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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

STEPHEN McCARTY,

Plaintiff and Appellant,

v.

DEPARTMENT OF  
TRANSPORTATION,

Defendant and Appellant.

E055157, E056694

(Super.Ct.No. RCVRS060424)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. David A. Williams and Gilbert G. Ochoa, Judges.<sup>1</sup> Affirmed in part and reversed in part.

Hollins Law, Andrew S. Hollins, Kathleen Mary Kushi Carter, and Christine R. Arnold for Plaintiff and Appellant.

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<sup>1</sup> Judge Williams granted the motion for judgment notwithstanding the verdict and the motion for new trial; he also entered judgment. Judge Ochoa denied the motion to vacate the order for judgment notwithstanding the verdict and granted the motion to vacate the order granting a new trial.

Jones & Dyer, Gregory F. Dyer, Kristen K. Preston, and Lindsey E. Read for Defendant and Appellant.

The State of California, Department of Transportation (Caltrans) was in charge of the construction of a major freeway project. The general contractor on the project was FCI Constructors, Inc. (FCI). Contractually, Southern California Edison (SCE) was supposed to remove utility poles in the freeway right-of-way. Nevertheless, Caltrans ordered FCI to remove certain poles that were holding up the project. When FCI employee Stephen McCarty attempted to remove one pole with an excavator, the pole fell, crushed the cab of his excavator, and struck him in the head, leaving him a near-quadruplegic.

McCarty sued Caltrans on the theory that Caltrans retained control over safety conditions at the worksite and negligently exercised that retained control so as to affirmatively contribute to his injuries. (See generally *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 209-210.) A jury agreed. It apportioned 37.5 percent of the fault to Caltrans, resulting in a net award to McCarty of \$6,674,627.98.

The judge who presided over the trial, however, granted Caltrans's motion for judgment notwithstanding the verdict (JNOV), as well as Caltrans's motion for a new trial. McCarty filed motions to vacate both orders. A different judge refused to vacate the JNOV but did vacate the new trial order.

McCarty appealed from the JNOV. Caltrans filed a protective cross-appeal from the judgment on the jury's verdict. Finally, Caltrans also appealed from the order vacating the new trial order.

We will hold that there was sufficient evidence to support the jury's verdict on a theory of the negligent exercise of retained control. We will further hold that the order granting a new trial was rendered belatedly and hence void. (See generally Code Civ. Proc., § 660.) Accordingly, we will reverse the JNOV and reinstate the judgment on the jury's verdict.

## I

### FACTUAL BACKGROUND

As of 2001, Caltrans was engaged in the construction of an extension of the I-210 freeway. FCI was the general contractor for the project. FCI was a road and highway contractor with nationwide operations. As general contractor, FCI was responsible for determining what equipment to use.

SCE owned utility poles that were in the freeway right-of-way. Under the original contract, Caltrans was responsible for the removal of utility poles; FCI was not. FCI had no experience in removing utility poles and had no protocol for removing them.

Caltrans had a separate contract with SCE that required SCE to remove its own utility poles. SCE, in turn, subcontracted with Sturgeon Electric Company (Sturgeon), an overhead electrical line contractor, to remove poles. Sturgeon had specialized equipment

for use in removing poles. This included boom trucks, with stabilizing outriggers, that could hold a pole and jack it up out of the ground.

Caltrans knew that removing a utility pole required specialized equipment, and it knew that FCI did not have such equipment. As required by the contract, FCI had given Caltrans a list of all of the equipment that it was going to have at the job site.<sup>2</sup>

In December 1999, Caltrans gave SCE written notice to remove its poles. Power lines were removed from the poles, but communications lines remained. Meanwhile, the poles were “topped” — i.e., cut down to the level of the communications lines.

As of December 2000, however, the poles themselves still had not been removed. They were literally standing in the way of FCI’s performance of its work. FCI was required to pay Caltrans liquidated damages of \$35,000 for every day it was late in completing its work. However, FCI would not owe liquidated damages for a delay caused by Caltrans. Likewise, if Caltrans caused a delay, it had to compensate FCI for the costs of any idle equipment.

One pole in particular (No. 4304302E) was blocking the area where FCI needed to build an access ramp before it could go on to do other work. The pole was made of Douglas fir. Even after being topped, it was still just under 40 feet tall, and it weighed 3,735 pounds.

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<sup>2</sup> FCI did have the ability to update the list.

On January 4, 2001, Caltrans instructed FCI to remove all of the SCE poles, setting January 12, 2001 as the date for removal. The work was to be done pursuant to a preexisting blanket change order, which allowed Caltrans to order FCI to do additional electrical work on a “time and material” basis. Thus, contractually, FCI could not refuse to comply. However, it could subcontract the work to another company. Caltrans did not know whether FCI removed utility poles and did not ask whether it knew how to remove this type of utility pole.

As of January 12, 2001, the communications lines still had not been taken down, so FCI still could not remove the poles.

On January 16, 2001, the communications lines finally came down. However, the poles still belonged to SCE; they were not abandoned. There was substantial (though not undisputed) evidence that Caltrans needed SCE’s approval to remove the poles. Moreover, there was substantial (though not undisputed) evidence that Caltrans did not have SCE’s approval. FCI and SCE were not allowed to communicate with each other directly; they had to communicate through Caltrans.

Under Caltrans’s own internal protocol, the “proper sequence” would have been for Caltrans to ask SCE to remove the poles before asking FCI to do so. Indeed, SCE was already scheduled to remove the poles.<sup>3</sup> Nevertheless, on January 17, 2001, Caltrans directed FCI to remove the subject pole “as soon as possible.”

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<sup>3</sup> Actually, Sturgeon was scheduled to remove the pole just “a few days” after FCI was instructed to do so. The trial court, however, excluded evidence of this under  
*[footnote continued on next page]*

FCI project manager Dale Nelson told FCI superintendent Michael Meza to remove the pole. Meza, in turn, told FCI grading foreman Rick Weir to remove the pole. FCI did not do a hazard assessment. Nelson, Meza, and Weir all testified that removing the pole did not require a hazard assessment.

Weir had no training or experience in removing utility poles. He was aware that one way of removing a pole would be to use a boom truck. He had the authority “to get the right equipment to do the jobs that were necessary to do . . . .” However, he believed that the pole could safely be removed using an excavator.

As of January 18, 2001, the pole was a “show stopper,” meaning that, if it was not removed, earth-moving operations already scheduled for the following day would have to be canceled. That morning, Caltrans employee Ali El-Zaynab told Weir “to just let [the pole] fall out of the hole.”

FCI employed McCarty as a heavy equipment operator. McCarty had more than 10 years of experience as a heavy equipment operator. He had taken down utility poles before, but none larger than 15 or 20 feet.

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*[footnote continued from previous page]*

Evidence Code section 352. While this ruling seems questionable, McCarty has not challenged it — presumably because the jury verdict, by and large, was in his favor.

Despite the trial court’s ruling, a Caltrans witness blurted out the fact that SCE was scheduled to remove the pole (though not the date when it was scheduled to do so.)

Weir told McCarty to remove the pole using an excavator. He did not give McCarty any other instructions.<sup>4</sup> McCarty believed he could take the pole down safely.

At first, McCarty tried to push the pole down, using the bucket of his excavator. However, it did not budge. McCarty then started removing dirt from one side of the pole. After he had removed three loads of dirt, and as he was going back to remove a fourth, the pole fell, crushing the cab of his excavator and hitting his head. He was left paralyzed from the chest down.

Dr. Stephen Wexler testified for McCarty as an expert in construction management and safety. In Dr. Wexler's opinion, Caltrans's January 17 order to remove the pole fell below the standard of care because Caltrans knew that the removal of the pole required specialized equipment, yet it was foreseeable that FCI would proceed to remove the pole without using such equipment. He added that Caltrans also fell below the standard of care because it ordered FCI to remove the pole "abruptly," and, as a result, FCI did not have the opportunity to do a hazard assessment.

Caltrans's own expert, Gerald Fulghum, admitted that it would have been "safer" to use a boom truck rather than an excavator to remove the pole.<sup>5</sup>

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<sup>4</sup> Specifically, he did not relay El-Zaynab's directive "to just let the pole fall out of the hole" to McCarty.

<sup>5</sup> McCarty claims that Fulghum even admitted that "Caltrans acted unreasonably . . . ." The cited portions of the record do not support this claim.

## II

### PROCEDURAL BACKGROUND

In 2002, McCarty filed this action against Caltrans, as well as other named defendants who ultimately settled before trial.

After a first trial, a jury found Caltrans not liable on a theory of a dangerous condition of public property, but liable on a theory of the negligent exercise of retained control. It apportioned 31 percent of the fault for McCarty's injuries to Caltrans. The trial court entered judgment awarding McCarty \$5,915,000 against Caltrans. The trial court, however, then granted Caltrans's motion for a new trial on the retained control theory.

Both sides appealed. In 2008, we affirmed the order granting a new trial. (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 980-986 [Fourth Dist., Div. Two].)

In 2011, in the second trial, the jury was instructed: "Certain facts were conclusively determined to be true by the jury in the first trial of this matter. . . . You must accept each of these facts as true, even if you disagree with them . . . : 1, Caltrans owned the property; 2, Caltrans retained control over safety conditions at the worksite; [3,] FCI . . . was negligent; [4,] Steve McCarty was negligent; [5,] Southern California Edison was negligent."

Once again, the jury found Caltrans liable on a theory of the negligent exercise of retained control. This time, it apportioned 37.5 percent of the fault for McCarty's

damages to Caltrans. On October 3, 2011, the trial court entered judgment awarding McCarty \$6,674,627.98 against Caltrans.

On October 24, 2011, Caltrans filed a motion for JNOV and a notice of intent to file a motion for new trial. On October 31, 2011, Caltrans filed a motion for new trial.

On December 2, 2011, while both motions were pending, Caltrans filed a timely notice of appeal from the judgment.<sup>6</sup>

On December 5 and/or December 8, 2011, the trial court (per the Hon. David A. Williams) granted Caltrans's motion for JNOV.

On December 5 and/or December 12, 2011, the trial court (again, per Judge Williams) also granted Caltrans's motion for new trial.

Accordingly, on December 12, 2011, the trial court vacated the previous judgment on the jury's verdict and entered a new judgment against McCarty and in favor of Caltrans.

McCarty filed a timely notice of appeal from the new judgment.

In April 2012, McCarty filed a motion to vacate the order for JNOV and the resulting judgment. He argued that the trial court lacked jurisdiction to grant JNOV because, at the time, Caltrans's appeal was pending.

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<sup>6</sup> We later deemed Caltrans's notice of appeal to be a protective cross-appeal from the JNOV.

At the same time, McCarty also filed a motion to vacate the order granting a new trial. He argued that the order for new trial was entered more than 60 days after notice of entry of judgment. (See Code Civ. Proc., § 660.)

In May 2012, the trial court (per the Hon. Gilbert G. Ochoa) denied the motion to vacate the JNOV. However, it granted the motion to vacate the new trial order, ruling that the order was “outside of this court’s jurisdiction as beyond the 60-day time period . . . .”

McCarty filed a timely notice of appeal from the denial of his motion to vacate the JNOV.

Caltrans filed a timely notice of appeal from the order vacating the order granting a new trial.

### III

#### THE SUFFICIENCY OF THE EVIDENCE

Caltrans contends that the jury verdict finding it liable based on the negligent exercise of its retained control is not supported by substantial evidence.

##### A. *Law of the Case.*

Preliminarily, McCarty claims that we determined in the previous appeal that there was sufficient evidence to support a finding of liability on this theory, and therefore this is now law of the case. But not so. In our opinion, we noted that Caltrans was claiming that there was insufficient evidence to support this theory, but we refused to consider that contention. Instead, we held that: “Caltrans has forfeited this contention by failing to

give a full or fair summary of the relevant evidence.” (*McCarty v. State of California Department of Transportation* (Jul. 10, 2008, E040627) [part. pub. opn.] (slip opn. at p. 37).)

McCarty relies on the portion of our opinion in which we held that the trial court correctly denied Caltrans’s motion for JNOV. (*McCarty v. State of California Department of Transportation, supra*, (E040627) at pp. 33-34.) As we noted, however, Caltrans’s motion for JNOV after the first trial was not based on insufficiency of the evidence. Rather, Caltrans raised a highly technical argument (which we did reject) that an earlier ruling granting a partial nonsuit required the trial court to grant the subsequent motion for JNOV. Once again, we held that Caltrans had forfeited any consideration of the sufficiency of the evidence, this time by failing to supply the trial court with a complete transcript of the trial. (*Id.* at p. 34.)

Thus, it is not the law of the case that there was sufficient evidence to support the jury’s verdict on the negligent exercise of retained control theory. We therefore proceed to review the sufficiency of the evidence in the second trial.

B. *Standard of Review.*

“Where findings of fact are challenged on a civil appeal, we are bound by the “elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,” to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party,

giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .’ [Citation.]” (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

C. *The Negligent Exercise of Retained Control Theory.*

In *Hooker v. Department of Transportation, supra*, 27 Cal.4th 198, the Supreme Court held “that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer’s exercise of retained control *affirmatively contributed* to the employee’s injuries.” (*Id.* at p. 202.) It further held that, in the case before it, the plaintiff failed to raise a triable issue of material fact with respect to affirmative contribution. (*Id.* at pp. 202, 214-215.)

Caltrans — the defendant in *Hooker* — had hired a general contractor to build an overpass. That contractor, in turn, had employed Paul Hooker as a crane operator. Hooker was killed when his crane tipped over because he swung the boom of the crane after retracting the stabilizing outriggers of the crane to make room for other vehicles to pass. The evidence showed that Caltrans retained control over traffic management in the construction zone and had the authority to correct an unsafe condition. Moreover, Caltrans knew that crane operators regularly retracted their outriggers to let other vehicles go by on the overpass; it also knew that it would be unsafe to operate a crane while its outriggers were retracted. (*Hooker v. Department of Transportation, supra*, 27 Cal.4th at pp. 202-203.)

The Supreme Court stated: “We are not persuaded that Caltrans, by *permitting* traffic to use the overpass while the crane was being operated, *affirmatively contributed* to Mr. Hooker’s death.” (*Hooker v. Department of Transportation, supra*, 27 Cal.4th at p. 215.) “There was, at most, evidence that Caltrans’s safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it.” (*Ibid.*) It explained: “[M]ere retention of the ability to control safety conditions is not enough. ‘[A] general contractor owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct. The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff. . . .’ [Citation.]” (*Id.* at p. 209.)

The heart of McCarty’s position is that Caltrans negligently exercised its retained control by insisting that FCI, rather than Sturgeon, remove the utility pole, even though (as Caltrans knew) Sturgeon had the necessary skill and equipment and FCI did not. Consistent with this theory, Dr. Wexler testified that Caltrans fell below the standard of care because it ordered FCI to remove the pole even though it knew that FCI lacked the requisite equipment. Caltrans’s own expert even admitted that it would have been “safer” to use specialty equipment.<sup>7</sup>

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<sup>7</sup> Caltrans’s negligence was exacerbated by the fact that it had prohibited FCI and SCE from communicating directly with each other, except through Caltrans. Otherwise, FCI might have been able to arrange with SCE to have Sturgeon remove the pole.

Caltrans's response is that a "hirer may not be held liable on the theory that it should have selected a specialty contractor to perform a task delegated to a general contractor," citing *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235. *Camargo*, however, dealt with the hirer's liability for the negligent hiring of a contractor, under section 411 of the Restatement Second of Torts (Restatement). (*Camargo, supra*, at pp. 1238, 1241-1242, 1245.) Here, as in *Hooker*, the issue is the hirer's liability for the negligent exercise of its retained control over a contractor, under section 414 of the Restatement.

In *Hooker*, the Supreme Court "distinguish[ed] between . . . negligent hiring cases, on the one hand, and negligent exercise of retained control cases, on the other, in this regard. 'At common law, a person who hired an independent contractor generally was not liable to third parties for *injuries caused by the contractor's negligence* in performing the work. [Citations.] *Central to this rule of nonliability was the recognition that a person who hired an independent contractor had "no right of control as to the mode of doing the work contracted for"* [citations]. The reasoning was that the work performed was the enterprise of the contractor, who, as a matter of business convenience, would be better able than the person employing the contractor to absorb accident losses incurred in the course of the contracted work. This could be done, for instance, by indirectly including the cost of safety precautions and insurance coverage in the contract price. [Citations.]' [Citation.] On the other hand, if a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that

affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer.

“Similarly, if an employee of an independent contractor can show that the hirer of the contractor affirmatively contributed to the employee's injuries, then permitting the employee to sue the hirer for negligent exercise of retained control cannot be said to give the employee an *unwarranted windfall*. The tort liability of the hirer is warranted by the hirer's own affirmative conduct. The rule of workers' compensation exclusivity 'does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury' [citation], and when affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee of a contractor, the employee should not be precluded from suing the hirer.” (*Hooker v. Department of Transportation, supra*, 27 Cal.4th at pp. 213-214, fn. omitted.)

In other words, in a case of negligent hiring, the hirer's initial selection of the contractor is negligent, but the hirer has no control over on-going work. Thus, it is reasonable to presume that both parties have rationally approximated, based on the contractor's own expertise and experience, the cost of safety precautions and the cost of insurance coverage and have included those costs in the contract price. Here, for example, FCI's worker's compensation premiums would have been based on FCI's experience rating, which in turn would have been based on FCI's history of worker's compensation claims — all known quantities. (See generally *Allied Interstate, Inc. v. Sessions Payroll Management, Inc.* (2012) 203 Cal.App.4th 808, 818-819.)

By contrast, in a case of the negligent exercise of retained control, the hirer *interferes* with the contractor's performance of on-going work. This is true even when, as here, the hirer's negligence consists of assigning a particular task to the "wrong" contractor or subcontractor. As a result, the hirer's negligence injects a risk into the work above and beyond the initial risk in light of the contractor's expertise and experience. When that risk results in an injury to an employee of the contractor, it is not unfair to require the hirer to bear some of the cost. For the same reason, it is not a windfall if the injured employee is allowed to recover against the hirer.

Here, there is no claim that Caltrans was negligent when it initially selected FCI as the general contractor. Rather, McCarty's claim is that Caltrans negligently exercised its retained control over the work by reassigning the removal of the pole from Sturgeon to FCI. In light of Caltrans's knowledge that Sturgeon had specialized equipment and FCI did not, in effect, Caltrans ordered that the work be done without any specialized equipment. This theory is legally viable under both *Hooker* and *Camargo*.

Moreover, this theory is factually viable — i.e., it is supported by substantial evidence. Caltrans's only contrary argument is that it did not act negligently by ordering FCI to remove the pole because, while FCI did not have specialized equipment, FCI could have obtained such equipment either "directly" or "indirectly," i.e., by hiring a subcontractor. Dr. Wexler testified, however, that the only way FCI could obtain additional specialized equipment directly would be with Caltrans's agreement. Hence, Caltrans had to know that FCI had not actually obtained such equipment.

The only evidence that FCI could have obtained the equipment indirectly, by hiring a subcontractor, was the following testimony of Allan Tanjuaquio, Caltrans's resident engineer, referring to FCI: "I assumed that they're a contractor and that they would either hire somebody else or they would do the work to remove the pole." The jury, however, did not have to believe this. Tanjuaquio indicated that it was just an assumption on his part. In any event, FCI was under considerable time pressure. On January 16, the communications lines finally came down. On January 17, Caltrans told FCI to remove the pole "immediately." The pole had to be removed by January 18, or else scheduled earth-moving operations would have had to be canceled. The jury could reasonably conclude that, under these circumstances, it was not feasible for FCI to hire a subcontractor.

In addition to the evidence that Caltrans negligently ordered FCI, rather than Sturgeon, to remove the pole, we note that there also was evidence that a Caltrans employee (El-Zaynab) told an FCI employee (Weir) "to just let [the pole] fall out of the hole." The jury could reasonably find that this, too, affirmatively contributed to McCarty's injuries.

Caltrans argues that there is no evidence that Caltrans *ordered* or *required* FCI to just let the pole fall out. But even though this was only a suggestion, it is reasonably inferable that it contributed to Weir's decision to have McCarty use an excavator. (Cf. *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225-226 [hirer could be liable for requesting, though not insisting, that contractor use unsafe equipment; hirer "was a

customer the contractor was presumably loathe [*sic*] to displease.”.) Weir had no particular training or experience in removing utility poles. El-Zaynab was a representative of his employer’s employer. Thus, his opinion would tend to be influential. The jury could reasonably infer that it was at least a substantial factor in Weir’s decision to use an excavator. It must be remembered that, under comparative negligence principles, FCI’s negligence did not relieve Caltrans of liability; the jury could find that both Caltrans and FCI were negligent and apportion liability accordingly.

Caltrans also claims “it is undisputed that Weir did not follow any suggestion from El-Zaynab on how to remove the pole.” Weir never testified that he did not rely on El-Zaynab’s suggestion; it is inferable that he did. What he actually testified was that he did not *remember* anyone from Caltrans telling him how to take down the pole.<sup>8</sup> He did not testify that, *even if* El-Zaynab told him this, he *would not* have relied on it. But even if Weir did testify that he did not rely on El-Zaynab’s suggestion, that would not necessarily relieve Caltrans from liability. A jury could reasonably find that Weir was not credible on this point and that he actually did rely.

Finally, Caltrans also argues that Weir did not communicate El-Zaynab’s suggestion to McCarty. However, Weir did specifically tell McCarty to use an excavator. Initially, McCarty tried using the excavator to push the pole down. However, this did not work, and when it did not, McCarty used the excavator to make the pole fall out of the

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<sup>8</sup> El-Zaynab likewise testified that he did not remember telling Weir this. However, he was impeached with his admission in the first trial.

hole — exactly as El-Zaynab had suggested. Thus, the jury could reasonably find that El-Zaynab’s suggestion caused McCarty’s injuries.<sup>9</sup>

Incidentally, we are less impressed with McCarty’s argument that Caltrans put time pressure on FCI, which prevented FCI from doing a hazard assessment. McCarty’s own expert, Dr. Wexler, testified that a contractor normally does a hazard assessment twice — once in the course of preparing its bid for a job, and again after the job is awarded to it. There was no evidence that a hazard assessment would also be done before carrying out extra work pursuant to a change order, as in this case. Three FCI employees all unanimously testified that they would not have done a hazard assessment in any event. Thus, there is no evidence that any act of Caltrans caused FCI’s failure to do a hazard assessment.

For the other reasons discussed above, however, we conclude that there was substantial evidence that Caltrans’s negligent exercise of its retained control caused McCarty’s injuries.

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<sup>9</sup> The trial court ruled that the evidence of El-Zaynab’s suggestion was insufficient to support the verdict, but for a different reason than Caltrans now argues. The trial court reasoned that El-Zaynab told FCI to let the pole fall out of the hole, but he did not specifically tell FCI to use an excavator: “They can grab it and pull it and drop it. They can do anything.” The jury could reasonably find, however, that El-Zaynab was referring to an excavator. How else was FCI going to loosen the earth around the pole so it would just fall out? Grabbing the pole and pulling it out would not be the same as just letting it fall out. El-Zaynab admitted that he “might have said . . . let it fall in the excavation. That’s possible.” In its motion for new trial, Caltrans acknowledged that El-Zaynab told Weir “to let the pole fall *during excavation*.” (Italics added.) In any event, Caltrans knew that FCI did not have the specialized equipment necessary to “grab it and pull it and drop it.”

## IV

### MOTION FOR JNOV

McCarty contends that the trial court erred by granting Caltrans's motion for JNOV, for five reasons.

First, he contends that the trial court lacked jurisdiction because Caltrans had already filed a notice of appeal.

Second, he contends that the ruling granting JNOV conflicted with the trial court's earlier rulings denying Caltrans's motions for nonsuit and for a directed verdict.

Third, he contends that the trial court applied an erroneous legal standard by weighing the evidence and picking and choosing among contradictory evidence.

Fourth, he contends that it was the law of the case that there was sufficient evidence to support a verdict in his favor.

Fifth and finally, he contends that there was sufficient evidence to support the jury's verdict.

We may assume, without deciding, that Caltrans's notice of appeal deprived the trial court of jurisdiction to entertain the motion for JNOV. Even if so, we can consider the sufficiency of the evidence in the context of Caltrans's appeal. The standard that the trial court uses in ruling on a motion for JNOV is the same as the standard that an appellate court uses in ruling on the sufficiency of the evidence — namely, “whether any substantial evidence — contradicted or uncontradicted — supports the jury's conclusion.” (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) Thus, now that

we have held, in the context of Caltrans's appeal that there was sufficient evidence, it necessarily follows that, even if the trial court *did* have jurisdiction to entertain the motion for JNOV, it erred on the merits by granting that motion.

In sum, one way or the other, the trial court did err by granting the motion for JNOV. We conclude that the judgment entered pursuant to the motion for JNOV must be reversed and that McCarty is entitled to judgment on the jury's verdict.

## V

### MOTION FOR NEW TRIAL

Caltrans contends that Judge Ochoa erred by vacating Judge Williams's order for a new trial.

#### A. *Additional Factual and Procedural Background.*

As mentioned earlier, on October 3, 2011, the trial court entered judgment in favor of McCarty and against Caltrans.

On October 10, 2011, McCarty served Caltrans with notice of entry of judgment.

On October 24, 2011, Caltrans filed its notice of intent to file a motion for new trial.

On December 5, 2011, at the hearing on the motion for new trial and the motion for JNOV, the trial court stated:

“As to my tentative ruling on the motion for new trial, after reviewing all of the evidence, I found that the evidence was insufficient. . . .

“Now, the standard in dealing with the motion for new trial is — and the basis for that is insufficiency of the evidence which was 657.6. You had 657.6 and 7. I was hard-pressed on 7, but I did find it on 6.”<sup>10</sup>

It explained at some length why it concluded that the evidence was insufficient. It then concluded:

“Once you review and read all this testimony, you come to the rather unsettling conclusion that there simply is not enough evidence to support the verdict.

“ . . . I have given you my tentative on the record for the new trial. The problem with the new trial is when I review the standard, a new trial means you come back for a new trial. This has been the second time at this. I don’t believe that the plaintiff can establish a case under the Hooker standards to show liability against Caltrans; so . . . I won’t rule on the new trial motion. I’ll find [it] moot, and I’m going to rule on the judgment notwithstanding the verdict and award judgment to the defendant Caltrans in this matter.”

It allowed both sides to present argument.<sup>11</sup> Thereafter, it stated: “I’m going to prepare findings . . . based on exactly what I have told you here today . . . . I’ll send out the ruling. I won’t give a written ruling on the new trial . . . . I have that on the record.”

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<sup>10</sup> Caltrans was seeking a new trial based on “[i]nsufficiency of the evidence to justify the verdict,” under Code of Civil Procedure section 657, subdivision 6, and “[e]rror in law,” under Code of Civil Procedure section 657, subdivision 7.

<sup>11</sup> During the argument, the trial court also commented:

*[footnote continued on next page]*

The minute order of the December 5, 2011 hearing stated:

“[Caltrans’s] Motion For New Trial is heard.

“The court gives tentative ruling as follows:

“The Court grants the motion.

“The Court finds the plaintiff[] cannot present sufficient evidence to support a verdict after two trials. The court further finds this motion moot due to the ruling on the Motion [for] Judgment Notwithstanding the Verdict.”

On December 8, 2011, Caltrans filed a “Suggestion to Sua Sponte Reconsider Ruling on Motion for New Trial” (Suggestion). It stated, “[Caltrans] hereby requests that the Court sua sponte reconsider its decision to decline to rule on the motion for new trial and instead grant that motion. [Citation.] Caltrans understands that the Court has granted the JNOV motion but has not yet ruled on the new-trial motion. Caltrans suggests that the Court grant the new-trial motion solely to ensure that Caltrans obtains a new trial in the event the JNOV is reversed on appeal.”

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*[footnote continued from previous page]*

“In reading special instruction 1A [defining a hirer’s “affirmative contribution” to an employee’s injuries], clearly the evidence was insufficient to satisfy that instruction. Clearly insufficient. *That’s why I’m not ruling on the motion for new trial. I’m finding that moot.* I just don’t feel after 11 years and two trials and one trip up to the court of appeal — of course, there will be another time — that you can make a case of their active participation.” (Italics added.)

It also stated, “If the court agrees and decides to grant the motion for new trial, it must enter a written order granting the motion for new trial . . . no later than **tomorrow, i.e., Friday, December 9, 2011.**” (Bolding in original.)

On December 12, 2011, the trial court issued a formal written order granting the motion for new trial “on the ground that the evidence was insufficient to justify the verdict.” At the same time, it also issued a longer written “Ruling,” stating the court’s reasons for concluding that the evidence was insufficient.

B. *Analysis.*

Code of Civil Procedure section 660, as relevant here, provides: “[T]he power of the court to rule on a motion for a new trial shall expire . . . 60 days from and after service on the moving party by any party of written notice of the entry of the judgment . . . . If such motion is not determined within said period of 60 days, . . . the effect shall be a denial of the motion without further order of the court. A motion for a new trial is not determined within the meaning of this section until an order ruling on the motion (1) is entered in the permanent minutes of the court or (2) is signed by the judge and filed with the clerk.”

It has been held that “[t]he 60–day time limit provided in section 660 is jurisdictional. Consequently, an order granting a motion for a new trial beyond the relevant 60–day time period is void for lack of jurisdiction. [Citation.]” (*Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 500 [Fourth Dist., Div. Two].)

Here, McCarty served Caltrans with a notice of entry of judgment on October 10, 2011. The trial court's power to rule on a motion for new trial expired 60 days later, on December 9, 2011. The issue, then, is whether the trial court "determined" the motion for new trial on December 5 or on December 12.

Caltrans asserts that "at the December 5 hearing, Judge Williams said that his tentative ruling was to *grant* the new-trial motion . . . ." Not so. At the hearing on December 5, the trial court *expressly* stated that it was *not* granting the motion for new trial. Admittedly, it *did* indicate that the motion was *meritorious*; thus, *if* the motion for new trial had been the only motion before it, it *would have* granted the motion. It concluded, however, that it was granting the motion for JNOV, and therefore the motion for new trial was moot. Indeed, it would be nonsensical to grant a moot motion.

Significantly, the trial court also stated, "I won't give a written ruling on the new trial . . . ." An order *granting* a new trial must be in writing (Code Civ. Proc., § 660) and "must state the ground or grounds relied upon by the court . . . ." (Code Civ. Proc., § 657.) The trial court must "specify . . . the court's reason or reasons for granting the new trial," either in the order granting the motion or in a separate statement filed within 10 days later. (*Ibid.*) The fact that the trial court did not intend to file such a written ruling confirms that it had no intention of granting the motion.

We recognize that the December 5 minute order did state, “[T]he court grants the motion.” However, this conflicts with the trial court’s oral ruling at the hearing that it was “not ruling on the motion for new trial.”<sup>12</sup>

“[C]onflicts between the reporter’s and clerk’s transcripts are generally presumed to be clerical in nature and are resolved in favor of the reporter’s transcript unless the particular circumstances dictate otherwise.” [Citation.]” (*In re P.A.* (2012) 211 Cal.App.4th 23, 30, fn. 4.) For example, in a criminal case, the court’s oral pronouncement of sentence controls over a minute order, “because the oral pronouncement constitutes the rendition of judgment and the written document is ministerial. [Citation.]” (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750, fn. 2; see also *People v. Mesa* (1975) 14 Cal.3d 466, 471.) “The clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order . . . . [Citation.] . . . [T]he clerk’s minutes must accurately reflect what occurred at the hearing.” (*People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388.) Here, the trial court ruled orally at the hearing; the minute order is merely one fallible clerk’s attempt to reduce that ruling to writing.

At the time, Caltrans recognized that the trial court had not actually granted its motion for new trial; that’s why it filed its Suggestion, and that’s why it stated in its

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<sup>12</sup> McCarty argues that the minute order was only a “tentative ruling.” He also argues that there is no evidence as to when the minute order was “entered in to the court’s permanent minutes.” In light of our conclusion, we need not decide these issues.

Suggestion that the trial court had not yet ruled on the motion. Caltrans argues that its statements in the Suggestion did not rise to the level of judicial estoppel. We need not decide this point. We simply note that the Suggestion is consistent with the conclusion that we reach independently from the record.

Caltrans argues that all that is required is “substantial compliance.” It asks us to construe the trial court’s December 5 ruling as granting the new trial motion, conditioned on the reversal of its order granting the motion for JNOV. (See Code Civ. Proc., § 629 [“If the court grants the motion for judgment notwithstanding the verdict . . . and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed . . . .”].)

“Where a reasonable attempt has been made to comply with a statute in good faith, . . . the doctrine of substantial compliance holds that the statute may be deemed satisfied. [Citation.]’ [Citation.] ‘Substantial compliance means “*actual* compliance in respect to the substance essential to every reasonable objective of the statute,’ as distinguished from ‘mere technical imperfections of form’” [citation].’ [Citation.]” (*People v. Green* (2004) 125 Cal.App.4th 360, 371 [Fourth Dist., Div. Two].) The doctrine does not allow us to construe an order knowingly, intentionally, and deliberately declining to rule on a motion as an order granting the motion.

Caltrans relies on *Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, disapproved on other grounds in *McCoy v. Hearst Corp.* (1986) 42 Cal. 3d 835, 846, fn. 9. There, much as here, after losing at trial, the defendants brought both a motion for

JNOV and a motion for new trial. The trial court granted the motion for JNOV; it further ordered: “In the event that, for any reason, the aforesaid order for judgment notwithstanding the verdict is reversed on appeal then the motion of defendants . . . for a new trial is hereby granted . . . .” (*Id.* at p. 422.)

The court held that this order “was technically defective.” (*Widener v. Pacific Gas & Electric Co.*, *supra*, 75 Cal.App.3d at p. 436.) It explained that the order “appears to be an announcement that the trial court would grant a motion for new trial sometime in the future in the event its prior order were to be reversed. Such an act would be in excess of the trial court’s jurisdiction [citation]. However, the language of the order can also be read as simply granting an alternative order for a new trial; it will be so construed, to give effect to the court’s manifest intention.” (*Id.* at p. 437, fn. omitted.)

In sum, the order in *Widener* was at least ambiguous. Moreover, there the trial court clearly intended to grant the motion for new trial, albeit only conditionally. Here, by contrast, on December 5, the trial court clearly did not intend to grant the motion for new trial. Moreover, its oral pronouncement of its ruling on December 5 was not ambiguous.

We therefore conclude that the trial court did not grant the motion for new trial until December 12, 2011. Thus, this order was outside the 60-day time limit and therefore void. It follows that Judge Ochoa did not err by vacating the order granting the motion. (Code Civ. Proc., § 473, subd. (d).)<sup>13</sup>

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<sup>13</sup> This is all something of a tempest in a teapot.

[footnote continued on next page]

C. *The Propriety of the Denial of the New Trial Motion.*

As just discussed, the December 12 order granting a new trial was void, and Judge Ochoa properly vacated it. As a result, the motion for new trial was denied by operation of law. Caltrans therefore also contends that the denial of the motion for new trial was erroneous.

“[T]he merits of a motion for a new trial denied by operation of law may be reviewed upon appeal in the same manner as if expressly denied by the court.

[Citations.]” (*Estate of Shepard* (1963) 221 Cal.App.2d 70, 73; accord, *Weisenburg v. Molina* (1976) 58 Cal.App.3d 478, 486 [Fourth Dist., Div. Two].)

The denial of the motion for new trial would be erroneous if, as Caltrans argued below, there was insufficient evidence as a matter of law. On appeal, however, Caltrans

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*[footnote continued from previous page]*

Even if we concluded that Judge Ochoa erred by vacating the December 12 order, we would hold that Caltrans was not prejudiced because the December 12 order was erroneous. (See *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1121 [respondent who has not cross-appealed can assert error to show lack of prejudice].) As we have already held (see part III, *ante*), there was sufficient evidence to support the verdict as a matter of law. Even assuming the trial court felt, in the exercise of its independent judgment as the “13th juror,” that the verdict was against the weight of the evidence (see generally *Jones v. Evans* (1970) 4 Cal.App.3d 115, 120-121), it abused its discretion. It focused on three pieces of evidence: (1) Caltrans’s directive to remove the pole as soon as possible, (2) El-Zaynab’s suggestion to just let the pole fall out of the hole, and (3) Dr. Wexler’s testimony that Caltrans put time pressure on FCI. It concluded that these were insufficient to show that Caltrans interfered with “means and methods” of removing the pole. (See *Hooker v. Department of Transportation, supra*, 27 Cal.4th at pp. 207, 215.) Regarding El-Zaynab, as we have already held (see fn. 9, *ante*), this was error. Moreover, it completely ignored the evidence that Caltrans was negligent in directing FCI — rather than SCE or Sturgeon — to remove the pole *at all*, which we have already held was sufficient to support the verdict.

does not reiterate this argument in connection with the new trial motion — and understandably so. If, in fact, there was insufficient evidence, then Caltrans was entitled to JNOV. Obviously, it would prefer to have JNOV in its favor than have to face a new trial. In any event, in part III, *ante*, we held that there *was* sufficient evidence to support the verdict.

Rather, Caltrans argues that the trial court applied an erroneous legal standard: it denied the motion for new trial as moot because it was granting the motion for JNOV, when what it should have done was grant both motions. However, that misdescribes what happened. The trial court did not *deny* the new trial motion as moot. Rather, it *refused to rule* on the new trial motion because it was moot. Thereafter, because the trial court had not ruled on the motion during the 60-day period, the motion was denied by operation of law. Caltrans cannot get around the 60-day limit by arguing that the trial court erred by failing to rule within 60 days. Yet that is exactly what it is trying to do — it is arguing that the trial court’s *reason* for not ruling within 60 days was erroneous.

Caltrans also argues that the trial court erred by failing to exercise its discretion to weigh the evidence as a “13th juror.” However, this is true *every* time a motion for new trial is denied by operation of law. Once again, it cannot be used as an end-run around the 60-day limit.

We therefore conclude that the denial of the motion for new trial by operation of law must stand.

VI

DISPOSITION

The order granting the motion for JNOV and the resulting December 12, 2011 judgment are both reversed. The October 3, 2011 judgment on the jury's verdict is affirmed and reinstated. The order vacating the order granting a new trial is affirmed. McCarty is awarded costs on appeal against Caltrans.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.