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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DANIEL GARCIA, Plaintiff and Appellant, v. SOUTHERN CALIFORNIA EDISON COMPANY, Defendant and Respondent.	B239217 (Los Angeles County Super. Ct. No. BC438475)

APPEAL from an order of the Superior Court of Los Angeles, Michael L. Stern, Judge. Affirmed.

Wentworth, Paoli & Purdy and William M. Delli Paoli, for Plaintiff and Appellant.

Pyka Lenhardt Schnaider Zell, A.J. Pyka and Daniel J. Kolcz for Defendant and Respondent.

Appellant Daniel Garcia was seriously injured from a fall he suffered while participating in an introductory powerline class taught at the East Los Angeles Skill Center (ELASC), a public school campus owned by the Los Angeles Unified School District (LAUSD). He brought suit against LAUSD, respondent Southern California Edison (Edison), Harry Burnett, an Edison employee who had been engaged in teaching powerline classes at ELASC for several years, and a small company owned by Burnett. Edison moved for summary judgment contending it had no direct involvement in the powerline program and that it was not responsible for Burnett's actions because he had been loaned to LAUSD as a "special employee," relieving Edison of respondeat superior liability. The trial court initially denied summary judgment, finding that an issue of fact existed concerning Burnett's status. It reversed itself after this court issued an alternative writ directing it to vacate the denial order and issue a new and different order or show cause why a peremptory writ should not issue. On appeal, Garcia contends disputed evidence supported that Burnett was Edison's employee or a dual employee. We review the matter de novo and affirm the grant of summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Certain background facts are not in dispute. The powerline program at ELASC consisted of an introductory class taught by LAUSD employee, Robert Estrada, and an advanced class, taught by Burnett. Garcia was enrolled in the introductory class. On May 5, 2010, Garcia fell while climbing a pole in the practice yard at ELASC. He was using a belt wrapped around the pole to assist his climb. The pole had no safety device or barrier installed at the top to prevent the

belt from going over it. When Garcia reached the top of the pole, his belt slipped over and he fell 45 feet.[1]

A. *Operative Complaint*

Garcia filed suit against LAUSD, Burnett, his company "E" Powerline Trades, and Edison for negligence.[2] The operative first amended complaint alleged that Burnett, "E" Powerline Trades, and Edison ran a business engaged in training individuals to traverse powerline poles at ELASC, and that those defendants controlled the premises where the classes took place. The complaint contended generally that those defendants failed to maintain the property and training equipment in a safe condition or to properly install safety equipment, and specifically alleged that in late April, those defendants removed poles equipped with safety equipment from the practice yard and installed different poles lacking necessary safety equipment.

B. *Motion for Summary Judgment*

Edison moved for summary judgment, presenting evidence that it was not directly liable because it had not installed the pole from which Garcia fell, and it was not responsible for the absence of safety devices on that pole. To the extent Edison's liability was based on Burnett's actions, Edison presented evidence that with respect to the powerline classes, Burnett was acting as a special employee of LAUSD and the powerline program did not represent a joint venture between Edison and LAUSD.

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[1] As a result of the fall, Garcia became paraplegic.

[2] The complaint also included claims for fraud and declaratory relief, which are no longer being pursued.

To support its contention that Edison was not responsible for the installation of the pole climbed by Garcia or its lack of safety equipment, Edison submitted a declaration from LAUSD's Estrada, the instructor in the introductory class in which Garcia was enrolled at the time of the accident. Estrada stated that the accident occurred in the area of the practice yard used by the introductory students. Estrada further stated that the pole Garcia was climbing had been installed in April 2010 by himself and the members of his class, and that no one from Edison had helped install the pole or provided any input as to what safety devices or equipment would be installed. According to Estrada, "I alone decided what safety devices, if any, would go on the poles on my side of the pole yard."[3]

To establish Burnett's status as a special employee of LAUSD, Edison presented declarations and transcripts of deposition testimony from multiple witnesses, including Burnett and Thomas Cohenno, Edison's director of corporate learning. Burnett's declaration stated he was employed by Edison from 1969 until August 2010. From June 2006 through August 2010, Edison placed him "'on loan'" to LAUSD "to share [his] expertise with students at the special request of LAUSD." While on loan to LAUSD, Burnett continued to receive his full salary from Edison, which LAUSD supplemented with one day's pay per week. Burnett also helped LAUSD obtain grant money from Edison, which funded the replacement of equipment in the portion of the poll yard used by Burnett's students. According to Burnett, he was supervised by the vice-principal of

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[3] This was corroborated by Burnett's deposition testimony, also submitted in support of the motion. Burnett testified that Edison personnel helped install poles on the advanced class portion of the practice yard only, and that to his knowledge, Estrada and his students had installed the poles that were in place for use by the introductory class on the day of the accident. Other witnesses similarly testified that Edison personnel sometimes delivered and helped install poles used by Burnett's class, but not Estrada's class.

ELASC, Dominque Shambra, who controlled the manner in which he performed his work. Burnett reported to Shambra once a week to discuss the instructional program. His teaching schedule was determined by ELASC, which also controlled the physical site where the class took place, and supplied materials, training facilities, classrooms and administrative support services. At his deposition, Burnett testified that he had very little contact with Edison personnel during the period he was teaching at ELASC and called periodically "just to check in" and to let them know he was "still alive."

Cohenno stated in his declaration that while he was manager of training for Edison's transmission and distribution unit, Edison agreed to loan Burnett to LAUSD to be an instructor at ELASC under a written Memorandum of Understanding (MOU).[4] Cohenno explained at his deposition that LAUSD requested the assistance, that Edison considered the loan of Burnett to LAUSD to be part of its "community involvement" as a regulated monopoly, and that there

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[4] The MOU stated: "[Edison] will[] . . . [p]rovide, at no cost to ELASC, one or more [Edison] employees, as determined solely by Edison, who meets State of California and [LAUSD] credentialing requirements ('instructor'), to teach the Electrical Technician/Electric Utility Lineworker/Introduction and the Electrical Technician/Electrical Distribution Mechanic Trainee classes at such location(s) on such days and at such mutually convenient times as the Parties may agree" and that "ELASC will[] . . . [e]xcept for the Instructor to be provided by Edison as described above, . . . provide all materials, classrooms, training facilities, and administrative support services required for the full performance of the MOU, at ELASC's sole cost, including, but not limited to: recruit students into the above classes, [¶] [] provide certification of training completion for those students who complete the program successfully, [¶] [] provide resources and referrals that are typically available to any ELASC student." (Underscore omitted.) The MOU designated Edison as a "supporting agency" for ELASC and said that Edison was to incur no liability in association with the conduct of the powerline classes. Under its terms, the MOU "commence[d] on July 10th, 2006 and continue[d] through December 31, 2006" and was "renewable thereafter from year to year upon the mutual agreement of the Parties." The trial court found that the MOU was not in effect at the time of the accident in 2010, having not been effectively renewed. This finding is not disputed on appeal.

was "very little" return for Edison. Cohenno further explained that Edison did not share an ownership interest in the powerline program or receive any profits from it, and did not manage or control Burnett's activities as an instructor at ELASC. Cohenno testified that Burnett was an experienced lineworker and training manager and needed no input from anyone at Edison to conduct the powerline course.

Edison also submitted excerpts from the depositions of Wendy Ramirez, former principal at ELASC, and Donna Brashear, current principal of ELASC, who testified that supplies and equipment needed by the powerline classes were obtained by LAUSD through its normal procurement channels, that LAUSD administrative officials had the power to discipline or terminate Burnett, and that the ELASC campus was owned by LAUSD.

C. *Opposition*

Garcia's opposition presented a theory of liability not specifically set forth in the operative complaint. He contended that Burnett had been negligently providing instruction and direction to Garcia at the time of his fall and that Edison was responsible for his actions under the principles of respondeat superior.[5] To

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[5] Garcia had testified at his January 2011 deposition that Burnett was below him, repeatedly yelling "six inches," referring to the placement of Garcia's feet. As a result, Garcia kept "looking at [his] feet" and "didn't realize how high [he] was" when his belt slipped over the pole.

Garcia also attempted to establish that disputes of fact existed concerning whether Edison was directly negligent by providing and installing the pole he was climbing at the time of his fall. On appeal, Garcia does not raise any issues concerning Edison's direct negligence. In any event, our review of the record has revealed no evidence that Edison personnel were responsible for installing the pole Garcia was climbing on the day of the accident. The evidence presented indicated that Edison personnel delivered and helped install poles used by Burnett's advanced class only.

establish Burnett's actions, Garcia submitted the declaration of Roman Taksas, a fellow student. Taksas stated that he was in the practice yard, standing underneath the pole Garcia was climbing when the accident occurred. He stated that Burnett had been nearby, yelling instruction to Garcia as Garcia climbed the pole. He heard Burnett yell "six inches" and another student yell "be careful" just before Garcia fell.[6]

To support the contention that Edison was responsible for Burnett's actions as Burnett's co-employer, Garcia presented excerpts from the depositions of Ramirez and Brashear, the former and current principals at ELASC. Ramirez testified that Burnett mentioned reporting to two individuals at Edison and that Edison employees, whom she believed to be Burnett's superiors, came to the practice yard and helped determine whether new poles, a truck or drilling tools were needed. Ramirez further testified that she believed Edison personnel exercised some control over the classes through conversations with the instructors, but she had no personal knowledge of the content of any such conversations. Ramirez referred to Edison as LAUSD's "partner[]" in testimony and in a letter to Edison dated January 9, 2007. The letter further said that LAUSD relied on Edison to "give . . . input" and to "upgrade, update, the curriculum . . . ," and relied on Burnett to "[s]erve as liaison between our school and [Edison] and other utility companies," "[d]evelop industry partnerships and sponsorships to provide program with tools, equipment and materials," and "[p]rovide utility companies, in

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[6] Taksas further stated that Burnett had the power or authority to discipline students in the introductory class. Several other students, Paul Rodriquez, Roderick Sharp, and Joe Medina, testified that Burnett sometimes gave introductory students advice or criticism when they were in the practice yard and that they were expected to comply.

particular [Edison], with trained, diverse, skilled and motivated candidates."[7] Brashear also referred to the relationship between Edison and ELASC as a "partnership," one where "[Edison] provided the instruction three days a week, and we paid the instructor one day a week."

Garcia also presented excerpts from the deposition of Cohenno, who testified that Edison gave poles to Burnett for use in his class and that Edison personnel delivered the poles and helped install them. He further testified that Edison hired a small number of graduates from the powerline program.

D. *Trial Court's Ruling and Prior Writ Proceedings*

The trial court denied the motion for summary judgment, finding the existence of disputed facts with respect to the status of Burnett and whether he was a special employee of LAUSD at the time of the accident or a dual employee of LAUSD and Edison.[8]

Edison petitioned this court for a writ of mandate, contending the evidence established as undisputed fact (1) that it was not directly liable because it did not install the pole or decide what safety devices should be attached and (2) that it was not liable under a theory of respondeat superior for Burnett's alleged actions because Burnett was a special employee of LAUSD at the time of the accident. On November 16, 2011, we issued an alternative writ of mandate and order requiring

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[7] The letter also stated: "We are aware and sensitive to the fact that Mr. Burnett works for your very generous company, one that is dedicated and responsive to the needs of diverse communities through educational support, encouragement, and development."

[8] The court's denial of summary judgment was also based on the existence of issues of disputed fact concerning Edison's direct involvement, specifically, whether it had installed the poles or the safety devices used in the introductory class. As noted, however, on appeal Garcia raises no issue concerning Edison's direct involvement, and our review of the record reveals no evidence that Edison personnel installed the poles or equipment used in the introductory class.

the trial court to either (a) vacate the order denying Edison's motion for summary judgment and make a new and different order granting the motion; or (b) in the alternative, show cause why a peremptory writ of mandate ordering it to do so should not issue on the ground that Edison had demonstrated it was entitled to an order granting its motion for summary judgment. On November 29, 2011, the trial court issued an order granting Edison's motion for summary judgment "[u]pon direction of the Court of Appeal," finding "no triable issues of material fact regarding said motion." On November 30, 2011, we summarily denied the petition as moot. Judgment was thereafter entered in favor of Edison, and this appeal followed.[9]

DISCUSSION

A. *Standard of Review*

A defendant moving for summary judgment "bears the burden of persuasion that there is no triable issue of material fact and that [the defendant] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) To meet this burden, the defendant must show one or more elements of

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[9] Edison suggests that we have already resolved the issues presented on appeal by virtue of the issuance of the alternative writ. As explained in *Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, 464, regardless of the conclusions, if any, expressed in an alternative writ, when the trial court complies and the writ petition is summarily denied as moot without issuance of a written opinion, "we consider the issue anew on appeal." (See *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-895 ["'Important incidents of the right to appeal from a superior court's judgment are the right to present oral argument in the appellate court [citations] and the right to a written opinion pursuant to the state constitutional requirement . . . '"; an "'explanatory comment'" is not a "'formal opinion [citation] precluding [an appellate] court from considering the issue anew upon [a] hearing at which the parties have had an opportunity to brief and argue the case in full.'"].) Edison's request for judicial notice of copies of pleadings and documents filed in the writ proceeding is granted.

the cause of action cannot be established, or that there is a complete defense to that cause of action. (*Ibid*.) "[A]fter a motion for summary judgment has been granted [by a trial court], [an appellate court] review[s] the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.)

"On review of a summary judgment, the appellant has the burden of showing error . . . ." (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230.) "'[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed.'" (*Ibid*., quoting *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) Many of the alleged facts set forth in Garcia's brief are not supported by citation to the record. Nevertheless, we address the substance of the appeal.

B. *Burnett's Employee Status*

"When an employer -- the 'general' employer -- lends an employee to another employer and relinquishes to a borrowing employer all right of control over the employee's activities, a 'special employment' relationship arises between the borrowing employer and the employee. During this period of transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492.) Where, on the other hand, "general and special employers share control of an employee's work, a 'dual employment' arises, and

the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Id*. at pp. 494-495.)

"'In determining whether a special employment relationship exists, the primary consideration is whether the special employer has "' [t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not . . . .'"'" (*Caso v. Nimrod Productions, Inc.* (2008) 163 Cal.App.4th 881, 888-889, quoting *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175.) As explained in *Marsh v. Tilly Steel Co.*, "[a]mong potentially liable employers, those who have the right to control the employee's activities at any given time are in the best position to predict, evaluate, absorb, and reduce the risk that these activities will injure others." (*Marsh v. Tilly Steel Co*., *supra*, 26 Cal.3d at p. 494.) It follows that "[e]vidence that the . . . special employer has the power to discharge a worker 'is strong evidence of the existence of a special employment relationship.'" (*Kowalski v. Shell Oil Co., supra*, 23 Cal.3d at p. 177.)

Other factors which may be considered include: "'whether the employee is performing the special employer's work'"; "'whether there was an agreement, understanding, or meeting of the minds between the original and special employer'"; "'whether the employee acquiesced in the new work situation'"; "'whether the original employer terminated [its] relationship with the employee'"; "'whether the special employer furnished the tools and place for performance'"; and "'whether the new employment was over a considerable length of time.'" (*Caso v. Nimrod Productions, Inc., supra,* 163 Cal.App.4th at p. 889, quoting *Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1250.) The fact that the general employer continues to pay the employee wages, though relevant, is "'not . . . determinative.'" (*Kowalski v. Shell Oil Co., supra,* 23 Cal.3d at p. 177; see *Caso v. Nimrod Productions, Inc., supra,* at p. 889, quoting *Marsh v. Tilley Steel*

Co., supra, 26 Cal.3d at p. 492 ["Circumstances tending to negate the existence of a special employment relationship include situations in which '[t]he employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer.'"].)

"The question whether a special employment relationship exists is generally a question of fact reserved for the jury. [Citation.] 'However, if neither the evidence nor inferences are in conflict, then the question of whether an employment relationship exists becomes a question of law which may be resolved by summary judgment.'" (*Wedeck v. Unocal Corp*. (1997) 59 Cal.App.4th 848, 857, quoting *Riley v. Southwest Marine, Inc*[, *supra*,] (1988) 203 Cal.App.3d at p. 1248; see *Caso v. Nimrod Productions, Inc*., *supra*, 163 Cal.App.4th at pp. 889-890 [individuals were special employees of production company as a matter of law where they reported to producers and performed regular business of production company at its studio and with tools supplied by it, and where production company had ultimate authority to direct employees' activities]; *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 984 [special employment relationship existed as a matter of law where employees received work schedules, daily work assignments and training from special employer and were not supervised by general employer]; *Riley v. Southwest Marine, Inc*., *supra*, at p. 1250 [no material fact in dispute concerning plaintiff's status as special employee of defendant where plaintiff agreed to assignment, worked exclusively at defendant's job site for seven months, received instruction and supervision from defendant's personnel, obtained safety equipment and tools from defendant, and could be discharged by defendant].)

In moving for summary judgment, Edison presented evidence that Burnett had taught the powerline class at ELASC for nearly four years. Although most of

his salary was paid by Edison, he worked five days a week at ELASC. He performed no services for Edison, rarely communicated with company personnel, and called in only to check in and let them know he was "still alive." It was undisputed that Burnett worked under the supervision of ELASC's administrators, who met with him regularly and had the power to discipline and terminate him. Thus, with respect to the most crucial element -- the right to control and direct the activities of the employee -- there is no dispute that such control resided with LAUSD as the special employer. (See *Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 579 ["Whether there is control may indeed be a question of fact, but if it exists, then the special relationship normally follows as a matter of law."]; *Thomas v. Edgington Oil Co*. (1977) 73 Cal.App.3d 61, 64 ["[W]here . . . the alleged special employer was, by the admission of plaintiff [loaned employee], exercising direct supervision over the exact task during the accomplishment of which an employee is injured, the status of special employer must be found to exist as to a claim for that injury."].)

The undisputed evidence also supported other factors establishing the special employment relationship. The arrangement originated with an agreement -- the MOU -- indicating a meeting of minds between Edison and LAUSD that Edison was a "supporting agency" with no responsibility for the powerline training program other than providing Burnett as an instructor. Burnett acquiesced in the transfer and remained an instructor at ELASC for nearly four years. Throughout this period, LAUSD directed the program, and provided all materials, classrooms, training facilities and administrative support services.[10]

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[10] Garcia presented evidence that LAUSD obtained funds to purchase materials and otherwise support the advanced class through applying to Edison for grant money. The evidence does not suggest that LAUSD relinquished its discretion over control of the
(Fn. continued on next page.)

Quoting *Marsh v. Tilley Steel Co., supra*, 26 Cal.3d at p. 494, Garcia contends that "'[f]acts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer.'" (Emphasis omitted.) As noted, where both the general employer and the borrowing employer share control of an employee's work, "a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (26 Cal.3d at pp. 494-495.) However, Garcia identified nothing in the record to counter the evidence that it was LAUSD and its personnel who exercised sole control over Burnett and his day to day activities at ELASC during the lengthy period he was on loan to them. While it is undisputed that Edison continued to pay Burnett's salary, as noted, this fact is not determinative. (*Kowalski v. Shell Oil Co., supra*, 23 Cal.3d at p. 177; *Thomas v. Edgington Oil Co., supra*, 73 Cal.App.3d at p. 63.) Nor is the fact that Burnett was an admittedly skilled worker with substantial control over the operation of the class, as it was LAUSD's business he was engaged in -- not Edison's. (See *Wedeck v. Unocal Corp., supra,* 59 Cal.App.4th at pp. 858-861 [chemist found to be special employee of refinery to which she was assigned].)

Garcia contends that Edison and LAUSD were engaged in an activity of "'mutual interest'" or a "joint venture" with respect to the powerline classes. It is true that "where the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other." (*Marsh v. Tilley Steel Co., supra*, 26 Cal.3d at pp. 490-493 [freeway's concrete contractor and

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classes to Edison by accepting the money. Rather, the evidence established that LAUSD purchased supplies for the classes based on its own needs.

subcontractor responsible for installation of reinforced steel which supported concrete work were engaged in a project of "'mutual interest'" and subcontractor remained responsible for negligence of crane operator loaned to contractor for half-day to assist in placement of concrete forms]; see *Moss v. Chronicle Pub. Co*. (1927) 201 Cal. 610, 614 ["'If, with a view to expediting the business or furthering the interests of his general master, the servant assists the servants of another in their work, he is not the fellow servant of those whom he is assisting, [although], acting under general orders from his employer to assist such servants, he does so at their request.'"].) However, Garcia's evidence failed to raise a triable issue as to the existence of a joint venture. While Ramirez characterized the relationship as a "'partnership'" to "'[p]rovide utility companies, in particular [Edison], with trained, diverse, skilled and motivated candidates,'" her opinion concerning the relationship is not evidence of a joint venture. (Emphasis omitted.) Nor is Burnett's testimony that he had helped expand training facilities over a decade earlier in Chino, and that Edison "expand[ed] . . . into [ELASC]" when he was sent there. Edison was undoubtedly interested in having an available supply of individuals trained in working around powerlines. But there was no evidence that the program represented a conduit to Edison, that it supplied Edison with a significant portion of its personnel, or that Edison hired more than an occasional graduate of the program.

In short, nothing in the record before us can counter the undisputed evidence that during the lengthy period of Burnett's employment as an instructor at ELASC, including the time of Garcia's accident, he was working full-time at ELASC under the supervision and control of LAUSD administrators, with only minimal contact with Edison. On this record, we conclude Burnett was a special employee of LAUSD. Accordingly, Garcia failed to raise a triable issue of fact as to Edison's liability for the acts of Burnett.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.