SUPREME COURT NO: 92166-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III
NO. 32094-4-III

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

RICARDO CASTILLO,

Appellant/Plaintiff

v.

GRANT COUNTY P.U.D.,

Respondent

OBJECTION AND ANSWER TO PETITION FOR REVIEW (RAP 13.4)

J. SCOTT MILLER, WSBA No. 14620
Law Offices of J. Scott Miller, P.S.
201 W. North River Drive, Suite 305
Spokane, WA 99201-2266
509/327-5591

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I. IDENTITY OF RESPONDENT

Respondent, Grant County P.U.D., is named as the defendant in the underlying action. Grant County P.U.D. was also the respondent at the Court of Appeals.

I. ANSWER TO ISSUES PRESENTED FOR REVIEW

1. This matter is not properly styled as a "petition for review" under RAP 13.4 because the decision is "interlocutory" and does not qualify as a "decision terminating review".
2. This matter should not be accepted as a "motion for discretionary review" pursuant to RAP 13.3 because it does not fit within the provisions of RAP 13.5.
3. Upon certification of an interlocutory ruling pursuant to RAP 2.3, the Court of Appeals correctly affirmed the grant of partial summary judgment by the Superior Court, which excluded the testimony of plaintiff's purported expert, James Voss.

II. COUNTER STATEMENT OF THE CASE

Plaintiff Ricardo Castillo is an agricultural worker who is assigned to manage irrigation circles for Skone & Connors, Produce, Inc., in Grant County. He claims he received a back injury in the course of his

employment on June 5, 2009. Grant County P.U.D. denies it has liability for the injury. The trial court granted partial summary judgment for the Defendant and dismissed claims of alleged violations of the Washington Administrative Code, and found the testimony of James Voss was insufficient to establish a standard of care. The trial court denied Defendant's motion for summary judgment on the allegations based on ordinary negligence.

Division III Court of Appeals summarized the case in an unpublished opinion[1], and correctly noted that many of the facts are undisputed. For example, the parties agree that the P.U.D. sent John Johnston to temporarily disconnect the electrical circuit so Mr. Castillo could work on a circuit breaker that powered the an irrigation pump.

The parties continue to dispute whether Mr. Johnston warned Mr. Castillo that the circuit would be reenergized briefly. The parties also disagree whether Mr. Castillo was injured as the result of electrical shock, or because he jumped backwards and fell when the circuit breaker exploded.

Here, the Court of Appeals issued its unpublished decision June 23, 2015. On July 2, 2015 the Plaintiff mailed a "*Motion for Clarification or*

[1] *Castillo v. Grant County P.U.D.* 2015 Wash.App. Lexis 1343 (2015).

Reconsideration" to the Court of Appeals[2]. The Court of Appeals filed the "*Order Denying Motion for Reconsideration*" on July 30, 2015. Attorney McKinney mailed the so-called "*Petition for Discretionary Review Under RAP 13.4*" on August 24, 2015.

On August 19, 2015 attorney McKinney served a Notice of Intent to Withdraw which was effective August 28, 2015[3]. Nevertheless, although the "*Petition for Discretionary Review Under Rap 13.4*" now at issue was apparently signed by the Plaintiff "pro se", it was clearly authored by Mr. McKinney, and shipped from his mailing address on California Avenue in Seattle[4]. Attorney McKinney's continued involvement in this matter is unclear.

III. LEGAL ANALYSIS

A. The Matter is Not Subject for Review Pursuant to RAP 13.4

The plaintiff here denominated the request for review as a "*Petition for Discretionary Review Under RAP 13.4*". However, it is not properly reviewed under that rule. As this court has clearly explained

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[2] Therefore, this pleading should be deemed to have been served Sunday July 5, 2015 which was 3 days after the date of mailing. CR 6(e). RAP 12.4(b) requires that a motion for reconsideration of a decision by the Court of Appeals be filed within 20 days.

[3] Appendix 1.

[4] Appendix 2 – copy of envelope used to serve the pending Petition on defendant's attorneys.

> "A Court of Appeals decision is subject to review by petition, as provided in [RAP 13.4] only if it is a 'decision terminating review'. RAP 13.3(b), 13.4(a). If a decision does not qualify as a 'decision terminating review' it is denominated 'interlocutory'. RAP 12.3(b). An interlocutory decision may be reviewed only by motion for discretionary review. RAP 13.3(c)." *Fox v. Sunmaster Prods.*, 115 Wn.2d 498, 798 P.2d 808 (1990).

It is obvious that the decision by the Court of Appeals in this case did not terminate review. First, the trial court granted only a partial summary judgment[5]. Second, there was only a single, discrete, issue certified by the trial court[6]. Third, the Plaintiff specifically noted that the request for review was from a trial court order granting partial summary judgment[7]. Fourth, the Court of Appeals accepted review as being interlocutory review of a partial summary judgment[8]. Finally, the decision by the Court of Appeals upheld the trial court decision granting partial summary judgment and remanded the matter back for trial on the remaining issues of negligence, which were not included in the interlocutory review of the certified question.

An order granting partial summary judgment is not fully adjudicated, but is merely a pretrial adjudication to determine certain

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[5] Appendix 3 - CP 0798-0821.
[6] Appendix 4 - CP 0803.
[7] Appendix 5 - CP 0833.
[8] Appendix 6 – Commissioner's Ruling Feb. 3, 2014.

issues deemed established for trial in the case. *Grill v. Meydenbauer Bay Yacht Club*, 57 Wn. 2d 800, 359 P.2d 1040 (1961).

The decision by the Court of Appeals, Division III, opens with the following language:

> "This interlocutory appeal involves a certified question concerning the admissibility of the plaintiff's expert's testimony following the trial court's granting of a partial summary judgment on one of the plaintiff's theories of the case. We affirm and remand for trial." *Castillo v. Grant County P.U.D.,* 2015 Wash. App. Lexis 1343, ¶1 (2015).

Clearly, the trial court did not grant summary judgment on the issue of negligence, therefore the matter was not fully resolved (which is why an interlocutory review was necessary). And the Court of Appeals clearly did not consider its decision to be one that terminated review.

> "'Decision terminating review' is a defined term of art. The term does not include every type of decision which can end proceedings in a case in an appellate court, but only those decisions which unconditionally terminate review after review has been accepted. RAP 12.3(a)(1), (2)." *Fox v. Sunmaster Prods.,* at 501.

Plaintiff apparently concedes that, despite multiple briefs and appellate arguments addressing this issue, he never intended to assert violation of the WACs as a basis for liability. He even referred to the claim as "nonexistent" in his current petition[9]. It seems, therefore, that Mr. Castillo is only aggrieved by the evidentiary ruling regarding admissibility

[9] Plaintiff's "*Petition for Discretionary Review Under RAP 13.4*" at p. 11.

of his expert, James Voss, on the limited question of violation of WACs as a basis for negligence. This is certainly not a "decision terminating" review as contemplated by RAP 13.4.

Plaintiff's request for review by this court cannot be one "*under RAP 13.4*" as characterized by the Plaintiff because there is no "decision terminating review". The Court of Appeals' decision did not dispose of the matters still pending in the trial court. Therefore, it must be considered as a "motion for discretionary review" as defined in RAP 13.3(c). *Fox v. Sunmaster Prods., supra.*

B. The Matter is Not Ripe for Review Pursuant to RAP 13.3

Assuming, without conceding, that Mr. Castillo's petition can be considered as one seeking review under RAP 13.3(d), it should be denied as premature as well as inappropriate.

Appeals should not be brought on a piecemeal basis, and CR54(b) certification should be accepted only if there is a demonstrated basis for finding no just cause for delay. *Doerflinger v NY Life Insur. Co.,* 88 Wn.2d 878, 567 P.2d 230 (1977). The Plaintiff's petition does not articulate a clear basis for this Court to accept review.

RAP 13.3(c) explains that a "motion for discretionary review" of a decision by the Court of Appeals must be brought as provided by RAP

13.5. Under that rule the Supreme Court will accept review of an interlocutory decision only if the Court for Appeals (1) has committed an obvious error which renders further proceedings useless, or (2) has committed a probable error that substantially alters the status quo or substantially limits the freedom of the plaintiff to act, or (3) has departed so far from accepted and usual course of judicial proceedings that the Supreme Court must exercise its "revisory jurisdiction". None of these bases support accepting review here.

First, the decision by the trial court as affirmed by the Court of Appeals does not render further proceedings useless, so RAP 13.5(b)(1) does not apply. As noted by both the majority and concurring opinions by the Court of Appeals, the result of the interlocutory appeal was to exclude inadmissible evidence. Trial can proceed on the negligence claim, but without improperly proferred testimony based on inapplicable WAC provisions.

Second, the decision by the Court of Appeals does not substantially "alter the status quo" or limit the plaintiff's "freedom to act". Plaintiff earnestly argues in his brief that violation of the WACs is not a basis of liability[10]. Nevertheless, as noted by in the concurring opinions by Judge

[10] Plaintiff's "*Petition for Discretionary Review Under RAP 13.4*" at p. 11 fn. 2.

Fearing, Plaintiff also argues that evidence of negligence is based on violation five WACs; however those regulations do not apply and, therefore, cannot provide the basis for expert testimony[11]. Further, as noted by the majority at Division III, James Voss failed to identify a standard of care and, therefore, his testimony is inadmissible. RAP 13.5(b)(2) does not apply.

Finally, "revisory jurisdiction" derives from Washington State Constitution Article IV Section 4, and pertains only to this Court's original jurisdiction for certain writs. See for example, *State ex rel. Murphy v Taylor*, 101 Wash. 148, 172 Pac. 217 (1918). "Revisory jurisdiction" refers to the limited jurisdiction of the Supreme Court as compared to the general jurisdiction of the superior courts. *Committee Care Coal of Wash. v. Reed*, 165 Wn.2d 606, 200 P3d 701 (2009). RAP 13.5 does not apply.

There is no basis under RAP 13.3 to accept review. Importantly, the determination below did not dispose of all issues. The motion/petition for review must, therefore, be viewed in the narrow context of an interlocutory decision.

Defendant submits that it would be inappropriate to accept review of an evidentiary issue before the trial court has even ruled on whether James

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[11] *Castillo v. Grant County P.U.D.*, 2015 Wash. App. Lexis 1343, ¶19-23 (2015).

Voss will be allowed to testify on the remaining issues, without relying on the WACs which do not apply.

C. Court of Appeals Correctly Affirmed the Trial Court

Although it is obvious that Mr. Castillo did not draft the brief submitted to this Court as a Petition, he raises three points in support of the request that the Supreme Court should accept review: (a) the Court of Appeals used the wrong standard of review, (b) the Court of Appeals ignored the record, and (c) he is puzzled at how the trial court might apply the appellate decision. None of these arguments are sufficient to support interlocutory review by the Supreme Court.

1. The Court of Appeals Properly Applied the Abuse of Discretion Standard of Review

In its majority opinion the Court of Appeals confirms that the trial court's grant of partial summary judgment was reviewed under the "abuse of discretion" standard because the issue was raised within the context of ER 702. Plaintiff incorrectly argues the review should have been "de novo".

It is, of course, well accepted 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 whether to admit testimony by a purported expert: (1) wheter the witness qualified to testify as an expert, (2) whether the expert's theory based on a theory generally accepted in the relevant community, and (3) wether the testimony be helpful to the fact finder. *Philippides v. Bernard*, 151 Wn.2d 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 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). 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).

It is clear that the Court of Appeals correctly characterized the certified question as one to review the admissibility of expert testimony under ER 702.

> "Although there is only one issue presented by this appeal, it overlaps the summary judgment order dismissing the WAC violation theory and has been argued as an indirect attack on the summary judgment ruling. The correct focus, in light of the certified issue, is on the trial court's evidentiary decision to strike Mr. Voss's testimony due to irrelevance." *Castillo v. Grant County P.U.D.,* 2015 Wash. App. Lexis 1343, ¶10 (2015).

ER 702 provides the basis for a trial court to allow an expert to express opinions:

> **"ER 702. Testimony by Experts**. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

A trial court's ER 702 ruling is reviewed using an "abuse of discretion" standard. *Moore v. Harley Davidson Motor Co. Group*, 158

Wn. App. 407, 241 P.3d 808 (2010) (citing *Carlton v. Vancouver Care, LLC*, 155 Wn. App. 151, 231 P.3d 1241 (2010)). Abuse of discretion occurs when a trial court enters an order that is manifestly unreasonable[12] or when it is based on untenable grounds or for untenable reasons[13].

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* 181 Wn.2d 346, 333 P.3d 388 (2014).

Here, Plaintiff's expert, James Voss, failed to identify a generally recognized standard of care. His testimony was properly excluded.

2. The Court of Appeals Did Not Disregard The Record

It is difficult to parse this argument offered by Mr. Castillo. First he claims James Voss does not rely on the WACs to define the standard of

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[12] *Wash. State Physicians Insur. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).
[13] *State ex rel. Carroll v Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

care, but in the next breath he argues the P.U.D. failed to comply with the standard of care because its conduct was prohibited by the WACs.

The trial court and the Court of Appeals recognize that James Voss has not described an industry standard of care, only his personal beliefs about what the standard should be. In his deposition at p. 32-33[14] he testified:

> "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."* (Emphasis added).

James Voss admitted in his Second Declaration[15] (dated May 9, 2013) at p.6, lines 5-14 that the standard of care was merely his personal opinion:

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[14] Appendix 7- CP 272-273
[15] Appendix 8 – CP 0111.

> "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 is my opinion that those same standards of same conduct are required by the general standard of care* 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 sufficient.

Ultimately, James Voss was unable to identify a standard of care other than his own "idiosyncratic standard of care" which, obviously, is insufficient under ER 702. As noted by Division III, "A statement of what the standard should be is not a statement of what the standard is."[16]

3. Applying the Court of Appeals' Decision Does Not Require the Supreme Court's Advice

Plaintiff's final argument seems to encourage the Supreme Court to express its opinion on how trial courts should weigh the impact of striking expert testimony. He asks this Court to "*clarify the significance of*

[16] *Castillo v. Grant County P.U.D.*, 2015 Wash. App. Lexis 1343, ¶15 (2015).

striking an expert's testimony" and to "*clarify the scope and meaning*" of the appellate decision, and to provide "*guidance*" within RAP 13.4(b)(4)[17].

Such a request is to invite this Court the dubious opportunity to wade into a thicket of advisory opinions, and would violate the well-established ripeness doctrine. A dispute is not ripe for appellate review if it is merely possible or speculative. *Grill v. Meydenbauer Bay Yacht Club*, 57 Wn. 2d 800, 359 P.2d 1040 (1961).

We do not know how the trial court will apply the decision by the Court of Appeals. Until it does, this matter is not ripe for further appellate consideration.

IV. CONCLUSION

As observed by the Court of Appeals, 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 ruling by Division III Court of Appeals is clear and succinct: We conclude that the trial judge had a tenable basis for excluding Mr. Voss's testimony. His own view of the standard of care was irrelevant to the issues for the jury. The court properly excluded Mr. Voss's testimony at trial." *Castillo v. Grant County P.U.D.,* 2015 Wash. App. Lexis 1343, ¶15 (2015)

Further review of the trial court's interlocutory order granting partial summary judgment is premature, unnecessary, and will cause further

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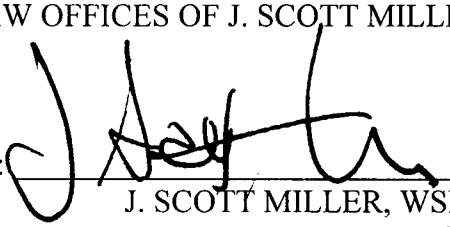
[17] Plaintiff's "*Petition for Discretionary Review Under RAP 13.4*" at p. 11-13.

delay. Defendant Grant County P.U.D. respectfully requests that the "Petition for Discretionary Review under RAP 13.4" filed by Mr. Castillo, and his attorney, be denied.

DATED: September 24, 2015.

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 September 24, 2015, a copy of the foregoing was duly served on all parties entitled to service by the method listed below, addressed as follows:

__ Hand delivery __ Federal Express __ U.S. Mail __ Fascimile __ Email	Ricardo Castillo 607 W. 6th Street Warden, WA 98857
__ Hand delivery __ Federal Express __ U.S. Mail __ Fascimile __ Email	Ricardo Castillo P.O. Box 2162 Warden, WA 98857

LISA S. MITTLEIDER, Paralegal
Law Offices of J. Scott Miller, P.S.

APPENDIX 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

RICARDO CASTILLO, Plaintiff, vs. GRANT COUNTY PUBLIC UTILITY DISTRICT, Defendant.	NO. 11-2-00388-1 **NOTICE OF INTENT TO WITHDRAW**

TO: SCOTT MILLER, ATTORNEY FOR DEFENDANT

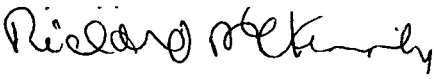
AND TO: CLERK OF COURT

Take notice that, effective at the end of the business day on August 28, 2015, Richard McKinney shall withdraw as attorney for Plaintiff, Ricardo Castillo without further notice unless objection is filed with Richard McKinney prior to the date when the withdrawal is effective. There is currently no trial or arbitration date scheduled.

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5275

After the effective date of withdrawal all further notices and pleadings should be served upon Ricardo Castillo, 607 West Sixth Street, Warden, WA 99857.

DATED: August 15, 2015.



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DECLARATION OF SERVICE

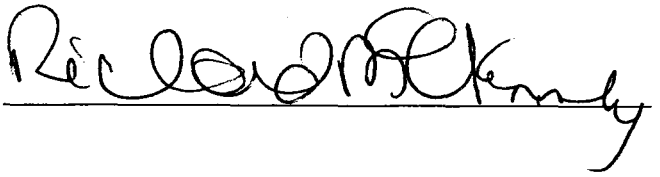
Richard McKinney makes the following declaration under penalty of perjury under the laws of the State of Washington. On August 15, 2015, I mailed, by ordinary mail, postage prepaid, the above Notice of Intent to Withdraw to the following entities at the addresses set forth below.

1. Scott Miller
   201 West North River Drive #305
   Spokane, WA 99201

2. Clerk of Grant County Superior Court
   33 "C" St. N.W.
   Ephrata, WA 98823-1685

Prior to the above mailings I sent this Notice of Intent to Withdraw to Ricardo Castillo at the address recited for him in the above Notice.

Executed at Bremerton, WA this 15th day of August, 2015



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APPENDIX 2

Richard McKinney
2701 California Ave. SW
Seattle WA. 98116

P

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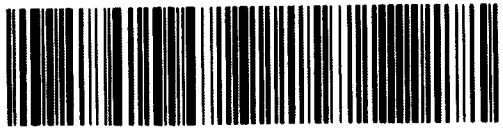

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APPENDIX 3

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF GRANT

RICARDO CASTILLO,

Plaintiff,

v.

GRANT COUNTY PUBLIC UTILITY DISTRICT,

Defendants.

CASE NO: 11-2-00388-1

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

THIS MATTER having come before the Court on May 29, 2013, upon Defendant's Motion for Summary Judgment; and Plaintiff supplemented the record with new materials; the Court also having heard Plaintiff's Motion for Reconsideration on September 27, 2013; J. Scott Miller of the Law Offices of J. Scott Miller, P.S., appearing on behalf of Defendant and Richard McKinney appearing on behalf of Plaintiff, and the court having considered all of the documents submitted in the above-captioned matter, including the following:

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//

1. Defendant's Motion for Summary Judgment;

2. Defendant's Identification of Undisputed Facts in Support of Summary Judgment;

3. Defendant's Memorandum of Authorities in Support of Motion for Summary Judgment;

4. Declaration of Paul T. Way In Support of Defendant's Motion for Summary Judgment (dated 11/12/12);

5. Declaration of J. Scott Miller in Support of Defendant's Motion for Summary Judgment;

6. Plaintiff's Memorandum in Opposition to Summary Judgment;

7. Declaration of James Voss in Opposition to Summary Judgment (11/21/12);

8. Defendant's Renewed Motion for Summary Judgment (4/30/13);

9. Defendant's Motion and Brief in Support of Motion to Disquality James Voss as Plaintiff's Second Liability Expert (4/30/13);

10. Declaration of Paul T. Way in Support of Motion to Disqualify James Voss (dated 4/30/13);

11. Declaration of J. Scott Miller Re: Deposition Testimony of James Voss (4/30/13);

12. Declaration of Paul T. Way in Support of Defendant's Motion for Summary Judgment (dated 4/30/13);

13. Second Declaration of James Voss in Response to Refiled Motion and In Response to Motion to Strike (5/9/13);

14. Declaration of Authentication (undated); and attachments

15. Declaration of Paul T. Way in Reply to Second Declaration of James Voss and in Support of Defendant's Motion for Summary Judgment (5/24/23);

16. Defendant's Reply Brief in Support of Motion for Summary Judgment (5/23/13);

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17. Deposition testimony of Ricardo Castillo (submitted 6/12/13);

18. Deposition testimony of John Johnston (submitted 6/12/13);

19. Verbatim Report of 5/29/13 Proceeding (submitted 6/12/13);

20. Defendant's Motion for Summary Judgment – Supplemental Materials (6/13/13);

21. Rebuttal Declaration of Paul T. Way in Support of Defendant's Motion for Summary Judgment (6/19/13);

22. Evidence Refuting Defendant's Special Submission (6/20/13);

23. Defendant's Objection to Plaintiff's Supplemental Materials Regarding Summary Judgment (6/25/13);

24. Declaration in Repsonse to Motion to Strike (06/26/2013);

25. Court's Memorandum Opinion Granting Plaintiff's Motion for Summary Judgment (08/20/2013);

26. Supplemental Declaration of James Voss (08/22/2013);

27. Amended Brief in Support of Motion for Reconsideration (08/25/2013);

28. Defendant's Brief in Opposition to Plaintiff's Motion for Reconsideration (09/05/2013);

29. Reply re Reconsideration (09/09/2013);

30. Motion to Consider Additional Materials Before Entry of Judgment (09/19/2013);

31. Declaration of McKinney to Consider New Material (09/19/2013);

32. Summary of Cases Relating to Right to Present New Legal Theory and New Evidence (09/19/2013);

33. Defendant's Objection to Plaintiff's Motion to Add New Legal Theories and New Evidence (09/24/2013);

34. Plaintiff's Brief Following Haring of 9/27/13 (09/30/2013);

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35. Declaration of James Voss of October 2013 (10/01/2013);

36. Defendant's Response to Court's Request for Supplemental Discovery Materials (10/03/2013);

37. Declaration of J. Scott Miller in Support of Defendant's Response for Supplemental Discovery Materials (10/03/2013)

38. Objection to Submission to PUD in Response to Court Request (10/04/2013);

39. Defendant's Motion to Strike and Objection to Plaintiff's Improper Submission (10/04/2013); and

40. Court's Memorandum Opinion Granting Summary Judgment (10/09/2013)

and the Court having received oral argument of plaintiff's counsel stating that the Plaintiff is proceeding only on a theory that the lineman in this case failed to follow the de-energizing procedure called for under the Washington Administrative Code and not on any theory that the lineman failed to warn Mr. Castillo he was re-energizing and not on any theory that he proceeded to reenergize even though Mr. Castillo had told him he was going to work on the circuit (transcript of 5/29/2013 proceedings at 31), and the Court having previously issued Memorandum Opinion (Amended) on 08/23/2013 determining that the testimony of Mr. James Voss is insufficient to establish a standard of care based on violation of the WACs, and is, therefore, irrelevant,

NOW, THEREFORE, it is HEREBY ORDERED AS FOLLOWS:

1. Defendant's Motion to Strike the Declarations of James Voss is **GRANTED;**

2. Defendant's Motion for Summary Judgment based on violations of the WACs is **GRANTED;**

3. Defendant's Motion for Summary Judgment based on alleged negligence is **DENIED;**

Law Offices of J. Scott Miller, P.S.
201 W. North River Drive
Suite 500
Spokane, WA 99201
(509) 327-5591

4. Plaintiff's Motion to Add New Legal Theories and New Evidence is **DENIED**;

5. Plaintiff's Motion for Reconsideration is **DENIED**.

DATED this 21 day of October, 2013. .

JUDGE JOHN D. KNODELL

Presented by:

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

By: _____
J. SCOTT MILLER, #14620
Attorney for Defendant

Copy Received:

By: _____
RICHARD MCKINNEY, WSBA #4895
Attorney for Plaintiff

Law Offices of J. Scott Miller, P.S.
201 W. North River Drive
Suite 500
Spokane, WA 99201
(509) 327-5591

FILED

OCT 31 2013

KIMBERLY A. ALLEN
GRANT COUNTY CLERK

07-696169

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

Ricardo Costa/10
Plaintiff(s),

vs.

Grant County PUD
Defendant(s).

No. 11-2-00388-1

ORDER

I. BASIS

Plaintiff moved the court for: Certification to the Court of Appeals, pursuant to RAP 2.3(b)(4), of this Court's order re admissibility of the expert opinion of Jane Van

II. FINDING

After reviewing the case record to date, and the basis for the motion, the court finds that:

III. ORDER

IT IS ORDERED that: this Court's ORder re the admissibility of the expert opinion of Jane Van is certified to the Court of Appeals for immediate review pursuant to RAP 2.3(b)(4)

Dated: 10/31/13

Judge

Presented by:
Richard McKinney

Copy received J. Scott A.
#14620

00803

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF GRANT

RICARDO CASTILLO,)

Plaintiff,)

vs.) No. 11-2-00388-1

GRANT COUNTY PUBLIC)

UTILITY DISTRICT,)

Defendant.)

FILED

NOV 13 2013

KIMBERLY A. ALLEN
GRANT COUNTY CLERK

ORIGINAL

VERBATIM REPORT OF PROCEEDINGS

BEFORE

THE HONORABLE JOHN D. KNODELL

1:07 p.m.

October 31, 2013

Grant County Courthouse

Ephrata, Washington

A P P E A R A N C E S

FOR THE PLAINTIFF: RICHARD McKINNEY

Attorney at Law

FOR THE DEFENDANT: J. SCOTT MILLER

Attorney at Law

Tom R. Bartunek, RPR, CRR, CCR, CSR #419M9
Grant County Official Court Reporter
P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011 Ext. 398

P R O C E E D I N G S

THE COURT: Thank you, everyone. Please be seated. Welcome to court.

MR. MILLER: Thank you, Judge.

THE COURT: Okay. So we've got a number of matters -- would you call the case? I'm sorry, Mr. Miller.

MR. MILLER: You bet, your Honor. This is Castillo vs. Grant County PUD, Cause No. 11-2-00388-1. And I believe this is defendant's presentment.

THE COURT: Right.

MR. MCKINNEY: Well, I believe my motion was filed first.

THE COURT: Okay.

MR. MCKINNEY: So I'd like --

MR. MILLER: Well, your Honor, this was originally set for October 22, we received notice from the court administrator that it was moved to today.

THE COURT: Yes.

MR. MILLER: And so I believe this is our presentment.

THE COURT: Well, your motion, Mr. McKinney, is to reconsider?

MR. MCKINNEY: Right. But not under Rule 59, though. I don't think I'm restricted to Rule 59.

It's in my brief, your Honor.

THE COURT: Okay. I'll hear from you. Let's take that up first. Go ahead.

MR. MCKINNEY: All right. So I'm going to -- without in the least bit wanting to be oppositional --

THE COURT: Sure. Sure.

MR. MCKINNEY: -- I'm going to state what I understand the court's ruling to be. Because I think it's important. If I'm misapprehending it in some way, we might just as well put it on the record.

As I understand the court's ruling, it's that Mr. Voss is a qualified expert, but that Mr. Voss created his own standard of care that isn't reflective of any objective standard of care. Mr. Voss -- now, if I'm wrong on that, then all I'm going to say next, you know, is misplaced. But with that predicate, Mr. Voss has said four times, in every way that I can imagine that he could agree to, you know, in all truthfulness, that he said four times that his opinions of Grant County PUD are based upon an analysis through the lens of an objective standard of care.

THE COURT: Right.

MR. MCKINNEY: And the court has continued to say that it believes that he's operating off of

self-created standard of care.

Now, my first problem is that there's no case in Washington that I can find, and counsel hasn't cited any, where a recognized expert who says he's testifying off the standard of care, an objective standard of care, is not accepted, his testimony is not accepted for summary judgment purposes. Now, if this court were trying the case, that would be a different matter. But for summary judgment purposes, where we just have to raise an issue of fact, I'm not aware of any authority.

So I keep wracking my brain trying to see, what could be the problem here? And so it was, I thought, well, maybe because Voss didn't identify the sources of his understanding of the standard of care.

Now, no Washington case requires that.

THE COURT: Right.

MR. MCKINNEY: But I did cite a couple of Idaho cases that dealt with the issue of whether you have to identify the source of standard of care, and they said it's okay to -- for the expert to say that the sources are anonymous. And I won't get into those cases in detail in order to save time. But if the court has questions, I think I understand those cases.

But just to further bolster it, I said to Voss, I

said, okay, let's just get into it. Where did you learn this standard of care? For example, he says, a lot of places. But I'll give you one guy's name right now, he conducts classes in this. And that's the person whose declaration has now been sent to the court, Brian Erga. He said Voss has got it right. That is the standard of care. And he attested to all four declarations as being accurate.

Now, in my opinion, your Honor, and I want the court to correct me, because I may not be understanding this, but in my opinion, the court's view on what's necessary to qualify under ER 104 for summary judgment purposes will set precedent. And so that's why I'm asking if the court doesn't change its mind, that we can take this up quickly to the Court of Appeals. And I see no harm to getting this resolved. And I've cited at least five published decisions, two unpublished decisions where this same sort of thing for an expert's qualifications have gone up. And then preliminary questions of discoverability, they have to go to the heart of the projected evidence, have gone up, in my appendix two, at least 17 times that I've cited.

What's the downside of this? The upside is my client's going to have surgery now because of this

accident, is going to have surgery next month. And the surgery is risky. And frankly, Counsel knows this, it's not part of the record, but it's not anything that I'm saying for the first time, he was going to have surgery a couple years ago and I discouraged him from that and I sent him to a doctor to tell him not to do it because he's a diabetic and overweight. But now he's going to have the surgery anyway. It's a different surgery.

And so this case may not even be appropriate for MAR anymore. We have to go through a full-scale jury trial. And I'm just going to wait to see what I hear from the doctor soon. We go through a full-scale jury trial, I'll ask that the case be taken out of MAR and then we have to pay for at least five to seven expert witnesses twice, if that happens. Now, I'm getting a little bit ahead of myself, because I don't know what the doctor -- he may say this surgery is just like falling off a log and there's nothing to worry about. But I don't know yet.

But I'm just saying I see no downside to taking it up to the Court of Appeals. I mean the reason the defense wouldn't want us to do that is because they want to put as much financial pressure as they can on us, because that makes us a lot more pliable. But in

terms of objective understanding of the law, I don't see why we wouldn't do that. That's my initial presentation. I'm going to stop now, your Honor.

THE COURT: Okay. Mr. Miller, if you could just address the motion to reconsider. Did I get it wrong?

MR. MILLER: Well, there's a motion to reconsider, but I guess it's a motion to reconsider a memo opinion.

THE COURT: Yes.

MR. MILLER: I think the court made it pretty clear last time that the motion to reconsider is dependent upon having an order in place.

THE COURT: That's true. But you know, you folks have come a long way. Are you prepared to address -- I'm just, for my own edification, did I get this wrong?

MR. MILLER: No.

THE COURT: Okay. Let me -- let me tell you, when I began to prepare for this hearing, I went back and read the cases and I read the -- my opinion. It appeared to me that I may not -- I may have created some confusion here. I may not have expressed myself as clearly as I might have. And I'm going to hear from Mr. McKinney, obviously, again.

But the problem that I have with Mr. Voss'

testimony is it does not -- it does not address generally-accepted standards in the industry. And the cases that I'm relying upon are those two medical malpractice cases that I cite in my first opinion. That was the difficulty. I've read Mr. Voss' submissions and everything that's there and I know this may appear to be a semantic difference to people, but I think what he has to say is not that this is -- this is a standard that's generally accepted in the relevant community for this to be -- to be admissible.

And as I say, I rely on you gentlemen to keep me on the straight and narrow. Did I get that wrong?

MR. MILLER: I think that what Mr. Voss is -- first of all, I want to -- I don't want to let this to slide by.

THE COURT: Sure.

MR. MILLER: I object to the idea that after a deposition is concluded that somebody can come in with affidavits that differ from the deposition testimony.

THE COURT: Right.

MR. MILLER: Putting that aside for the moment, I think that what Mr. Voss has said is I have read the WACs, I'm familiar with what I think the standard of care ought to be, and what he has not done is articulate what the standard of care is in the

industry. What he has said is the standard of care is articulated in the WACs, but it's not. And the WACs don't apply to this particular situation. Because we're talking about an entire whole different situation.

THE COURT: The WACs still on their face apply to the situation.

MR. MILLER: Right. No, I don't think that the court ought to entertain an expert coming in and telling the court questionable law. Which is what Mr. Voss is trying to do.

And so what I think -- I think you were right the first time. When Mr. Voss presented evidence, what his evidence was is he thinks the standard of care ought to be something, but he didn't go and say, this is what the industry standard is, he didn't provide any evidence about what the industry standard was or how the facts apply to the industry standard. He just said based on his opinion.

And I think that the court had it right in the first memorandum opinion. That that's what Mr. Voss had done. And therefore, there is no claim left.

THE COURT: Well, but there's the claim -- there's the claim on just general negligence theory, there's a failure to warn, right?

MR. MILLER: I disagree with that, because what Mr. Voss' counsel -- excuse me, what Mr. McKinney did in the hearing was specifically take that out of the case.

THE COURT: Okay.

MR. MILLER: The only issue, and the record clearly shows, is whether or not there's a WAC violation. Now, after the fact, we've got claims that I ought to be able to inject a new -- I ought to be able to, you know, take back what I said. And no longer is that what this case is about, I want to now create another cause of action in order to go forward.

THE COURT: All right. So you said that Mr. McKinney sort of injected this. And maybe that's true. But was there something -- I went through the discovery that you provided to us earlier and that Mr. McKinney provided to us. I wasn't able to find or identify anything in which Mr. McKinney -- what's the word? -- restricted his theory into the discovery process. It appears to me the first time that this occurred was in argument on the first time we had summary judgment motion; is that true?

MR. MILLER: I would agree with that.

THE COURT: Okay.

MR. MILLER: Because I had -- I apologize if I

misled the court.

THE COURT: No, no.

MR. MILLER: I recalled that there was something in the discovery. But you now have seen all the discovery, there was no retraction or waiver or anything like that. I would agree with that.

THE COURT: Okay.

MR. MILLER: So, you know, I guess where we are right now is, you know, I don't understand this argument about financial pressure, I don't understand the argument about there's new surgery coming, this is information that has never been disclosed, there's been no updated discovery, discovery stopped in November, because there was an MAR notice filed.

THE COURT: Right. Right.

MR. MILLER: And we attempted to do more discovery, but we got road blocked on that. And so all of this argument is really just hyperbole at this point. And so I think what we need to do is -- and what I respectfully suggest we do, is go ahead and dismiss the case, let Mr. McKinney take it up on appeal, if that's what he wants to do, and let's handle it that way.

But I think the case is handled -- or has been handled correctly, that it has come up to this point

that Mr. Voss is not admissible, his testimony is not relevant, and therefore anything that he has to say shouldn't sway the court about where we're going to go on this.

MR. MCKINNEY: Your Honor?

THE COURT: Mr. McKinney?

MR. MCKINNEY: Somehow there's a mythology that's drawn here in these hearings. And it's taken on a life of its own that somehow Mr. -- the two cases that the court relied on, the Adams case was the primary case.

THE COURT: Right.

MR. MCKINNEY: Is when the experts said this is my opinion.

THE COURT: Right.

MR. MCKINNEY: There's another case, a malpractice case where a doctor said, this is how we do it at the University of Washington. He says, I don't know what the statewide standard is. And so the case said not good enough.

But before -- before Voss -- Voss was never asked in deposition as to whether his opinions were based on the objective standard of care. He was asked about how -- you know, he was asked specific questions by counsel and by me, but his first declaration said that

he got his understanding of the standard of care through third parties.

THE COURT: Right.

MR. MCKINNEY: Through objective sources. And he said that -- he didn't use the words that you referenced, generally accepted standard of care. But the Leaverton case, which I cited at least twice, said there's no magic incantation.

THE COURT: Right.

MR. MCKINNEY: And that's the problem here. Is the court carefully reviewed the deposition, and nowhere in his deposition did Voss say that he was relying on an objective standard of care. I concede that. But he said it in all the declarations, again and again and again. And that's why I'm so chagrined about this. Because he can't control what's in the deposition. He gets asked questions and he just responds.

But when he said that -- and one of the troubling factors for the court was he said I teach classes saying that. And the court used that to say, well, that just shows that it's his opinion. But actually I cited two cases saying that if you teach something, you've risen to that level of esteem in your industry, that's all the more reason why you should be listened

to as to articulating the standard of care.

But there's no case where somebody -- I mean there are cases where people are not recognized as experts and that happens all the time, where the court says this is not an expert so I'm going to disregard his opinion. But you've ruled, your Honor, that he is an expert. So once you have a recognized, authenticated expert and that person says this is the standards of care, there's no case where in summary judgment they don't allow his opinion to be heard. I think it's a startling ruling, your Honor. Your Honor, I enjoy coming here, I like your court.

THE COURT: Thank you.

MR. MCKINNEY: But I still think it's a startling ruling. And so I'm anxious -- and I don't see any harm to getting this reviewed if the court's not willing to change its mind.

In terms of the things -- the second declaration is when he referenced the WAC violations, he said that he hadn't referenced this in the first declaration. And that's because counsel said there's nothing objective. And he says -- first of all, he said this standard of care applies in other states. So WAC violations don't even apply in other states. But he said in Washington the WAC violations set forth what

the standard of care should be. But that's the standard of care anyway. Because he's worked in a lot of other states, and he was working for Potelco as a safety inspector. Potelco is the third biggest private utility company in the United States and he was their main safety inspector. He knows this business.

THE COURT: Right.

MR. MCKINNEY: As for Brian Erga, who was hired by the Grant County PUD --

THE REPORTER: I'm sorry, you have to slow down.

MR. MCKINNEY: I'm sorry.

MR. MILLER: Your Honor, I'm going to object to any mention of Mr. Erga. He has not been disclosed in any discovery and all his deposition or affidavit is purporting to do is provide credibility evidence on Mr. Voss, and that's clearly inadmissible and objectionable.

THE COURT: Thank you.

MR. MCKINNEY: It's to show that Voss didn't self create the standard of care. That's what it's for. And he's got credentials that are better than Paul Way. You know, I mean Erga's an electrical engineer who has done nothing but this in terms of high-power issues. He's back in Connecticut instructing people

right now on the standard of care.

And counsel makes statements that are semi true. He says they were road blocked in discovery. They wanted to take all the lay witnesses deposition in MAR and I opposed that. He was road blocked on that. I acquiesced readily to him taking Voss' deposition and he did. He wasn't road blocked on all discovery. He never sought any additional medical evidence. And what I'm referring to is brand new.

But I'm just saying, your Honor, this is a new ruling that will make precedent for all time if it stands. And so if the court's not willing to reverse itself, I ask that at least we get the Court of Appeals to look at it without having to go through the expense of perhaps having this trial twice. Because if we go through and we lose on ordinary negligence and we have to put all this damages evidence on and there's no damages quantum that we can rely on on a second trial. And that's where the expense is on these cases is the damages evidence.

THE COURT: First of all, let me say that we very much enjoy having both you and Mr. Miller come too. We enjoy you I'm sure more than you enjoy us.

Secondly, I understand the significance of my ruling here, and I also understand that I very well

could be wrong. But I -- it's not that I'm unwilling to change my mind. I just, when I look at this, when I look at the body of the evidence that's here, it appears to me that in order to avoid the situation in the case law to have Mr. -- to have -- to have Mr. Voss invade the province of the jury on this question of standard of care, we have to restrict his testimony to testimony -- expert testimony about what is a generally-accepted practice or a generally-accepted standard in the industry. And I understand I could very well be wrong. Lord knows, you and Mr. Miller have a lot more experience and knowledge on this than I do. I'm taking my best shot at it.

So I'm not changing my mind -- and first of all, let me say I do agree with you, I'm considering all the affidavits. I've read all the affidavits. I've looked at them all. And I've come to the same conclusion. So I'm not going to change my mind about that. I do want to make it clear, I don't know that this ruling forestalls you from proceeding on a -- just a general negligence theory, on just a general failure to warn theory. That could be subject -- because we just didn't reach that. That's not something we even discussed in the motion. That could

be subject to another motion.

But at this point I think it's a viable -- I think it's viable. I don't think that the PUD has been sandbagged at this point. I think if you had narrowed that down in the interrogatories, it might be a different situation. But I don't think that happened here.

So I'm going to go ahead and enter an order along those terms. I'm going to hear from Mr. Miller. Let me just say this for Mr. Miller's benefit. I am inclined to certify this. I'm not inclined to stay the proceeding until the Court of Appeals accepts interlocutory review. That's where I'm coming from right now. So let me hear from Mr. Miller now and I'll hear from you again.

Mr. Miller?

MR. MILLER: Thank you, your Honor.

I understand the court's position on this. I actually prepared two orders.

THE COURT: Okay.

MR. MILLER: Both of them are identical except the second was in -- actually one is consistent with your first memo ruling and the other is consistent with the second memo ruling. What I'm hearing you say is you want to go with the second memo ruling which

APPENDIX 4

Further, Your Honor, such misconduct amounts to the concealment of the policy for William Vue which defeats the very purpose of the Plaintiff's discovery, which is full disclosure and production of the auto policy for William Vue issued by Farmers with or without coverage for a particular claim alleged by their counsel.

Discovery is not a shell game so, when we ask to produce any documents affecting the coverage, we want those and we did. When we asked for the policy for William Vue, we want the policy from Farmers. It is not a shell game.

Discovery did not disclose William Vue's policy, whether because of a lack of any inquiry by Counsel or because of actual concealment; it is irrelevant. The policy was never disclosed.

By not producing William Vue's auto policy Plaintiffs did not have valid information for the driver William Vue, further no information on the driver's contract of insurance with William Vue which would identify all drivers.

All of this added to the obvious falsehood found by Judge Austin's Memorandum Decision where he said, "not to mention a lot of falsehoods regarding the relationship and the insurers," but not more apparently was it just misrepresented here about the registered owner. The registered owner was his parent, the father Pai Vue. And so, Your Honor, all these falsehoods get just mounted and mounted and completely grow.

APPENDIX 5

07-711539

KIMBERLY ALLEN
FILED

NOV 26 2013

KIMBERLY A. ALLEN
GRANT COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR GRANT COUNTY

RICARDO CASTILLO	NO. 12-00388-1 ~~11203142-4~~
PLAINTIFF,	NOTICE OF SEEKING
vs.	DISCRETIONARY REVIEW BY
	COURT OF APPEALS
GRANT COUNTY PUD	
DEFENDANT.	

Ricardo Castillo, plaintiff, seeks a review by the designated appellate court of the following order entered by the trial court on October 31, 2013: Order granting partial summary judgment in which the court struck the expert testimony of James Voss. On the same date the trial court certified its Order to the Court of Appeals pursuant to RAP 2.3 (b)(4).

A copy of the Orders are attached to this Notice.

November 25, 2013

Richard McKinney, WSBA No. 4895
Attorney for Appellant Ricardo Castillo

LAW OFFICES OF RICHARD MCKINNEY
2701 CALIFORNIA AVENUE SW, PMB 225
SEATTLE, WASHINGTON 98116
PHONE: 206/933-1605

APPENDIX 6

The Court of Appeals
of the
State of Washington
Division III

FILED

FEB - 3 2014

COURT OF APPEALS
DIVISION III

RICARDO CASTILLO, Petitioner, v. GRANT COUNTY PUBLIC UTILITY DISTRICT, Respondent.	)	COMMISSIONER'S RULING NO. 32094-4-III

Having considered Mr. Castillo's motion for discretionary review of a Grant County Superior Court order granting partial summary judgment striking the testimony of Mr. Castillo's expert witness, the response and reply thereto, the Statement of Additional Authorities, the record, file, and oral argument of counsel, and being of the opinion that discretionary review should be granted in light of the fact the trial court certified, pursuant to RAP 2.3(b)(4), the issue presented here and considering the cases listed in Mr. Castillo's Statement of Additional Authorities; now, therefore,

IT IS ORDERED, the motion for discretionary review is granted.

February 3, 2014.

Joyce J. McCown
COMMISSIONER

APPENDIX 7

BEFORE THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF GRANT

RICARDO CASTILLO,

Plaintiff,

vs.

GRANT COUNTY PUBLIC UTILITY DISTRICT,

Defendant.

No. 11-2-00388-1

DEPOSITION UPON ORAL EXAMINATION

OF: JAMES VOSS

FEDERAL WAY, WASHINGTON

MONDAY, APRIL 1, 2013

Reported by:

Linda Lee, CCR

CCR No. 3272

Roger G. Flygare & Associates, Inc.
Professional Court Reporters, Videographers & Legal Transcriptionists
1715 South 324th Place, Suite 250, Federal Way, WA 98003
800-574-0414-Toll free 253-661-2711-Local
RGFlygare@flygare.com - scheduling

guess.

Q. Do you have a range, even, that you have in mind?

A. I would be remiss in even offering that information.

Q. Okay. In determining whether or not Mr. Castillo was injured, as a result of this incident, that would be something you would defer to the medical doctors about?

A. Yes. You absolutely do.

Q. Okay. And you had not been asked to express a medical opinion?

A. No.

Q. In the -- I forgot to mention. If you ever need to take a break, just let us know.

A. Yes.

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.

Q. Okay. There is, however, document for switching and clearance protocol; correct?

A. There are several different documents for that.

Q. Okay. What is a switching and clearance protocol?

A. Well, I guess, where that would begin is determining who has jurisdiction over the lines.' Obviously, you're referring to the switching protocol of the Grant County PUD? Or just in general?

Q. Well, I'm looking at your page 2, line 19, switching and clearance protocol?

A. Line 19. Let me read exactly what I said here.

Q. Sure.

A. Grant County PUD provided a copy of their switching and clearance protocol, which is in my documents that I brought here in the documents that I reviewed. And I

APPENDIX 8


07-654290

FILED

MAY 14 2013

KIMBERLY A. ALLEN
GRANT COUNTY CLERK
LAUREN A. RUANE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON,
IN AND FOR THE COUNTY OF GRANT

RICARDO CASTILLO, Plaintiff, vs. GRANT COUNTY PUBLIC UTILITY DISTRICT, Defendant.	NO. 11-2-00388-1 SECOND DECLARATION OF JAMES VOSS IN RESPONSE TO REFILED MOTION AND IN RESPONSE TO MOTION TO STRIKE

James Voss makes the following declaration under penalty of perjury under the laws of the State of Washington. This declaration combines to refute allegations of my lack of expertise and substantive allegations that there is no issue of fact for trial in this case. I adopt and resubmit my declaration of November 21, 2012 and my resume.

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
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Way's deposition. I include all these sections for the Court's easy reference as well as WAC 296-45-325 referenced above. Once again, pp. 86-87, 93, 100-01, 111, 115-16 of my deposition refer to other specific WAC violations committed by the PUD. Each of these violations individually and all of these violations cumulatively place a stake in the heart of PUD's allegation that I concocted my own standard of care. 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 is my opinion that those same standards of same conduct are required by the general standard of care 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. (p. 85 of my deposition)

The WAC standards are objective but exist in most instances to protect workers. I referenced this in illustrative instances in my deposition. See e.g. deposition p. 106 ll. 12-14. However, the standard of care includes the WAC but is far more expansive. See my deposition p. 83 line 16- o.84 line 4; p. 84 ll. 14-18 et seq.; p. 85 ll.13-18; p.106 ll.15-21; p. 107 ll. 6-10; p. 109 ll.2-14. As stated in my deposition I have taught the standard of care for years. (My deposition p. 85 ll.18-25) I have attended more than 20 seminars and instructional courses on electrical safety for utilities. (deposition p. 86 ll.2-7) That Mr. Way would accuse me of creating an idiosyncratic standard of care is an unsubstantiated slur. Indeed there is reason to question the qualifications of Mr. Way when he says that high voltage incidents are those exceeding 1000 volts. This is not the standard governing utilities as set forth in the National Electrical Safety Code and the WAC.

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