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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

HEATHER McCORMACK et al.,

Plaintiffs and Appellants,

v.

PACIFIC GAS & ELECTRIC
COMPANY,

Defendant, Cross-Complainant and
Appellant;

QUYEN NGUYEN,

Defendant, Cross-Defendant and
Respondent.

H035217

(Santa Clara County
Super. Ct. No. CV071436)

INTRODUCTION

Appellant, cross-complainant, and defendant Pacific Gas and Electric Company (PG&E) appeals from an order by the trial court granting a partial new trial after a jury returned a verdict finding PG&E negligent but not a substantial cause of Santa Clara County Fire Department Captain Mark McCormack's death. Captain McCormack suffered fatal injuries while responding to a house fire on February 13, 2005, after he touched a downed electrical power line. Plaintiffs and appellants are Heather McCormack, Captain McCormack's widow, and Jack and Shirley McCormack, Captain

McCormack's surviving parents. The McCormacks brought suit against PG&E, as well as defendants, cross-defendants, and respondents Quyen Nguyen and Dam Mac, for wrongful death and negligence. Nguyen owned the residence that caught on fire, and Mac, Nguyen's ex-husband, inadvertently started the fire.

On appeal, PG&E argues that the McCormacks' claims are barred by the common law firefighter's rule. PG&E additionally claims that the trial court's order granting the new trial is reversible per se as the court failed to supply a sufficient statement of reasons with its order. In the alternative, PG&E contends that even if this court were to find the trial court's statement of reasons adequate, this court should reverse the order as the trial court erred in granting the motion since sufficient evidence supported the jury's verdict and because the jury's verdict was not against the law. Lastly, PG&E asserts that the trial court tainted the jury by allowing improper expert testimony from Dr. John Palmer, one of the McCormacks' expert witnesses.

For the reasons set forth below, we find the firefighter's rule inapplicable to this case. We further find that the trial court did not abuse its discretion in granting the motion for new trial on the basis of insufficient evidence, nor did it err in allowing Dr. Palmer's testimony. We therefore affirm the new trial order and the judgment.

FACTUAL BACKGROUND

The Blossom Hill Road Property and the Initial 2003 Fire

Nguyen purchased her home on 15700 Blossom Hill Road (hereafter "Blossom Hill Road property") in 1985, where she lived with her now ex-husband Dam Mac. The original structure was approximately 2,920 square feet in space, but Nguyen and other various owners constructed additional rooms to the home over time. The construction efforts added approximately 2,192 square feet to the house, including numerous outbuildings. Nguyen utilized portions of the main house and outbuildings as a storage area for artifacts.

In 2003, the Blossom Hill Road property caught on fire for the first time. Santa Clara County Building Official Thomas Whisler testified at trial that building inspector Tom Avon inspected the Blossom Hill Road property after this initial fire.¹ Pursuant to the inspection, the department issued “red tag” notices designating certain portions of the home as unsafe for human occupation. These red tags included danger warnings and a statement that read: “This Building is Deemed Unsafe for Human Occupancy.” The department placed red tags on several areas of the Blossom Hill Road property, including the room where the fire originated.

PG&E Inspection in 2004 and PG&E’s Easement

PG&E possessed two easements over the Blossom Hill Road property that allowed the company to suspend electrical lines over the house. The electrical lines placed by PG&E included a 12 kilovolt (kV)² line that ran across the house, directly over its second story.³

Nguyen testified at trial that she complained to PG&E several times about the overhead power lines located directly above her home. Nguyen said she personally went to PG&E’s Cupertino office and informed them that she wanted the lines moved. Nguyen claimed that PG&E told her that they would take her request under consideration, though the lines were never moved.

¹ According to Whisler’s testimony, the department routinely receives notices from county or local fire departments after a fire has taken place in a structure within the department’s jurisdiction. After receiving a notice, the department sends an inspector to the site to “assess the amount of damage and whether or not the building is still habitable and structurally safe.”

² One kV is 1,000 volts.

³ The second story of the Blossom Hill property was one of the additions made to the original structure, and was illegally added.

The 2005 Fire

Mac, Nguyen, and their children were all at the house on February 13, 2005, during the Tet holiday, the Vietnamese new year. Mac lit an incense stick and left the stick in a bowl of sand in one of the red-tagged rooms in the house as he went to take a shower. At trial, PG&E's expert witness James Hall estimated that the incense stick fell out of the bowl at some point between 1:30 and 1:45 a.m. Nguyen testified she realized the house was on fire when she smelled smoke and called 911 within five minutes of her discovery. Nguyen's testimony clashed with Hall's, who testified that the fire was discovered sometime between 1:50 a.m. and 2:00 a.m., and that therefore approximately 20 minutes elapsed before Nguyen called 911 at 2:19 a.m. Hall testified that Nguyen and other residents in the house tried to put out the fire themselves with buckets and a garden hose prior to contacting the authorities.

Fire engines arrived at the scene of the fire at 2:26 a.m., seven minutes after Nguyen called 911. The first firefighters that arrived estimated that around 70 to 80 percent of the second floor was ablaze, so the incident commander present at the scene ordered the rest of the firefighters to get into "defensive mode." This meant that firefighters prioritized preventing the fire from spreading to neighboring homes over saving the Blossom Hill Road property itself.

The 12kV electrical line located above the second story of the house broke and fell down shortly after the firefighters' arrival. The line separated, with both halves of the line falling into the area of the Blossom Hill Road property commandeered by the fire department. One half of the line (Wire 1), fell into a tree next to the driveway of the home, suspended at "about chest or mid-abdomen level." The second half of the line (Wire 2), fell onto a hill next to the home. Santa Clara County Fire Department Assistant Chief Ken Kehmna described Wire 1 as a bare copper wire, greenish in color, smaller than a pencil, and approximately an eighth of an inch thick.

Captain Carol Miller, one of the responding firefighters, was assigned “Branch 1” of the fire scene, which consisted of the side of the property facing Blossom Hill Road. Branch 1 included the area where Wire 1 lay. Captain McCormack arrived at the scene at approximately 2:29 a.m. and was assigned Branch 2, which faced the dirt road and hillside to the back of the property. Captain Miller and fellow firefighter Captain Jim Swanson discussed methods to possibly secure Wire 1, but decided it was impractical to completely close off the driveway since firefighters were using the area. Captain Swanson ultimately tied caution tape in a semicircle around Wire 1. Captain Miller retrieved a pole stick with the intent to push Wire 1 into the tree, but she later stated in a deposition that “I knew it was live and I wasn’t going to kill myself trying to move [the wire].”

At some point, firefighter Dwayne Drake, working in the driveway close to Wire 1, left the driveway to turn on the lights in a fire truck due to the lack of visibility in the area. Drake testified that the smoke in the area was so thick that “[w]e could not see the house anymore and we could not see in front of our face[s].”

At approximately 3:25 a.m., Captain McCormack walked up the driveway, contacted Wire 1, and instantly fell to the ground. Captain Miller broadcasted by radio that a firefighter was “down” at 3:25 a.m., and firefighters moved Captain McCormack from the scene. Hospital personnel pronounced Captain McCormack dead at 4:14 a.m. Captain McCormack’s tragic death in the line of duty was the first in the Santa Clara County Fire Department’s history, which spans back to 1947.

PG&E’s Response to the Fire

As firefighters responded to the fire alarm and arrived at the scene of the blaze, county communications also notified PG&E by calling PG&E dispatcher Gene Brooks at approximately 2:34 a.m., after the fire raised a second alarm. Brooks first called Paul Lopez, a PG&E gas serviceman. Lopez testified that he received Brooks’ call between

2:30 and 3:00 a.m. Lopez waited until his vehicle's FAS computer booted up and confirmed the address of the fire. Lopez acknowledged the job tag on his FAS computer system at approximately 3:06 a.m.⁴ Lopez lived around four miles away from the Blossom Hill property, and arrived at the fire at around 3:10 a.m, where a firefighter informed him that an electric power line had fallen. Lopez did not have the necessary equipment to deal with a high-voltage electric line, so he called Brooks to tell him that an electric power line was down. Brooks told him that an electric troubleman was on his way.

Brooks testified that he called the electric troubleman, Bob Mayer sometime between 2:50 a.m. and 3:00 a.m. Mayer booted up his FAS system at 3:19 a.m., and set off for the scene of the fire. Mayer arrived at 3:40 a.m., around 15 minutes after Wire 1 electrocuted McCormack. Upon his arrival, Mayer manually cut down the lines and reported that the lines were "cut and clear" at approximately 4:05 a.m., around 25 minutes after his arrival.

At the time of the fire, PG&E possessed the technology to de-energize its electric power lines. It takes 15 to 60 seconds to de-energize a power line, and an equal amount of time to re-energize a power line. PG&E's system operators are trained to de-energize power lines if instructed to by fire or police commanders, but it is the company's general policy to wait for an electric troubleman to arrive on scene before doing so. Tomoro was the only system operator on duty at the time of the fire, and he was not notified of the electrical emergency until after Mayer arrived at the scene around 3:40 a.m., after Captain McCormack had already been killed.

⁴ PG&E's standard policy for responding to emergency situations is to have the gas servicemen and electric troublemen wait until the FAS computer in their trucks gives them the exact address before departing from their residences.

PROCEDURAL BACKGROUND

The McCormacks' Complaint and PG&E's Demurrer

The McCormacks filed a complaint for wrongful death and negligence against PG&E, Mac, and Nguyen on September 19, 2006.⁵ PG&E filed a demurrer, alleging that the McCormacks failed to state a cause of action since the firefighter's rule barred all their claims. On February 6, 2007, the trial court overruled PG&E's demurrer in part, finding that the McCormacks' complaint brought their cause of action into the "independent cause" exception of the firefighter's rule. The trial court then sustained PG&E's demurrer with leave to amend on the grounds that the McCormacks lacked capacity to bring the cause of action on Captain McCormack's behalf.

On February 9, 2007, the McCormacks filed their first amended complaint for wrongful death and damages against PG&E and Nguyen. The McCormacks' argued that PG&E negligently managed, maintained, inspected and controlled their easement over the Blossom Hill Road property, and that PG&E negligently failed to exercise the appropriate level of care and urgency in de-energizing the electrified 12kV power line. The complaint also alleged that Nguyen and Mac were negligent in the construction, management, and maintenance of their home on 15700 Blossom Hill Road. The McCormacks attached a declaration to their first amended complaint describing their capacity to bring a cause of action as Captain McCormack's successors in interest.

PG&E thereafter filed a cross-complaint against Mac and Nguyen for indemnification, apportionment of fault, and declaratory relief.

⁵ This current appeal centers on the trial court's grant of a new trial against PG&E. So even though the McCormacks also sued Mac and Nguyen in the underlying case, our procedural background will focus on the litigation between PG&E and the McCormacks.

PG&E's Motion for Summary Judgment

On September 29, 2008, PG&E moved for summary judgment against the McCormacks. PG&E argued that the undisputed facts established that the McCormacks' complaints were barred by the firefighter's rule, and that "[a]ll of the elements for the firefighters rule are satisfied in this case and no exceptions apply." The McCormacks filed an opposition to PG&E's motion for summary judgment, arguing that exceptions to the firefighter's rule applied.

The trial court denied PG&E's motion for summary judgment, finding that the firefighter's rule did not bar the McCormack's complaint. PG&E filed a motion for reconsideration, which the trial court denied on March 12, 2009.

The Trial and Jury Verdict

Trial against PG&E, Nguyen, and Mac commenced on October 2, 2009. A multitude of witnesses testified, including the McCormacks' expert Dr. John Palmer, who testified over PG&E's objections. Dr. Palmer testified a combination of the air, smoke, and flame coming out of the burning house contributed to the 12kV wire breaking due to a phase-to-phase arc. Dr. Palmer also testified that if PG&E had installed a fuse to the 12kV line, the fuse would have tripped and the 12kV line would have automatically de-energized when it fell. Further, Dr. Palmer offered the opinion that the placement of the 12kV line over the home constituted a hazard since those doing work on the roof might accidentally encounter the live wire, and that in the event of a fire the wire could fall, creating a danger to first responders such as firefighters.

When asked if the placement of the 12kV wire over the home complied with California Public Utilities Commission standards that "conductors shall be arranged so as to not endanger workers or firefighters who are performing their duties," Dr. Palmer answered that he believed it did not, basing his opinion on the fact that "there were

conductors extending over [the] two-story structure [that] had been there for a number of years, and that no action was taken to mitigate the hazard associated with those lines.”

PG&E expert witness Michael O’Connor called into question much of Dr. Palmer’s testimony, and testified that in his opinion, a phase-to-phase arc could not have occurred under the conditions of the 2005 fire.

The trial concluded on November 12, 2009, after the jury returned a special verdict. The jury’s special verdict found PG&E negligent by a 10 to 2 vote, but also found that PG&E’s conduct was not a substantial factor in causing Captain McCormack’s death. The special verdict similarly found Nguyen and Mac negligent, and that Nguyen and Mac’s negligence was not a substantial factor in Captain McCormack’s death. With regards to PG&E’s cross-complaint against Nguyen and Mac, the jury found that Nguyen and Mac were negligent, and that Mac’s negligence was a substantial factor in causing damage to the overhead power line while Nguyen’s negligence was not. The trial court entered the jury’s verdict on November 30, 2009.

The McCormacks’ Motion for New Trial

On December 24, 2009, the McCormacks filed a motion for new trial as to their causes of action against PG&E, seeking a partial new trial on the issues of causation, damages, and apportionment of responsibility.⁶ The McCormacks argued that the jury’s determination that PG&E was negligent must certainly have resulted in a finding that PG&E was a substantial factor in causing Captain McCormack’s death. PG&E filed an opposition to the motion for new trial, contending that the jury did not need to find PG&E a substantial factor in Captain McCormack’s death simply because it found PG&E negligent. In its opposition, PG&E again reiterated its position that the McCormacks’

⁶ Though the jury verdict against Nguyen was similar to the verdict against PG&E (finding Nguyen negligent but not a substantial cause of Captain McCormack’s death), the McCormacks did not seek a new trial against Nguyen.

complaint was barred by the firefighter's rule from the beginning, and that it would be "unjust to require PG&E to defend a lengthy, expensive trial twice without appellate examination of the Court's ruling on the firefighter's rule."

The Trial Court's Order Granting the McCormacks' Motion for New Trial

On January 27, 2010, the trial court granted the McCormacks' motion for new trial on all issues, not just the issues the McCormacks initially sought in their motion. The 14-page ruling included a brief outline of the court's findings and a summary of the evidence presented to the jury. The trial court first reasoned that the plaintiff's theories can be summarized into four distinct theories:

First, that PG&E was unreasonably slow in getting an electric troubleman to the scene of the fire since the company was notified of the fire at 2:32 a.m. and that there was a live, 12kV power line in a tree close to the fire scene at 3:00 a.m.

Second, that PG&E was unreasonably slow in remotely de-energizing the 12kV power line since it possessed the technology to do so but declined to because of policy reasons.

Third, that PG&E unreasonably failed to install fuses on its 12kV power line, despite the fact that PG&E installed fuses on its transformers on the same line. The McCormacks further contended that if PG&E installed the fuses, the deadly 12kV power line would have automatically de-energized when it fell.

Fourth, that PG&E failed to move the 12kV power line. The McCormacks argued that if the power lines were moved prior to 2005, they would not have been in the path of the fire and would not have broken, ultimately killing Captain McCormack.

The court then reasoned that at the center of these four theories was the argument that PG&E possessed a legal duty to control and de-energize the 12kV power line, and that PG&E breached this duty. The trial court's order summarized that there was considerable testimony from both sides on all of the issues, and that the jury elected to

find PG&E negligent. The trial court reasoned that since the only basis of negligence alleged against PG&E was the company's failure to either de-energize the 12kV line or ensure the 12kV line was not in the path of the fire, it seemed that "the jury's finding that PG&E was not a substantial factor in causing Captain McCormack's death cannot be reconciled with its finding that PG&E was negligent," and further found that the "two findings are inherently inconsistent and illogical."

In support of its conclusions, the trial court outlined evidence it believed was laid out with considerable proof during the trial, including testimony by various witnesses covering a range of topics including the timeline of events the night of the fire and PG&E's processes and procedures for remotely de-energizing power lines. The trial court ultimately concluded that there was overwhelming evidence of both negligence and causation, and that the jury was "clearly" wrong in not finding PG&E a substantial factor of Captain McCormack's death.

The trial court also noted that though it "may or may not have agreed with a verdict of 'no negligence' on the overall record," it would have been "bound to deny a motion for new trial had the jury found no negligence" but that since in this case the jury *did* find negligence but failed to find causation, it was compelled to grant the motion for new trial.

PG&E filed a timely notice of appeal over the trial court's order granting the McCormack's motion for new trial and the underlying jury verdict on January 28, 2010. The McCormacks filed a protective cross-appeal on February 10, 2010.

DISCUSSION

PG&E raises four main arguments on appeal. First, PG&E argues that the trial court erred in allowing the case to go before a jury, as the firefighter's rule clearly applies. Second, PG&E claims that the trial court's order granting the McCormacks' motion for new trial must be reversed since the court's statement of reasons was

insufficient and failed to specifically discuss the trial evidence regarding causation. Third, PG&E contends that the trial court abused its discretion in granting the motion for new trial because there was sufficient evidence to support the jury's verdict finding negligence but *not* finding causation, and because the verdict was not "against [the] law." Lastly, PG&E contends that the trial court improperly admitted Dr. John Palmer's testimony since his theories were not generally accepted within the scientific community.

We first address the merits of PG&E's appeal.

I. PG&E's Appeal

1. Applicability of the Firefighter's Rule

A. Standard of Review

On appeal, PG&E contends that the McCormacks' complaint is barred by the firefighter's rule, which in certain situations abrogates the traditional duty of care owed to first responders from third parties. Whether PG&E had a duty of due care to Captain McCormack is a question of law that we will review *de novo*. (See *Eric M. v. Cajon Valley Union School Dist.* (2009) 174 Cal.App.4th 285, 293.)

B. Overview of the Firefighter's Rule

The Firefighter's Rule

Our Supreme Court recognized the existence of the common law firefighter's rule in *Knight v. Jewett* (1992) 3 Cal.4th 296 (*Knight*). In *Knight*, the Supreme Court explained that "[i]n its most classic form, the firefighter's rule involves the question [of] whether a person who negligently has started a fire is liable for an injury sustained by a firefighter who is summoned to fight the fire; the rule provides that the person who started the fire is not liable under such circumstances. [Citation.] Although a number of theories have been cited to support this conclusion, the most persuasive explanation is that the party who negligently started the fire had no legal duty to protect the firefighter from the very danger that the firefighter is employed to confront. [Citations.] Because

the defendant in such a case owes no duty to protect the firefighter from such risks, the firefighter has no cause of action even if the risk created by the fire was so great that a trier of fact could find it was unreasonable for the firefighter to choose to encounter the risk. This example again demonstrates that primary assumption of risk is not the same as ‘reasonable implied assumption of risk.’ ” (*Id.* at pp. 309-310, fn. 5.)

Accordingly, “[u]nder the firefighter’s rule, a member of the public who negligently starts a fire owes no duty of care to assure that the firefighter who is summoned to combat the fire is not injured thereby. [Citations.]” (*Neighbarger v. Irwin Indus., Inc.* (1994) 8 Cal.4th 532, 538 (*Neighbarger*)). However, the firefighter’s rule does not serve to bar all lawsuits brought by firefighters and first responders for injuries sustained in the line of duty. “The firefighter does not assume every risk of his or her occupation. [Citation.] The rule does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer, and it does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene.” (*Ibid.*)

The *Neighbarger* court outlined several policy considerations in support of the firefighter’s rule. First, “firefighters may not complain of the very negligence that makes their employment necessary.” (*Neighbarger, supra*, 8 Cal.4th at p. 540.) Second, “public safety employees receive special public compensation for confronting the dangers posed by [those who started the fire] negligence” and “that the abolition of the firefighter’s rule would embroil the courts in relatively pointless litigation over rights of indemnification among the employer, the retirement system, and the defendants’ insurer.” (*Ibid.*) Additionally, the firefighter’s rule is largely “ ‘based upon a public policy decision to meet the public’s obligation to its officers collectively through tax-supported compensation rather than through individual tort recoveries. This spreads the costs of injuries to public officers among the whole community, making the public in essence a

self-insurer against those wrongs that any of its members may commit.’ [Citations.]” (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1062 (*Calatayud*)). “[P]ublic safety officers are compensated through public benefits for injuries sustained in the line of duty. If they were also permitted private recovery for those injuries, the public would in effect pay the bill twice: first through taxes and then from insurance. [Citations.]” (*Yamaguchi v. Harnsmut* (2003) 106 Cal.App.4th 472, 479-480.)

Exceptions to the Firefighter’s Rule

There are exceptions to the firefighter’s rule: an exception expressly codified under Civil Code section 1714.9, and a common law independent cause exception.

First, the exception under Civil Code section 1714.9, subdivision (a), provides that “any person is responsible not only for the results of that person’s willful acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, but also for any injury occasioned to that person by the want of ordinary care or skill in the management of the person’s property or person [¶] (1) Where the conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel.”

Civil Code section 1714.9 expressly does not abrogate or impinge upon the common law independent cause exception to the firefighter’s rule illustrated in *Donahue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658 (*Donahue*). (Civ. Code, § 1714.9, subd. (e).) In *Donahue*, a firefighter sued the San Francisco Housing Authority (SFHA) after slipping and breaking his arm after a routine fire safety inspection. (*Donahue, supra*, 16 Cal.App.4th at p. 661.) The firefighter’s fall occurred after he arrived on the premises of an apartment building he was meant to inspect. (*Ibid.*) During his inspection, the firefighter noticed that the floor of the stairwell was wet, so he traversed the stairs with caution but ended up slipping and injuring himself. (*Ibid.*) He sued over his injuries, and SFHA moved for summary judgment citing the firefighter’s

rule. (*Ibid.*) The appellate court in *Donahue* found that “the firefighter’s rule did not apply because it does not bar recovery for independent acts of misconduct which were *not the cause of the plaintiff’s presence on the scene*. [Citations.]” (*Id.* at p. 663.)

The *Donahue* court reasoned that “[t]he facts that plaintiff was injured while in the regular course of his duties as a fireman and that the hazard was one normally encountered as part of his job, are not dispositive. The negligent conduct at issue was SFHA’s failure to install nonslip adhesive treads on the stairs, coupled with the improper maintenance practice of hosing down the stairs. Neither of these acts was the reason for plaintiff’s presence. Plaintiff was not summoned to the scene to inspect the slipperiness of the stairs, he was there to inspect for fire code violations. Since the injuries were not caused by an act of negligence which prompted plaintiff’s presence in the building, the firefighter’s rule does not bar the present claim. [Citation.]” (*Donahue, supra*, 16 Cal.App.4th at p. 663.)

Another illustration of an independent cause exception can be found in *Lipson v. Superior Court* (1982) 31 Cal.3d 362 (*Lipson*). In *Lipson*, a firefighter responded to the scene of a chemical boil over. (*Id.* at p. 365.) The firefighter asked the owners of the plant whether or not the boil over contained toxic substances. (*Ibid.*) He was told the boil over was safe, though it actually contained toxic chemicals. (*Ibid.*) The firefighter ultimately suffered injuries in the process of trying to contain the boil over, and thereafter brought suit against the plant owners, who asserted that the firefighter’s rule barred the firefighter’s complaint. (*Id.* at p. 366.) The Supreme Court held “that a fireman can recover damages for personal injuries sustained as a result of a defendant’s negligent or intentional misrepresentation of the nature of the hazard which the fireman is called to confront. While the fireman’s rule shields a defendant from liability for negligently or recklessly causing or for failing to prevent a fire, it does not provide protection to a

defendant who commits independent acts of misconduct after the firefighters have arrived on the premises.” (*Id.* at p. 373, fn. omitted.)

We find, however, as the Third Appellate District did in *Terry v. Garcia* (2003) 109 Cal.App.4th 245 (*Terry*), that there are essentially two situations in which the firefighter’s rule *does* apply and the exceptions to the firefighter’s rule *do not* apply even though the alleged negligence did not summon the firefighter or peace officer and the negligence occurred after the firefighter or peace officer arrived at the scene. (*Id.* at p. 252.)

The first situation is one in which the responding firefighter or peace officer arrives on the scene of an emergency, during which time a second emergency arises and the firefighter or peace officer injures him or herself while responding to the second emergency. This situation is illustrated in *Seibert Security Services, Inc. v. Superior Court* (1993) 18 Cal.App.4th 394. In *Seibert*, an officer escorted a suspect to a hospital and suffered injuries after he helped subdue another patient at the facility. (*Id.* at p. 403.) There, the appellate court found that the independent cause exception did not apply. (*Id.* at p. 411.) The *Seibert* officer’s injuries were the direct result of his response to second emergency situation that, by chance, arose while he was present and responding to the first emergency. No independent cause or unrelated act of negligence barred application of the firefighter’s rule.

The second situation in which the firefighter’s rule does apply is one in which the responding firefighter or peace officer suffers injuries due to the negligence of an officer from a jointly responding agency. This situation is illustrated in *Calatayud, supra*, 18 Cal.4th 1057. In *Calatayud*, a Pasadena police officer was injured after a California Highway Patrol Officer’s shotgun accidentally discharged while both officers attempted to subdue and arrest a resisting suspect. (*Id.* at p. 1060.) The injured officer brought suit, and the California highway patrolman unsuccessfully argued before the trial court that the

firefighter's rule acted as a bar to the injured officer's claims. (*Ibid.*) A jury awarded the injured officer damages in excess of \$700,000, and the parties appealed. (*Id.* at pp. 1060-1061.) The appellate court affirmed, and the Supreme Court reversed, finding that the Legislature did not intend the exception set forth in Civil Code section 1714.9 to include fellow public safety members "jointly engaged in the discharge of their responsibilities." (*Calatayud, supra*, 18 Cal.4th at p. 1072.) As described *ante*, Civil Code section 1714.9 provides that "any person" is responsible for willful or negligent acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity. In coming to its conclusion, the court cited numerous policy reasons for not expanding the scope of Civil Code section 1714.9 to all individuals, such as fellow officers, including the potential to create conflicting duties between officers employed by different agencies, and the likelihood of damage to the public fisc contemplated in *Neighbarger*. (*Calatayud, supra*, at pp. 1068-1070.)

C. Application of the Firefighter's Rule to PG&E

In the trial proceedings below, PG&E repeatedly asserted that the firefighter's rule immunizes it from liability, and raises this argument again on appeal. PG&E contends that its role in assisting the fire department in emergencies supports the application of the firefighter's rule as a bar against the McCormacks' claims. PG&E further argues that downed power lines, such as the 12kV line that killed Captain McCormack, are hazards that firefighters are trained and paid to face in their line of duty, and that as a result, fairness supports the application of the firefighter's rule. For reasons set forth below, we determine that these arguments lack merit.

The Independent Cause Exception to the Firefighter's Rule Applies

PG&E cites to *Calatayud, supra*, 18 Cal.4th 1057 and several other cases for the proposition that peace officers and other first responders cannot file suit for injuries sustained as a result of negligence that occurred during an emergency situation. (See,

e.g., *Farnam v. State of California* (2000) 84 Cal.App.4th 1448 [holding that the firefighter’s rule applied when a police dog controlled by California Highway Patrol officer injured a city police officer]; *City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269 [holding that firefighter’s rule applied when lifeguard employed by city was injured during cooperative rescue operation handled negligently by Camp Pendleton lifeguards].)

Nonetheless, PG&E’s position fails to acknowledge that the current action is dissimilar in facts and in law to the cases it cites. This case does not fall under the umbrella of the two situations outlined in *Terry*, where the independent cause exception and the exception outlined in Civil Code section 1714.9 do not prevent application of the firefighter’s rule despite the fact that the alleged negligence that caused the injury did not summon the firefighter or peace officer and the alleged negligence occurred after the firefighter or peace officer arrived on scene. (See *ante*.)

Unlike *Catalayud*, PG&E was not an assisting agency whose negligence in handling the emergency situation resulted in Captain McCormack’s injuries. Put in other words, Captain McCormack’s death was not the result of negligence that occurred during joint rescue operations with an assisting public agency.⁷ The case law PG&E relies on

⁷ In its opening brief, PG&E argues that the rule set forth in *Calatayud* extends beyond “uniformed public safety officers.” In support of this contention, PG&E cites to *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 (*Hamilton*). The Court of Appeal in *Hamilton* found that the firefighter’s rule barred a probation corrections officer’s claim of negligence against a training course business and its owner after the officer was injured during a mandatory training session. (*Id.* at pp. 1017-1018, 1025-1026.) PG&E is correct in that the appellate court determined that the scope of the firefighter’s rule extended not only to the risk of injury when responding to emergency situations but also to the risk of injury when *training* to respond to emergency situations. (*Id.* at p. 1026.) Nonetheless, this extension of the firefighter’s rule has little application to this instant case, as PG&E is not assisting in the training of public safety professionals and because Captain McCormack’s mortal injuries did not occur during the course of training.

applies the firefighter’s rule to negligence committed by public safety officers that injure fellow public safety officers, such as barring a city police officer from bringing suit against a negligent California state highway patrol officer, or barring a city lifeguard from bringing suit against a negligent Camp Pendleton lifeguard. (See, e.g., *Farnam v. State of California*, *supra*, 84 Cal.App.4th 1448; *City of Oceanside v. Superior Court*, *supra*, 81 Cal.App.4th 269.) We disagree that these cases may be extended such that utilities companies must also be exempted from liability.

Furthermore, unlike the set of facts contemplated by the appellate court in *Seibert*, *supra*, 18 Cal.App.4th 394, Captain McCormack’s injuries did not arise from his response to secondary emergency situation that occurred after he arrived at the scene of the fire. His injuries did not result from his attempt to secure the downed power line. In fact, the McCormacks alleged that Captain McCormack’s fatal injuries directly resulted from an independent action by PG&E—its alleged negligent failure to de-energize the downed 12kV wire. PG&E’s assertion that firefighters are trained to deal with power lines as part of their duties may be true. However, firefighters are *not* trained to handle power lines that, due to an independent act of negligence, are energized when they should not be. Nor do we believe firefighters assume the risk of all injuries they may incur at the scene of an emergency, including injuries arising from a third party’s independent tortious conduct committed after firefighters’ presence at the scene is known, as this cuts into the independent cause exception set forth in *Donahue*, *supra*, 16 Cal.App.4th 658.

In fact, we find that this case is similar to the facts set forth in *Terry*, *supra*, 109 Cal.App.4th 245. In *Terry*, a police officer received a call from dispatch regarding a domestic violence incident. (*Id.* at p. 248.) He responded in “code 3,” which permitted him to use his sirens and go above the speed limit by 25 miles per hour. (*Ibid.*) En route to the location of the incident, he came across a truck driver pulling an empty cattle trailer. (*Ibid.*) The officer attempted to avoid collision, but the truck driver clipped the

officer's car. (*Id.* at p. 249.) The officer sustained injuries after the accident, and brought suit against the truck driver and owner for negligence. (*Ibid.*) The trial court determined that risk of an injury during a high-speed pursuit was an inherent part of the officer's job, and ruled in favor of summary judgment for the truck driver and owner. (*Ibid.*) The officer appealed, arguing that the negligence that caused his injuries was "independent conduct that did not create the occasion for his employment." (*Id.* at p. 252.) The court of appeal reversed in favor of the officer, finding that the case fell squarely into the independent cause exception to the firefighter's rule as he was injured due to the truck driver's independent act of negligence. (*Id.* at p. 253.)

PG&E's argument that the hazards of downed power lines are inherent to the scope of a firefighter's duties echoes the truck driver and owner's failed arguments in *Terry*. Like the officer in *Terry*, Captain McCormack did not arrive at the scene of the fire in response to a downed power line. He came to the Blossom Hill Road property solely to battle the fire. His injuries arose from PG&E's alleged negligence in de-energizing the power lines, which constituted an independent cause. The facts of this case simply fall under the purview of the independent cause exception articulated in *Donahue, supra*, 16 Cal.App.4th 658.

PG&E refutes the proposition that the wire's fall constitutes an independent cause, since firefighters "reasonably anticipated that downed electrical lines might be present, and were trained to treat all such wires as being energized and dangerous." PG&E relies on *Lenthall v. Maxwell* (1982) 138 Cal.App.3d 716, 719 (*Lenthall*). In *Lenthall*, the appellate court held that "[the firefighter's] rule does apply to injuries inflicted by a participant in the event bringing the officer to the place of injury and the act causing the injury is one which the officer should reasonably expect to occur while he was engaged in the duty bringing him to the place of injury." (*Id.* at p. 719.) Nonetheless, the facts in *Lenthall* are dissimilar to this instant case. In *Lenthall*, the plaintiff, a police officer,

responded to a home where it was reported that “ ‘a 415 Family With Weapons, possibly shots fired, was in progress.’ ” (*Id.* 138 Cal.App.3d at p. 717.) The plaintiff arrived at the scene, and defendant shot and injured him. (*Ibid.*) On appeal, the court reasonably concluded that the firefighter’s rule precluded plaintiff’s claim, as he was arriving to the scene “to subdue a violent offense involving firearms” and therefore should have been able to reasonably anticipate that one of the individuals at the scene may resist using a firearm. (*Id.* at p. 719.) No independent cause exception existed under these circumstances.

We further find no merit in PG&E’s argument that the negligence did not constitute an independent cause because the wire would not have fallen without the fire. PG&E relies on *Stapper v. GMI Holdings, Inc.* (1999) 73 Cal.App.4th 787 (*Stapper*). In *Stapper*, the plaintiff firefighter fought a fire inside a garage. (*Id.* at p. 790.) Smoke, fire, and heat eventually forced the plaintiff to attempt to leave the garage, which is when she discovered the garage door would not open because of a defect. (*Ibid.*) Other firefighters eventually rescued the plaintiff, but not before she sustained serious injuries. (*Ibid.*) The plaintiff sued the manufacturer of the garage door opener for defective design, and the appellate court held that the firefighter’s rule did not bar her complaint because “the garage door’s malfunction was *independent* of the fire, and not caused by the fire.” (*Id.* at p. 791.) The court expressly stated in its opinion that it reserved analyzing whether or not the outcome would be different if the plaintiff firefighter instead alleged that the fire somehow caused the garage door’s defect. (*Id.* at p. 793, fn. 2.) PG&E argues that unlike the garage door malfunction in *Stapper*, which was independent of the fire, the 12kV wire only broke because of the fire and was thus fully dependent on the fire.

We find this argument unconvincing. There is no doubt that the 12kV electrical line fell because of the fire. However, PG&E’s independent acts of *negligence* in handling the situation were *not* the direct result of the fire. Like the *Stapper* plaintiff, the

McCormacks alleged that PG&E committed independent acts of negligence that resulted in Captain McCormack's death. The McCormacks' allegations are analogous to the *Stapper* plaintiff's allegations that the garage door manufacturers' independent defective design caused her injury. (*Stapper, supra*, 73 Cal.App.4th 787, 791.)

Furthermore, PG&E's contention that policy considerations support the use of the firefighter's rule to bar the McCormacks' complaint is unpersuasive. It is PG&E's view that since downed power lines are a hazard that firefighters are trained and paid to confront in the course of their work, public policy supports barring lawsuits over injuries resulting from these dangers. Applying the firefighter's rule to bar first responders from *ever* bringing suit over injuries incurred because of hazards they are trained to confront does not comport with our understanding of the rule. Certainly, as the *Neighbarger* court reasoned, there is a sound rationale for why firefighters should not recover through civil lawsuits for certain injuries sustained in the course of their work. But as the independent cause exception illustrates, there are times when first responders may be injured by hazards they are typically paid to confront, but that arise from someone else's independent tortious conduct. For these injuries, recovery of damages against the tortfeasors through civil lawsuits is appropriate, as the traditional policy reasons for applying the firefighter's rule do not apply.

For example, PG&E's argument that efficient judicial administration requires avoidance of complex litigation over alleged negligence committed by those assisting in the fire department's response is unavailing. Excluding all third parties and those present at the emergency scene for all liability stemming from their tortious conduct does not promote public policy but frustrates it. In its opening brief, PG&E posits a scenario where an apartment dweller negligently starts a fire. Under the firefighter's rule, the apartment dweller would be excused from liability. However, PG&E argues that under the trial court's reading of the firefighter's rule, the responding firefighter is then free to

sue any of the other tenants in the building for injuries from the fire so long as the “firefighter’s counsel argues they caused or failed to prevent the harm resulting from the spread of the fire.” PG&E contends that courts would then be subject to the nearly impossible task of sorting out the harms caused by ignition of the fire and by the spread of the fire.

In a sense, PG&E is partially correct, though we do not believe this interpretation of the firefighter’s rule creates the widespread judicial chaos PG&E argues it will. Allowing firefighters to bring suit against third parties for injuries resulting from the third parties’ independent acts of negligence is the very essence of the firefighter’s rule and the independent cause exception outlined in *Donahue, supra*, 16 Cal.App.4th 658 and the exception outlined in Civil Code section 1714.9. So, the responding firefighter in PG&E’s fictional scenario may be able to bring suit against the tenants if they, through their independent acts of negligence, cause injury. As we explained previously, risk of injury may be inherent in a firefighter’s position. Nonetheless, barring firefighters from ever bringing suit against those who intentionally, willfully, or negligently cause harm to firefighters or first responders after their arrival at the scene of an emergency is known does not further any public policy goal.

In sum, we find that the independent cause exception of the firefighter’s rule applies. We therefore conclude the trial court did not err in finding that the firefighter’s rule did not bar the McCormacks’ claims against PG&E.⁸

⁸ PG&E also argues that the statutory exceptions to the firefighter’s rule set forth under Code of Civil Procedure section 1714.9, subdivision (a), do not apply to this case. Since we find the common law independent cause exception applies to this case, we decline to address whether or not the statutory exceptions set forth under Code of Civil Procedure section 1714.9, subdivision (a) could apply to this situation.

2. The Order for New Trial on All Issues

PG&E makes two main arguments for why the trial court's order granting the McCormacks' motion for a new trial must be reversed. First, PG&E contends that the trial court's order fails to contain an adequate specification of reasons. Second, PG&E contends that sufficient evidence supported the jury's verdict. Before we address the merits of these claims, we first briefly discuss the trial court's power to grant a new trial pursuant to Code of Civil Procedure section 657.

A. Overview of Code of Civil Procedure section 657

A party to an action may move, after a verdict, for a new trial under Code of Civil Procedure section 657. Code of Civil Procedure section 657 provides that a "verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved" for several reasons, including insufficiency of the evidence. If a new trial is granted, the court must "specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated." (*Ibid.*) "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (*Ibid.*)

Furthermore, an order granting or denying a motion for new trial must be made and entered in accordance with Code of Civil Procedure section 660.⁹ It must also "state

⁹ Code of Civil Procedure section 660 sets forth some of the procedural requirements of a motion for a new trial, including the priority of a hearing on a new trial motion over other matters such as probate proceedings, attendance of a court reporter and the reading of notes during the hearing, limitations and expiration of a trial court's power to grant a new trial motion, the timeframe of when an automatic denial occurs, and other

the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.” (Code Civ. Proc., § 657.)

B. Sufficiency of The Trial Court’s Statement of Reasons

Before discussing the merits of the contents of the trial court’s order, we first address PG&E’s argument that the order is reversible on its face because it fails to include an adequate specification of reasons as required under Code of Civil Procedure section 657. PG&E argues that the trial court extensively discussed evidence relating to PG&E’s negligence, but failed to discuss evidence relating to causation.

An order granting a new trial must contain an adequate statement of the grounds and a specification of reasons under Code of Civil Procedure section 657. The seven listed “grounds” for a new trial under Code of Civil Procedure section 657 include: “1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. [¶] 2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors. [¶] 3. Accident or surprise, which ordinary prudence could not have guarded against. [¶] 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. [¶] 5. Excessive or

miscellaneous procedural requirements of entering the order. Neither party argues there were any procedural defects with the trial court’s new trial order.

inadequate damages. [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law. [¶] 7. Error in law, occurring at the trial and excepted to by the party making the application.” (See also *Mercer v. Perez* (1968) 68 Cal.2d 104, 111.) A trial court need only track the statutory language in Code of Civil Procedure section 657 to create a sufficient statement of grounds. (*Ibid.*)

“The statement of ‘reasons,’ on the other hand, should be specific enough to facilitate appellate review and avoid any need for the appellate court to rely on inference or speculation.” (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 634.) A statement of reasons that simply lists “ ‘ultimate facts,’ ” such as a lack of negligence or the existence of contributory negligence, fails to comply with Code of Civil Procedure section 657. (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 370 (*Scala*)). Nonetheless, a trial judge does not need to specifically cite pages, lines in testimony, or extensively describe a witness’s testimony in a fully compliant order. (*Ibid.*) Nor are they tasked with writing a statement of reasons that states the weight and inferences to be drawn from “ ‘each item of evidence supporting, or impeaching, the judgment.’ ” (*Ibid.*)

PG&E argues that the trial court’s 14-page order fails because its specification of reasons is inadequate. In its new trial order, the trial court described evidence presented by both PG&E and the McCormacks, and discussed the trial court’s assessment of the credibility and testimony provided by certain key witnesses, and described in rather extensive detail the testimony and facts presented to the jury by these witnesses during trial. The court ultimately concluded that it was “clear” that “after reviewing the entire trial record,” that while “PG&E recognized the extraordinary danger of a downed live 12,000-volt line[,] PG&E’s procedures, when combined with the policy that prohibited remote de-energizing without the on-scene presence of an electric troubleshooter cannot be viewed as either remote or trivial. (CACI 430).” (Capitalization omitted.)

Furthermore, the court noted that the last sentence of the CACI No. 430 jury instruction given to the jury, states that “ ‘[c]onduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.’ ” (Capitalization omitted.) The court reasoned that after examination of the record, it could not see how the same harm (the electrocution of Captain McCormack) could have occurred without PG&E’s negligence.

The court also briefly considered PG&E’s argument that the fire department’s response bore significant responsibility for Captain McCormack’s death. Nonetheless, as the trial court pointed out, PG&E did not seek a CACI No. 432 instruction¹⁰ on superseding cause. The court also concluded that the evidence presented by PG&E at trial would not have met the requirements for a CACI No. 432 instruction. In sum, the court concluded that though “[t]here [was] no question in the court’s mind that the jury may well have found the fire department’s failure to protect Captain McCormack to be one of the substantial factors in causing damage,” it found after analysis of all the evidence that the “evidence of causation was overwhelming” and that the “jury was clearly wrong in not finding PG&E a substantial factor in Captain McCormack’s death.” (Emphasis in original.)

This order satisfies the requirements of a statement of grounds and specification of reasons set forth under Civil Code section 657. Unlike the inadequate order

¹⁰ CACI No. 432 instructs the jury on the affirmative defense of superseding cause. It allows a defendant to avoid legal liability due to a third party’s later misconduct. In order to avoid legal responsibility for the plaintiff’s harm, the defendant must prove that the third party’s conduct occurred after the defendant’s conduct, that a reasonable person would conclude the third party’s conduct is a highly unusual or extraordinary response to the situation, that the defendant did not know or had no reason to know that the third party would act in a negligent or wrongful manner, and that the harm resulting from the third party’s conduct was different from the kind of harm reasonably expected from the defendant’s conduct. In this instant situation, PG&E would be the defendant; the fire department would be the third party.

contemplated in *Scala, supra*, 3 Cal.3d 359 at page 370, here the trial court's order did not simply list " 'ultimate facts' " or conclusions regarding negligence or causation. The plaintiff in *Scala* sued the defendant subcontractor after he was injured on a construction site. (*Id.* at p. 362.) A jury found for the plaintiff, and the defendant moved for a new trial on all grounds specified in Code of Civil Procedure section 657. (*Id.* at pp. 362-363.) The trial court granted the motion on grounds that there was insufficient evidence, and issued an order that only stated: " 'there is no sufficient evidence to show that the defendant was negligent and the evidence does show that the plaintiff failed to use ordinary care for his own safety and that that failure was a proximate cause of his injuries.' " (*Id.* at p. 363.) The California Supreme Court reversed, determining that an order that "follows that a specification of reasons phrased, as here, in terms of such 'ultimate facts' as defendant's freedom from negligence and plaintiff's guilt of contributory negligence frustrates rather than promotes the legislative purpose of facilitating meaningful appellate review of the order granting a new trial, and hence is inadequate to comply with the mandate of Code of Civil Procedure section 657." (*Id.* at pp. 369-370, fn. omitted.)

The trial court's order here is readily distinguishable from the order rejected by the Supreme Court in *Scala*, as in this situation the trial court appeared to go above and beyond the bare minimum requirements. In its new trial order, the trial court described, in rather great detail, the evidence presented at trial and the credibility and non-credibility of certain witnesses, and did not simply reiterate ultimate facts. The trial court specifically and quite clearly stated the reasons behind its grant of a new trial: (1) that the trial court found ample evidence of PG&E's negligence in the record, and (2) given that the jury found negligence, the trial court felt determined there was insufficient evidence to support the conclusion that PG&E was *not* a substantial cause in Captain McCormack's death. The latter point is underscored by the trial court's explanation that since the

instrument of Captain McCormack's death was the electrified 12kV wire, PG&E's negligence in failing to turn off the wire or install safeguards *must* have been a substantial cause to Captain McCormack's death.

PG&E mistakenly relies on the Second District's decision in *Devine v. Murrieta* (1975) 49 Cal.App.3d 855 (*Devine*), to support its argument that the trial court's order is defective. *Devine* was a medical malpractice action in which the plaintiff alleged the physician defendant's negligence caused her injuries. (*Id.* at pp. 857-858.) The plaintiff had visited the physician defendant for a Papanicolaou smear, which was read by a cytotechnologist at home without any supervision. (*Id.* at p. 858.) The cytotechnologist incorrectly read the smear as negative. (*Ibid.*) The physician defendant contested both the claim of negligence and the claim of proximate cause, arguing that if the plaintiff had followed up after the initial appointment, the atypical cells would have been revealed. (*Ibid.*) A jury returned a verdict for the physician defendant, and the plaintiff filed a motion for new trial, arguing that insufficient evidence supported the jury's verdict. (*Id.* at pp. 857-858.)

The trial court granted the plaintiff's motion for new trial. (*Devine, supra*, 49 Cal.App.3d. at p. 859.) The appellate court reversed, finding that the trial court's order *only* addressed the physician defendant's alleged breach of the standard of care and failed to address the issue of causation. (*Id.* at pp. 861-862.) Specifically, the appellate court found that "[t]he order on its face fails to indicate that the trial court considered that the verdict could have been based upon a finding that defendant's alleged negligence had not harmed plaintiff. The absence of a reference to the evidence on that issue also precludes appellate review to determine whether the evidence the trial judge had in mind was sufficient to support a verdict in favor of the moving party." (*Id.* at p. 861.) The appellate court concluded that "[c]learly, a verdict for the defendant cannot be set aside

solely for the reason that defendant violated the standard of care without any consideration of causation and harm to plaintiff.” (*Id.* at p. 861.)

The new trial order issued by the trial court in *Devine* was defective because it completely failed to address the issue of causation, a vital and contested issue at trial. (*Devine, supra*, 49 Cal.App.3d at p. 861.) Similarly, whether or not PG&E was a substantial cause of Captain McCormack’s death was also a contested issue raised in trial. However, PG&E’s argument that *Devine* is instructive fails because unlike the new trial order in *Devine*, the new trial order here specifically discussed the issue of causation. The trial court did not base its grant of a new trial based solely on PG&E’s alleged negligence. The trial court explicitly explained in its order that the evidence of PG&E’s negligence, combined with the circumstances of Captain McCormack’s death, demonstrated that there was insufficient evidence to support the jury’s verdict that PG&E was not a substantial factor in Captain McCormack’s death. The trial court further specified that it found the evidence PG&E put forth of a superseding cause insufficient.

We therefore find the trial court’s order granting the McCormacks’ motion for new trial sufficient under Code of Civil Procedure section 657.

C. The Merits of Trial Court’s Order Granting the Motion for New Trial

PG&E argues the new trial order should still be reversed as the trial court erred in granting the motion on the basis that the evidence was insufficient and that the verdict was against the law. Preliminarily, PG&E and the McCormacks offer conflicting standards of review for this court’s assessment of the new trial order. PG&E urges that this court should review the trial court’s order de novo because the order functions as a partial directed verdict or judgment notwithstanding the verdict. The McCormacks argue we must review the trial court’s order for abuse of discretion.

Appropriate Standard of Review

Code of Civil Procedure section 657 specifies that “[o]n appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.”

The trial court’s order granting the new trial motion specified the court granted the new trial on two grounds: that the jury’s verdict was supported by insufficient evidence and that the jury’s verdict was contrary to law. Under Code of Civil Procedure section 657, this court must affirm the trial court’s order if the new trial motion was properly granted on any of the two grounds specified in the order.

Typically, an appellate court reviews a trial court’s grant of a motion for new trial with great deference. “The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside. [Citations.]” (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.)

Accordingly, an order granting a new trial “ ‘must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court’s] theory.’ [Citation.]” (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412 (*Lane*)). “In other words, ‘the presumption of correctness normally accorded on appeal to the jury’s verdict is replaced by a presumption in favor of the [new trial] order.’ [Citation.] [¶] The reason for this deference ‘is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.’ [Citation.] Therefore, the trial court’s factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury’s factual determinations.” (*Ibid.*)

In other words, deference is given because the trial court is in the best position to evaluate a jury’s verdict. (*Lane, supra*, 22 Cal.4th at p. 412.) The trial judge is present during the witness testimony, and is privy to the plaintiff and defendant’s presentation of the evidence. No matter how closely an appellate court may scrutinize the record following the conclusion of a trial, the trial court still retains a higher level of access to the arguments and evidence presented in the case. But the trial court’s discretion is not without its limits, and there must be substantial evidence in the record to support the trial court’s reason for granting a new trial. (Code Civ. Proc., § 657.)

However, if a trial court grants a motion for new trial on the basis that the jury’s verdict was not supported by sufficient evidence and the order essentially constitutes a de facto judgment notwithstanding the verdict, appellate courts should instead apply the standard of review afforded to judgments notwithstanding the verdict. (*Fountain Valley Chateau Blanc Homeowner’s Assn v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 753 (*Fountain Valley*)). “An appellate court has the power to look at the substance of a new trial ruling, and where the effect of the ruling is closer to a directed verdict or a JNOV [(judgment notwithstanding the verdict)], the ruling may be

deemed to have been based on a conclusion of law so that de novo review is appropriate. [Citations.]” (*Dell’Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 548 (*Dell’Oca*).

De novo review is appropriate in these situations because “one kind of ruling—such as nonsuit, directed verdict or JNOV—disposes of the litigation. In granting the motion the court essentially rules the plaintiff never can prevail, even if the matter were to be retried.” (*Dell’Oca, supra*, 159 Cal.App.4th at p. 548.) As the *Dell’Oca* court explained, a grant of a new trial “ ‘does not entail a victory for one side or the other. It simply means the reenactment of a *process* which may eventually yield a winner.’ ” (*Ibid.*, quoting *Fountain Valley, supra*, 67 Cal.App.4th at p. 751.) “The motion is granted ‘not because the judge has concluded that the plaintiff *must* lose, but only because the evidence in the trial that actually took place did not justify the verdict. Evidence might exist to justify the verdict, but for some reason did not get admitted; perhaps [because] the plaintiff’s attorney neglected to call a crucial witness or ask the right questions. *There is still the real possibility that the plaintiff has a meritorious case.*’ [Citation.]” (*Dell’Oca, supra*, at p. 548, fn. omitted.)

PG&E asserts that the trial court’s grant of the McCormacks’ motion for new trial on the grounds of insufficient evidence warrants de novo review since it functions as a directed verdict on causation. PG&E points out that in its order it appears the trial court concluded that if the jury found PG&E negligent, it necessarily *had to* find causation. After a review of the trial court’s order, we disagree.

Here, the trial court’s order does not function as a partial directed verdict on causation. At no point does the court assert that the jury *must* find a verdict of substantial causation against PG&E. Instead, the trial court reasons that because the jury found that PG&E was negligent, and because there was overwhelming evidence of causation, the

jury was clearly wrong.¹¹ Simply put, the trial court did not state or infer that PG&E would *never* be able to prevail on the issue of causation.

In *Fountain Valley*, a case that PG&E relies upon, the appellate court looked at the substance of the new trial order and determined that the trial court essentially granted a judgment notwithstanding the verdict as the trial judge unequivocally stated that so long as the jury found for the plaintiff, he would continue to grant motions for new trials. (*Fountain Valley, supra*, 67 Cal.App.4th at pp. 749-753.) In short, the *Fountain Valley* court made it explicitly clear that the plaintiff would never be able to prevail. Here, in no way did the trial court affirmatively state on the record or infer that PG&E would never be able to prevail on its claims.

PG&E and the McCormacks are simply given another chance to present their evidence, and potentially present new evidence before a jury. PG&E could provide more evidence in the new trial to rebut causation and negligence. Whether or not the trial court properly and adequately cited evidence in support of its conclusions that the jury clearly erred on the issue of causation is not a proper consideration in deciding which standard of review to apply. Thus the new trial order in this case, unlike the erroneous order in *Fountain Valley*, does not function as a partial directed verdict or judgment NOV.

Similarly, the trial court's granting of the motion for new trial on the basis that the verdict was against the law is also reviewed for abuse of discretion. As we previously stated, "as a general matter, orders granting a new trial are reviewed for abuse of discretion. [Citations.] However, "any determination underlying [the] order is

¹¹ PG&E seems to argue that this means the trial court is ruling that as a matter of law, the jury must return with a finding of causation. PG&E is correct in that it appears this is the trial court's reasoning for why the motion for new trial should be granted under the basis that the jury's verdict was against the law, as the trial court found the jury's special verdict findings inconsistent and illogical. This, however, is a separate from the ground of insufficient evidence.

scrutinized under the test appropriate to such determination.” ’ ” (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678 (*City of San Diego*).) The trial court’s second basis for its new trial order was that the jury’s special verdict findings that PG&E was negligent but not a substantial cause of Captain McCormack’s death were inconsistent and could not be reconciled. Under this situation, the underlying determination made by the trial court with regards to the special verdict “ ‘must be analyzed as a matter of law.’ ” (*Ibid.*)

Accordingly, we apply an abuse of discretion standard of review to the trial court’s order granting the new motion on the basis of insufficient evidence and that the verdict was against the law, but will review the underlying determination as to the inconsistency of the jury’s special verdict as a matter of law.

Insufficient Evidence to Support Jury’s Special Verdict

Under the abuse of discretion standard of review, the new trial order must be affirmed unless this court determines that no reasonable trier of fact could have found for the trial court’s theory. (*Lane, supra*, 22 Cal.4th 405, 412.) Under Code of Civil Procedure section 657, an order granting a new trial based on insufficient evidence “shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.”

Preliminarily, we note that the nature of the special verdict bears on our review of the order granting a new trial. When reviewing a special verdict, unlike a general verdict, this court does not imply any findings in favor of a prevailing party. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285.) For example, if a jury returns a general verdict of “negligence,” courts must assume that the jury found for the prevailing party on every negligence issue. (*City of San Diego, supra*, 126 Cal.App.4th 668, 678.) So if the jury in this case simply returned a general verdict of negligence in this case, we

would be bound to the assumption that the jury found for the McCormacks on every negligence issue.

However, if a jury returns a special verdict finding a defendant negligent only on one theory, a reviewing court may not imply any inferences beyond the jury's explicit finding of negligence for that one theory. (*City of San Diego, supra*, 126 Cal.App.4th at p. 678.) The jury in this case found PG&E negligent in its special verdict. Nonetheless, the special verdict form did not allow jury members the ability to distinguish on which theory or theories they found PG&E to be negligent. Given the situation, we cannot assume that the jury relied on any one specific theory in finding PG&E negligent. We review the new trial order with this framework in mind.¹²

As PG&E points out, evidence existed in the record to demonstrate that it was possible that even if PG&E responded sooner, Captain McCormack may still have

¹² The McCormacks argue that the jury's special verdict of negligence was in effect a general verdict because it was rendered on multiple theories of liability without making specific findings to any one specific theory. The McCormacks therefore assert that this court must find that the trial court did not abuse its discretion if there is insufficient evidence as to *any* of the McCormacks' theories of negligence. This argument conflicts with our understanding of the nature of special verdicts. Since both the trial court cannot assume that the jury based its special verdict on any particular theory or theories of negligence presented to them at trial, before it may set aside a verdict and order a new trial the trial court must find that there was insufficient evidence to support a verdict of no substantial causation on *all* of the McCormacks' theories of negligence under Code of Civil Procedure section 657.

For example, even if the trial court determined there was insufficient evidence to support the jury's verdict of no substantial causation as to one of the McCormacks' theories of negligence, it cannot be said that the jury did not find negligence due to one of the other theories of negligence and that under that theory of negligence a verdict of no causation was not supported by insufficient evidence. Accordingly, in order to satisfy the requirements of Code of Civil Procedure section 657, the trial court must have determined that there was insufficient evidence to support the jury's finding of insufficient evidence as to all of the McCormacks' theories of negligence.

encountered the downed 12kV wire before it was de-energized.¹³ Nonetheless, our analysis here is not based on whether or not a reasonable trier of fact could find that PG&E was not a substantial cause of Captain McCormacks' death. On the contrary, our analysis must be based on whether or not there is substantial basis in the record to support the *trial court's theory* that overwhelming evidence of substantial causation existed for all four main theories of negligence presented by the McCormacks. The applicable standard is that if *no* reasonable trier of fact could find for the movant on the trial court's theory, we must reverse the order granting the new trial. This means that if a reasonable trier of fact *could* find for the movant on the trial court's theory, we must affirm, given the great deference to the trial court's grant of a new trial.

Here, the trial court theorized the jury found PG&E negligent on either one, or several, of the McCormacks' four main theories of negligence, which included the following: First, that PG&E acted unreasonably slowly in getting an electric troubleman to the scene of the fire. Second, that PG&E was unreasonably slow in de-energizing the 12kV line remotely using its technology. Third, that PG&E negligently failed to install fuses on its 12kV line. Fourth, that PG&E failed to move the 12kV power line to the two easements it held over 15700 Blossom Hill Road so that it would not have been in the path of the fire. The trial court surmised that the gravamen of the McCormacks' theories of negligence against PG&E centered on the company's failure to de-energize the 12kV

¹³ As PG&E posits, even if Brooks, the PG&E dispatcher, had called Mayer, the electric troubleman, right after his call with the county communications dispatcher at 2:35 a.m., it is possible that Mayer would not have been able to de-energize the line prior to Captain McCormack contacting it. It took Mayer approximately 35 minutes to arrive at the scene after leaving his home, so if had had left at 2:35 a.m., he theoretically would have arrived at 3:10 a.m. It also took Mayer approximately 15 minutes after his arrival to report that the 12kV line was cut and clear, so if he began this work at 3:10 a.m. he theoretically would have finished at approximately 3:25 a.m. Captain Carol Miller broadcasted that Captain McCormack came into contact with the wire and was "down" at 3:25 a.m.

wire or prevent the wire from falling. Accordingly, the trial court found that there was substantial evidence to support causation and that the jury was very clearly wrong in its verdict since the instrumentality of Captain McCormack's death was the energized 12kV wire that PG&E either negligently failed to move or de-energize.

There is substantial basis in the record to support the trial court's theory. As the trial court noted in its order, numerous witnesses testified at trial, and many exhibits were submitted. These testimonies included statements from PG&E workers who affirmatively stated that they had the technology to de-energize the lines remotely. Nguyen also testified that she complained to PG&E prior to the fire about the placement of the wires over the house, and that PG&E failed to act on these complaints. Furthermore, there was testimony from the McCormacks' expert opining that if PG&E installed fuses on the line, the line would have automatically de-energized if broken. There was also testimony from PG&E workers that established the electric troubleman was not sent out to the scene until nearly 30 minutes after the second alarm was raised.¹⁴ This evidence supports the trial court's conclusion that PG&E's negligence was a substantial cause of Captain McCormack's death as he was killed as a direct result of the downed power line under any of the McCormacks' theories.

We acknowledge, however, that evidence also existed that supported the jury's verdict of no causation. It is possible that the jury found deficiencies with the fire department's handling of the scene, or that jury members concluded that even if PG&E

¹⁴ County communications called Brooks at approximately 2:34 a.m. after the fire raised its second alarm. Brooks called Lopez, the gas serviceman, sometime between 2:30 and 3:00 a.m. that night. However, Brooks did not call Mayer, the electric troubleman, until sometime between 2:50 and 3:00 a.m., approximately 20 to 30 minutes after receiving the call from county communications.

responded quicker Captain McCormack may still have contacted the downed wire.¹⁵ This evidence was clearly set forth before the trial court during its consideration of the new trial motion, and was raised again by PG&E during the hearing on the motion. However, as we previously emphasized, as a reviewing court we must give the trial court great deference in its ruling to grant a new trial as the trial court essentially functions as an additional trier of fact. So while we may not necessarily agree with the trial court's decision to grant the motion for new trial, we are bound to affirm its decision given the existence of substantial evidence supporting its conclusions.

Code of Civil Procedure section 657 provides that if *any* of the trial court's stated grounds for ordering a new trial are valid, the order shall be affirmed. Since we determine that the trial court did not abuse its discretion by granting the McCormacks' motion for new trial on the basis of insufficient evidence, there is no ancillary need to address the issue of whether or not the trial court's erred by granting the motion for new trial on the basis that the jury's special verdict was against the law. We therefore decline to reach this issue on appeal.

3. Admission of Dr. Palmer's Testimony

The last of PG&E's arguments is that if this court were to affirm the trial court's order granting the motion for new trial, this court should do so with instructions that the testimony of one of the McCormacks' expert witnesses, Dr. John Palmer, not be admitted.

¹⁵ The trial court also acknowledged the likelihood that the jury believed the fire department was at least partially responsible for Captain McCormack's death. In its order, the trial court noted that "[t]here is no question in the court's mind that the jury may well have found the fire department's failure to protect Captain McCormack to be one of the substantial factors in causing damage." Nonetheless, the trial court still concluded that on a whole, after review of the record and the evidence before it, the jury clearly reached a wrong verdict due to insufficient evidence.

A. *Standard of Review*

We will apply an abuse of discretion standard of review to the trial court's admission of Dr. Palmer's expert testimony since "an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. [Citations.]'" (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900) *Admission of Dr. Palmer's Testimony was Not an Abuse of Discretion*

At trial, Dr. Palmer offered expert testimony over PG&E's objections as to the way in which the burning fire could have caused a phase-to-phase arc between the two electrical poles which then caused the 12kV line to break. Dr. Palmer further testified that if PG&E installed a fuse on the line, the line would have automatically de-energized when it fell.

PG&E argues that the trial court erroneously admitted Dr. Palmer's testimony, because expert testimony must be based on principles "generally accepted as reliable in the relevant scientific community." (*People v. Bolden* (2002) 29 Cal.4th 515, 544; *People v. Kelly* (1976) 17 Cal.3d 24, 37 (*Kelly*)). PG&E contends that Dr. Palmer's testimony fails since he "candidly admitted that his theory—that a flashover could result in a phase-to-phase arc because of the ash, fire and temperature of a house fire—has never been replicated in any scientific literature" during the Evidence Code section 402 hearing on excluding his testimony.

PG&E's reliance on *Kelly* is misleading. *Kelly* holds that California courts, "when faced with a novel method of proof, have required a preliminary showing of general acceptance of the new technique in the relevant scientific community." (*Kelly, supra*, 17 Cal.3d 24, 30.) PG&E has not shown that Dr. Palmer's testimony involved any sort of new technique or novel method of proof, and thus whether or not his views are "generally accepted as reliable in the relevant scientific community" is not a requirement for the admissibility of his testimony. *Kelly* does not apply to an expert's personal opinion, as an

expert's opinion is readily distinguishable from proof based on a new scientific method. "Triers of fact can temper their acceptance of such a personal opinion 'with a healthy skepticism born of their knowledge that all human beings are fallible.' [Citation.]" (*Texaco Producing v. County of Kern* (1998) 66 Cal.App.4th 1029, 1049.)

Dr. Palmer's testimony about the phase-to-phase arc was simply his expert opinion on the events that transpired prior to Captain McCormack's death given his review of the evidence. PG&E's arguments that his testimony amounted to "junk science" and that his views were refuted by PG&E's experts are issues that were properly brought before the jury during Dr. Palmer's cross examination. It is up to the jury members, as fact finders, to either believe or discredit Dr. Palmer's testimony given the contrary evidence provided by PG&E's expert witnesses. Simply because Dr. Palmer's testimony went into the ultimate issue of negligence to be determined by the jury does not mean it should be excluded. (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App 2d 774, 783.)

Therefore, no evidence exists that demonstrates the trial court abused its discretion in admitting Dr. Palmer's testimony. Under Evidence Code section 720, subdivision. (a), a person is qualified to testify as an expert if he or she "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." "[T]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth [Citation.] Where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility. [Citation.]" (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38.) Abuse of discretion can therefore be found if " ' "the evidence shows that a witness *clearly lacks* qualification as an expert" ' [Citation.]" (*People v. Chavez* (1985) 39 Cal.3d 823, 828.) PG&E does not contest Dr. Palmer's status as an

expert in the field, and apparently only argues that his expert opinion should be discredited.¹⁶

Furthermore, we note that the trial court vetted Dr. Palmer's testimony during an Evidence Code section 402 hearing, where the court heard testimony from Dr. Palmer about his opinion regarding the phase-to-phase arc. It is true that an expert's opinion may not be based upon speculative or conjectural data. (*Long v. Cal.-Western States Life Ins. Co.* (1955) 43 Cal.2d 871, 882; Evid. Code, § 801.) Evidence code section 801 further provides that any opinion of an expert must be based upon matter that is of the type that reasonably may be relied upon. These were issues the trial court took under consideration during the Evidence Code section 402 hearing, during which Dr. Palmer explained that his theories and hypotheses about the phase-to-phase arc arose from his interpretation of findings from scientific papers, which he applied to a slightly different scenario. Though he admitted that no scientific data was ever replicated to exactly produce the results he hypothesized, he maintained that his opinions were based on research and understanding of basic fundamental concepts within his expertise. There is no indication given the information provided during the Evidence Code section 402 hearing that Dr. Palmer relied upon unreliable data or methodologies when formulating his hypothesis.

We therefore find that the trial court did not abuse its discretion in admitting Dr. Palmer's testimony. PG&E initially requested that if this court were to rule that the trial court should not have admitted Dr. Palmer's testimony, this court would also have to

¹⁶ Dr. Palmer stated during the Evidence Code section 402 hearing that he holds a Ph.D. in Electric Power Engineering from Rensselaer Polytechnic Institute, a Master's degree from Rensselaer Polytechnic Institute, and a Bachelor's of Science degree in Electrical Engineering from Brigham Young University. He further stated for the record that his occupation was an "Electric Forensic Engineer," and described that his job duties included the study and analysis of failures and accidents related to electricity.

reverse the jury's special verdict with respect to Nguyen and Mac because Dr. Palmer's testimony may have also tainted the jury's verdict as to their alleged negligence in PG&E's cross-claim against them for indemnification. Since we find no abuse of discretion in the admission of Dr. Palmer's testimony, this request is accordingly moot.

II. *The McCormacks' Cross-Appeal*

The McCormacks filed a protective cross-appeal over the jury verdict in the event that this court reverses the trial court's order granting the new trial. The McCormacks argue that if this court were to reverse the new trial order, the jury verdict must be reversed because the verdict was against the law. Since we find no error with the trial court's grant of a new trial, we dismiss the McCormacks' cross-appeal as moot.

DISPOSITION

We affirm the trial court's order granting a new trial as to the McCormacks' claims against PG&E on all issues and the jury's underlying verdict. The McCormacks' cross-appeal is dismissed as moot. The McCormacks are awarded their costs on appeal.

RUSHING, P.J.

WE CONCUR:

ELIA, J.

MIHARA, J.