sup>15</sup> Accordingly, the court properly granted summary adjudication on this issue.

## ***2. The Trial***

### ***(a). Eleventh Cause of Action for Design Defect against JLG and Don's Rent-All***

The parties proceeded to trial on the eleventh cause of action under which Royse alleged the boom lift was defectively designed for its intended use of elevating workers into the air because it was not insulated and it was foreseeable that it would be used near high voltage power lines where electrocution was a hazard. The jury found against Royse, returning a special verdict finding that the boom lift was not used or misused in a way that was reasonably foreseeable to JLG.

On appeal, Royse contends that the trial court erroneously denied his motion in limine to preclude JLG and Don's Rent-All from introducing evidence of the custom and usage of boom lifts in the industry to establish that the boom lift was not defective. The court denied the motion only insofar as Royse sought to preclude testimony of custom and usage of the boom lifts in the industry on the issue of foreseeability. The court's ruling on Royse's motion was as follows: "First, as pertains to this motion, there's nothing before me about whether or not you can present evidence that the boom lift was

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<sup>15</sup> We are troubled that the court may have been persuaded by JLG's argument that it analyzed the hazard and concluded that rather than create a false sense of security with insulation or a proximity warning device, it had determined that simply including warnings concerning possible dangers was sufficient to apprise operators of the risks associated with using the boom lift near power lines. It appears that the parties vigorously argued the false sense of security theory prior to the court's ruling on the summary adjudication motion. We, however, are not privy to the court's analysis of this issue and must presume that the court gave it whatever weight it deserved. At trial, counsel for JLG moved in limine to exclude the false sense of security theory, arguing that it was not JLG's position and that she had used the term in her motion papers without realizing that it was a term of art in the field of human factors engineering. The court granted the motion. On appeal, Royse contends that the court's ruling on the issue was in error. He, however, fails to present any cogent argument or citation to the record or legal authority on how the court's ruling prevented him from presenting evidence that the boom lift was defective given that JLG did not present any expert testimony relying on the false sense of security theory at trial.

designed or built according to the [ANSI] standards. So, I'm not prohibiting that. I do grant the motion in so far as it relates to the boom lift being –strike that–as it relates to custom and usage. [¶] As to designability, I deny the motion as [ ] it relates to custom and usage as to how it is actually used in the field, which would relate to the issue of foreseeability. . . .” Thus, the court’s ruling permitted evidence of the boom lift’s customary usage in the construction and maintenance industry as it pertained to foreseeable use. The court’s ruling excluded only evidence of custom and usage in the industry as to how boom lifts are designed. The parties, however, agreed that evidence that the boom lift was constructed in accordance with ANSI standards would be admissible. The court’s ruling was therefore consistent with the law. (See *Akers v. Kelley Co.* (1985) 173 Cal.App.3d 633, 652 [evidence of custom or usage in the trade in determining whether a design defect existed is inadmissible], disapproved on another ground in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 804 and fn. 10, [same].)

Royse next contends that the jury’s verdict that the boom lift was not “used or misused in a way that was reasonably foreseeable to JLG” was legally erroneous. His argument is in effect a challenge to the sufficiency of the evidence to support the verdict. “ ‘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.)

Although Royse failed to set forth in his argument any of the evidence he claims would have supported a contrary jury verdict on this issue, we have conducted an independent review of the record and conclude that the jury’s verdict in favor of JLG is supported by substantial evidence. There was ample evidence in the record that Royse’s action in operating the boom lift in close proximity to a high-voltage power line was not foreseeable to JLG.

Barris Evulich, an engineer and member of ANSI's committee on Title A92 and several subcommittees which have the responsibilities of drafting and approval of ANSI standards, opined that the design of JLG's boom lift was reasonable and based on sound engineering principles and practices. It was not designed to be used near power lines, and both JLG's instructions and OSHA prohibited the use of the boom lift near power lines. Evulich concluded that it was not foreseeable that Royse would operate a boom lift in close proximity to a high-voltage power line.

Dr. Cheng testified that an insulated boom would be the last defense and would come into play only if the defenses of staying away from power lines, and being trained to work around them and de-energizing the power lines or insulating them failed. He opined that the use of the boom lift by Royse was not proper because there was insufficient space between the power lines and the building to accommodate work in that location without violating OSHA requirements. He further concluded that no lifting equipment was proper, even if insulated, because there was insufficient space to get it into position at the accident site.

Gene Broadman, a mechanical engineer, also concluded that the location of the accident "made the safe operation of the equipment an impossibility" due to the inability to maintain a proper distance to the high voltage power line. He testified that the boom lift could not have been safely used to clean the gutters in the accident location if the power lines were energized.

In sum, there was substantial evidence before the jury that the boom lift was not used in an intended or reasonably foreseeable manner given the close proximity of the power lines to the house at the site of the accident. Consequently, the jury's verdict on the eleventh cause of action was not legally erroneous.

***(b). The verdict form***

Royse faults the jury's failure to allocate percentages of fault on the verdict form even though the jury found in favor of defendants on all causes of action that were submitted to it on the special verdict form. Royse argues that the jury's failure to place a

zero in the blanks next to the parties' names to reflect the percentage of responsibility for his injuries rendered the verdict "hopelessly ambiguous."

" '[A]n appellate court will interpret the verdict if it is possible to give a correct interpretation,' but will reverse if the verdict is 'hopelessly ambiguous.' [Citation.]" (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 705.) Here, it is clear that the jury found against Royse on the issues before it. Its failure to include zeros in the blanks for allocating percentages of fault was not contradictory with its verdict. The jury awarded no damages to Royse. Since the jury concluded that none of the defendants were at fault, there was no reason for it to allocate a percentage of fault to them. The jury's failure to place a zero next to each of the defendant's names on the verdict form did not render the verdict inconsistent or ambiguous.

***(c). Exclusion of expert testimony***

Royse argues that his experts were improperly excluded from giving testimony at trial unless they gave the same testimony in their depositions. Apparently, his argument refers to a motion in limine by PG&E which sought to prohibit Royse's experts from testifying to opinions not expressed at their depositions.

As PG&E points out, the trial court did not grant this motion. The court opined that the motion was premature and that it would consider the issue if it arose during trial. The court thus deemed the motion "as withdrawn subject to being renewed at trial on a witness-by witness basis." Royse fails to present any argument concerning what evidence he was precluded from offering as a result of the court's ruling or how he was otherwise prejudiced by the court's ruling. We deem the issue waived.

### III. DISPOSITION

The judgment entered in favor of PG&E and Don's Rent-All is reversed. The judgment in favor of JLG is affirmed.<sup>16</sup> Royse shall recover his costs on appeal as they pertain to PG&E and Don's Rent-All. JLG shall recover its costs on appeal.

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RIVERA, J.

We concur:

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REARDON, ACTING P. J.

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SEPULVEDA, J.\*

\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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<sup>16</sup> In light of our disposition, we need not reach the other issues raised by Royse.