

64835-7

64835-7

64835-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Western National Assurance Company
Appellant

v.

Puget Sound Energy, Inc.
Respondent

FILED
COURT OF APPEALS, DIV. #1
STATE OF WASHINGTON
2010 MAY 28 AM 10:03

REPLY BRIEF OF APPELLANT

THE BACKUS LAW FIRM
Joel W. Backus, WSBA No. 12288
1001 Fourth Avenue, Suite 3200
Seattle, WA 98154-1003
206-292-9045
joel@backuslegal.com
Attorney for Appellant

TABLE OF CONTENTS

Page

Table of Authorities.....iii - iv

I. INTRODUCTION.....1

II. ARGUMENT IN SUPPORT OF REPLY.....2

 A. Standard of Review.....2

 B. Contrary to PSE’s Position, a Material Issue of Fact
 Was Before the Court on Summary Judgment.....3

 (1) The law regarding high-voltage transmissions
 and PSE’s corresponding duty of care.....3

 (2) Proof the line in question was high-voltage.....4

 (3) Proof the line was still energized when it struck
 the Jeretzky’s home -- an issue of material fact.....4

 (4) The TARIFF is inapplicable to the facts
 of this case.....6

 (5) Absent evidence of weather as an intervening
 cause, where falling lines present an
 unreasonable risk of harm, PSE’s duty of care
 is either to prevent its lines from falling or
 de-energize the lines if they do fall.....7

 C. The Criteria Required for *Res Ipsa Loquitur*
 Have Been Met.....11

(1) Western National’s motion for reconsideration complied with CR 59’s procedural requirements.....	11
(2) Western National’s evidence establishes all the requisite elements of <i>res ipsa loquitur</i>	12
(3) The line was under PSE’s exclusive control.....	13
(4) The standard of review re Western National’s motion for reconsideration.....	16
III. CONCLUSION.....	16
CERTIFICATE OF SERVICE.....	18

TABLE OF AUTHORITIES

Page

Table of Cases

American Universal Ins. Co. v. Ranson,
59 Wn.2d 811 (1962).....16, 17

Chen v. State,
86 Wn. App. 183 (1997).....12

Detention of Turay,
139 Wn.2d 379 (1999).....11, 12

Hogland v. Klein,
49 Wn.2d 216 (1956).....14

Keegan v. Grant County Pub. Util. Dist. No. 2,
34 Wn. App. 274 (1983).....3

King v. Olympic Pipeline Co.,
104 Wn.App. 338 (2000).....2, 7, 16

Pacheco v. Ames,
149 Wn.2d 431 (2003).....2, 16

Scott v. Pacific Power & Light Co,
178 Wash. 647 (1934).....4, 10

Wells v. Vancouver,
77 Wn.2d 800 (1970).....9

Zukowsky v. Brown,
79 Wn.2d 586 (1971).....14

Other Authority

RULE 12 ELECTRIC TARIFF G.....6, 7, 8

I. INTRODUCTION

On October 4, 2008, the Anacortes home of Frank and Sharon Jeretzky was damaged when it was struck by one of PSE's high-voltage lines falling onto the home. As it fell, the line remained energized striking the home with 7,200/12,470 volts of electricity that destroyed the home's wiring, outlets, and fixtures. At the time of the loss, the Jeretzkys were insured by Western National who paid for the damages, took an assignment of the claim, and then filed suit against PSE.

On December 7, 2009, the trial court granted summary judgment for PSE. Following the trial court's ruling, Western National moved for reconsideration; however, the motion was denied. This appeal followed.

Nothing in PSE's responsive brief should dissuade this Court from reversing the trial court's grant of summary judgment. Although PSE contends that that Western National has no evidence to support its claim of negligence, PSE is mistaken and it was error

for the trial court to have entered summary judgment in PSE's favor.

II. ARGUMENT IN SUPPORT OF REPLY

A. Standard of Review.

PSE does not dispute the appropriate standard of review in this case. It agrees that this Court reviews summary judgment orders *de novo*,¹ considering the facts and all of the inferences to be drawn therefrom in the light most favorable to Western National as the nonmoving party.

Finally, with regard to motions for reconsideration, PSE is correct that the standard of review is abuse of discretion.² But whether the doctrine of *res ipsa loquitur* applies to a particular case is a question of law that is reviewed *de novo*,³ and an error of law constitutes an abuse of discretion.⁴

¹ Br. of PSE at 5.

² *Id.*

³ *Pacheco v. Ames*, 149 Wn.2d 431, 436 (2003).

⁴ *King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 355 (2000).

B. Contrary to PSE's Position, a Material Issue of Fact Was Before the Court on Summary Judgment.

According to PSE, Western National "cannot support its claim because it has no evidence of breach or causation;"⁵ however, PSE is incorrect. Rather, what PSE overlooks is that breach and causation reside not in the fact that the line fell, but in the fact that line remained energized when it fell, and that is a critical distinction, for it presents an issue of material fact.

(1) The law regarding high-voltage transmissions and PSE's corresponding duty of care.

As noted in Western National's opposition memorandum,⁶ it is the law in Washington that an electrical supplier's duty of care varies according to the danger posed by the utility's activity (i.e., the higher the voltage, the greater the care the supplier must exercise).⁷ The duty is nondelegable⁸ and where harm is likely to

⁵ Br. of PSE at 6.

⁶ CP 31 - 36.

⁷ *Keegan v. Grant County PUD*, 34 Wn. App. 274 (1983).

⁸ *Id.*

result from exposure to high-voltage, the degree of care is nothing less than “the highest that human prudence is equal to:”

First, the rule in Washington is that “. . . if the wires carry a strong and dangerous current of electricity, so that negligence will be likely to result in serious accidents, and perhaps death, . . . a very high degree of care, indeed, *the highest that human prudence is equal to, is necessary.*”⁹

(2) Proof the line in question was high-voltage.

According to PSE, the line that struck the Jeretskys’ home was in fact high-voltage: “7,200 volts phase to ground; 12,470 volts phase to phase.”¹⁰ Therefore, because the offending line was high-voltage, under Washington law, the degree of care applicable in this case, and the standard required at summary judgment, is “the highest that human prudence is equal to.”

(3) Proof the line was still energized when it struck the Jeretzkys’ home -- an issue of material fact.

Finally, there are the photographs¹¹ of the Jeretzkys’ home, which according to PSE are nothing more than proof of damage.

⁹ *Scott v. Pacific Power & Light Co*, 178 Wash. 647, 650 (1934).

¹⁰ CP 40.

¹¹ CP 47, 49, 51, 53, 55, 57.

While it is true the photographs do document the damage, they are important in yet another respect: They provide uncontroverted proof that the damage occurred, not merely because the line fell, but because the line remained energized when it fell.

This fact -- of an energized line falling onto a family's home -- is significant because it raises the question PSE never addressed and that is: Where the duty is one of utmost care, how it is not an issue of material fact when a 7,200/12,470 volt line falls onto a home and still continues transmitting power?

In other words, where the degree of care is nothing less than "the highest that human prudence is equal to," a trier of fact could quite easily conclude that an energized high-voltage line falling into a residential neighborhood presented a foreseeable and unreasonable risk of harm, and that PSE therefore breached its duty of care to the Jeretzkys.

(4) The TARIFF is inapplicable to the facts of this case.

While PSE is correct that “[t]he TARIFF governs PSE’s relationship with its customers, and has the force and effect of law,”¹² PSE is mistaken that the Jeretzky’s damage “squarely falls within the scope of the TARIFF.”¹³ Rather, as Western National pointed out to the trial court:

The TARIFF only addresses the issue of ‘continuity of service’ and immunity from the kind of damages that naturally occur when service is interrupted, e.g., no lights, no heat, and thawed-out food in the freezer. That is a very different situation from that of the Jeretzky’s whose property was electrocuted by defendant’s 7,200 volt line. In short, although the power may have gone out on October 4, 2008, the disruption in service was not a proximate cause of the Jeretzky’s damages. And if the damages were not the result of a service disruption, the TARIFF is inapplicable in this case and its grant of immunity does not apply.¹⁴

Analytically, there is nothing in this case to suggest the proximate cause of Jeretzky’s damage was the result of an

¹² Br. of PSE at 15.

¹³ *Id.*, 16.

¹⁴ CP 33 - 34.

“interruption, suspension, curtailment [or] fluctuation”¹⁵ of their electrical service as contemplated by the TARIFF’s immunity clause. To the contrary, as the photographs¹⁶ of the home show, the proximate cause of the loss was PSE’s 7,200/12,470 volt line striking the home – an event beyond the scope of the TARIFF.

Because the issue of duty here is a question of law that is reviewed *de novo* on appeal,¹⁷ this Court should hold as a matter of law that the TARIFF is inapplicable to the underlying facts of this case.

(5) Absent evidence of weather as an intervening cause, where falling lines present an unreasonable risk of harm, PSE’s duty of care is either to prevent its lines from falling or de-energize the lines if they do fall.

In addition to its claim of immunity under the TARIFF, PSE also asserts that as a general matter it “does not have a duty

¹⁵ RULE 12 ELECTRIC TARIFF G.

¹⁶ CP 47, 49, 51, 53, 55, 57.

¹⁷ *King, supra*.

to prevent electrical lines (energized or no [sic]) from falling during a storm with high winds.”¹⁸

Again, as with the TARIFF’s applicability, the issue as to PSE’s duty on this point is a question of law for the Court to decide *de novo*. And, there are a number of problems associated with PSE’s claim that are worth considering.

First, as the moving party on summary judgment, the burden is upon PSE to offer authority that it (PSE) has no duty to maintain its lines in stormy weather; however, PSE fails to cite any authority on point.

Second, although PSE attributes the line falling to the presence of high winds, PSE fails to offer any evidence that the wind on October 4, 2008 was an extraordinary event. In fact, according to PSE, the wind on October 4 was not only common to the area but reasonably to be expected:

The effect of windstorms on power lines is hardly an ‘esoteric field.’ . . . Almost anyone living in this region for more than one year has experience with

¹⁸ Br. of PSE at 5.

windstorms causing downed lines and power outages.¹⁹

As Western National noted in its opening brief:

'One who is under a duty to protect others against injury cannot escape liability for injuries to the person or property of such others on the ground that it was caused by an act of God, unless the natural phenomenon which caused the injury was so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against, and it is not sufficient that such phenomena are unusual or of rare occurrence.'²⁰

In conclusion here, there is no basis to conclude that the weather on October 4, 2008 constituted an intervening cause that would excuse PSE from its duty of utmost care to protect the public from an unreasonable risk of harm.

Third, PSE's claim that the line fell because of harsh weather does not explain why the line continued to transmit power after it fell, especially where, as its brief suggests, PSE has extensive experience with falling lines. Certainly, given the

¹⁹ Br. of PSE at 11.

²⁰ Br. of Western National at 9 – 10. [Citing *Wells v. Vancouver*, 77 Wn.2d 800, 803 (1970).]

foreseeable range of danger in having a 7,200/12,470 volt line fall into a residential neighborhood, it is reasonable to expect that PSE as the moving party on summary judgment should be required to show why such a remarkable event does not constitute an issue of material fact.

Finally, since *Scott*,²¹ Washington law has required suppliers of electricity to exercise the utmost care in order to protect people and property from injury. To accept PSE's assertion that "energized or [not]," it had no duty to prevent the line from falling during a storm, would be to relegate the holding of *Scott*, and the cases that have since followed, to a backseat and permit PSE to evade responsibility on every occasion simply by claiming that it has no control over the weather.

Here, PSE as the moving party on summary judgment offers no authority for the proposition that it has no duty to maintain its lines during adverse weather conditions. Therefore, this Court should hold that as a matter of law that where a high-voltage line

²¹ *Scott, supra*.

falls under weather conditions common to the area and the falling line presents an unreasonable risk of harm to the public, PSE's duty of care is to either prevent the line from falling or otherwise take measures to de-energize line prior to its contact with people and property.

C. The Criteria Required for *Res Ipsa Loquitur* Have Been Met.

Taking aim at Western National's motion for reconsideration, PSE argues that the trial court did not abuse its discretion in denying the motion. Here too, PSE is incorrect.

(1) Western National's motion for reconsideration complied with CR 59's procedural requirements.

According to PSE, Western National's motion for reconsideration ignored the procedural requirements of CR 59(a) and (b) and hence, "no basis for reconsideration exists."²² While PSE is, of course, entitled to its opinion, its argument on this issue is neither here nor there. As pointed out in *Detention of Turay*,²³ the

²² Br. of PSE at 18.

²³ *Detention of Turay*, 139 Wn.2d 379 (1999).

preference of the civil rules is for cases to be decided on their merits and not on procedural technicalities, thus, substantial compliance with procedural court rules is sufficient.²⁴ Further,

[i]n the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration. Furthermore, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. Motions for reconsideration and the taking of additional evidence, therefore, are within the discretion of the trial court.²⁵

At a minimum then, Western National's motion for reconsideration substantially complied with the procedural requirements of CR 59, and accordingly, there is no unfair prejudice to PSE because of the motion.

(2) Western National's evidence establishes all the requisite elements of *res ipsa loquitur*.

As a second matter, contrary to PSE claim, Western National has established all of the elements of *res ipsa loquitur*. As Western National points out in its opening brief,²⁶ the facts fall under the

²⁴ *Id.*, 390 – 391.

²⁵ *Chen v. State*, 86 Wn. App. 183, 192 (1997). [Citations omitted.]

²⁶ Br. of Western National at 6 – 11.

second element: When the general experience and observation of mankind teaches that the result would not be expected without negligence. This is because it is a remarkable event for a power line to fall into a residential neighborhood and at the same time continue transmitting thousands of volts of power – remarkable because it is an event that is not reasonably to be expected unless there has been negligence on the part of the electrical supplier.

Although PSE would have this Court believe that weather is the culprit, PSE's materials suggest that its power lines fall as a matter of routine during stormy weather – even under conditions common to the area. What PSE fails to explain is that if it has reason to believe that its lines are likely to fall, why measures were not taken to see that the lines are de-energize when they do fall – and why that is not an issue of material fact.

(3) The line was under PSE's exclusive control.

According to PSE, although the power line was PSE's, the line's location was on a public right-of-way and accessible to

anyone and everyone; therefore, or so PSE now contends, the line was not under PSE's exclusive control.²⁷

But, for purposes of *res ipsa loquitur*, exclusive control does not require actual physical control. Rather, exclusive control refers to the right of control at the time of the accident:

. . . the requirement, that the offending instrumentality be under the management and control of the defendant or his servants, does not mean actual physical control but refers rather to the right of control at the time of the accident.²⁸

Further, under this requirement, "the degree of control must be exclusive to the extent that it is a legitimate inference that defendant's control extended to the instrumentality causing injury or damage."²⁹ In other words,

Legal control or responsibility for the proper and efficient functioning of the instrumentality which caused the injury and a superior, if not exclusive, position for knowing or obtaining knowledge of the facts which caused the injury, provide a sufficient basis for application of the doctrine.³⁰

²⁷ Br. of PSE at 2 and 12.

²⁸ *Hogland v. Klein*, 49 Wn.2d 216, 219 (1956).

²⁹ *Zukowsky v. Brown*, 79 Wn.2d 586, 595 (1971).

³⁰ *Hogland*, *supra*.

Certainly, PSE has not shown the case to be otherwise. As for PSE's suggestion that "Western National cannot . . . show that the occurrence was caused by an agency or instrumentality in PSE's exclusive control,"³¹ PSE seems to have forgotten that *it* is the moving party on summary judgment and the one having the burden of proof.

Finally, for what its worth, there is certainly an element of nonsense implicit in PSE's suggestion that because the line was accessible to the public, the line was not under PSE exclusive control. It is an idea that is as theoretical as it is preposterous in view of the fact the line was transmitting 7,200/12,470 volts power. Once again, although PSE is the moving party on summary judgment, it offers no evidence establishing that the line fell because of interference by a third party.

³¹ Br. of PSE at 13 -14.

(4) The standard of review re Western National's motion for reconsideration.

Finally, as PSE correctly notes in its brief, abuse of discretion is the appropriate standard of review for motions for reconsideration. But as noted above, whether the doctrine of *res ipsa loquitur* is applicable to a particular case is a question of law, which is reviewed *de novo*,³² and an error of law constitutes an abuse of discretion.³³ Here the criteria for *res ipsa loquitur* have been met, in view of which, it was error for the trial court to have denied Western National's motion for reconsideration.

III. CONCLUSION

Because this was summary judgment, the burden was upon PSE as the moving party to establish the absence of any material fact -- not upon Western National to prove its case. As stated in *American Universal Ins. Co. v. Ranson*:³⁴

The burden is upon the party moving for a summary judgment to show that there is no genuine dispute of

³² *Pacheco, supra.*

³³ *King, supra.*

³⁴ *American Universal Ins. Co. v. Ranson*, 59 Wn.2d 811 (1962).

a material fact and this burden cannot be shifted to the adversary, irrespective of whether he or his opponent would, at the trial, have the burden of proof on the issue concerned.³⁵

For the reasons set forth herein and in Western National's opening brief, this Court should reverse the trial court's order granting summary judgment dismissal to PSE. Costs on appeal should be awarded to Western National.

DATED at Seattle, May 27, 2010.

Respectfully submitted,

THE BACKUS LAW FIRM



Joel W. Backus, WSBA No. 12288
1001 Fourth Avenue, Suite 3200
Seattle, WA 98154
Telephone: 206-292-9045
E-mail: joel@backuslegal.com
Attorney for Plaintiff/Appellant

³⁵ *Id.* 816.

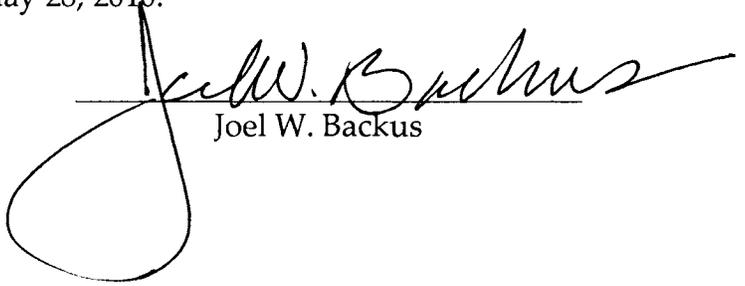
CERTIFICATE OF SERVICE

On May 28, 2010, the original and one copy of the APPELLANT'S
REPLY BRIEF was sent for filing with the Court of Appeals,
Division I, 600 University Street, Seattle, Washington 98101, and
that one copy was sent for service on attorneys for Respondent:

Jeffrey M. Thomas
Pamela J. DeVet
Gordon Tilden Thomas & Cordell
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154-1007

I certify under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct.

DATED at Seattle, May 28, 2010.


Joel W. Backus

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 MAY 28 AM 10:03