

No. 66714-9-1

**COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON**

ESTATE OF CONNELLY,

Appellant,

vs.

SNOHOMISH COUNTY PUD # 1,

Respondents.

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REPLY BRIEF OF APPELLANT ESTATE OF CONNELLY

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I. INTRODUCTION

The dispositive issue in this case is whether the trial court's conclusion that it is not a utility's duty to perform vegetation management more than 12 feet away from high-voltage power lines comports with Washington's "utmost prudence" standard. That duty of care is "the highest degree of care that human prudence is equal to." Keegan v. Grant County PUD No. 2, 34 Wn. App. 274, 280, 661 P.2d 146 (1983). It requires the utility to both "anticipate more remote possibilities of danger" and to "take exceptional precautions to prevent an injury being done thereby." Celiz and Sanchez' Estates v. Public Utility Dist. No. 1 of Douglas County, 30 Wn. App. 682, 686, 638 P.2d 588 (1981); Scott v. Pacific Power & Light Co., 178 Wash. 647, 651-52, 35 P.2d 749 (1934).

The Estate of Connelly has maintained throughout this action that, in order to meet Washington's "utmost prudence" standard of care, the Snohomish County PUD # 1 had to meet its own internal Vegetation Management (VM) standards. Ex 27.

The PUD does not dispute this contention. Instead, the PUD argues on appeal, as it did at trial, that its internal VM standards do not—in practice—require what the plain language requires: identification and removal of "danger trees" ("trees weakened by decay, disease or erosion" that are more than 12' from the power lines that pose "a potential threat to

the continued operation of the line"). Ex 27 at 1, 3 (Appendix 2). Rather than applying the standards as written, the PUD and its VM expert apply a lesser VM standard, one that excises the above written requirement and limits the duty to inspecting ("notifying") and trimming only the zone immediately under and adjacent to the high-voltage distribution power lines, unless a third party informs the PUD of a danger tree outside that limited zone if the PUD sees one leaning over dangerously towards its power lines.

The trial court, in accepting this re-written reduction of the PUD's own VM standards, committed legal error. Washington's "utmost prudence" standard of care is a much higher duty than the negligence "ordinary care" standard in two ways. First, it requires the utility to anticipate even "remote possibilities of danger." Second, the "utmost prudence" standard of care requires the utility to guard against even remote dangers by taking "exceptional precautions," e.g., "every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken." Scott, 178 Wash. at 652. Thus, in order to conclude that the PUD met Washington's "utmost prudence" standard of care, one must determine either that the harm-causing danger was too remote to be anticipated, or that the precaution *not* taken was so exceptional as to be unreasonable.

Trees easily tall enough to fall across a two-lane road and onto high-voltage power lines are clearly "a potential threat to the continued operation of the line." That tall trees weakened by disease, decay and erosion can be blown over by a typical Puget Sound wind-storm is by no means beyond local experience. And, requiring the PUD to notify such trees when the trees are directly adjacent to the road and easily observable from the road is in no way an "unreasonable precaution" beyond the "exceptional precautions" the "utmost prudence" standard of care requires.

By relieving the PUD of the obligation to meet its own internal standards and by requiring only that the PUD inspect and trim vegetation under, intruding into, or directly adjacent to the high-voltage power lines, the trial court held the PUD to a lower standard of care than Washington requires. Because the PUD's arguments in this appeal are premised on the same error, its arguments should not be persuasive to this court.

The PUD also argues that the trial court's findings, conclusions, and verdict on the standard of care should be affirmed because there is evidence supporting them. While it is true that the PUD's VM expert testified that the PUD's VM in the subject area met the standard of care, the mere recitation of this conclusion is not sufficient to sustain the verdict. First, findings are only supported by the evidence if the evidence is substantial, *i.e.*, "sufficient to persuade a fair-minded person of the truth

of the declared premise." Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 210, 936 P.2d 1163 (1997). Second, testimony that the PUD's internal standards are substantially different from what is written down by the PUD is not persuasive to a fair-minded person. Third, testimony that establishes a standard of care that does not require either anticipation of dangers or exceptional precautions to guard against those dangers, contrary to Washington law, is not persuasive to a fair-minded person. Fourth, testimony that the standard of care cannot require inspection of trees more than 12' from high-voltage power lines because utilities are regulated by state utility commissions, when the PUD is not regulated by any state commission, is not persuasive to a fair-minded person. Fifth, testimony that the standard of care cannot require inspection of trees more than 12' from high-voltage power lines because it would require trespass onto private property, when a state statute specifically immunizes utilities for timber trespass, is not persuasive to a fair-minded person. Sixth, testimony that the PUD met the standard of care when it did not even inspect the area in which Mr. Connelly was killed is not persuasive to a fair-minded person.

Likewise, the PUD argues that the trial court's findings, conclusions, and verdict on proximate causation should be affirmed because there is evidence supporting them. But, again, mere evidence is

not sufficient: the evidence must be sufficient to persuade a rational, fair-minded person of its truth. Conclusory statements that the tree that fell over PUD high-voltage power lines showed no external signs of decay are not sufficient when those statements are directly contradicted on cross-examination and are inconsistent with the photos in evidence.

II. THE TRIAL COURT APPLIED A LESSER DUTY OF CARE THAN IS REQUIRED BY LONG-STANDING WASHINGTON LAW

Applying the wrong standard of care is reversible legal error.

Brashear v. Puget Power & Light Co., Inc., 100 Wn.2d 204, 210-11, 667 P.2d 78 (1983). As noted above, and in the estate's opening brief (at 18-19, 41-42, etc.), Washington's "highest prudence" standard of care requires in this case that the PUD exercise the highest prudence humans are equal to, both to anticipate danger and to take exceptional precautions to prevent injury.

The PUD does not dispute that this standard of care applies in this case. Instead, the PUD maintains that this standard of care does not require the PUD to take any action to anticipate and guard against danger from danger trees when those trees are located more than 12' from its high-voltage power lines. The trial court adopted this view of what the "highest prudence" standard of care requires. See COL A, C (CP 85).

There was at trial, and now on appeal, no dispute that a tree

interfering with high-voltage power lines is a well-known danger, and that the result is often severe injury or death. This is one of the primary reasons for utility VM programs in the first place. Nor is there any dispute that typical Puget Sound wind storms can blow over weakened tall trees. Thus, there is no dispute that the "highest prudence" standard of care required the PUD to anticipate the danger that befell Mr. Connelly: that a tall "danger tree" would blow over in a wind storm, fall across a narrow road onto high-voltage power lines located some 25' feet away, and bring high-voltage electricity into fatal contact with a human being.

Thus, the issue is: what does the "highest prudence" duty of care require of the PUD in terms of taking action to guard against this danger harming members of the public? The PUD argues that the duty does not require vegetation management of the subject tree, because it was more than 12' away from the high-voltage PUD power lines. This is based almost exclusively on the testimony of the PUD's expert, Mr. Cieslewicz.

But, as shown below, the testimony of Mr. Cieslewicz is so fundamentally flawed from premises to conclusions that it is not sufficient evidence to support the trial court's findings and conclusions. Bryant, 86 Wn. App. at 210 (evidence must be sufficient to persuade a rational, fair

mindful person of the truth of the matter asserted).¹ For this reason, the trial court committed reversible error by relying on it. The trial court also committed reversible error by applying a standard of care that is lower than the required "human prudence" standard of care to the PUD's performance of its VM duties. Brashear, 100 Wn.2d at 210-11 (applying the wrong standard of care is reversible legal error).

III. THE TESTIMONY OF THE PUD'S VEGETATION MANAGEMENT EXPERT ON THE STANDARD OF CARE AND WHETHER THE PUD MET THE STANDARD OF CARE WAS NOT SUFFICIENT TO PERSUADE A FAIR-MINDED PERSON

Mr. Cieslewicz testified that the PUD had no duty to inspect trees more than 12' away from the PUD's high-voltage power lines. The only exceptions are if a third party informed the PUD of a danger tree, or if the tree's limbs extended into the 12' zone. The PUD argues the same.

Response at 10.

A. Expert Testimony on the Standard of Care Cannot Supersede the Duty of Care Imposed by Washington Law and Justify Replacing It With a Lesser Duty of Care

The trial court cannot allow a witness, even an expert, determine the duty of care. The court must determine whether the expert's testimony

¹ Compare the actual standard requiring supporting evidence to be "persuasive to a rational, fair-minded person" to the PUD's argument, e.g. at 4, that evidence merely needs to be "in the record" to support the trial court's findings of fact.

on the duty of care fully implements Washington law establishing that duty. Thus, the trial court must evaluate whether Mr. Cieslewicz' testimony applies a standard of care which comports with Washington law requiring exercise of the "utmost prudence." More specifically, the trial court must ensure that the expert's standard of care requires of the utility:

- "the highest degree of care human prudence is equal to"
- "to anticipate more remote possibilities of danger"
- "to take exceptional precautions to prevent an injury being done thereby"
- to take "every reasonable precaution suggested by experience"

Requiring a utility to inspect trees only immediately adjacent to high-voltage power lines, or whose limbs extend into that zone, unless a member of the public informs the utility of a problem, as Mr. Cieslewicz and the PUD define the duty, simply does not require the highest possible prudence or the exceptional precaution that Washington law demands.

B. Mr. Cieslewicz' Reasons For Not Requiring the PUD to Manage Vegetation More Than 12' Away From High Voltage Power Lines Are Nonsensical

In order for Mr. Cieslewicz' testimony on what the "utmost prudence" standard of care requires in the VM context to be sufficient, there must be good reasons supporting his opinions. The estate submits that the foundational bases for Mr. Cieslewicz' opinions are, to be blunt, nonsense.

The first "reason" for Mr. Cieslewicz' opinion that the "utmost prudence" duty of care does not require PUD VM outside 12' is that the PUD is regulated by the state. Response at 7-9.² This is nonsense. In Washington, only investor-owned utilities (IOU's) are regulated by the Washington Utilities and Transportation Commission (WUTC). RCW 80.01.040, 80.04.010.³ As the PUD knows very well, the PUD is not an IOU. It is a PUD created by RCW 54.04.020. WUTC regulations governing the operations of IOU's do not apply to Washington PUD's. RCW 54.04.045(1)(b) ("public utility district not subject to rate or service regulation by the utilities and transportation commission"). WUTC rate-setting authority does not apply to Washington PUD's. WUTC does not in any way regulate any part of the PUD's provision of electrical service. The PUD sets its own rates and practices independent of WUTC authority. For Mr. Cieslewicz to ascribe state regulation as a reason the PUD cannot do VM that meets the "utmost prudence" standard of care shows a

² At 7: "In Washington, the Public Utility Commission has adopted the NESC, compelling utilities to comply with its requirements."

At 8-9: "Utilities are regulated and expenditures must be appropriate and consistent with the practical operation of the utility . . . utilities are not allowed to 'gold plate their systems' . . . because a factor in determining what the utility will be doing will be the regulatory oversight and control of the money resources . . ."

³ See also WUTC website at <http://www.wutc.wa.gov/webimage.nsf/63517e4423a08de988256576006a80bc/6cb88e8a2983af62882567b70071e7f5!OpenDocument>: "The Washington Utilities and Transportation Commission regulates three investor-owned electric utilities—Avista, Puget Sound Energy, and PacifiCorp."

complete lack of knowledge and understanding of the PUD's most basic operational conditions. The PUD is not regulated by the WUTC, so regulatory prohibition or discouragement is simply no justification at all for Mr. Cieslewicz' opinion that VM of "danger trees" exceeds the standard of care.

The second reason offered for Mr. Cieslewicz' standard of care opinion is that it is "impossible" for utilities to do VM outside of the utility right-of-way because it would result in the PUD trespassing onto private property. Response at 9. This reason also is nonsense, and continues the theme of Mr. Cieslewicz not knowing, not understanding, and not taking into account local conditions. This "reason" ignores the fact that RCW 64.12.035 immunizes utilities doing VM from such trespass claims. This "reason" also ignores the fact that no entry onto private property was required to inspect ("notify") the tree that blew over onto the PUD's high-voltage power lines resulting in Mr. Connelly's electrocution death—the tree was about 3' off the public road. Ex 40 F. Finally, it ignores the fact that the property owner testified it would not have objected had the PUD informed it the tree posed a danger and needed to be removed. NRP2 7:24-9:23 (Ghaffari).

The third "reason" for Mr. Cieslewicz' opinion is that, in his opinion, the primary responsibility for dangerous trees on private property

is with the property owner. Response at 11, 49. Again, Mr. Cieslewicz is not aware of, does not understand, or simply does not incorporate Washington law into his analysis of Washington's standard of care. Washington law is very clear that the "utmost prudence" standard of care applies to utility VM, and requires that utilities perform VM with "the highest degree of care human prudence is equal to." A private property owner's duty to others regarding trees is much, much lower; it requires no inspection of trees, and only requires that ordinary care be taken if the owner has actual knowledge that a tree poses an unreasonable risk to others. Lewis v. Krussel, 101 Wn. App. 178, 186-87, 2 P.3d 486 (2000) (tree defect must be "readily observable" and property owner has no duty to inspect for defects). Thus, Mr. Cieslewicz' "reason" is demonstrably false as a matter of Washington law. Mr. Cieslewicz' rationale also ignores RCW 64.12.045, because if the primary duty of VM was on the property owner, why would the Legislature immunize utilities for performing VM on private property?

The final "reason" offered by Mr. Cieslewicz for not imposing on the PUD a duty to inspect and remove the subject tree in this case is that the utility cannot inspect every single tree that could fall onto power lines. Response at 8, 36, 48. This is nothing but a slippery slope straw man. Whether the "utmost prudence" duty of care extends that far is not before

the court. The issue before the court is whether the duty of care for VM extends to a very tall tree, readily observable from the road, easily close enough to fall over high-voltage power lines, that shows external signs of disease and internal decay, *i.e.* a "danger tree" as defined by the PUD's own standards. It is not logical or rational to conclude that, because a utility does not have to inspect *every* tree, it therefore does not have to inspect *this particular* tree.

C. Mr. Cieslewicz' Lesser Standard of Care is Even Contrary to the NESC Standard, to Tacoma Power's Standards, and to the PUD's Own Standards

In addition to the fallacies Mr. Cieslewicz put forth in support of his standard of care opinion that inspecting the subject tree was not required because it was more than 12' away from the power lines and was not leaning way over, this opinion is demonstrably inconsistent with the foundations upon which it rests.

First, Mr. Cieslewicz based his standard of care opinion on the NESC (National Electric Safety Code) standard. App. 1. The plain language of that standard enunciates a much higher standard than the one Mr. Cieslewicz purports to derive from it:

Trees that may interfere with ungrounded supply conductors should be trimmed or removed.

Nowhere does the NESC limit the scope of its standard to within 12' of the

power lines, or even suggest that there is a limit to its scope. Nowhere does it limit "danger trees" to those leaning way over. Nowhere does the NESC standard place the VM burden on property owners. In fact, as Mr. Bollen testified, it sets a very exacting standard without limitation: *All* trees that *may interfere* with above-ground power lines *should be* trimmed or removed.

Second, Mr. Cieslewicz' opinion is directly at odds with the PUD's own standards. App. 2. They start with "Required Clearances" (discussing trees 12' or closer to the power lines) and then go on to provide a separate category of trees that also require attention—"Danger Trees." His opinion that trees more than 12' away from the lines are not within the PUD Guidelines requires ignoring this fact. It also requires excising almost all of the text describing a "danger tree" in the PUD Guidelines, in particular the highlighted portion relevant here, as follows:

Danger Trees

Trees that are determined by the District to be a potential threat to the continued operation of the line (danger trees) shall be cut leaving a stump as close to the ground as possible.

Danger Trees may include:

- ~~Forked trees.~~
- ~~Dead or rotten trees.~~
- ~~Trees weakened by decay, disease or erosion.~~
- Trees visibly leaning toward the line.

- ~~Trees or parts of trees which may contact the line under snow, ice or wind loads.~~
- ~~Trees originating from fallen decaying logs, old growth stumps or other unstable rooting positions.~~
- ~~Troublesome trees such as alder, big leaf maple and hemlock.~~

Third, Mr. Cieslewicz' opinion on the standard of care is inconsistent with local standards. Tacoma Power—like the PUD a publicly-owned electrical utility—does not define a "danger tree" as Mr. Cieslewicz does: a tree leaning way over toward power lines. App. 3. Rather, Tacoma defines danger trees as "trees that are located within falling distance to our power lines and pose imminent danger to the electrical facilities due to tree health, ground conditions, or any other condition that leaves the tree unstable." The Tacoma standards go on to pledge removal of such trees. This Tacoma standard is very like the duty of care urged by the estate, and very unlike that urged by Mr. Cieslewicz and the PUD.

D. Nor Does Mr. Cieslewicz Have Any Basis to Maintain That Requiring the PUD to Inspect the Subject Tree and Remove the Danger Would Interfere With the Practical Operation of the Utility

In high-voltage cases like this one the "practical operation of the utility" qualifier to the "utmost prudence" duty of care is only "minimally relevant." Keegan, 34 Wn. App. at 281; Opening at 33-35. In its response, the PUD did not directly argue that "practical operation"

considerations justify a lower standard of care, but it did cite conclusory statements by Mr. Cieslewicz to that effect. This evidence cannot justify the trial court's lowering of the "utmost prudence" standard of care. First, because under Keegan such evidence is only "minimally relevant." Second, because Mr. Cieslewicz has no credible foundation for his conclusory statements that costs and burdens would be too high. He testified to no analysis or study documenting that *any* increases in labor, time, \$, or effort would result from holding the PUD VM program to the "utmost prudence" standard of care, let alone such an increase as to cost more than Mr. Connelly's life was worth. Any opinion Mr. Cieslewicz has on this subject is not "substantial" because it simply has no factual basis, either in the evidence or outside the evidence.

Finally, this opinion cannot persuade a rational, fair-minded person because it defies common sense. How hard would it really be for a PUD line notifier to look at both sides of the road when driving around inspecting trees? How hard would it be to inspect those trees at the edge of the road that are tall enough to fall onto high-voltage power lines, looking for "danger tree" indications? Common sense says it would not be hard at all. Absent actual evidence from the PUD that it would be, there is simply no "substantial" basis in this record for the trial court to conclude that imposing Washington's duty of care on the PUD is too burdensome.

E. Mr. Cieslewicz' Conclusion That the PUD Met the Standard of Care on East Sunnyside School Road is Likewise Without Foundation and Self-Contradictory

The PUD argues that the trial court's findings, conclusions, and verdict should be affirmed because Mr. Cieslewicz testified that the PUD VM performance met the standard of care. Response at 12. Again, Mr. Cieslewicz' conclusory opinion on this issues cannot be considered substantial evidence. Because Mr. Cieslewicz testified that meeting the standard of care required field inspections, (Response at 7), this opinion boils down to his "conclusion" that the PUD actually inspected East Sunnyside School Road before Mr. Connelly's death. That is simply not the case. See Opening Brief at 11-13. The PUD argues at length that no line notification records does not mean no line notification occurred, but does not address the testimony of its own VM Superintendent that no records *does* mean no notification. She testified (NRP 31:7-8 Soden):

I would say if we don't have any records, it wasn't notified.

Nor does the PUD address the testimony of every PUD line notifier assigned to the subject circuit, each of whom testified they did not notify East Sunnyside School Road. RP 91:3-92:10 (S. Packebush); RP 69:5-25 (Shayne); RP 79:6-15 (Petty).

As a backup argument, the PUD claims that its line clearance

coordinator (Mr. Munsterman) "notified" East Sunnyside School Road while standing over 500' from the subject tree (on the other side of SR 9) by glancing once down the power-line side of the road. This is neither an inspection nor an adequate one. If it was, the PUD would not have waited until trial to spring the heretofore hidden information that it had found someone who "looked at" East Sunnyside School Road in 1999-00 when the subject circuit last notified and trimmed, when none of its line notifiers had done so.

It is simply not credible to believe any opinion that the PUD actually inspected the trees on East Sunnyside School Road when the evidence is overwhelming that it did not. A foundationless opinion that a non-inspection met the "utmost prudence" standard of care is simply not sufficient to sustain a similar finding.

F. The PUD's Criticisms of the Estate's Evidence on the Standard of Care Miss the Mark

The PUD criticized the estate's evidence and argument on the standard of care at length, but its criticisms do not effectively undercut the estate's case. First, the PUD argues generally that the estate advocates too burdensome a standard of care. These arguments are not well taken, as explained herein above, because the estate's position is entirely consistent with Washington law, with the NESC VM standard, with the Tacoma

Power standard, and most importantly with the *PUD's own written guidelines*. Moreover, as discussed above, the "practical operation" consideration is only "minimally relevant" in a high-voltage case such as this one, and the PUD offered no evidence of any burden, let alone an unreasonable burden, of requiring it to meet its own VM Guidelines.

The PUD also argues that the estate's reliance on the utility trespass immunity statute is misplaced, because it does not establish a duty of care. But the PUD ignores the testimony of its own VM Superintendent, who testified that RCW 64.12.035 "is the basis for our work" in vegetation management. NRP 23:18-24:4 (Soden). Her testimony was that the PUD must do all that RCW 64.12.035 allows. Id. at 25:10-25.

The PUD also severely criticized the estate's expert, Austin Bollen. These criticisms are unpersuasive. First, the PUD argues at length that Mr. Bollen was wrong on his engineering analysis. VM is not based on electrical engineering, so this criticism is irrelevant. Second, the PUD complains that Mr. Bollen is not an arborist. However, this is also irrelevant, as he clearly deferred to the certified arborist, Mr. Baker, on tree condition issues and what could be observed about the health of the subject tree at the pertinent times. Next, the PUD complains that Mr. Bollen deferred to Mr. Baker on arborist issues! How this is a bad thing is

not clear.

Third, the PUD complains that Mr. Bollen has little relevant experience, and that was before the NESC standard. But Mr. Bollen actually directed a utility's VM program for 5 years. RP 56:13-20 (Bollen). Moreover, Mr. Bollen testified that utility VM has not changed significantly since that time, *id.* at 59:4-15, rendering this criticism irrelevant. Mr. Cieslewicz did not offer any evidence of recent VM practices or procedures that have any impact here.

Finally, the PUD actually criticized Mr. Bollen for resting the foundation for his VM standard of care testimony on the NESC standard, as if this was the stupidest thing ever. But the PUD expert, Mr. Cieslewicz, did the exact same thing, as the PUD notes at length! Response at 7.

IV. THE TESTIMONY THE TRIAL COURT RELIED ON TO FIND NO CAUSATION WAS NOT SUFFICIENT

The PUD attempts to support the trial court's finding that, if the duty of care required the PUD to inspect the subject tree, there was nothing observable about the tree that would necessitate action. Like the other evidence the PUD relies upon, it is simply too self-contradictory or uninformed to be sufficient evidence of the truth of the matter asserted, as required by Brashear and Bryant.

First, the PUD relies extensively on the testimony of its employee, Randy Packebush. But the PUD focusses only on his direct testimony, in which he concluded there were no visible signs of rot on the subject tree. As detailed in the estate's opening brief, however, on cross-examination he contradicted himself by admitting, as he had to do from the contemporaneous photos of the tree in evidence, that there were indeed visible external signs of the extensive internal rot in the subject tree. Opening at 16-17. The objective evidence, the photos taken shortly after Mr. Connelly's death, are the best evidence of the condition of the subject tree at pertinent times, and only Scott Baker's testimony is consistent with those photos. Opening at 13-17.

Second, the PUD curiously argues that Mr. Packebush testified there was evidence of internal rot, not external rot. Response at 31. Well, exactly! There was no dispute at trial that it was the extensive internal rot in the subject tree that caused it to blow over. The dispute was whether there were external indicators of that internal rot that would have been observed by an arborist doing VM work (had it been done) before Mr. Connelly's death. The PUD then argues that, contrary to its immediately preceding argument, that there were no external indicators of rot on the subject tree, despite Mr. Packebush's admission that there were! Id. at 31. The entire issue of causation comes down to what an arborist could tell

about the internal health of the subject tree by looking at its exterior and its surroundings. The PUD's response brief itself demonstrates the estate's position: there were observable external signs of substantial internal rot. The only conclusion supported by the evidence is that a competent inspection of the subject tree when the PUD notified the rest of that circuit would have alerted the PUD that the subject tree was a "danger tree" that had to be removed.

The PUD next argues that the testimony of a non-arborist lay witness, school district employee Kevin Knowles, somehow establishes that the subject tree was completely healthy before it blew over. The PUD does not explain how Mr. Knowles' purported testimony can be reconciled with Mr. Baker's and Mr. Packebush's. But perhaps more importantly, the PUD way overstates Mr. Knowles' testimony. He did not "inspect" the trees, let alone closely inspect them as an arborist doing VM work to the "highest prudence" standard of care must do. In actuality, he testified that he never noticed a problem with any of the trees on the entire school district bus barn property. See Ex 102 for an idea of the size of the property. Moreover, Mr. Knowles' testimony on the "health" of the bus barn trees must be taken with a large grain of salt, as he also testified that the 40 trees that he had cut down after Mr. Connelly's death were perfectly healthy, too! NRP 22:9-25. Again, the PUD does not even attempt to

reconcile Mr. Knowles' un-expert testimony with that of its own arborist, Mr. Packebush.

A. The PUD's Criticisms of the Estate's Evidence on Causation Also Miss the Mark

Like the trial court, the PUD in its response misconstrues the testimony of Mr. Baker regarding whether there were visible, external signs on the subject tree sufficient to alert a competent arborist that the tree was a "danger tree." The evidence is presented in detail in the estate's opening brief, at 13-17, 46-48, and will not be repeated here. A fair reading of Mr. Baker's testimony can only result in the conclusion that, based on the objective photographic evidence he observed and his site visits, at the pertinent time the subject tree was a "danger tree" and that was observable from the adjacent road. The PUD's trial attorney understood Mr. Baker's testimony, RP 116:6-12 (Cieslewicz), and that understanding is directly at odds both with the trial court's and with the PUD's on appeal. The PUD in its response did not address the fact that its own trial attorney's understanding of Mr. Baker's testimony is more like the estate's than the PUD's on appeal.

The PUD reveals the extent of its misunderstanding of the trial evidence by actually arguing that the trial court was correct to conclude that the sole basis for Mr. Baker's testimony were dark nighttime photos

and site visits years later. Response at 30. The estate's extensive citation to Mr. Baker's testimony about the numerous contemporaneous, daytime photos (Exs 40-42) of the subject tree he carefully reviewed to reach his conclusions should have eliminated that as an issue. Opening at 46 (RP 27-34 Baker). It is revealing that this demonstrably false claim is still being made.

Finally, the PUD attempts again on appeal to impeach Mr. Baker on his pre-trial declaration. Response at 20-21, 23. This is, bluntly stated, a cheap shot. The PUD knows perfectly well that, before trial, the school district—and *only* the school district—moved for summary judgment, and that Mr. Baker filed a declaration as part of the estate's response to that motion. Attacking Mr. Baker for not including claims against the PUD in that declaration, claims that were clearly not relevant to the pending motion, is disingenuous.

Moreover, the PUD also knows perfectly well that in response to the school district's summary judgment motion, the estate moved under CR 56(f) for a continuance in order to take the deposition of a witness who stated in interview that the school district told him it had an arborist inspect the subject tree before Mr. Connelly was killed. The PUD knows perfectly well that Mr. Baker's testimony about the potential import of such testimony is required under CR 56(f). And, the PUD knows perfectly

well that the witness recanted that interview statement, that the estate was never able to establish school district prior notice of the condition of the subject tree, and that is why settlement with the school district happened. The PUD's attempt to make Mr. Baker's declaration testimony seem nefarious, or to demonstrate a habit of wild inaccuracy, is as unfounded as it is unbecoming.

V. THE TRIAL COURT ERRED WHEN IT IMPOSED A 12% POSTJUDGMENT INTEREST RATE

The PUD argues that the trial court correctly imposed 12% interest on the judgment entered against the estate, claiming that because the PUD was not held liable, the tort statutory tort interest rate provided by RCW 4.56.110(3)(a) does not apply. The tacit premise underlying this argument, and the trial court's application of RCW 4.56.110 below, is that:

- If the estate had prevailed, post-judgment interest would have been set by RCW 4.56.110(3)(a) at 2.157%
- Since the PUD prevailed, the post-judgment interest rate is set by RCW 4.56.110(4) at 12%

This is erroneous on its face. Under the statute, the post-judgment interest rate is determined by the type of action, not by the identity of the prevailing party.

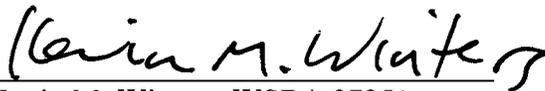
VI. CONCLUSION

Because the trial court imposed a lesser duty of care than is

required by Washington law and is justified by the evidence, and because the trial court's findings and conclusions on causation are not supported by the evidence, the Estate of Connelly respectfully requests that this court reverse the trial court and remand with instructions to enter findings and conclusions holding the PUD liable for Mr. Connelly's death, and to determine damages from the evidence presented at trial.

Respectfully Submitted on NOV 23, 2011.

HAWKES LAW FIRM, P.S.



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Appendix

1. Excerpt of Exhibit 25 (NESC Vegetation Management Standard)
2. Excerpt of Exhibit 27 (PUD Vegetation Management Guidelines)
3. Excerpt of Exhibit 29 (Tacoma Vegetation Management Guidelines re danger trees)

Appendix 1

Excerpt of Exhibit 25

(NESC Vegetation
Management Standard)

National ELECTRICAL

C2-2002

218. Tree Trimming

A. General

1. Trees that may interfere with ungrounded supply conductors should be trimmed or removed.

NOTE: Normal tree growth, the combined movement of trees and conductors under adverse weather conditions, voltage, and sagging of conductors at elevated temperatures are among the factors to be considered in determining the extent of trimming required.

2. Where trimming or removal is not practical, the conductor should be separated from the tree with suitable materials or devices to avoid conductor damage by abrasion and grounding of the circuit through the tree.

Appendix 2

Excerpt of Exhibit 27

(PUD Vegetation Management
Guidelines)



Scope

This standard covers the District's requirements for tree to conductor clearance for existing and new transmission and distribution construction.

Tree Trimming

The term "Tree Trimming" is intended to encompass tree, brush and vegetation cutting, trimming, removal, disposal and control on right-of-ways utilized by the District.

Required Clearances

Transmission and Transmission w/Distribution Underbuild Tree Trimming Clearances — See Figure 1.

Distribution Tree Trimming Clearances — See Figure 2.

Trees that cannot be removed and which are within the clearing zones specified in Figures 1 and 2 shall have all limbs removed that are within 180° of the conductor from the ground up to a point 15 feet above the uppermost distribution conductor. All limbs overhanging transmission conductor shall be removed. All dead branches overhanging primary conductors at any height shall be removed. Also, any branches that overhang the conductor at a sharp angle or threaten to touch the conductor because of ice and snow loading shall also be removed. Limbs that are accessible to climbing by children shall be removed around the entire tree to a height of 15 feet above ground.

Any tree shall be removed if proper pruning to required clearances results in a reduction of 50% or greater in live crown area.

All trees and brush within a 6 foot radius of each pole shall be removed. All trees and brush within 2 feet of pole to pole service lines, guy wires and down guys shall be removed.

Removing trees and brush shall mean cutting as close to the ground as possible and, in no case, higher than 6" above ground.

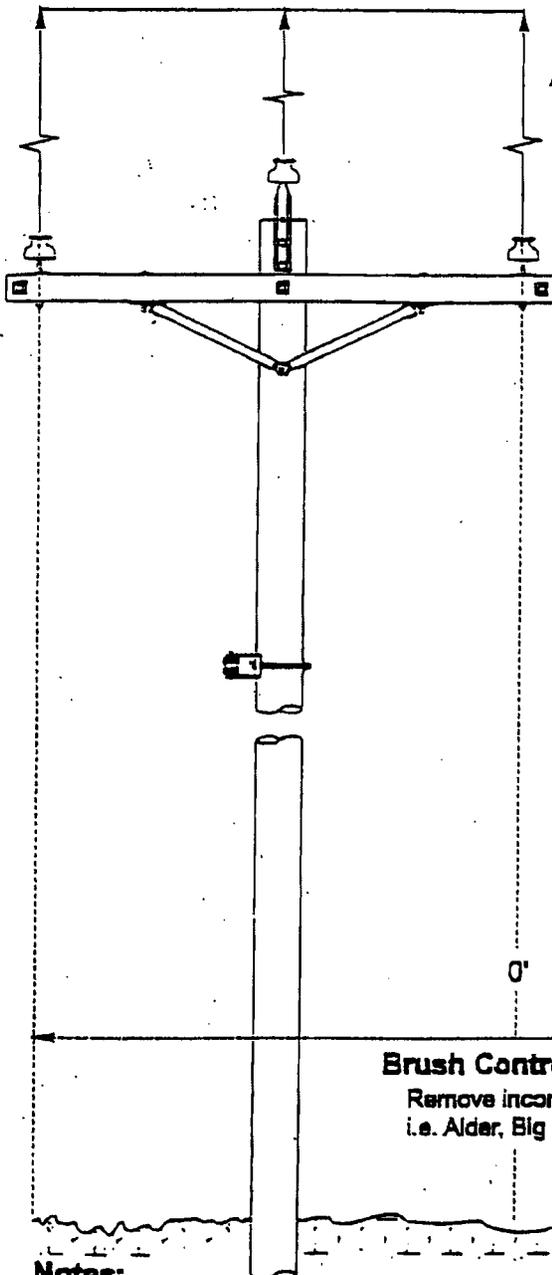
Danger Trees

Trees that are determined by the District to be a potential threat to the continued operation of the line (*danger trees*) shall be cut leaving a stump as close to the ground as possible.

Danger Trees may include:

- Forked trees.
- Dead or rotten trees.
- Trees weakened by decay, disease or erosion.
- Trees visibly leaning toward the line.
- Trees or parts of trees which may contact the line under snow, ice or wind loads.
- Trees originating from fallen decaying logs, old growth stumps or other unstable rooting positions.
- Troublesome trees such as alder, big leaf maple and hemlock.

No overhanging branches within 15' of primary conductors. Remove all dead overhanging branches



A Zone

Wire and Clearing Zone: Remove all trees with a mature height of 25' or greater. Trees with a mature height of less than 25' may remain. Trees that cannot be removed shall be trimmed.

B Zone

OK to trim Douglas Fir or Western Red Cedar 15" D.B.H. or greater.

C Zone

OK to trim Douglas Fir or Western Red Cedar 10" D.B.H. or greater.

D Zone

Danger Tree Removal Zone:

0' to 4' to 8' to 12'

Brush Control Zone

Remove incompatible tree species 6" D.B.H. or less. i.e. Alder, Big Leaf Maple, Cottonwood, Hemlock.

Notes:

- All zones are measured from the outermost wire regardless of construction type.
- Transmission clearances apply for distribution underbuild.
- D.B.H. — (Diameter at Breast Height), diameter measured 4-1/2' above ground.

Figure 2
Minimum Distribution Trimming Clearances

Appendix 3

Excerpt of Exhibit 29

(Tacoma Power Vegetation
Management Guidelines
re danger trees)



Trimming Plans

The following portions of this standard describe how trees are trimmed in different circumstances.

General Plan

The trimming of trees will follow the criteria below:

- Trees will be trimmed in such methods as to direct new growth away from electrical conductors, poles, and towers.
- When possible trees that will pose continual maintenance or hazard to the electrical facilities will be removed.

Customer Requests

At times customers may request specific trimming of trees that are to be trimmed. Tacoma Power will consider such requests however the minimum clearances will not be compromised.

Danger Trees

Danger trees are trees that are located within falling distance to our power lines and pose imminent danger to the electrical facilities due to tree health, ground conditions, or any other condition that leaves the tree unstable.

When these trees are identified TACOMA POWER will notify the owner and work with the owner on a case by case basis to have the trees removed.

Diseased Vegetation

Tacoma Power will identify and remove diseased portions of trees during routine tree trimming activities. Limiting the spread of tree disease is a concern of Tacoma Power.

DANGER: This document contains information that is confidential and proprietary to Tacoma Power. It is intended for internal use only. It is not to be distributed outside of Tacoma Power.

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ESTATE OF CONNELLY,
Appellant,

No. 66714-9-I

vs.

SNOHOMISH COUNTY PUD #
1,

DECLARATION OF SERVICE
OF APPELLANT'S REPLY
BRIEF

Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 NOV 28 AM 11:20

COMES NOW the undersigned and declares under penalty of perjury under the Laws of the State of Washington as follows:

1. I am of legal age, have personal knowledge of the facts set forth herein, and am competent to testify. I am an employee of Hawkes Law Firm, P.S., 19929 Ballinger Way N.E., Shoreline, WA 98155, attorney of record for appellant in this matter.

2. On this day I sent by U.S. Mail, postage prepaid, an original and one copy of the Reply Brief of Appellant Estate of Connelly to:

Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

ORIGINAL

3. On this day I sent by U.S. Mail, postage prepaid, a true and correct copy of the Reply Brief of Appellant Estate of Connelly to counsel of record for all parties, addressed as follows:

Attorneys for Respondent Sno PUD 1
Christopher J. Knapp, WSBA 19954
2707 Colby Avenue, Suite 1001
Everett, WA 98206
425-252-5161

SIGNED at Shoreline, Washington on November 23, 2011.


Kevin M. Winters