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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

BERNARDINO MEJIA-GUTIERREZ et al., Plaintiffs, SEABRIGHT INSURANCE COMPANY, Intervener and Appellant, v. COMCAST OF CALIFORNIA III, INC., Defendant and Respondent.	A132933 (City & County of San Francisco Super. Ct. No. CGC-09-489055)

Seabright Insurance Company (Seabright) intervened in a negligence action brought by Bernardino Mejia-Gutierrez and his wife Elvira Vasquez against Comcast of California III, Inc. (Comcast) for on-the-job injuries Mejia-Gutierrez sustained while working for AC Square, a cable company hired as a subcontractor by Comcast. Seabright appeals the trial court's grant of summary judgment in favor of Comcast, contending the court erroneously found that Seabright had not submitted any evidence raising a triable issue of material fact as to Comcast's liability for Mejia-Gutierrez's injuries. Because we agree with the trial court that Seabright did not raise a triable issue of material fact with respect to Comcast having either negligently exercised retained control of jobsite safety or breached a relevant nondelegable duty, we shall affirm the judgment.

PROCEDURAL BACKGROUND

Mejia-Gutierrez and Vasquez filed a complaint for damages against Comcast on June 4, 2009. Mejia-Gutierrez alleged general negligence and Vasquez alleged loss of

consortium. Thereafter, Seabright Insurance Company filed a complaint in intervention against Comcast.

On March 18, 2010, Vasquez dismissed her claim and, on April 5, 2011, Mejia-Gutierrez dismissed his claim with prejudice.

On April 13, 2011, Comcast filed a motion for summary judgment. On June 12, 2011, the trial court granted Comcast's summary judgment motion, ruling that Seabright had not raised a triable issue of material fact as to Comcast "either having negligently exercised retained control, or having breached a relevant non-delegable duty." Notice of entry of order was filed on July 19, 2011.

On August 5, 2011, Seabright filed a notice of appeal.

FACTUAL BACKGROUND

Bernardino Mejia-Gutierrez began working for AC Square in 2001. AC Square was hired by Comcast to install, maintain, repair, and replace cable utility lines (drop lines), which run from a utility pole to a customer's building.

On June 11, 2007, Mejia-Gutierrez, a lead technician for AC Square, was at a residence on 34th Avenue in San Francisco to replace a drop line. As he testified at his deposition, he had previously examined the line, which was about 26 feet above ground and connected to the residence, and determined that it was an old wire that needed replacement. The wire was putting out a low signal and, based on his examination, appeared to be crystallizing. As an AC Square employee, it was his responsibility to decide whether an old drop line needed to be replaced. He believed that he was qualified to replace the drop line and that the job was a simple one.

Mejia-Gutierrez was in charge of safety at the jobsite. He relied on himself and AC Square supervisors, not Comcast, to determine whether a particular jobsite was safe. He never received instruction directly from Comcast regarding how to make repairs, including how to perform a drop line repair or how to use a ladder. AC Square provided all such instruction. Upon arriving at a jobsite, employees of AC Square were supposed to look at the quality of the wire, to "read the levels of the signal that was there and what

the condition of the wire was, whether it had to be replaced or not." Before his fall, Mejia-Gutierrez had received a written guide on the use of ladders from AC Square.

Mejia-Gutierrez would contact a Comcast "leader" for his area only when an installation required use of a bucket truck or was extremely high. He also remembered a Comcast employee giving out information sheets after there had been a problem, with topics such as how to put out cones, how to put on your helmet, or how to work with a customer.

On the day of his accident, Mejia-Gutierrez was at the jobsite with fellow-AC Square employee Joeldo DeSantos; Mejia-Gutierrez was DeSantos's supervisor that day. Mejia-Gutierrez had already determined that he would use a ladder rather than a bucket truck to do the job when he saw a Comcast employee driving by. He asked the employee for his opinion and the employee opined that a bucket truck was not necessary. Mejia-Gutierrez relied on his own experience in the field to decide that it was safe to replace this line without a bucket truck. He did not rely on any Comcast employee to determine the safety of the jobsite because he had already made that determination.

To replace the drop line, Mejia-Gutierrez hung his ladder from the mid-span wire. It was not his practice to cut the drop line at the house before ascending the ladder on the mid-span, and he did not do so that day. After he ascended the ladder, the wire he was going to replace snapped where there was a knot in it, which made the ladder rock back and forth. Then another wire, which was attached to an adjacent house, snapped, which made the ladder rock even more. Mejia-Gutierrez lost his balance and fell some 26 feet to the ground. As a result of the injuries he sustained in the fall, Mejia-Gutierrez received workers' compensation benefits.

Andrew Bahmanyar, AC Square's managing director since 2005, testified at his deposition that AC Square had many strict rules to follow, including General Order No. 95 of the Public Utilities Commission. The company's compliance department provided all technicians with safety trainings, weekly meetings, and yearly certifications, including ladder certification. AC Square, not Comcast, instructed AC Square employees on how to use a ladder when replacing a drop line. Comcast was not in any way directing

AC Square employees at the time of Mejia-Gutierrez's accident. Bahmanyar investigated the accident and concluded that "proper safety procedures that [AC Square] had in place were not followed." In particular, the mid-span ladder was supposed to be placed facing the house so that tension is released on the cable. Mejia-Gutierrez, however, had placed it facing the street.

Gilbert Jaquez had been AC Square's safety and training manager at the time of Mejia-Gutierrez's accident. He testified at his deposition that he was responsible for ensuring that all AC Square employees followed safety practices. An AC Square safety manual entitled "Working With Ladders," which is given to all new hires at the company, instructs employees who are replacing a drop line to cut it at the house before ascending a ladder attached to the mid-span wire. The reason for this rule is to avoid a drop line snapping or detaching while the technician is on the ladder. AC Square records showed that Mejia-Gutierrez received a copy of "Working with Ladders" at a safety meeting in 2005.

Darren Eaton, described by Comcast as AC Square's "Safety/Trainer" at the time of the accident, further explained during his deposition that disconnecting the drop line from the house before ascending a ladder on a mid-span is safer because, if you cut the drop line from the mid-span, "it will cause the ladder to spring back." He also testified that, in 2007, Comcast did not in any way control the means and methods used by AC Square employees in replacing drop lines.[1]

John Winn, described by Seabright as Comcast's "person most knowledgeable," testified at his deposition that Comcast employees install and repair cable lines in San Francisco and that Comcast also use subcontractors, including AC Square, for overflow work. Subcontractors are held to the same safety standards as Comcast employees. Comcast provides supplies to its subcontractors that are necessary to perform cable

[1] Eaton also confirmed that Mejia-Gutierrez was at a training on working with ladders in 2005 or 2006 and had received a copy of the "Working with Ladders" document.

installations and requires that subcontractors follow Comcast's guidelines regarding installation procedures. Comcast has a system of cable wire inspection, the purpose of which is "safety for everyone," including employees and subcontractors. All Comcast technicians perform daily inspections of wires at the jobsites at which they work, and also are required to observe the wires in the general area in which they are working.

Jonathan Kramer, a consultant in the field of cable television telecommunications technology and plant construction, submitted a declaration on behalf of Seabright. In his opinion, given various special conditions affecting the cable system in San Francisco, Comcast should have provided safety training to everyone it directed to work on that system. He also opined that Comcast did not frequently and thoroughly inspects its overhead lines as required by rule 31.2 of Public Utilities Commission General Order No. 95. Kramer believed that, on the day of his accident, Mejia-Gutierrez placed the ladder in the safest possible location, given the factors he faced. Finally, Kramer believed that, had Mejia-Gutierrez not been advised by a Comcast employee that no bucket truck was necessary to perform the cable drop replacement and had Mejia-Gutierrez used a bucket truck, he would not have fallen to the ground when the cable sprang back.

DISCUSSION

I. *Summary Judgment Rules and Standard of Review*

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc. § 437c, subd. (c).)[2] A defendant moving for summary judgment has the initial burden of showing either that one or more elements of the cause of action cannot be established or that there is a complete defense. (§ 437c, subd. (p)(2).) If that initial burden is met, the burden shifts to the plaintiff to show the existence of a triable issue of fact with respect to that cause of

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

action or defense. (§ 437c, subd. (p)(2); see *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850-853.)

" ' "[W]e take the facts from the record that was before the trial court when it ruled on that motion," ' and ' " ' "review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' " ' [Citations.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.) "We also ' " 'liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' " ' [Citations.]" (*Tverberg v. Fillner Construction, Inc*. (2010) 49 Cal.4th 518, 522 (*Tverberg*).)

II. *The* Privette *Line of Cases*

"Under the peculiar risk doctrine, a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes injuries to others." (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 691 (*Privette*).) In *Privette*, the California Supreme Court for the first time "addressed the potential conflict between the peculiar risk doctrine, as applied in favor of the contractor's employees, and the system of workers' compensation." (*Ibid*.) As the *Privette* court explained: "When an employee of the independent contractor hired to do dangerous work suffers a work-related injury, the employee is entitled to recovery under the state's workers' compensation system. That statutory scheme, which affords compensation regardless of fault, advances the same policies that underlie the doctrine of peculiar risk. Thus, when the contractor's failure to provide safe working conditions results in injury to the contractor's employee, additional recovery from the person who hired the contractor—a nonnegligent party—advances no societal interest that is not already served by the workers' compensation system." (*Id.* at p. 692.) The Court therefore joined "the majority of jurisdictions in precluding such recovery under the doctrine of peculiar risk." (*Ibid*.)

Thereafter, in *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 267 (*Toland*), our Supreme Court further held that the hirer of an independent contractor "has

no obligation to specify [in the contract] the precautions an independent hired contractor should take for the safety of *the contractor's employees*." The court reasoned that subjecting hirers "to peculiar risk liability in such circumstances would negate their 'right to delegate to independent contractors the responsibility of ensuring the safety of their own workers.' [Citation.]" (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 599 (*SeaBright*), quoting *Toland*, at p. 269.)

Our Supreme Court further developed the principles discussed in *Privette* and *Toland* in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 (*Hooker*), holding that an independent contractor's employee can recover in tort from the contractor's hirer if the hirer retained control of safety conditions at a worksite and its negligent exercise of that retained control "*affirmatively contributed* to the employee's injuries."

Subsequently, in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 671 (*Kinsman*), the Court stated: "[I]n *Privette* and its progeny, we have concluded that, principally because of the availability of workers' compensation, [the] policy reasons for limiting delegation do not apply to the hirer's ability to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment." Hence, a hirer is presumed to delegate such a duty to the contractor. (*Kinsman*, at p. 671; see also *Tverberg*, *supra*, 49 Cal.4th at pp. 527-528 [claim against hirer by independent contractor himself (rather than contractor's employee) also failed, even though contractor was not entitled to workers' compensation benefits, because of hirer's presumed delegation to contractor of responsibility for performing work safely].)

Finally, in *SeaBright*, *supra*, 52 Cal.4th 590, 594, the Court addressed the applicability of the *Privette* rule to the nondelegable duties doctrine, and held that the *Privette* rule applies when employees of independent contractors are injured as a consequence of the hirer's failure to comply with workplace safety requirements concerning the precise subject matter of the contract. In such a situation, any duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements is delegated to the contractor. (*Ibid*.)

In sum, the *Privette* line of cases "establishes that an independent contractor's hirer presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees." (*SeaBright*, *supra*, 52 Cal.4th at p. 600.)

In the present case, Seabright contends the evidence raised triable issues of material fact as to whether Comcast retained control of the jobsite and affirmatively contributed to Mejia-Gutierrez's injuries. It also contends the evidence raised a triable issue of material fact as to whether Comcast breached a nondelegable regulatory duty to provide Mejia-Gutierrez with a safe workplace.

III. *Retained Control and Affirmative Contribution*

Seabright contends it submitted sufficient evidence to raise triable issues of material fact as to whether Comcast negligently exercised retained control over safety at the jobsite at which Mejia-Gutierrez was injured. (See *Kinsman*, *supra*, 37 Cal.4th 659, 671 ["when the hirer does not fully delegate the task of providing a safe working environment, but in some manner actively participates in how the job is done, and that participation affirmatively contributes to the employee's injury, the hirer may be liable in tort to the employee"].)

A. *Retained Control*

First, with respect to the claim that Comcast retained control over workplace safety, Seabright argues that it has introduced evidence showing that AC Square was merely an "extension" of Comcast in that it performed overflow work assigned by Comcast, using Comcast's procedures and supplies. Seabright also notes that AC Square was contractually subject to quality control inspections by Comcast to ensure compliance with Comcast's installation guidelines. Seabright also refers to evidence that Comcast employees on occasion provided AC Square employees with safety-related handouts and that AC Square technicians were required to report to a Comcast supervisor in the field when they believed a job required a bucket truck.

Comcast, on the other hand, notes that AC Square's managing director, Andrew Bahmanyar, testified during his deposition that AC Square, not Comcast, instructed AC Square employees on how to replace a drop line, including how to use a

ladder when replacing a drop line, and that Comcast was in no way directing AC Square employees at the time of Mejia-Gutierrez's accident. Bahmanyar also testified that he had concluded that, at the time of his accident, Mejia-Gutierrez had failed to follow the safety procedures AC Square had in place regarding placement of the ladder when replacing a drop line.

In addition, Mejia-Gutierrez testified during his deposition that, as a lead technician, he was in charge of safety at the jobsite and that he relied on himself and AC Square supervisors, not Comcast, to determine whether a particular jobsite was safe. He also testified that AC Square, not Comcast, provided him with all instructions regarding how to make repairs, including how to perform a drop line repair and how to use a ladder. Mejia-Gutierrez also acknowledged that he did not rely on the opinion of the Comcast employee who was driving by the jobsite to decide whether to use a bucket truck because he had already determined that a bucket truck was unnecessary.[3]

We conclude that the fact that Comcast's contract with AC Square specified that AC Square was to comply with Comcast's service specifications and use Comcast's supplies, as well as that Comcast had the right to perform quality control inspections, plainly does not raise a triable issue of fact regarding whether Comcast retained control over the safety practices of AC Square's employees. Rather, the undisputed facts show that AC Square was responsible for its employees' safe performance of their job. (See *SeaBright*, *supra*, 52 Cal.4th at p. 600 [under *Privette* line of cases, hirer presumptively delegates to independent contractor its tort law duty to provide a safe workplace for contractor's employees]; accord, *Kinsman*, *supra*, 37 Cal.4th at p. 671; compare *Hooker*, *supra*, 27 Cal.4th 198, 202, 215 [where hirer retained responsibility for obtaining contractor's compliance with all safety laws and had authority to monitor and ensure correction of any dangerous conditions—and in fact had a representative at jobsite partly

[3] The mere fact that Mejia-Gutierrez testified that he asked the opinion of an unknown Comcast employee who happened to be driving by (and whose hearsay opinion he recounted), clearly is not sufficient to raise a triable issue of fact regarding whether Comcast retained control of safety conditions at the jobsite.

for that purpose—plaintiff raised triable issues of material fact as to whether hirer retained control over safety conditions at worksite].)[4]

In sum, Seabright has not raised a triable issue of material fact as to whether Comcast retained control of safety conditions at the jobsite where Mejia-Gutierrez was injured. (See § 437c, subd. (p)(2).)

B. *Affirmative Contribution*

Second, even were there a triable issue of fact as to whether Comcast retained control over safety at the jobsite, we find that Seabright has not met its burden of showing that Comcast negligently exercised any retained control and affirmatively contributed to Mejia-Gutierrez's injuries. (See § 437c, subd. (p)(2).)

Our Supreme Court has explained that, since the liability of an independent contractor is limited to providing worker's compensation coverage, "it would be unfair to impose tort liability on the hirer of the contractor merely because the hirer retained the

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[4] Seabright attempts to distinguish *Tilley v. CZ Master Assn.* (2005) 131 Cal.App.4th 464, 470-471 (*Tilley*), in which a homeowners' association, hired a security company to provide security on the association's property. A security guard who suffered injuries when he was assaulted during a party on the association's property sued the association. (*Ibid*.) In affirming the trial court's grant of summary judgment in favor of the association, the appellate court found that, although the association retained control of some aspects of the worksite (i.e., the property), "[t]he undisputed facts demonstrate that [the security company] was in control of how its work was performed, and that all decisions concerning the activities of its employees were ultimately its responsibility." (*Id*. at p. 484.)

According to Seabright, an important distinction between the present case and *Tilley* is that, "in *Tilley* the hirer and contractor were engaged in two entirely separate, different, and specialized enterprises. . . . Here, on the other hand, Comcast's own employees performed the same services which AC Square provided on a contract basis." However, that fact, as well as the fact that Comcast in some ways controlled the work that its contractors did, does not without more demonstrate retained control of workplace safety. Indeed, as previously explained, the undisputed facts in this case show that Comcast had delegated control over workplace safety for AC Square employees to AC Square. (Cf. *Tilley*, *supra*, 131 Cal.App.4th at p. 485 [homeowners' association's "misconduct amounts to merely a failure to exercise its (presumed) power to restrict or impose controls over the parties. Such a failure cannot be the basis of liability"].)

ability to exercise control over safety at the worksite. In fairness, . . . the imposition of tort liability on a hirer should depend on whether the hirer *exercised* the control that was retained in a manner that *affirmatively* contributed to the injury of the contractor's employee." (*Hooker*, *supra*, 27 Cal.4th at p. 210.)

In *Hooker*, Caltrans had hired a contractor to construct an overpass. Caltrans's construction manual stated that it was responsible for obtaining the contractor's compliance with all safety laws and regulations and gave it authority to monitor and ensure correction of dangerous conditions at the jobsite. (*Hooker*, *supra*, 27 Cal.4th at p. 202.) Caltrans also had a representative at the jobsite whose responsibilities included safety. During the construction, a crane operator for the contractor retracted the outriggers on his crane to let traffic pass, but failed to reextend the outriggers before swinging the boom. (*Ibid*.) This caused his crane to tip over, throwing him to the pavement and killing him. (*Ibid*.) The Caltrans representative acknowledged having previously observed crane operators retract their outriggers to let other vehicles pass. (*Id*. at pp. 202-203.) The crane operator's widow sued Caltrans on the theory that it had negligently exercised control it had retained over safety conditions at the jobsite, and the trial court granted Caltrans' summary judgment motion. (*Id*. at p. 203.)

Our Supreme Court found that summary judgment was appropriate in that the widow had raised triable issues of material fact as to whether Caltrans retained control over safety conditions at the worksite, but had failed to raise triable issues of fact as to whether Caltrans had actually exercised its retained control so as to affirmatively contribute to the crane operator's death. (*Hooker*, *supra*, 27 Cal.4th at p. 215.) As the Court explained: "[T]here was no evidence Caltrans's exercise of retained control over safety conditions at the worksite affirmatively contributed to the adoption of [the dangerous] practice by the crane operator. 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*.; accord *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 30 [concluding that "a general contractor who claims the power to control all safety procedures on the worksite [is not] liable to the injured employee of a

subcontractor for failing to direct the subcontractor to take safety precautions where there is no evidence that any conduct by the general contractor contributed affirmatively to the injuries"].)

Here, Seabright has raised no triable issue of fact remotely suggesting either that Comcast claimed the power to control any safety procedures at the jobsite (see pt. III, A, *ante*), or that its actions in any way affirmatively contributed to Mejia-Gutierrez's injuries. Instead, the undisputed facts show only that AC Square was responsible for safety instructions and workplace safety and that Mejia-Gutierrez had failed to follow required safety procedures related to ladder use and cutting a drop line at the time of his accident. Thus, even if Comcast retained control of certain aspects of AC Square's activities, it plainly has no liability for its failure to direct AC Square or Mejia-Gutierrez to take particular safety precautions, or for Mejia-Gutierrez's actions, which the evidence shows caused his accident. (See *Hooker*, *supra*, 27 Cal.4th at p. 211.)[5]

"As [our Supreme Court] stressed in *Kinsman*, . . . when the hirer of an independent contractor delegates control over the work to the contractor, the hirer also delegates 'responsibility for performing [the] task safely.' [Citations.] Therefore, a hired independent contractor who suffers injury resulting from risks inherent in the hired work, after having assumed responsibility for all safety precautions reasonably necessary to prevent precisely those sorts of injuries, is not, in the words of *Privette*, . . . a 'hapless victim' of someone else's misconduct. In that situation, the reason for imposing vicarious liability on a hirer—compensating an *innocent third party* for injury caused by the risks inherent in the hired work—is missing." (*Tverberg*, *supra*, 49 Cal.4th at p. 528.)

In sum, Seabright has not raised any triable issues of material fact either as to whether Comcast retained control of workplace safety or whether it affirmatively contributed to plaintiff's injury. (See *Hooker*, *supra*, 27 Cal.4th at p. 210.) The trial

[5] Seabright refers to its expert's belief that Mejia-Gutierrez's placement of the ladder on the sidewalk was the safest location he could have put it, in the circumstances. Kramer's opinion does not change the fact that Comcast did nothing to affirmatively contribute to Mejia-Gutierrez's accident.

court properly granted Comcast's motion for summary judgment. (See § 437c, subd. (p)(2).)

IV. *Nondelegable Duty*

Seabright contends that, even if Comcast did not otherwise retain control of safety conditions at the jobsite, it breached a nondelegable duty to provide Mejia-Gutierrez with a safe workplace.

Our Supreme Court's "decisions recognize a presumptive delegation of responsibility for workplace safety from the hirer to the independent contractor, and a concomitant delegation of duty." (*SeaBright, supra*, 52 Cal.4th at p. 597.) Under the nondelegable duties doctrine, however, there are certain duties that may not be delegated to an independent contractor. (*Ibid.*) The nondelegable duties doctrine "prevents a party that owes a duty to others from evading responsibility by claiming to have delegated that duty to an independent contractor hired to do the necessary work. The doctrine applies when the duty preexists and does not arise from the contract with the independent contractor. [Citations.]" (*Id.* at pp. 600-601; see also Rest.2d Torts, § 424.)[6] Even if a duty is found to be nondelegable, however, a plaintiff must still show that the hirer's conduct affirmatively contributed to his or her injury. (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 673; *Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal.App.4th 595, 610.)

Here, Seabright argues that Comcast's safety duty, pursuant to rule 31.2 of General Order No. 95 of the Public Utilities Commission,[7] to "frequently and thoroughly" inspect the lines was not delegable to AC Square. It also argues that whether Comcast's failure to perform this duty at Mejia-Gutierrez's jobsite affirmatively

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[6] Restatement Second of Torts, section 424 provides: "One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions."

[7] All further rule references are to rules of General Order No. 95 of the Public Utilities Commission.

contributed to his injuries remained a triable issue of fact, which precluded summary judgment.

The purpose of General Order No. 95, which contains rules for overhead electric line construction, "is to formulate, for the State of California, requirements for overhead line design, construction, and maintenance, the application of which will ensure adequate service and secure safety to persons engaged in the construction, maintenance, operation or use of overhead lines and to the public in general." (Rule 11.)

Rule 31.2 provides: "*Lines shall be inspected frequently and thoroughly* for the purpose of ensuring that they are in good condition so as to conform with these rules. Lines temporarily out of service shall be inspected and maintained in such condition as not to create a hazard." (Italics added.)[8]

In *SeaBright, supra*, 52 Cal.4th 590, 594, decided after the trial court's ruling in the present case, our Supreme Court considered whether the *Privette* rule applies when the hirer "failed to comply with workplace safety requirements [under Cal-OSHA regulations] concerning the precise subject matter of the contract, and the injury is alleged to have occurred as a consequence of that failure."[9] The Court concluded that the *Privette* rule does apply in such a circumstance: "By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes *to the contractor's employees* to ensure the safety of the specific workplace that is the subject of the contract. That implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements." (*Ibid*., fn. omitted.) The Court further explained that, "under the definition of 'employer' that applies to California's workplace safety laws (see Lab.

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[8] In addition, on the date in question, rule 31.1 provided, in relevant part: "All work performed on public streets and highways shall be done in such a manner that the operations of other utilities and the convenience of the public will be interfered with as little as possible and no conditions unusually dangerous to workmen, pedestrians or others shall be established at any time."

[9] "Cal-OSHA" regulations set forth workplace safety requirements. (See Lab. Code, § 6300 et seq. [Cal. Occupational Safety & Health Act of 1973 (Cal-OSHA)].)

Code, § 6304), the employees of an independent contractor are not considered to be the hirer's own employees." (*Ibid.*, fn. omitted.)

Seabright argues that the *SeaBright* holding is a narrow one, not applicable to the present case because (1) unlike in *SeaBright*, Comcast's duty under rule 31.2, related to line inspection, predated the contract with AC Square; (2) unlike the Cal-OSHA safety requirements at issue in *SeaBright*, General Order No. 95 does not arise from the workplace safety laws set forth in the California Labor Code, under which employees of an independent contractor are not considered to be the hirer's own employees; and (3) the duties set forth in General Order No. 95 exist—regardless of contracts—to protect all "persons engaged in the construction, maintenance, operation or use of overhead lines and to the public in general." (Rule 11.) (See *SeaBright*, *supra*, 52 Cal.4th at pp. 601-603.)

Assuming, as Seabright claims, that these distinctions render the *SeaBright* holding inapplicable to the present case, we nonetheless conclude that rule 31.2's mandate that utility companies must "frequently and thoroughly" inspect the lines was not the kind of specific, well-defined nondelegable duty that could give rise to liability.

Felmlee v. Falcon Cable TV (1995) 36 Cal.App.4th 1032 (*Felmlee*), which has facts quite similar to those in the present case, is instructive. In *Felmlee*, a cable company hired a contractor to perform maintenance and repairs on its cable lines. (*Id.* at p. 1035.) The plaintiff, an employee of the contractor, was sent out to replace a drop line at a customer's home. (*Ibid.*) He hooked his ladder onto a mid-span cable, climbed about 25 feet, and cut the messenger cable. (*Ibid.*) When he cut the messenger cable, the change in tension on the mid-span wire caused it to rock back and forth. (*Ibid.*) This caused the plaintiff to be thrown off the ladder to the ground. (*Ibid.*)

In his lawsuit, the plaintiff alleged that the cable company was responsible for his injuries because it had improperly allowed overtension of the line and had failed to assure that he was properly instructed on safety precautions. (*Felmlee*, *supra*, 36 Cal.App.4th at p. 1036.) He asserted at trial that the cable company had certain nondelegable duties pursuant to, inter alia, several rules of General Order No. 95, including rules 31.1 and

31.2. (*Felmlee*, at p. 1036.) The trial court refused to instruct on nondelegable duties and the case went to the jury on general negligence principles, ultimately resulting in a verdict in favor of the cable company. (*Ibid*.) The appellate court agreed that the rules in question were not specific enough to constitute a nondelegable duty to insure the safety of others. (*Id*. at pp. 1038-1039.)

As the *Felmlee* court explained: "[T]he ordinances and rules at issue here do not specifically require a cable operator to insure that its independent contractor's employees wear safety belts or harnesses. . . . The rule of the general order of the Public Utilities Commission speaks to a general duty of a cable operator to maintain safe conditions for its employees. These broad provisions do not give rise to an action for breach of a nondelegable duty." (*Felmlee, supra,* 36 Cal.App.4th at p. 1039; see also *Padilla v. Pomona College, supra,* 166 Cal.App.4th at p. 673 [nothing in Cal-OSHA regulation requiring that pipes in a demolition work area first be depressurized "mandates that it imposes safety precautions that cannot be delegated from the landowner to the general contractor to subcontractors"]; compare *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, [hirer billboard owner had nondelegable duty with respect to regulation requiring owners of outdoor advertising structures to take one of three specific safety precautions]; *Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 298 [hirer's specific regulatory duty, to provide fire extinguishers within 75 feet of fuel tanks on its property, was nondelegable].)

We find *Felmlee* persuasive and find that rule 31.2's mandate to "frequently and thoroughly" inspect the cable lines to ensure that they are in good condition constitutes a general duty to maintain safe conditions, to which the nondelegable duties doctrine is inapplicable. (See *Felmlee, supra,* 36 Cal.App.4th at pp. 1039-1040; see also Rest.2d Torts, § 424.**)** Instead, the undisputed evidence shows that AC Square was responsible for maintaining the lines in good condition on the jobs Comcast assigned to it.[10]

[10] In fact, AC Square's managing director, Andrew Bahmanyar, testified that AC Square had to follow many strict rules, including General Order No. 95.

Furthermore, it is also undisputed both that it was Mejia-Gutierrez's job to examine the lines for the cause of the problem in service and to follow AC Square's safety procedures and practices in making any repairs, and that Mejia-Gutierrez was not in fact following AC Square's safety practices at the time of his accident.

Seabright observes that the *Felmlee* court approved of the trial court's decision to permit the case to go to the jury on direct negligence principles. Seabright is correct that the appellate court in *Felmlee* concluded that there was sufficient evidence of negligence on the part of the cable company to permit that issue to go to the jury. (*Felmlee*, *supra*, 36 Cal.App.4th at p. 1037.) Although the rules in question were not the type of specific safeguards or precautions that could give rise to liability under the doctrine of nondelegable duties, the jury in *Felmlee* was free to consider whether the cable company "was directly negligent in failing to correct any foreseeable, dangerous condition of the cables which may have contributed to the cause of [the plaintiff's] injuries." (*Id.* at p. 1040.) The court did not describe the evidence that was sufficient to show possible negligence liability there and, as we have already explained, the evidence here is *not* sufficient to raise a triable issue of fact as to Comcast's direct negligence. (See pt. III, A, *ante*.) Thus, for purposes of this case, the relevant holding in *Felmlee* relates to the inapplicability of the nondelegable duties doctrine to rule 31.2.

Accordingly, we conclude that, regardless of whether there were problems with either of the wires that snapped, such as crystallization or a knot, which played a part in its snapping, the general duty of rule 31.2—to "frequently and thoroughly" inspect lines to ensure they are in good condition—is not a basis for holding Comcast liable for Mejia-Gutierrez's injuries.[11] This is particularly so, given that Mejia-Gutierrez, on behalf of AC

[11] At oral argument, counsel for Seabright repeatedly asserted that Mejia-Gutierrez's injury was caused in whole or part by the snapping of the second wire attached to an adjacent house, and argued that this fact made the case one of direct negligence by Comcast. We observe that this argument, which would not in any case affect the result, was raised obliquely in a single sentence in appellant's reply brief: "Lastly, contrary to Respondent's presumptions, there is no evidence that even if Mejia-Gutierrez had followed the ladder guidelines and cut the drop line at the house that the

Square, was specifically responsible for discerning and addressing problems with drop lines and ensuing job site safety. (See *Felmlee*, *supra*, 36 Cal.App.4th at p. 1039.) Summary judgment was proper on this ground as well. (See § 437c, subd. (p)(2).)[12]

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent, Comcast of California III, Inc.

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Kline, P.J.

We concur:

_____
Lambden, J.

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Richman, J.

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accident would not have occurred as he testified that a second drop line at the adjoining home also snapped, which alone could have caused him to lose his balance and fall." (See *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1072 [appellate court generally will not address issues raised for first time in a reply brief].)

[12] In light of our conclusion that the trial court properly granted summary judgment in favor of Comcast for the reasons previously discussed, we need not address Comcast's argument that the primary assumption of risk doctrine completely bars Seabright's lawsuit.