NO. 32094-4-III

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

Discretionary Review
Grant County Superior Court No: 11-2-00388-1

RICARDO CASTILLO,

Appellant/Plaintiff

v.

GRANT COUNTY PUBLIC UTILITY DSTRICT,

Respondent/Defendant

BRIEF OF RESPONDENT (RAP 2.3(B)(4))

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I. INTRODUCTION

Respondent (Defendant) is Public Utility District No. 2 of Grant County ("Grant County PUD"). Appellant (Plaintiff) is an agricultural employee of Skone & Connors Produce, Inc., dba S&C Ranching, a corporate farming operation located in Grant County.

Plaintiff claims he received a back injury in the course of his employment on June 5, 2009 (CP 884-885), and Defendant denies it has liability for the injury (CP 890-893).

The Court granted partial summary judgment for the Defendant on the issue of alleged violations of the Washington Administrative Code, and found the testimony of James Voss was insufficient to establish a standard of care[1]. The Court subsequently denied Plaintiff's motion for reconsideration[2], and entered an Order to that effect, but which retains Plaintiff's claims based on ordinary negligence[3].

The Court granted Plaintiff's motion for RAP 2.3 certification (CP 803). That Order is explicitly restricted to only the issue of "*...the admissibility of the expert opinion of James Voss...*" The Plaintiff filed a Notice Seeking Discretionary Review (CP 0833) which also limits the

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[1] The Court's original memorandum decision is at CP 0522-0524.
[2] The Court's memorandum decision denying Plaintiff's motion for reconsideration and granting partial summary judgment is at CP 0741-0742.
[3] The Court's Order is at CP 0798-0802.

issue requested for review to, "*Order granting partial summary judgment in which the court struck the expert testimony of James Voss.*"

On February 3, 2014 this Court granted Plaintiff's Motion for Discretionary Review.

In short, therefore, the only issue before this Court is the admissibility of the testimony of James Voss, **not** the remaining aspects of the Court's Order granting partial summary judgment based on (a) violations of WACS, or (b) Plaintiff's Motion to Add New Legal Theories and New Evidence or (c) Plaintiff's Motion for Reconsideration.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Plaintiff incorporates three assignments of error within the Argument section of his brief. Respondent's summary of responses is as follows:

Assignment of Error No. 1[4]: "The trial court erred in striking the testimony of expert witness James Voss on the ground that his testimony was mere opinion evidence."

Response: The trial court correctly ascertained that the testimony by James Voss did not conform to ER 702 because it was mere opinion testimony and would not assist the trier of fact.

[4] Located on p. 11 of Appellant's Brief.

Assignment of Error No. 2[5]: "Voss should be permitted to explain how PUD, a governmental agency, violated its own internal safety standards."

Response: The so-called "internal safety standards" pertain only to the "switching and clearance protocol" which applies exclusively to work performed on high voltage distribution systems. The incident in this case involved low voltage. Even if the court ultimately concludes this protocol is relevant, testimony by James Voss is not required.

Assignment of Error No. 3[6]: "Voss' testimony should be admissible to the extent it explains PUD's statutory violation, a standard that is not dependent on Voss' view of the unwritten standard of care."

Response: There is no statutory violation. The WAC regulations relied on by James Voss apply only to activities among electrical workers and not to allegations brought by members of the public. Further, the statute referred by plaintiff, RCW 19.28.101, applies only to inspections of completed operations, and does not pertain to the issues in this case.

III. COUNTERSTATMENT OF THE CASE

Plaintiff is an agricultural farm worker assigned to manage circle irrigation systems for his employer, S & C Ranching. He was apparently assigned to repair the circuit breaker for a pump after it was removed from

[5] Located on p. 25 of Appellant's Brief.
[6] Located on p. 27 of Appellant's Brief.

the irrigation circle. The undisputed facts show that the incident in this case occurred while Plaintiff was attempting to repair a circuit breaker located between the electrical meter box and the pump.

It is also undisputed that Grant County PUD received a request from S&C Ranching (Plaintiff's employer) to provide a temporary power disconnect[7]. Further, it is undisputed that the "base" (or "meter box") in which the electrical meter is located, was owned by, installed by, and maintained by S&C Ranching (not Grant County PUD).

PUD Lineman, John Johnston, opened the meter base and removed the meter which is the customary and accepted method of temporarily de-energizing the type of equipment where Plaintiff intended to make repairs[8].

Ordinarily a temporary disconnect of this nature only requires a few minutes, so Mr. Johnson remained at the scene, expecting he could replace the meter when Plaintiff completed his task[9]. However, Plaintiff soon realized the circuit breaker was damaged and would require replacement, which Mr. Johnston knew required calling a licensed electrician. Therefore, Mr. Johnston had to make the meter base safe before he left the scene.

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[7] Deposition of John Johnston at 27:18-28:14 (CP 0393-0394 & CP 956)
[8] John Johnston deposition at 34:8-36:19 (CP 0400-0402 & CP 0958).
[9] John Johnston deposition at 61:11-62:06 9CP 0427-0428 & CP 0965).

When a meter is removed from its base and the lineman is going to leave the scene a "pie plate" must be installed, which is a non-conductive round device that fills the hole where the meter usually goes. This prevents anyone from being injured by reaching inside the hole where the meter usually is located[10]. Mr. Johnston was in the process of installing a "pie plate" when the incident occurred[11].

Because the meter base installed by S&C Ranching was a "lever bypass" type, the electricity flows downstream to the circuit breaker when the lever is UP. If the lever is in the DOWN position the electricity is interrupted unless a meter is installed[12].

To install either a meter or a "pie plate" in a lever bypass-style meter base, the lever must be placed in the UP position to open the jaws of the device, then the lever is lowered to lock either the meter or "pie plate" into position.

In this particular case, before Plaintiff arrived to begin working on the circuit breaker, Mr. Johnston had raised the bypass lever UP, removed the meter, and lowered the bypass lever to disconnect the power to the pump circuit break. After Plaintiff arrived it took only a few minutes before he

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[10] John Johnston deposition at 67:23-68:03 (CP 0433-0444 & CP 0966).
[11] John Johnston deposition at 46:42-48:07 (CP 0412-0448 & CP 0961).
[12] The "lever bypass" style of meter base is designed to allow contractors to provide temporary power to a construction site, before a meter is installed.

concluded he was unable to repair the circuit breaker and it had to be replaced. That meant he needed to call a licensed electrician[13].

Mr. Johnston told Plaintiff that to install the "pie plate" he had to re-energize the line temporarily[14], and walked across the road and back to the power pole where the meter base had been installed by Plaintiff's employer.[15]

Unknown to Mr. Johnston, while he was walking back to the meter base the Plaintiff had returned to the circuit breaker to renew the repair efforts even though the circuit breaker was irreparable and could only be replaced by a licensed electrician. When Mr. Johnston pushed the meter box lever UP to open the jaws and install the "pie plate", the electricity briefly flowed to the circuit breaker. There was a loud bang, the Plaintiff jumped or fell backwards, and injured his back.

Plaintiff's counsel originally retained Dr. Mark Rhodes from California as his electrical engineering expert. After Dr. Rhodes was deposed, Plaintiff's counsel retained Mr. James Voss as an expert regarding electrical issues.[16]

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[13] John Johnston deposition at 41:14-25 (CP 0407 & 960).
[14] John Johnston deposition at 37:12-38:5 (CP 0403-0404 & CP 959).
[15] The meter base was across the road from the electrical pedestal where the circuit breaker was installed and approximately 200 feet away.
[16] Dr. Rhodes has never been withdrawn so it is currently unknown if he will testify at trial.

James Voss testified that he has worked in the electrical industry as a journeyman lineman, but for the majority of his career was in management. He does not have the credentials or background comparable to the Defendant's expert, Paul Way, P.E. (Interestingly, Appellant's Brief does not even mention Paul Way).

Appellant's Brief does mention Mr. Brian Erga[17]. This person was never disclosed as a witness in Plaintiff's pretrial discovery. (CP 0772-0773 & 0774-0779). Mr. Erga's declaration (CP 0758-0763) was offered in a packet of new materials filed after the trial court's memorandum decision denying the Plaintiff's motion for reconsideration (CP 0741-0742). The Court granted Defendant's motion to exclude this declaration (CP 0802 at line 1) and this ruling is not included in the issues certified by for interlocutory review (CP 0803).

IV. ARGUMENT

Plaintiff incorrectly alleges at p. 4 of his brief that "*The trial court found that Voss qualifies as an expert witness.*" at CP 522. The referenced document does not contain such a finding (in fact, the Court never did make such a finding). Nevertheless, it is clear that the judge did carefully consider his testimony, regardless of James Voss' status.

[17] See, for example, Appellant's Brief at p. 5.

What the court actually did find is unambiguously described in the Court's first memorandum granting partial summary judgment (CP 0522-0524), and again in the Court's final denying Plaintiff's motion for reconsideration (CP 0741-0742).

In the first memorandum granting partial summary judgment the Court explained at CP 0523-0524:

> "The Court has reviewed the entirety of James Voss' deposition and affidavits and can find nothing to indicate his opinion is anything other than his own, based on his training and experience. For this reason, the record before the court is insufficient, even when viewed in the light most favorable to the Plaintiff, to support a cause of action based on Defendant's failure to follow the procedures set forth in the WACs."

Every time the trial court judge explained the rationale for granting the motion for partial summary judgment, Plaintiff tried to avoid the decision by filing a new declaration.

Plaintiff filed multiple declarations by James Voss[18] in an effort to avoid the impending decision excluding his personal opinion. In every

[18] Declarations by James Voss are found at CP 0049-0073, and CP 0106-0114 and CP 0531-0532 and 0727-0728.

instance there was a declaration by Paul Way, P.E.[19] that explained to the Court that James Voss' personal opinions did not properly describe the actual standard in the industry.

Despite the fact courts prefer not receive multiple declarations, particularly after oral argument, the Court in this case was correct to consider all of them. See: *Cofer v. Pierce County*, 8 Wn.App. 258, 505 P.2d 476 (1973). Therefore, the only issue on appeal is whether the Court reached the correct conclusion after considering all of the various declarations.

After considering all of the voluminous additional material submitted by the Plaintiff, the Court denied the motion for reconsideration, and explained at CP 0741-0742 that James Voss' testimony was insufficient because it does not identify an accepted standard of care, it described only his personal belief of what the standard should be:

> "It is after all, the Defendant's duty to do that which a reasonable person would do and generally includes following generally recognized norms. The Defendant must comply with Voss' notion of reasonable conduct only if those notions are in accord with either the reasonable person standard.

[19] Declarations by Paul T. Way are found at CP 0035-0038, and CP 0080-0081, and CP 0082-0086, and CP 0121-0125, and CP 0491-0500.

> It is within the province of the jury to determine what is reasonable and any opinion on this subject must be helpful to the jury. ER 702. Testimony about what norms are generally accepted in the industry may very well be helpful to the jury in this regard. Testimony about what those norms should be invades the province of the jury.
>
> The court has again reviewed James Voss' submissions, including the most recent, and cannot, even reading those submissions broadly, find the assertion that the community of power providers has generally recognized the standard of care he has endorsed. On the contrary, James Voss describes what he believes, perhaps rightly, the generally accepted standard should be. James Voss' testimony is, therefore, irrelevant in establishing a standard of care in this case."

It is crystal clear that the Court considered every declaration filed by James Voss, and reached the correct conclusion that he was describing only what he believes the industry standard of care ought to be, not what it actually is.

A. A SUBSEQUENT DECLARATION CANNOT CONTRADICT JAMES VOSS' PREVIOUS DEPOSITION TESTIMONY

Washington courts have explained many times that a party cannot avoid summary judgment by filing an affidavit that is inconsistent with previous deposition testimony. *Marshall v. AC&S, Inc.*, 56 Wn.App. 181, 782 P.2d 1107 (1989). Although the Court in this case does not expressly cite to the *Marshall* rule, it seems apparent that the deposition testimony by James Voss was important in determining that he was describing personal opinion, not articulating accepted industry standards.

Another example that James Voss was testifying about his personal opinion, and not generally accepted industry standards, is found in his deposition at page 106:7-107:5 (CP 0346-0347) in which he responds to questions posed by Plaintiff's counsel:

> "Q. Let's go to [WAC 296-] 45-085. What was the issue there?
>
> A. This was the section 085 that puts the onus on the serviceman to apply the provisions of this chapter on a day-to-day basis. And his disregard for the energy source at the meter base, you know, exhibits his non-applying it to day-to-day basis because he did even make the comment that he does – that's the way he does it all the time.

Q. Okay. Now, 085 was designed to protect the employees of the PUD?

A. That's what it's defined for.

Q. Okay. Does the standard of care reach farther than that?

A. I'd say the standard of care reaches way farther than just the employees involve. *I think the standard of care implies a duty* to any worker that's trained to be able to act in a – rely on the training.

Q. I'm talking about the standard of care in reference to the individuals' protected. Because I think that the WACs simply are designed to protect other employees?

A. Correct.

Q. Okay. Does the standard of care have a broader – does it or does it not – have a broader sweep in terms of the people that are supposed to be protected by correct actions?

A. *It would be my opinion. Yes.*" [emphasis added].

This discussion was held in the context of how far WAC 296-045-085 could stretch. This WAC chapter deals only with safety of electrical workers. The scope of that chapter is clearly defined in WAC 296-045-015 which provides in relevant part:

"(6) Any rule, regulation or standard contained within this chapter, if subject to interpretation, shall be interpreted so as to achieve employee safety, which is the ultimate purpose of this chapter.

. . .

(8) Neither the promulgation of these rules, nor anything contained in these rules shall be construed as affecting the relative status or civil rights or liabilities between employers and their employees and/or the employees of others and/or the public generally; *nor shall the use herein of the words "duty" and "responsibility" or either, import or imply liability other than provided for in the industrial insurance and safety laws of the state of Washington, to any person for injuries due to negligence predicated upon failure to perform or discharge any such "duty" or "responsibility," but failure on the part of the employees, lead worker,* or employer to comply with any compulsory rule may be cause for the department of labor and industries to take action in accordance with the industrial insurance and safety laws."

[emphasis added]

Clearly, this chapter of regulations applies only to activities between electrical workers and cannot be expanded beyond that that scope as articulated in the language of the regulation.

James Voss is expressing a personal opinion that the WAC provisions that expressly apply to only the PUD lineman in this case, should be expanded to create a new duty imposed on that employee to protect Plaintiff. This is, quite simply, not the law. The WAC provisions do not apply beyond their clear language, regardless of the personal preference of Plaintiff's expert.

B. THE TESTIMONY OF PAUL WAY PROPERLY IDENTIFIES THE CORRECT STANDARD OF CARE FOR THE PUD

Defendant's expert, Paul Way, P.E., is a registered electrical engineer with extensive experience in both electrical and mechanical engineering, and has testified as an expert in multiple state and federal cases (CP 0035 at ¶2).

As Mr. Way explains in this declaration dated Nov. 12, 2012, removing the meter box to de-energize this circuit was the industry standard, and the accident was the sole result of Plaintiff's violation of WAC 296-46B-920, and being improperly trained to perform the required work. Furthermore, because Plaintiff's employer provided a bypass-lever style meter box, it was impossible for the lineman (John Johnston) to insert the required "pie plate" without momentarily energizing the circuit. In other words, as Mr. Way explained:

> "Mr. Castillo was injured solely because he failed to comply with and conform to industry standards regarding removing and replacing the circuit breaker, which was work that could be performed only by a licensed electrician." (CP 0037 at ¶3(n)).

It is undisputed that the incident in this case involved low voltage, not high voltage. Mr. Way also testified that it is totally inappropriate to accept James Voss' assertion that WAC requirements applying exclusively to high voltage activities should be used to create an artificial standard of care for low voltage work. It is curious that Appellant's Brief fails to acknowledge this basis for the trial court's ruling.

In his April 30, 2013 declaration (CP 00882-0086) Mr. Way identified multiple instances in which James Voss exceeded his expertise. For example, at CP 0084 at ¶ 9(e) James Voss admitted in his deposition that there is no written standard of care, and that he is only applying his personal experience. Again, it is odd that Appellant's Brief disregards this testimony.

Finally, Mr. Way testified that removing a meter is the regular and customary way for a lineman to temporarily disconnect power to allow a customer to perform maintenance. (CP 0086 at ¶10.)

C. THE TESTIMONY BY BRIAN ERGA CANNOT BE ADMITTED TO VOUCH FOR THE CREDIBILITY OF PLAINTIFF'S EXPERT JAMES VOSS

Plaintiff argues that the trial court improperly discounted or disregarded a declaration by Brian Erga[20]. In fact, it is unknown who this purported witness really is, because he was never identified in discovery responses. (CP 0772-0773 & 0774-0779). The proffered testimony was improper attempt to bolster or vouch for James Voss' declarations, and was otherwise duplicative.

It is hornbook law that a witness may not give an opinion as to another witness's credibility. *State v. Casteneda-Perez*, 61 Wn.App. 354, 360, 810 P.2d 74, *rev.den.*, 118 Wn.2d 1007 (1991). Credibility determinations lie within the sole province of the fact finder. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Similarly, an expert witness may not express an opinion about the credibility of another witness because such "testimony invades the province of the jury to weigh the evidence and decide the credibility of witnesses." *State v. Jones*, 71 Wn.App. 798, 812, 863 P.2d 85 (1993) *rev.den.* 124 Wn.2d 1018 (1994); *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992); *State v. Madison*, 53 Wn.App. 754, 760, 770 P.2d 662, *rev. den.*, 113 Wn.2d 1002 (1989).

[20] CP 758-762.

The trial court properly denied the motion to add new legal theories and new evidence[21], which was submitted after the memorandum decision granting partial summary judgment and denying reconsideration was issued[22]. The Erga Declaration was correctly rejected because it is obviously an improper attempt to vouch for the credibility of James Voss.

D. SWITCHING AND CLEARANCE PROTOCOL DOES NOT APPLY TO THE LOW VOLTAGE WORK AT ISSUE HERE

It is clear that James Voss was grossly overreaching his abilities when he tried to apply "switching and clearance protocol" to this incident. As Mr. Way explained, the protocol applies only when a portion of the high (or ultra-high) voltage system is removed from the distribution grid. The process involves careful coordination and constant communication between the linemen working at the scene, and the system operator, as described by Paul Way, P.E. (CP 0123 at ¶12.)[23]

The protocol has absolutely nothing to do with the low voltage work at issue in this case, and the Court properly found that James Voss did not show that the standard of care for high voltage "switching and clearance

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[21] CP 802 Order at ¶4
[22] CP 0741-0742.
[23] The specific script that is required to be used is set forth at CP 0203-0206 (duplicated at CP 0627-0635)

protocol" could be twisted to fabricate a new industry standard for low voltage work.

As clearly provided in ¶2.1.1 at CP 0203(duplicated at CP 0640), this protocol applies only to de-energizing lines and equipment for PUD employee safety, pursuant to WAC 295-45-335 which provides in relevant part:

> "(1) **Application**. This section applies to the de-energizing of transmission and distribution lines and equipment for the purpose of protecting employees. ..." (emphasis added).

There is absolutely no basis on which James Voss should be allowed to speculate the regulations for" switching and clearance protocol" that were promulgated in compliance with the WAC regulations, can be distorted to apply to temporary disconnect of a low voltage circuit breaker for an irrigation pump.

The complete "switching and clearance protocol" is attached as at CP 0183-0222 (duplicated 0625-0670). The protocol document clearly states it applies only to 115kV and 230kV[24] systems. (CP 0643.) The incident at issue in this case was 480 volts, (considered low voltage), and is not covered by the "switching and clearance protocol" that applies exclusively to high voltage.

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[24] 115,000 volts and 240,000 volts.

As the court can clearly perceive, this protocol involves a highly regimented process designed to protect PUD employees from danger of injury when they work on systems transmitting over 115,000 volts. It involves specific language that must be exchanged by radio between a system operator at the master controls, and linemen in the field. It is ludicrous to think this would apply to a simple temporary disconnect that was requested by Plaintiff's employer.

E. THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY OF JAMES VOSS BECAUSE HE EXPRESSED PERSONAL OPINION INSTEAD OF IDENTIFYING THE INDUSTRY STANDARD OF CARE

James Voss is trained as an electrical lineman, and is not a registered electrical engineer. (CP 0058-0061) After he lost his arm in a high voltage accident, he moved into operations and management. (CP 0250-0252 & CP 997-999, Voss deposition at 10:22-12:01).

In his deposition at 32:15 – 33:9 (CP 0272-0273 & CP 1019-1020) James Voss admitted that he was not relying on a written standard of care on which to base his conclusions:

> "Q. Let's see. I'm back on page 2 of your declaration now. And throughout the document, you refer to a "standard of care." And on line 14, right now, where you analyze – you say the declaration

here and analyzes the standard of care for public utility lineman. And then on line 17 you refer to a general standard of care. And I guess that's related to GCPUD, Grant County PUD. Looking first at the standard of care for public utility lineman. Where is that located?

A. There's no written document for that.

Q. Okay. So the standard of care is just something you pick up as you go along?

A. Standard of care is something that is a culmination of experience, training and application.

Q. So if I were to ask you where can I go buy a copy of the standard of care, there isn't one?

A. No.

Q. How about the general standard of care for a PUD? Is there such a document?

A. There's no document."

It its first memorandum granting partial summary judgment (CP 0522-0524) the Court quoted James Voss' deposition testimony at 85:13-86:01 (CP 0325-0326) directly:

"Q. Okay. And can you say, either way, as to whether the protection of fellow workers in the WACs is part of the standard of

care that a lineman should follow in protecting members of the public?

A. *I would say yes*[25].

Q. Okay. Have you taught that in any of the classes that you've taught?

A. It's a subject that comes up all the time. You know the standard of car, as I understand it, is what a reasonable person would do in a given situation, and when that reasonable person is trained to the degree of a lineman is supposed to be trained, we have to actually substitute the reasonable person as what a reasonable lineman with a proper training, how would he respond. And yes. (emphasis added)."

The trial court also noted (at CP 0523) that James Voss admitted in his Second Declaration[26] (dated May 9, 2013) that the standard of care was merely his personal opinion:

"It is my belief that PUD violated the WAC in numerous ways and, as stated in my original declaration, that PUD violated the general standard of care apart from the precise fact patterns covered by the WAC. In other words portions of the WAC impose standards of safe conduct for the protection of PUD employees. *It*

[25] Emphasis added by the Court.
[26] CP 0106-0114.

is my opinion that those same standards of same conduct are required by the general standard of care[27] for the protection of members of the public such as Mr. Castillo. As stated in my deposition, I have taught that concept in safety classes which I have conducted. (emphasis added)."

As the trial court explained, the Plaintiff has been unable to identify an industry standard of care that was violated by the PUD. The personal opinion of James Voss is not adequate.

Of course, it is well accepted in this state that the test for deciding whether to allow expert testimony is left to the sound discretion of the trial court. *Vasquez v. Markin*, 46 Wn.App. 480, 491, 731 P.2d 510 (1986). The trial court will not be reversed absent a manifest abuse of that discretion. *Harris v. Robert C. Groth, MD, Inc.,* 99 Wn.2d 438, 450, 663 P.2d 113 (1983); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000).

The trial court applies a three part test in exercising this discretion to decide whether to admit testimony by a purported expert: (1) is the witness qualified to testify as an expert, (2) is the expert's theory based on a theory generally accepted in the relevant community, and (3) would the testimony be helpful to the fact finder? *Philippides v. Bernard*, 151 Wn.2d

[27] Emphasis added by the Court.

376, 393, 88 P.3d 939 (2004). See also: *Saldivar v. Momah,* 145 Wn.App. 365, 186 P.3d 1117 (2008).

To find abuse of the trial court's discretion the reviewing court must find that no reasonable person would take the position of the trial court. *Mayer v. City of Seattle*, 102 Wn.App. 66, 79, 10 P.3d 408 (2000). If the basis for ruling on admissibility of the expert testimony is "'fairly debatable,'" the appellate court will not disturb the trial court's ruling. *Group Health v. Dep't of Revenue,* 106 Wn.2d 391, 398, 722 P.2d 787 (1986) (quoting *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)). Abuse occurs only where discretion is exercised on untenable grounds or for untenable reasons. *Carroll v. Junker,* 79 Wn.2d 12, 482 P.2d 775 (1971).

> In other words, the trial court's decision is given particular deference where there are fair arguments to be made both for and against admission. *In re Bennett,* 24 Wn.App. 398, 404, 606 P.2d 1308 (1979). As noted by the Court of Appeals, when "the reasons for admitting or excluding the opinion evidence are both fairly debatable, the trial court's exercise of discretion will not be reversed on appeal." *Levea v. G.A. Gray Corp.,* 17 Wn.App. 214, 220-21, 562 P.2d 1276 (1977).

Another way to look at the question recognizes that a trial court must exclude expert testimony unless it satisfies ER 702. The trial court must determine that the witness qualifies as an expert and the testimony will assist the trier of fact, because unreliable testimony does not assist the trier of fact. See: *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011).

The trial court's decision whether to admit expert testimony should be guided within the context of the specific facts in a case. See *Johnston-Forbes v. Matsunaga*, 177 Wn. App. 402, 311 P.3d 1260, (2013), *aff'd* __ Wn.2d __, __P.3d __, 2014 Wash. LEXIS 648 (*slip op.* Aug. 28, 2014 at p. 8-9).

In this case the trial court examined the testimony offered from James Voss within the context of the facts in this case, and found that his testimony was not based on a recognized general standard of care in the industry, and, therefore, was unreliable and would not assist the trier of fact. Consequently the Court's decision to exclude James Voss' opinion testimony in this case ought not to be disturbed on appeal.

F. THE COURT SHOULD GIVE DEFERENCE TO FINDING BY L&I INTERPRETING THE WAC REGULATIONS

The Department of Labor and Industries investigated this incident and determined there was no violation of the applicable WAC regulations. (CP 0240).

The courts defer to an administrative agency when interpreting the regulations promulgated by that agency. *J&S Servs., Inc. v. Dep't of Labor & Indus.,* 142 Wn.App. 502, 174 P.3d 1190 (2007). Substantial weight is given to an agency's interpretation within its area of expertise, and the courts will uphold that interpretation if it is a plausible construction of the regulation and not contrary to legislative intent. *Id.*

If a regulation's meaning is plain and unambiguous on its face, then the courts give effect to that plain meaning. *Overlake Hosp. Ass'n v. Dep't of Health,* 170 Wn.2d 43, 52, 239 P.3d 1095 (2010). Ambiguity exists only if there is more than one reasonable interpretation of the regulation. *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs.,* 168 Wn.2d 421, 433, 228 P.3d 1260 (2010).

The court will not construe unambiguous language in a statute. *King County v. Taxpayers of King County*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985). Although this case involves an administrative regulation, not a statute, courts interpret regulations under the rules of statutory

construction. *City of Kent v. Beigh*, 145 Wn.2d 33, 45, 32 P.3d 258 (2001). Agency regulations are interpreted as if they were statutes. *Roller v. Dep't of Labor & Indus.,* 128 Wn.App. 922, 926-27, 117 P.3d 385 (2005).

Regulations are to be given a rational, sensible interpretation." *Cannon v. Dep't of Licensing,* 147 Wn.2d 41, 57, 50 P.3d 627 (2002). When a regulation is unambiguous, intent can be determined from the language alone, and courts will not look beyond the plain meaning of the words of the regulation. *Thurston County v. Cooper Point Ass'n,* 148 Wn.2d 1, 57 P.3d 1156 (2002); *Kilian v. Atkinson*, 147 Wn.2d 16, 50 P.3d 638 (2002); *Flanigan v. Dep't of Labor & Indus.,* 123 Wn.2d 418, 869 P.2d 14 (1994); *Waste Management of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 869 P.2d 1034 (1994); *In re Matter of Juveniles A, B, C, D, E,* 121 Wn.2d 80, 87, 847 P.2d 455 (1993).

Plaintiff also asserts that there was a violation of RCW 19.28.101. This statute clearly does not apply. However, Title 19.28 is subject to a vast array of WAC regulations, all of which are interpreted by the L&I inspectors.

The L&I inspectors in this case determined was no violation of WAC regulations. As noted in their report, Plaintiff told the lineman (John Johnston) the circuit breaker would take a day or two to replace.

Furthermore, the L & I inspectors noted that the design of the meter base was a significant factor in the incident, as described by the L&I inspectors in their report (CP 0240):

> "The type of meter base in use had a manual bypass switch. In order to open the jaws of the meter base to install either a meter or a pie plate the manual bypass is used and momentary burst of power opens the jaws. When this burst came through, one of the conductors was touching the cabinet wall and shorted producing the flash that led to the S&C worker's injury."

Additionally, contrary to plaintiff's argument, RCW 19.28.101, by its clear language, applies only to inspections of final installations. There are no facts in this case that even hint that there was final installation requiring inspection.

Finally, to the extent Plaintiff is attempting to imply that Grant County PUD is responsible for the safety of Plaintiff, that theory was rejected by The Washington Supreme Court over thirty years ago.

In *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 635 P.2d 426 (1981), the plaintiff was an employee of Potelco, Inc. Puget Power hired Potelco to perform work on a 55 kv (55,000) volt electrical distribution system. Plaintiff was killed when he came into contact with the high voltage line. The Court rejected Plaintiff's argument that Puget

Power owed him a non-delegable duty to provide a safe work place under WAC 296-45[28] and the statutes under which those electrical worker safety regulations were promulgated.

> "The language of this regulation specifically indicates that all employers engaged in this work must comply with these regulations. The respondent contends that had the legislature, through the Department of Labor and Industries, intended to place a nondelegable or absolute duty per se upon electrical utilities, over and above other employers, the regulations would have so stated. Ordinary rules of statutory construction preclude rewriting the clear language of a statute. *King County v. Seattle*, 70 Wn.2d 988, 425 P.2d 887 (1967)."
>
> *Tauscher v. Puget Sound Power & Light Co.*, *supra*, at p. 286

Plaintiff was an employee of S&C Ranching, not Grant County PUD. As the trial court has observed, there could be a common law duty owed, but there is no statutory duty owed by the PUD to the Plaintiff as defined by the electrical safety laws and regulations. Those electrical safety statutes and WAC provisions pertain only to the duty owed among the electrical workers employed by the same employer. In other words, if Plaintiff had been working for the PUD the statutes and regulations might

[28] *Tauscher* evaluated the plaintiff's claims in the context of WAC 296-45-65003(9). That regulation was recodified in 1994 as WAC 296-45-015 which is at issue in this case.

apply here. But in this case plaintiff's status is the same as that of Mr. Tauscher. It would be reversible error for the trial court to allow a jury to evaluate liability in the context of alleged negligence per se.

John Johnston testified that Plaintiff knew the circuit breaker was irreparable and had to be replaced; therefore no further work could or should be done without a licensed electrician, and the Plaintiff also was told that the circuit would be temporarily re-energized when the "pie plate" was installed in the meter box. (CP 0176-0178).

V. CONCLUSION

The trial court properly and correctly decided that James Voss should not testify regarding his personal opinions about electrical safety. He was unable to identify a generally accepted standard of care that applies to the PUD because there is none. Plaintiff's alleged errors are all insufficient to overturn the trial court's carefully considered decision to exclude James Voss as an expert in this case.

The trial court did not grant Defendant's motion for dismissal of common law negligence claims, so the case will go forward on those theories. The only practical result of the Court's granting of partial summary judgment is to preclude allegations of negligence per se for violation of a statute or regulation. This is, of course, appropriate because there is no statute or regulation that applies, and there is no generally

accepted standard of care. There is only the personal opinion of James Voss, and that is insufficient to establish liability.

DATED: August 29, 2014

LAW OFFICES OF J. SCOTT MILLER, P.S.

By: _____
J. SCOTT MILLER, WSBA No. 14620
Attorneys for Respondent

CERTIFICATE OF SERVICE

I declare, pursuant to RCW 9A.72.085 and under penalty of perjury under the laws of the State of Washington, on August 29, 2014, a copy of the foregoing was duly served on all parties entitled to service by the method listed below, addressed as follows:

/	Hand delivery	Richard McKinney
__	Overnight mail	Attorney at Law
___	U.S. Mail	2701 California Avenue, S.W.
___	Fascimile	#225
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