

66714-9

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No. 66714-9-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ESTATE OF CONNELLY,

Appellant,

vs.

SNOHOMISH COUNTY PUD # 1,

Respondents.

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
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OPENING BRIEF OF APPELLANT ESTATE OF CONNELLY

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it found that the issue to be decided was "whether the PUD negligently performed its vegetation management program as outlined in its Transmission & Distribution (T&D) Guidelines (exhibit 27). CP 80 (FOF C). See App. 1.

2. The trial court erred when it found that tall trees adjacent to high voltage power lines, but not in the clearance zone within 12 feet of those lines, only need to be inspected if there is "obvious evidence of decay or rotting or threat to the power line." CP 81 (FOF 9).

3. The trial court erred when it found that the Estate arborist only reviewed photos taken on the night of the incident. CP 81 (FOF 12).

4. The trial court erred when it found that the Estate arborist testified merely that "there would have been *some indication* of damage to the tree that would have warranted further investigation." CP 81 (FOF 12).

5. The trial court erred when it found that the subject downed tree had an "open cavity" only "because it was split open after [it fell]" and that "there were no external indicators that it was unhealthy." CP 82 (FOF 13).

6. The trial court erred when it found that the "Estate's arborist clearly stated that decay may have been discovered only upon further investigation around the backside of the tree." CP 83 (FOF 17).

7. The trial court erred when it found that "the evidence does not support finding that the tree was an imminent threat to the power line." CP 83 (FOF 18).

8. The trial court erred when it concluded that the PUD "was not negligent and is not liable for the death of Mr. Connelly." CP 85:1-2 (COL __).

9. The trial court erred when it concluded that "it does not follow that the PUD had a duty to inspect each tree on that road if such tree was not in the 10'-12' clearance zone." CP 85 (COL A).

10. The trial court erred when it concluded that "Absent seeing an obvious decaying tree, or having actual notice of a danger tree, the PUD did not have a duty to investigate each and every tree in the row of poplars on the School District property to determine whether each such tree was healthy or posed a threat to the line." CP 85 (COL A).

11. The trial court erred when it concluded that "even if the subject tree was seen in 1999-2000 by a PUD arborist, that

individual would not have been able to visually determine whether the tree was rotting or in decay without undertaking further investigation." CP 85 (COL B).

12. The trial court erred when it concluded that "Requiring the PUD to go to the backside of the tree, to hammer the tree or insert diagnostic instruments, based upon the initial impression of this tree far exceeds the duty imposed on a utility company exercising even the highest standard of care. The implication of imposing such a duty on a power company in the Northwest is to require that a utility company ensure that no tree, whether healthy or not, may exist in such proximity to its lines because of the possibility of contact in a windstorm. Thus, the PUD complied with the applicable standard of care with respect to vegetation management." CP 85 (COL C).

13. The trial court erred when it concluded that "the PUD did not breach its legal duty and was not negligent with regard to vegetation management." CP 85 (COL D).

14. The trial court erred when it entered a verdict that the PUD was not negligent and is not liable for Mr. Connelly's death. CP 86:16-17.

15. The trial court erred when it imposed a postjudgment

interest rate of 12% in this tort case, contrary to RCW

4.56.110(3)(a). CP 76:24.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court apply the proper standard of care to the facts in determining whether the PUD was liable when a danger tree fell across high voltage PUD power lines in an area the PUD failed to perform vegetation management, proximately causing the electrocution death of Mr. Connelly? Assignments 1-2, 9-10, 12-13.

2. Did the trial court misunderstand the evidence when it found that a visual inspection of the subject tree would not have revealed that it was a danger tree, and that the subject tree that fell over high voltage PUD power lines was not a danger tree? Assignments 3-8, 11.

3. In a tort action, when the defendant prevails at trial and has judgment entered in its favor, is the proper postjudgment interest rate the variable interest rate for tort actions set in RCW 4.56.110(3)(a)? Or is it the 12% rate for "other" types of actions set in RCW 4.56.110(4)? Assignment 15.

III. STATEMENT OF THE CASE

A. Why Utilities Must Perform Vegetation Management

The PUD power lines where Mr. Connelly was killed were high voltage distribution power lines. CP 79 (FOF 2). High voltage power lines are extremely dangerous. Persons who come in contact with high voltage power lines get killed. Those who are not killed get very serious electrical burns. Straying high voltage electricity also causes fires, damaging and destroying property while endangering lives. The extreme dangerousness of high voltage power lines is why they are built high in the air, intentionally kept well away from people and buildings. It is also why utility vegetation management is required—to keep trees away from lines so that power does not stray outside of lines, and to keep the lines up in the air where they are clear of buildings and people. RP 37-38, 50 (Bollen).

B. Pertinent Vegetation Management Standards

The purpose of vegetation management is public safety and system reliability. RP 29:14-18 (Munsterman). To ensure safety and reliability "utilities are compelled to keep trees away from wires." RP 97:22-23 (Cieslewicz); but see RP 127:18-25 (it is reasonable to allow trees to contact power lines).

The standards for utility vegetation begin with the national standard issued by NESC—the National Electric Safety Code. Ex

25. It provides:

PART 2: SAFETY RULES FOR OVERHEAD LINES

218. Tree Trimming

A. General

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

NESC sets the basic requirements. Utilities then must determine safe clearances between power lines and vegetation depending on local climate, the types of vegetation in the area, and how quickly vegetation grows in the area. RP 51:23-25; 60:1-19 (Bollen).

Like all utilities, the PUD has established its own vegetation management standards. The PUD standards require trimming and removal of trees growing within 12 feet of its distribution power lines, roughly corresponding with the utility right of way. Ex 27 at 3. However, the PUD's internal standards do not stop there. They also require removal of "danger trees" growing outside of that 12 foot clearance zone. Id. ("D Zone Danger Tree Removal Zone").

The PUD's internal standards define "danger tree" as:

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.

Ex 27 at 1. The PUD's standards as written are consistent with other local utility standards, including Tacoma Power's (Ex 29 at 6):

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.

The PUD's vegetation management standards are typical.

RP 61:4-11 (Bollen); 71:9-17 (Felling); 105:24-106:8 (Cieslewicz).

They do not exceed the standard of care. RP 62:1-5 (Bollen). In order to meet the standard of care, the PUD must implement its vegetation management standards in their entirety. RP 62:19-63:13 (Bollen). The PUD must have a schedule for regular tree trimming, must inspect the trees in the area of their power lines throughout the circuit, must trim and remove trees according to its standards, and then must audit the work to ensure that all was done and nothing was missed. RP 104:13-105:4 (Cieslewicz).

The PUD's vegetation management is supposed to be done according to its written standards. NRP 17:5-8 (Soden); RP 47:13-20 (Munsterman). The PUD performs vegetation management on a circuit every 7-10 years. RP 18:24-19:4 (R. Packebush).

C. Mr. Connelly's Death

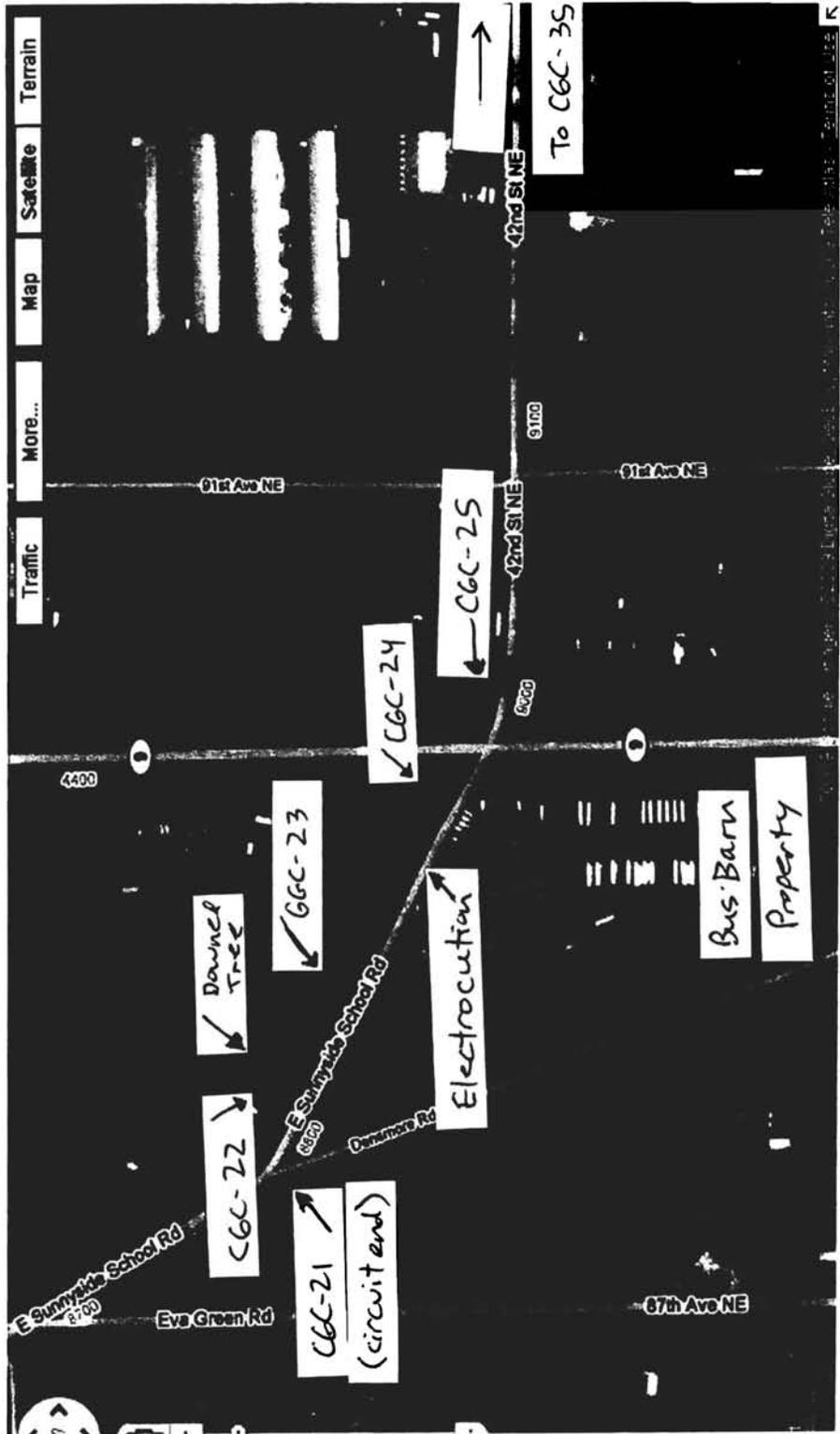
Patrick Connelly was electrocuted on October 16, 2003, near the intersection of State Route 9 and East Sunnyside School Road, Snohomish County, Washington. CP 79 (FOF 1). Mr. Connelly was electrocuted on the PUD's East Marysville Circuit, also known as Circuit EMA 12-37. Id. (FOF 4).

During a storm, a tall Lombardy poplar blew over and fell onto the PUD's high voltage distribution lines. Id. (FOF 2). That tree was located between PUD poles CGC-22 and CGC-23. Id.

(FOF 4). It grew at the edge of the 2-lane road on property across the street from the PUD power lines. Id. (FOF 3); Ex 41F. When the tree blew over the PUD's high voltage lines, two of the three lines touched each other, causing their fuses to blow and de-energizing them. CP 79 (FOF 5). The third line broke one span east of where the tree fell over it, near CGC-24, falling into a ditch by the side of the road and remaining energized. CP 80 (FOF 6, 8);

Michael Varnell and Patrick Connelly were driving westbound on 42nd Street NE, saw the brush fire in the ditch, and decided to investigate. CP 80 (FOF 7-8). Acting as a Good Samaritan, Mr. Connelly attempted to stomp out the fire. CP 69. While attempting to do so Mr. Connelly contacted the energized field phase and was electrocuted. CP 80 (FOF 8). Mr. Connelly was not negligent. CP 86 (COL H), CP 69.

Ex 102 provides a helpful overview of the scene:



D. The PUD Failed to Perform Vegetation Management on East Sunnyside Road

The PUD notified EMA 12-37 in 1999 and 2000. CP 80 (FOF 9). Notification includes inspecting the trees near circuit power lines, arranging tree trimming and removal work with property owners, hiring the contractor to do the tree trimming and removal, and supervising the contractor's work. CP 80-81 (FOF 9). Inspecting the trees is done through PUD notifiers either walking or driving the entire circuit. RP 30:5:7 (Munsterman).

PUD notifiers are arborists. RP 27:7:-9 (Munsterman); Narrative Report of Proceedings (NRP) 19:11, 19-23 (Soden). If a notifier observes an unhealthy tree that poses a threat to the power lines, the PUD's vegetation management standards instruct them to pursue removal even if it is outside the 12' clearance zone. CP 81 (FOF 9).

The PUD, however, did not inspect that portion of the circuit where Mr. Connelly died between CGC-24 and CGC-21 (East Sunnyside School Road). Though the circuit was inspected and trimmed in 1999 and 2000, that work stopped east of SR-9 and did not continue through the rest of the circuit west of SR-9. This was shown through both circumstantial and direct evidence.

- There was no PUD record of any notification between poles CGC-24 and CGC-21 on East Sunnyside School Road. RP 50:4-11 (Munsterman); CP 81 (FOF 11). As the superintendent of PUD vegetation management testified, "[I]f we don't have any records, it wasn't notified." NRP 31:7-8 (Soden).
- When doing vegetation management on a circuit, the PUD breaks up each circuit into smaller areas called "packets." The packets for the EMA 12-37 circuit in 1999 stopped at SR-9, even though the circuit extended across SR-9 onto East Sunnyside Road. The packet maps and descriptions show that East Sunnyside School Road was not inspected by PUD arborists. Ex 30 Packet 109 (00256); Contact Log (00263) (omitting poles CGC-24 through CGC-21 from the circuit); Packet 110 (00264).
- PUD line clearance coordinator Mike Munsterman admitted that East Sunnyside School Road was not included in Circuit EMA 12-37 line notification maps. RP 50:7-25, 52:5-10 (Munsterman). As a result, the PUD's tree trimming and removal contractor did not do any work west of SR-9 on East Sunnyside School Road. Id.
- The only "inspection" was done by Mr. Munsterman, who was told by the contractor that a portion of the circuit was missing from the map. RP 56: 16-24. As a result, Mr. Munsterman testified that, standing at CGC-25, he looked across SR-9 at the span between CGC-24 and CGC-21. RP 58:14-25; 63:20-23. From where Mr. Munsterman was standing, the distance to the end of the circuit is 875 feet, and the distance to the tree that blew over on October 16, 2003 is 600 feet. RP 70:21-71:5 (Bollen).
- Mr. Munsterman did not consider his glance from across the street to be line notification. RP 59:18-19. He could not see from that distance whether the trees in the row from which the poplar fell over the PUD high voltage power lines well enough to determine if there was a problem. RP 69:21-70:10 (Bollen).

Expert testimony was that the utility vegetation management

standard of care required inspection of trees outside the clearance zone to determine whether or not they pose a hazard to PUD power lines, because there was no other way know whether removal was appropriate. RP 65:15-66:2 (Bollen). Because the PUD did not inspect the circuit between CGC-24 and CGC-21 where Mr. Connelly was killed, its vegetation management did not meet the standard of care. RP 69:21-70:10 (Bollen).

The PUD's expert opined that the PUD's vegetation management in the area of Mr. Connelly's death met the standard of care, but he was not aware that the PUD never notified the critical area between CGC-24 and -21. RP 123:2-8 (Cieslewicz).

E. Had the PUD Performed Vegetation Management According to Its Own Standards, the Rotted Tree Would Have Been Removed Before Mr. Connelly's Electrocuting Death

As noted above, no PUD notifier walked the East Sunnyside School Road portion of East Marysville Circuit when vegetation management was done in 1999 and 2000. No PUD notifier drove down East Sunnyside School Road. No PUD notifier inspected any of the trees on either side of East Sunnyside School Road. No PUD contractor did any tree trimming or removed danger trees on East Sunnyside School Road.

If the PUD had performed vegetation management on East Sunnyside School Road, it would have seen *from the road* visible signs of disease, rot, and decay on the trees in the row of poplars that included the subject tree that blew over the PUD power lines. RP 14:13-14 (Baker 11/2) ("I could see evidence of disturbance of the trees at the base of the trunks."); RP 15:10-12 (Baker); RP 21:16-22:15 (Baker); RP 12:8-13:12 (R. Packebush).

These signs would have indicated that a closer look of all the trees in the row, including the subject tree that blew over the PUD power lines, be taken. RP 15:10-23 (Baker); RP 22:16-23:10 (Baker). A PUD notifier agreed that the PUD vegetation management guidelines required a notifier to inspect a tree if he or she saw visible decay on the trunk of the tree, even if the tree was across the road from the power line. RP 8:14-9:3 (R. Packebush). In fact, after Mr. Connelly's death this notifier noticed trees outside the clearance zone in a yard close to where the tree fell over the PUD lines with dead branching and other indicators of an unhealthy tree, and had them trimmed. RP 10:2-23 (R. Packebush). Cf. PUD expert's testimony that vegetation management does not require looking at trees outside the clearance zone. CP 83 (FOF 15).

If the PUD had performed vegetation management on East

Sunnyside School Road, it would have seen *from the road* visible signs of disease, rot, and decay on the subject tree that blew over the PUD power lines. RP 15:5-6 (Baker) ("[T]he lower trunk of those trees [in the row] allowed me to see the diagnostic signs that I am almost—I'm more than certain that the subject tree would have shown as well."). Photos of the subject tree in fact revealed those diagnostic signs. RP 27:14-22 (Baker); RP 28:2-23 (Baker); RP 30:16-24; RP 33:20-25; RP 34:5-12; Exs 39E, 39H, 40D, 41A; RP 15:6-15 (R. Packebush).

The subject tree also would have exhibited problems in the canopy as well. RP 19:20-25 (Baker); RP 29:3-10.

And all of these signs of disease, decay, and rot are on Lombardy poplars, a tree that, "once they have been compromised by wounding and decay they tend to fall apart rather rapidly." RP 16:24-25 (Baker). These signs were visible in 1999 and 2000, when East Sunnyside School Road should have been notified by the PUD, but was not. RP 18:2-4 (Baker).

Those signs too required a closer look: RP 30:16-24 (Baker); RP 35:20-36:25 (Baker); RP 93:25-94:16 (S. Packebush) ("[I]f you could tell that a tree was rotted from the exterior of the tree, you would take a closer look.").

That required closer look would have revealed near total rot through the subject tree, and converted a strong belief that the tree had failed into a certainty. RP 35:20-36:25. Though a more thorough examination with tools would have accomplished an absolute confirmation, it was not necessary to determine substantial rot and disease in the subject tree. Id.

The school district, if informed by the PUD that its poplars, including the subject tree, were danger trees, would have allowed removal. NRP2 7:24-9:23 (Ghaffari).

In sum, visual inspection would have revealed that the subject tree fit the definition of a danger tree under the PUD's own standards. RP 38:3-39:16 (Baker). Because the tree was tall enough to fall over PUD power lines when it went over, PUD vegetation management standards required its removal. Ex 27; RP 71:6-12 (Bollen). If removed, the tree would not have blown over the PUD's high voltage distribution power lines, the line would not have fallen to the ground and remained energized, would not have started a fire, and would not have resulted in the electrocution of Mr. Connelly. RP 73:23-74:1 (Bollen).

There was no persuasive contrary evidence. A PUD notifier testified on direct exam that, examining the row of Lombardy poplar

trees in which the subject tree grew soon after Mr. Connelly's death, he "found no signs on the exterior part of the trees that would be an indication for us to contact them." RP 6:9-17 (R. Packebush). But on cross, the PUD notifier looked at photos of the subject tree and the same row of trees, and agreed that there were visible signs of disease and decay. RP 12:8-13:12 (row trees); RP 15:6-15 (R. Packebush). Cf. Baker on extensive signs visible on the outside of the tree in the same photos, supra.

F. Procedural History

The estate filed this wrongful death action against the PUD in 2006. The estate claimed, *inter alia*, that the PUD breached its high duty of care to manage vegetation near its high voltage distribution power lines to prevent downed lines and electrocution. CP 3-13. A bench trial before Judge Yu of the King County Superior Court was held between November 1 and November 15, 2010. CP 64. A preliminary decision was issued by the trial court on November 18, 2010. CP 64-70. Findings, conclusions, and judgment were entered on January 21, 2011. CP 76-97. This appeal timely followed. CP 98-121.

IV. ARGUMENT

A. Standard of Review

The nature and scope of the duty that the defendant owed to the plaintiff are questions of law. Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., 170 Wn.2d 442, 455, 243 P.3d 521 (2010); Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Whether there was a breach of that duty is a question of fact. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

The appellate court reviews a trial court's findings of fact in a bench trial to determine whether they are supported by substantial evidence, and whether the findings support the court's conclusions of law. Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 562 (2002). The trial court's conclusions of law are reviewed de novo to determine if they are supported by its findings of fact. Bingham, 111 Wn. App. at 127.

B. The Trial Court Applied the Wrong Standard of Care, or Improperly Applied the Correct Standard of Care, to the PUD's Implementation of its Vegetation Management Program

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). In Brashear, the Supreme Court reversed the Court of Appeals for applying the wrong standard of care in a utility tort case.

1. Washington Law Imposes on Electric Utilities the Highest Duty of Care

An electric utility has the duty to maintain its electrical systems with "the utmost care and prudence." Keegan v. Grant County PUD No. 2, 34 Wn. App. 274, 278, 661 P.2d 146 (1983). "[T]he standard of care varies according to the danger posed by the utility's activity." Keegan, 34 Wn. App. at 279 (emphasis added):

If the danger is minimal, the utility is held to conventional negligence concepts. But when the danger and the likelihood of injury is increased, the standard of care rises. ***When the utility's operation exposes the public to serious accidents or death, the utility is held to the highest degree of care human prudence is equal to.***

This has been the duty of care for Washington utilities for a very long time. In 1934, our Supreme Court stated:

[A] very high degree of care, indeed, ***the highest that human prudence is equal to, is necessary.*** This is particularly true of electric light and electric railway wires, which carry a high tension current often of great danger.

Scott v. Pacific Power & Light Co., 178 Wash. 647, 659, 35 P.2d 749 (1934) (emphasis added).

In order to meet its standard of care, an electric utility is obligated not just to act in keeping with "the highest duty of care human prudence is equal to" in designing, building, and operating its electrical system. In addition, the utility must also endeavor to foresee even remote possibilities of danger and use highest prudence to guard against them:

The duty of care exercised by an electrical power company is more than mere mechanical skill in compliance with minimal State requirements; it also includes foresight. ***It has been said that those engaged in the business of conducting electricity over high voltage wires are bound to anticipate more remote possibilities of danger.***

.
The test . . . is whether [the utility] should have foreseen the probability that injury might result from any reasonable thing that might be done.

Celiz and Sanchez' Estates v. Public Utility Dist. No. 1 of Douglas County, 30 Wn. App. 682, 686, 638 P.2d 588 (1981) (emphasis added) (citing Muck v. Snohomish County PUD 1, 41 Wn.2d 81, 87, 247 P.2d 233 (1952)).

2. If the Trial Court Applied a Negligence Standard Rather Than the Highest Prudence Duty of Care, it Erred

It is not entirely clear what standard of care the trial court applied to the PUD's implementation of its vegetation management program. The trial court used the words "negligence" and "utmost

care" both to describe the applicable duty of care in its findings and conclusions. This subsection addresses the negligence standard; the trial court's inferred application of the utmost care standard will be addressed below. The trial court in its findings stated:

C. Vegetation Management One liability issue in contention in this case is whether the PUD negligently performed its vegetation management program as outlined in its Transmission & Distribution (T&D) Guidelines (exhibit 27).

CP 80; COL D at CP 85 ("the Court concludes that the PUD did not breach its legal duty and was not negligent with regard to vegetation management"); CP 86 ("the Court's verdict is that the PUD was not negligent and is not liable for Mr. Connelly's death").

As noted above, in this case involving extremely dangerous high voltage power lines, the PUD's duty here is of the utmost: "***the highest degree of care human prudence is equal to.***"

Negligence, on the other hand, is nowhere near "the highest degree of care human prudence is equal to. As stated in WPI 10.01:

Negligence is the failure to exercise ordinary care.

The trial court's choice of words is not the only indication that it applied the ordinary care standard. The trial court limited the PUD's vegetation management responsibilities to trees under or within 12 feet of the high voltage power lines—only requiring

removal of non-obvious danger trees when members of the public notify the PUD of the danger tree's existence. CP 85 (COL A).

This limited duty of care is really nothing more than ordinary care. It certainly does not rise to "***the highest degree of care human prudence is equal to.***" If the trial court applied an ordinary care standard in this case, it made an error of law requiring reversal.

3. Applying the Correct General Utility Standard of Care to the Specific Context of High Voltage Vegetation Management in This Case Requires that the PUD, at Minimum, Meet Its Own Internal Standards

There was no dispute below that electric utilities have a duty to take steps to keep trees out of its power lines—to adequately perform vegetation management. So, what does the general utility duty of care specifically require in the context of utility vegetation management near high voltage power lines? That is a mixed question of law and fact. Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 475 n. 3, 951 P.2d 749 (1998) (scope of duty is a question of law); Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 54, 914 P.2d 728 (1996) (after determination of the applicable legal duty, the trier of fact decides whether the particular harm should have been anticipated and whether proper care was taken

to protect against the harm).

As noted above, Washington's utility standard of care in high voltage circumstances requires not only "***the highest degree of care human prudence is equal to***" but also that the utility anticipate possible dangers and "take exceptional precautions to prevent an injury being done thereby." In short, under Washington law an electric utility must both anticipate high voltage dangers and take exceptional precautions to guard against them. Applying this high standard to the evidence presented at trial, the only reasonable conclusion in this case is that the PUD must, at minimum, satisfy its own written, internal vegetation management standards. That was the standard of care urged to the trial court by the Estate.

a. The Evidence Supports Application of the PUD's Own Standards

As the PUD's Line Clearance Superintendent, NRP 23:18-21, testified:

[T]he pertinent standards of care are described in our T & D Guidelines. Basically, it is a multiple page document defining our trimming zones, our trimming methods

NRP 36:18-37:1, 38:10-20 (Soden).

The PUD's written vegetation management standards

require trimming and removal of trees growing within 12 feet of its distribution power lines, roughly corresponding with the utility right of way (referenced by the trial court as the "clearance zone"). But they do not stop there. In fact, the PUD's own vegetation management standards *also require* the removal of "danger trees" growing more than 12 feet away from the power lines, *i.e.*, outside of the clearance zone. Ex 27 at 3 (see Zone D re danger trees) and at 1 (defining danger tree). See also RP 43:15-22 (Munsterman) (a danger tree is anything defined as a danger tree on page one of Exhibit 27); RP 45:4-6; and 46:25-12 (vegetation management is not limited to the 12' clearance zone).

Asked if tree inspections are limited to the clearance zone within 12' of the power lines, the PUD Superintendent testified:

No. We would also look for danger trees that might, how do I say it? Might threaten our lines.

NRP 17:14-18:3 (Soden). She also testified:

If there was a tree that looked to be a danger tree on the opposite side of the road we would assess that tree and determine whether or not it needed work.

Id. at 26:12-14.

The evidence also demonstrates that applying the PUD's own written internal standard of care in this case is not an

excessively high standard of care. First, every trial witness testified that the PUD's internal vegetation management standards as written are typical. RP 61:4-11 (Bollen); 71:9-17 (Felling); 105:24-106:8 (Cieslewicz). Second, the PUD's own written standards are consistent with both the national standard and with local standards. Ex 25 (NESC); Ex 29 (Tacoma Power).

b. RCW 64.12.035 Supports Application of the PUD's Own Standards

Moreover, the PUD Superintendent also testified that the PUD is required to do as much or more than state law allows. She testified that RCW 64.12.035 "is the basis for our work" in vegetation management. Id. at NRP 23:18-24:4. Her testimony was that the PUD must do all that RCW 64.12.035 allows. Id. at 25:10-25.

State law allows much more than working in the clearance zone. In fact, RCW 64.12.035 immunizes utilities specifically for management of a tree that is "of such proximity to electric facilities that trimming or removal of the vegetation is necessary" (hazard tree) or is of such proximity "that it can be reasonably expected to cause damage to electric facilities" (potential threat tree), as determined by a certified arborist. RCW 64.12.035(2)(a)(ii) and (3).

App. 3.

The legislative history of this statute makes clear that the Legislature expected electric utilities to perform vegetation management outside the clearance zone. First, neither the statutory language nor the legislative history restricts the scope of the immunity to the clearance zone. In fact, neither "clearance zone" nor "right of way" nor "easement" is mentioned. Second, the House Bill Report recognizes that the statute creates two classes of trees subject to trimming and removal:

A hazard exists to the general public if the vegetation has encroached upon electric facilities by overhanging or growing in close proximity to overhead electric facilities . . . A hazard *also exists* if the vegetation is diseased or dying . . .

App. 2 at 2 (emphasis added). The first class grows or intrudes into the clearance zone, while the second class consists of diseased or dying vegetation without reference to encroachment into the clearance zone.

**c. Washington Case Law Supports
Application of the PUD's Own
Standards**

In addition to the evidence and Washington statute, Washington case law also supports using the PUD's internal written standards as the standard of care in this case. See, e.g., Kelly v.

Howard S. Wright Const. Co., 90 Wn.2d 323, 338, 582 P.2d 500 (1978) (a company's own manuals or guidelines may be used as evidence of the standard of care in the industry); Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wn.2d 629, 453 P.2d 619 (1969) (same); Joyce v. State Dep't of Corrections, 155 Wn.2d 306, 324, 119 P.3d 825 (2005) (internal directives, department policies, and the like provide evidence of the standard of care and therefore are evidence of negligence); Andrews v. Burke, 55 Wn. App. 622, 626, 779 P.2d 740 (1989) ("Standards adopted by private parties or trade associations are admissible on the issue of negligence where shown to be reliable and relevant"); Bayne v. Todd Shipyards Corp., 88 Wn.2d 917, 922, 568 P.2d 771 (1977) (same).

4. Had the PUD Simply Implemented its Own Vegetation Management Standards Competently, Mr. Connelly Would Not Have Been Electrocuted

Requiring the PUD to meet its own written vegetation management standards to protect public safety requires nothing unusual or special of the PUD. The PUD's internal standards are typical in the industry. In fact, the Washington general standard of care—that the utility take "exceptional precautions to prevent an

injury" and that "every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken" per Scott, 178 Wash. at 651-52—requires nothing less.

Had the PUD followed its own internal standards, this is what would have happened:

- The PUD would have inspected ("notified") East Sunnyside School Road in 1999-2000 when it did the rest of the East Marysville Circuit
- The PUD would have scanned the row of tall poplar trees on school property from the road
- The PUD would have seen clear signs of disease and decay on several of them, including the subject tree that blew over its high voltage lines
- The PUD would have made a closer visual inspection of the subject tree
- The PUD would have determined the subject tree to be a danger tree per PUD Guidelines, and as either a potential threat or hazard tree per RCW 64.12.035
- The PUD would have contacted the school district about removal of the subject tree
- The school district would have agreed and allowed removal
- Even if the school district hesitated, simple additional testing (a screwdriver driven by hand into the rotted wood) would have confirmed that the subject tree was rotted
- Even if the school district had requested further proof, more advanced diagnostic testing by an arborist hired by the school district would have confirmed

- After demonstrating to the school district's satisfaction that the subject tree was a danger tree, it would have been removed by the PUD per its own Guidelines
- Had the subject tree been inspected and removed by the PUD in 1999-2000, it would not have blown over high voltage PUD power lines on October 16, 2003, no energized power lines would have been brought to the ground, there would have been no brush fires, and Mr. Connelly would not have been electrocuted

5. The Trial Court Erred in Holding That the Duty of Care Only Made the PUD Responsible for Vegetation Management of the "Clearance Zone" Within 12 Feet of the Power Lines

As noted above, it appears the trial court may have applied an ordinary care standard. If it did so, it erred. However, there is also indication in the trial court's findings and conclusions that it attempted to apply Washington's actual electric utility standard of care. Introducing its conclusions of law, the trial court stated:

[U]tilities must exercise the utmost care, consistent with the practical operation of the utility.

FOF CP 84:24. If this is the standard the trial court actually applied, it could only have been using the word "negligence" to mean "breach of the applicable duty of care" rather than its customary meaning of "ordinary care."

However, even if the appeals court determines that the trial court applied the "utmost care" standard, that would not necessarily

mean that the trial court applied the proper standard of care. The trial court's mere statement of the correct standard of care—assuming that "utmost care" meant "highest degree of care human prudence is equal to" to the trial court—does not mean that the trial court applied the proper standard of care to the PUD's vegetation management performance in this case. In fact, the trial court made several errors in determining and applying the standard of care. First, the trial court's determination of the PUD's duty in this context required so little of the PUD that it is contrary to the very high standard of care imposed by Washington law. Second, the trial court overemphasized the "practical operation of the utility" qualifier to the highest prudence standard of care, when in high voltage cases the practical operation qualifier has only "minimal relevance." Third, there is no actual finding that requiring the PUD to comply with its own written vegetation management standards would interfere with the practical operation of the utility. Fourth, the evidence does not in any way support any express or implied finding by the trial court that making the PUD comply with its own written vegetation management standards would interfere with the practical operation of the utility.

a. The Trial Court's Standard of Care

**Requires So Little of the PUD That It
is Contrary to the Highest Prudence
Standard Established by Law**

What the standard of care required of the PUD in terms of its vegetation management on East Sunnyside School Road prior to Mr. Connelly's electrocution death was *the* issue in this case. The estate maintained that the PUD's own vegetation management standards (Ex 27) should be applied as written. The PUD argued this duty was too burdensome, and that a lesser duty applied. See CP 80:19-22 (FOF C). The trial court applied the lesser duty:

Even if the Court were to find that the PUD had a duty to walk or drive up Sunnyside School Road and to find that visual inspection of the line across some 600 feet was inadequate, it does not follow that the PUD had a duty to inspect each tree on that road if it were not in the clearance zone or leaning towards the line. Absent seeing an obvious decaying tree, or actual notice of a danger tree, the PUD does not have a duty to investigate each and every tree to determine whether it is healthy and poses a threat to the line.

CP 85 (COL A). Rejecting the Estate's position that the PUD's own written standards should apply, the trial court held:

The implication of imposing such a duty on a power company in the Northwest is to require that a utility company ensure that no tree, whether healthy or not, may exist in such proximity to its lines because of the possibility of contact in a windstorm. Thus, the PUD complied with the applicable standard of care with respect to vegetation management.

CP 85 (COL C).

In sum, the trial court held that the PUD had no duty to inspect the subject tree because it was outside the clearance zone, was not obviously leaning over toward the lines, and no third party had alerted the PUD to the problem. As noted above, this minimal duty is contrary to the PUD's own standards (Ex 27), is contrary to RCW 64.12.035 in which the Legislature's intent was plainly to immunize utilities for vegetation management protecting power lines (thus indicating that utilities were in fact doing so), and is contrary to the PUD Superintendent's testimony.

But most importantly, it is contrary to Washington law which requires that the PUD exercise the highest human prudence, the utmost care, and take extraordinary measures to both anticipate and guard against dangers to human life associated with their high voltage power lines. Not requiring the PUD to determine whether or not tall trees immediately across the road from high voltage power lines are "danger trees" is simply inconsistent with any Washington standard of care other than ordinary care. In applying this standard, the trial court committed reversible legal error.

- b. The Trial Court Overemphasized the "Minimally Relevant" Practical Operations Qualifier to the Highest**

Prudence Standard of Care

The PUD may argue that the lower standard of care was adopted by the trial court because requiring more would interfere with the "practical operation of the utility." The PUD would cite Keegan, 34 Wn. App. 274 as authority for this position.

But Keegan does not support substantially lowering the duty of care in high voltage cases such as this one. In Keegan, at issue on appeal was the trial court's instruction to the jury on the applicable duty of care. The Court of Appeals affirmed, holding:

[T]he standard of care varies according to the danger posed by the utility's activity. If the danger is minimal, the utility is held to conventional negligence concepts. But when the danger and the likelihood of injury is increased, the standard of care rises. When the utility's operation exposes the public to serious accidents or death, the utility is held to the highest degree of care human prudence is equal to.

Keegan, 34 Wn. App. at 280.

This sliding scale duty of care has important implications for the significance of the "practical operation" qualifier to the highest prudence duty of care. As the Keegan Court noted:

One of the factors to be considered in determining whether a utility has satisfied its duty of care is the practical operation of the utility. Evidence concerning the utility's practical operation addresses whether the utility has conducted its operations under the known safety methods and the present state of

the art. The admissibility of evidence relating to the practical operation of the utility is not an open door for the utility to argue the economic impact of safety measures on the ratepayers. The fact the requisite care is expensive or inconvenient does not, of itself, relieve the utility of its duty to exercise commensurate care.

The extent to which a utility is allowed to present evidence relating to its practical operation will be determined by the circumstances of each case. A sliding scale approach proportional to that utilized for the standard of care should be used. ***If the danger posed to the public is minimal, then the utility should be afforded considerable latitude in presenting evidence of its practical operation. If the danger is lethal, then the practical operation becomes minimally relevant.***

34 Wn. App. at 280-281 (citations omitted, emphasis added).

Thus, per Keegan itself, in high voltage cases the "practical operation" qualifier is minimally relevant, and thus should only minimally impact the determination of what the highest prudence duty of care requires in a particular circumstance.

In addition, other than in the 1983 Keegan case, no Washington Court has included the "practical operation" qualifier in its description of the highest prudence standard of care since the Supreme Court's 1949 decision in Heber v. Puget Sound Power and Light Co., 34 Wn.2d 231, 208 P.2d 886 (1949) In fact, shortly after Keegan was decided, the Supreme Court decided Brashear,

supra. It referenced the Keegan Court's description of the sliding scale standard of care. 100 Wn.2d at 211. But the Supreme Court in Brashear did not reference the "practical operation" qualifier, and did not include the qualifier in its description of the highest prudence standard of care. This is further indication of just how "minimal" the importance of the qualifier is in high voltage cases involving electrocution death.

In sum, even if incorporating the "practical operation" qualifier to the highest prudence standard of care in this case is appropriate, its impact must be "minimal." The more "practical operation" considerations influenced the trial court's determination of the specific duties imposed on the PUD's vegetation management, the more the resulting duty is like a mere "ordinary care" negligence standard. Thus, in high voltage death cases like this one, overemphasis of the "practical operation" qualifier is an error of law because doing so improperly reduces the highest prudence standard of care. Applying the wrong standard of care is reversible error of law. Brashear, supra.

- c. **There is No Finding of Fact that Implementing the PUD's Own Written Vegetation Management Standards Would Interfere With the Practical Operation of the Utility, Rendering**

the Conclusions Unsupported by the Findings

A trial court's conclusions of law must be supported by its findings of fact. American Nursery Prod., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 222, 797 P.2d 477 (1990). The trial court concluded in this case, in effect, that requiring the PUD to comply with its own written vegetation management standards would impair the practical operation of the utility. CP 85 (COL A, C). The court therefore imposed a lower duty. Id.

No findings of fact support this conclusion. The vegetation management findings appear at CP 80-83 (FOF 9-18). Not a single one makes any finding that complying with its own written vegetation management standards would be too expensive, would be too time consuming, would be too difficult, or would be impractical. The only express finding that is even remotely pertinent is the "finding" that the PUD's expert testified that utilities "do not routinely inspect trees outside the clearance zone simply because the tree is tall enough to fall on the line." CP 82:23-24 (FOF 15). But this is not really a finding, because the court nowhere expressly adopts it. Conclusions of law that are not supported by findings are reversible error. Ridgeview Properties v.

Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

d. An Implied Finding of Fact that the PUD's Own Written Vegetation Management Standards Would Interfere With the Practical Operation of the Utility is Not Supported by the Evidence

The PUD may argue that—or the appellate court may consider whether—the trial court's findings as a whole *imply* a finding that requiring PUD compliance with its own written vegetation management standards would interfere with the practical operation of the PUD electrical system. This would be improper because there is not substantial evidence to support such an implied finding.

Findings of fact must be supported by substantial evidence in the record. Ridgeview Properties, 96 Wn.2d at 719.

There must be "substantial evidence" as distinguished from a "mere scintilla" of evidence, to support the verdict-*i.e.*, evidence of a character "which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." A verdict cannot be founded on mere theory or speculation.

Brashear, 100 Wn.2d at 209 (quoting Arnold v. Sanstol, 43 Wn.2d 94, 98, 260 P.2d 327 (1953)).

As noted above, there were no findings that holding the PUD to its own written vegetation management standards would cost too

much, would take too much extra time, would require too many extra employees, or would interfere in any way with the distribution of PUD power to its customers. In fact, there was no evidence on any of these things introduced at trial.

From FOF 15 (CP 82-83), it could be inferred that the trial court adopted the PUD's vegetation management expert's testimony, even though the court did not make any explicit finding so indicating. But if so, this was error because the PUD expert's testimony was simply not substantial evidence on these points.

The PUD expert testified that a utility's vegetation management responsibilities extend only as far as the 12' clearance zone, unless by third-party notice or direct observation it had actual knowledge of a danger tree outside the clearance zone. FOF 15. Otherwise, the utility has no duty to look at trees outside the limited clearance zone.

The sole basis for this testimony was the contention that inspecting trees outside the clearance zone, such as the subject tree that caused Mr. Connelly's electrocution, would require unlawful entry onto private property. RP 109:25-110:8 (Cieslewicz). But this testimony cannot persuade a fair-minded person.

First, it ignores the fact that the PUD's own written standards

require vegetation management outside the clearance zone. Ex 27 at 3. The PUD expert could point to nothing in the written standards which supported his testimony. RP 131:5-132:20 (Cieslewicz).

Second, it ignores the provisions of RCW 64.12.035 immunizing utility vegetation management from Washington's timber trespass statutes.

Third, it ignores the fact that Tacoma Power's internal standards also require vegetation management outside the clearance zone. Ex 29 at 6.

Fourth, perhaps most importantly, it ignores the fact that the subject tree was very close to the road and could be closely observed without entering private property at all, even if that was a legitimate concern. RP 71:13-24 (Bollen).

Fifth, the PUD's expert contradicted his own testimony on direct when he admitted on cross that the PUD standards do not limit line notification to the clearance zone, and that it is necessary to look at trees outside of the clearance zone to determine if they are danger trees as that term defined by the PUD. RP 132:1-20 (Cieslewicz).

Sixth, the PUD expert's testimony contradicted the testimony

of PUD employees responsible for vegetation management, who agreed that the PUD's written standards do not limit tree inspections to the clearance zone. See, e.g., RP 93:25-94:16 (S. Packebush) ("[I]f you could tell that a tree was rotted from the exterior of the tree, you would take a closer look.").

Seventh, the expert's testimony that the PUD's vegetation management responsibilities ended at the edge of the 12' clearance zone was also inconsistent with other evidence. These include the fact that the PUD uses arborists to perform its vegetation management tree inspections strongly suggests that danger trees are not limited to "obvious" danger trees, for the simple reason that a lay person can identify an obvious danger tree, such as a tree substantially leaning over toward the power lines. Thus, the exclusive use of arborists indicates that more subtle signs of danger are required to be looked for. In addition, the Estate's expert, a professional local arborist, has encountered numerous situations where a utility has identified a tree outside the clearance zone that needs to be removed, and the property owner calls in the arborist to examine the health of the tree. RP 17:23-19:1 (Baker 11/3). Finally, the PUD clearly did substantial vegetation management work outside of clearance zone, since it removed 40

danger trees on the East Marysville Circuit in 1999-2000. RP 74:12-75:4 (Bollen). Also most indicative is the fact that, after Mr. Connelly's death, the PUD arborist sent to the scene noticed danger trees outside the clearance zone and had them removed. RP 10:2-23 (R. Packebush).

In sum, the PUD's expert testimony was not substantial or convincing enough to persuade a fair minded person of his testimony that utility vegetation management ends at the edge of the clearance zone. Neither the evidence nor common sense could lead a reasonable person to conclude that inspecting and taking appropriate action in accordance with the PUD's own written standards is "impractical":

The fact the requisite care is expensive or inconvenient does not, of itself, relieve the utility of its duty to exercise commensurate care.

Keegan, 34 Wn. App. at 280.

6. **Washington's Electric Utility Duty of Care Required the Trial Court To Determine (1) Whether the Danger Could Be Anticipated and (2) Whether the Harm Could Have Been Prevented by Application of the Highest Prudence Level of Care, and Reasonable Minds Could Reach But Once Conclusion—The PUD Breached its Duty of Care and its Breach Proximately Caused Mr. Connelly's Electrocution Death**

The trial court imposed only a severely limited vegetation management duty on the PUD, one most akin to ordinary care but at best one substantially limited by "practical operation" considerations not supported by either Washington law or the evidence. CP 85 (COL A). This constraining of the duty of care as a result of considerations of ease and convenience are inconsistent with Washington's "**highest degree of care human prudence is equal to**" standard of care. As stated by the Supreme Court:

Where death or serious injury may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it.

It may be stated as a general principle of law that one who has in his possession or under his control an instrumentality exceptionally dangerous in character is **bound to take exceptional precautions** to prevent an injury being done thereby. The law exacts of one who puts a force in motion that he shall control it with a skill and care proportioned to the danger created. A higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business, which involve little or no risk of injury to persons or property. While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say, in general terms, that **every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken.**

Scott, 178 Wash. at 651-52.

The Estate's contention that applying this standard required,

at minimum, that the PUD comply with its own written vegetation management standards is not a demand that the PUD meet a standard of perfection or some new higher duty. Two cases from very different jurisdictions and time periods so demonstrate. In Rocca v. Tuolumne County Electric Power and Light Company, 245 P. 468 (Cal. App. 1926) (App. 4), a wrongful death case, a storm caused a tree limb to fall onto a power line, the tree limb brought the line down to ground level, and the decedent contacted the line and was electrocuted. The subject tree was located on private property across the road from the power lines. Id. at 472. The utility failed to inspect the tree prior to the death, but there was no evidence that an inspection would have revealed the defect that caused the tree failure. Id. at 470. The Rocca Court held:

To hold that [the utility] was relieved from all obligation or duty to the public simply because the tree stood on private property would deprive those lawfully and properly using the highway of the protection they were entitled to . . .

Id. at 472. Likewise in Robben v. Hartford Electric Light Co., 468 A.2d 1266 (Conn. App. 1983) (App. 5). In that case, a power line fell across a driveway and injured a resident. The utility had inspected the power lines in that area one year prior to the injury, but did not notice that the subject tree had cracked. The subject

tree was on private property outside the clearance zone, 51 feet away from the power lines. Id. at 1268. Noting the Connecticut standard requiring the utility to "exercise . . . the highest degree of care and skill which may be reasonably expected of intelligent and prudent persons engaged in [the electric utility] business, in view of the instrumentalities provided and the dangers reasonably to be anticipated ," the court affirmed the verdict against the utility. Id. at 1269-70.

Properly applying Washington's highest prudence standard of care to this high voltage electrocution case, the trial court really only needed to answer two questions: using the highest degree of care human prudence is equal to, (1) could the PUD have anticipated the danger that befell Mr. Connelly? and (2) could the PUD have prevented the harm that befell Mr. Connelly?

The only reasonable conclusion from the record evidence is that the answer to both questions is "yes." The trial court committed reversible error in ruling otherwise.

C. In Addition to Applying the Wrong Duty of Care, the Trial Court Also Misunderstood the Evidence, and as a Result There is Not Substantial Evidence Supporting its Key Findings of Fact

The standard of review for challenges to factual findings is

whether there is "evidence of a character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." Brashear, 100 Wn.2d at 209.

The trial court failed to find that the PUD did not do its vegetation management inspection of the trees on East Sunnyside School Road when it inspected the rest of the circuit in 1999-2000. CP 81 (FOF 81). A cursory glance from 600 feet away is simply not an arborist inspection of the trees on East Sunnyside School Road. The trial court should have found that the PUD did not perform vegetation management on East Sunnyside School Road before the electrocution, because the evidence conclusively demonstrated that the PUD ***simply left out the portion of the circuit where Mr. Connelly was electrocuted***—the area west of SR 9 between poles CGC-24 to CGC-21 on East Sunnyside School Road (the rest of the circuit is east of SR-9 (see Ex 102)). This is a very important issue. Because the PUD simply did not perform vegetation management in the immediate area of Pat's electrocution, it never inspected the subject tree, never determined whether it was a danger tree, never instructed its contractor to trim or remove it, and then never audited its vegetation management cycle performance to ensure that no part of the circuit was missed. Court clearly erred

when it found otherwise.

The trial court found that the Estate's arborist only viewed nighttime photos of the subject tree. CP 81:23 (FOF 12). This is simply wrong—the arborist clearly testified that he looked at photos taken that night, along with daytime photos taken shortly after that night, and inspected the trees in person twice. See, e.g., RP 27-34 (Baker). There was no contradictory evidence.

The trial court found that the subject tree did not have external indicators that it was unhealthy before the electrocution. CP 82:4-5 (FOF 13). This was contrary to the evidence. See generally supra, § III. E (especially the cited testimony of Scott Baker and PUD arborist R. Packebush). While it is true that the PUD arborist testified on direct that there were no external signs of rot on the subject tree, on cross-examination he agreed that the photos did show visible signs of disease and decay. Id.

The trial court found that the subject tree was not a danger tree. CP 83 (FOF 18). This too was contrary to the evidence, both in terms of what constitutes a danger tree (Ex 27 at 1) and whether the subject tree fit that definition. See generally supra, § III. E.

The trial court found that the only way to determine that the subject tree was a danger tree was to inspect the backside of the

tree or insert sophisticated diagnostic instruments, citing the testimony of the Estate's arborist. CP 85 (COL A-B). This is plainly contrary to Scott Baker's testimony. He testified that the subject tree was visibly decayed and unhealthy. RP 15 (Baker); RP 18. And that those signs were visible from the road. RP 15 (Baker). No further examination was required. RP 18 (Baker).

It is true that Mr. Baker also went on to testify that, given resistance, there were ways to absolutely, convincingly demonstrate that the subject tree was "certainly" rotted out, including the diagnostic tools referenced by the trial court in its findings. RP 35:20-36:25. But Mr. Baker never testified those tests were necessary to make a solid determination that the subject tree was a danger tree. Rather, he was explaining how things would play out *if* the property owner contested the conclusion that the tree needed to be removed. Recall his many experiences with utility vegetation management, where he is called in by property owners to verify the utility's determination. RP 17:23-19:1 (Baker 11/3). Here, the property owner would not have contested or resisted removal. NRP2 at 7:24-9:23 (Ghaffari).

The trial court clearly misunderstood this critical evidence. The PUD's attorney did not misunderstand the Estate's evidence on

this point:

Now, you weren't here for his testimony but I'll represent to you that Mr. Baker has said as a non-utility arborist that the tree that fell was in a line of trees that had some wounds or scarring on their trunks, and that the tree that fell had significant internal rot and that he thinks that an arborist would have identified that as a tree that required further investigation.

RP 116:6-12, Cieslewicz. Also note that in Mr. Baker's testimony, the further investigation was a closer look from the road after the initial look from a distance. Supra, § III. E.

Finally, in COL C (CP 85), the trial court found that requiring the PUD to meet its own vegetation management standards to include danger trees outside the clearance zone would require the removal of all tall trees in proximity to power lines:

The implication of imposing such a duty on a power company in the Northwest is to require that a utility company ensure that no tree, whether healthy or not, may exist in such proximity to its lines because of the possibility of contact in a windstorm.

This is contrary to both the evidence and to Washington's highest prudence standard of care. No one claimed that the PUD was strictly liable. No one argued that the PUD should not allow healthy tall trees near its power lines. What the Estate maintained was simply that, pursuant to the PUD's own standards, trees tall enough

to impact high voltage power lines if they failed should be inspected, and if they showed signs of disease, decay, and rot, an arborist should determine whether the tree was a danger tree that needed to be removed. It is incomprehensible that the trial court equated this standard—the PUD's own standard—with cutting down all tall trees near power lines. The court erred doing so.

D. The Trial Court Erred When It Imposed a 12% Postjudgment Interest Rate

The trial court entered judgment with a postjudgment interest rate of 12%. CP 76. The estate objected. CP 73. This was error. Since this is a tort case, the postjudgment interest rate is prescribed in RCW 4.56.110(3)(a). Section 4 of the statute, providing for a 12% interest rate, only applies when no other section applies. It is a well-settled rule of statutory construction that the specific prevails over the general. S. Martinelli & Co., v. Washington State Dep't of Revenue, 80 Wn. App. 930, 940, 912 P.2d 521, review denied, 130 Wn.2d 1004, 925 P.2d 989 (1996). Since § (3)(a) applies, the trial court erred in providing an interest rate of 12%. Given the timing of judgment entry, the correct postjudgment interest rate under § (3)(a) is 2.157%. CP 73.

In sum, RCW 4.56.110(3)(a) prescribes the interest rate

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In sum, RCW 4.56.110(3)(a) prescribes the interest rate

Appendix

1. Findings of Fact and Conclusions of Law, and Judgment. CP 76-87.
2. House Bill Report, SSB 5154 (RCW 64.12.035)
3. RCW 64.12.035
4. Rocca v. Tuolumne County Electric Power and Light Company, 245 P. 468 (Cal. App. 1926)
5. Robben v. Hartford Electric Light Co., 468 A.2d 1266 (Conn. App. 1983)

EXHIBIT 1

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2011 JAN 21 AM 9:40

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

HONORABLE MARY I. YU
Trial Date: November 1, 2010

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ESTATE OF PATRICK NELSON)
CONNELLY, by its Personal Representative)
Richard G. Connelly, Jr., on behalf of the)
Estate's beneficiaries,)

Plaintiff,)

No. 06-2-37337-5 SEA

JUDGMENT

vs.

SNOHOMISH COUNTY PUBLIC UTILITY)
DISTRICT #1, a Washington municipal)
corporation, and LAKE STEVENS SCHOOL)
DISTRICT #4, a Washington municipal)
corporation,)

Defendants.)

*Clerks Action
Required*

JUDGMENT SUMMARY

Judgment Creditor: SNOHOMISH COUNTY PUBLIC
UTILITY DISTRICT #1

Judgment Debtor: ESTATE OF PATRICK NELSON
CONNELLY, by its Personal Representative
Richard G. Connelly, Jr., on behalf of the
Estate's beneficiaries

Principal Judgment: ~~\$956.53~~ ^{\$}117.28

Statutory Attorneys Fees: \$200.00

Judgment amount shall bear interest at 12% per annum from
1/21/11, 2010.

Attorney for Judgment Creditor: Christopher J. Knapp
Anderson Hunter Law Firm
P.O. Box 5397, Everett, WA 98206

CKM
RMW
[Signature]

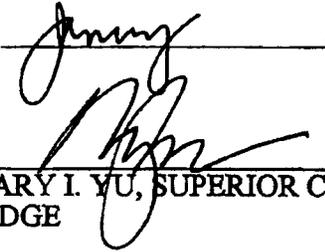
ORIGINAL

JUDGMENT

THIS MATTER came on regularly for hearing before the undersigned Judge of the above-entitled Court on the below date; the Court having considered the records and files herein; and the Court being otherwise fully advised in the premises; NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Snohomish County Public Utility District #1 is hereby awarded net Judgment against plaintiff Estate of Patrick Nelson Connelly as set forth in the summary, above.

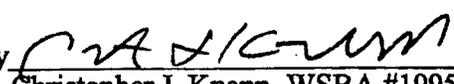
DONE IN OPEN COURT this 21 day of January, 2011.



MARY I. YU, SUPERIOR COURT
JUDGE

Presented By:

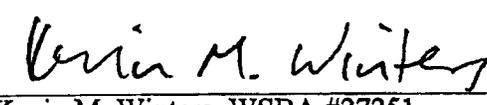
ANDERSON HUNTER LAW FIRM, P.S.

By 

Christopher J. Knapp, WSBA #19954
Attorneys for Defendant PUD

Copy Received; Approved as to Form; *only*
~~Notice of Presentation Waived:~~

HAWKES LAW FIRM, P.S.

By 

Kevin M. Winters, WSBA #27251
Attorney for Plaintiff

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HONORABLE MARY YU

2011 JAN 21 AM 9:40

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ESTATE OF PATRICK NELSON
CONNELLY, by its Personal Representative
Richard G. Connelly, Jr., on behalf of the
Estate's beneficiaries,

Plaintiff,

vs.

SNOHOMISH COUNTY PUBLIC UTILITY
DISTRICT #1, a Washington municipal
corporation, and LAKE STEVENS SCHOOL
DISTRICT #4, a Washington municipal
corporation,

Defendants.

No. 06-2-37337-5 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER came on regularly for a trial before the undersigned judicial officer of the above-entitled court commencing on November 1, 2010 and concluding on November 15, 2010. The Court admitted and considered the exhibits identified on attached Exhibit A and heard testimony from the following witnesses: Barbara Athanas, George Athanas, Scott Baker, Tim Baker, Roger Bauer, Austin Bollen, Helmut Brosz, Steve Cieslewicz, Joe Clark, Richard Connelly, Mark Felling, John Finch, David Fish, Sara Gahan, Joe Ghaffari, Lucinda Jennings, Yvette Kloiber, Kevin Knowles, Mike Mansur, Clifford Mass, Jessica Mogle, Don Mulder, Mike Munsterman, Randy Packebush, Scott Packebush, William Partin, John Petty, Suzi Shayne, Tad Smith, Libbie Soden, Paige Tangney, Michael Varnell, Duane Wiseman and Donald Wright. The principle question for

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

ORIGINAL

1 the Court was whether Defendant Snohomish County PUD was negligent in the design,
2 maintenance and operation of its electrical distribution system. The specific areas of
3 contention involved system protection engineering and vegetation management. Having
4 considered the evidence submitted at trial, argument of counsel, and being otherwise fully
5 advised in the premises, based upon a preponderance of the evidence the Court now makes
6 the following Findings of Fact and Conclusions of Law.

7 **I. FINDINGS OF FACT**

8 **A. The Incident**

9 1. Patrick N Connelly was electrocuted on October 16, 2003, near the
10 intersection of State Route 9 and East Sunnyside School Road, Snohomish County,
11 Washington.

12 2. During a storm a large poplar tree that was located on real property owned
13 by the Lake Stevens School District blew over and fell across East Sunnyside School Road
14 onto three-phase ^{high voltage} electrical distribution power lines owned and operated by Snohomish
15 County Public Utility District No. 1 ("PUD").

16 3. The real property where the tree subject tree was planted was used by the
17 Lake Stevens School District as the site of its bus barn. The subject tree was approximately
18 40' away from the PUD power lines, on the opposite side of Sunnyside School Road.

19 4. The distribution lines contacted by the subject tree were identified as a
20 portion of Circuit EMA-037. The tree fell between PUD Poles CGC-22 and CGC-023.

21 5. When the subject tree fell across the road, the road phase and the center
22 phase of the three-phase distribution system contacted each other, causing a "fault" to occur
23 and this fault was detected by station breakers in the East Marysville substation at 19:01:39
24 (7:01 PM). After the station breakers re-opened the road phase and the center phase de-
25 energized when the 100-amp fuses for the road and center phases (located at pole CGC-35)
26 operated and instantaneously opened the circuit for those two conductors.

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1 6. The field phase conductor was broken by the tension from the tree falling.
2 That conductor landed in the ditch on the north side of East Sunnyside School Road.
3 Because the field phase did not develop enough fault current to ground to blow the 100 amp
4 fuse, it remained energized, starting a small brushfire in the ditch.

5 7. Within minutes of the tree falling Michael Varnell and Patrick Connelly
6 were driving westbound on 42nd Street NE and stopped on the east side of Highway 9. Mr.
7 Connelly and Mr. Varnell saw the small brush fire in the ditch and decided to investigate.

8 8. Mr. Varnell drove his van across Highway 9 and encountered the tree that
9 had fallen across East Sunnyside School Road (the westbound continuation of 42nd Street
10 NE), so he turned the van around and drove back to the fire in the ditch on the north side of
11 East Sunnyside School Road. Mr. Connelly suggested that they stop and attempt to "stomp
12 out" the fire. Both Mr. Connelly and Mr. Varnell exited the vehicle, and while Mr. Varnell
13 was getting a fire extinguisher out of his truck Mr. Connelly attempted to stomp out the fire.
14 While attempting to do so Mr. Connelly contacted the energized field phase and was
15 electrocuted, *at a location approximately 50 feet west of C&C-14.*

16 C. Vegetation Management One liability issue in contention in this case is whether
17 the PUD negligently performed its vegetation management program as outlined in its
18 Transmission & Distribution (T&D) Guidelines (exhibit 27). The Court heard expert
19 testimony from both parties. Although there was no dispute of what actually constitutes a
20 danger tree, there were conflicting interpretations regarding the implication of the policy
21 and whether any tree that might fit the description of a danger tree is subject to the
22 PUD's inspection.

23 9. Circuit 12-37 East Marysville, the circuit in question, was "notified" for
24 vegetation management in 1999 and 2000. Line clearance notifying is the process by which
25 the PUD informs property owners that it intends to remove certain vegetation that has the
26 potential to come into conflict with the PUD's power lines. Once this is done, a contractor

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1 is hired by the PUD to do the work and supervised for quality control by the PUD line
2 clearance coordinator. PUD employees who had served as Line Clearance Notifiers
3 testified that they are primarily looking for trees and limbs that are within the 10'-12'
4 "clearance zone" on either side of the power lines, as defined by the T&D Guidelines, or for
5 trees that clearly endanger the lines such as leaning trees which can be seen. When the Line
6 Clearance Notifiers observe an unhealthy tree that poses a threat to the power lines, they
7 pursue removal even if it were outside the clearance zone and not in the right of way.
8 However, the PUD does not require the inspection of all trees along the road right of way or
9 on private property simply because they might fall on a line absent some obvious evidence
10 of decay or rotting or threat to the power line.

11 10. If vegetation needs to be removed because it does not meet the clearance
12 standards as outlined in the T&D Guidelines, the Line Clearance Notifier identifies and
13 contacts property owners and obtains permission for needed line clearance work.

14 11. The question regarding vegetation management by the PUD in the area of
15 the incident was complicated by the fact that there were no records of whether anyone
16 actually walked or drove up Sunnyside School Road. Mr. Munsterman, a Line Clearance
17 Coordinator involved with the 1999-2000 work, testified that he visually looked down the
18 line segment (from the vantage point of CGC 25)^{from CGC-24 to CGC-21} and saw that the line was clear; that no
19 tree was in the line. Beyond the visual inspection of Mr. Munsterman that occurred in
20 1999-2000, there was no other evidence of tree notification for this particular area prior to
21 the 2003 incident.

22 12. The Estate's arborist testified that after reviewing photos of the subject tree
23 taken on the night of the incident and upon visual inspection of the stumps and site in 2007
24 and 2009, he believes there would have been some indication of damage to the tree that
25 would have warranted further investigation. There was no evidence that the tree was
26 leaning towards the line or that any limb was within the clearance zone.

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[Signature]

1 13. The PUD's arborist, a PUD employee, inspected the tree within a week of
2 the incident and opined that it would not have been a tree that he would have notified. He
3 observed the open cavity of the tree because it was split open after the fall and noted that
4 there was some rot in the interior of the tree but that there were no external indicators that it
5 was unhealthy. His inspection of the actual tree so near in time to the time it came down is
6 persuasive and credible to the Court.

7 14. The Estate's expert, Mr. Bollen, testified on both vegetation management
8 and the electrical distribution system. Mr. Bollen oversaw a vegetation management
9 program for an Arkansas power company from 1951-56 and aside from working on cases
10 for the last ten years, has not applied vegetation management standards since working for
11 the Arkansas power company. He opined that the PUD's implementation of its Guidelines
12 did not meet the standard of care because no one specifically notified the trees between
13 CGC 21-24 and that looking down the line would not have allowed the notifier to see the
14 specific tree and determine if it was a problem. He believed that, based on the testimony of
15 estate arborist Scott Baker on the condition of the trees on School District property ^{at} ~~and~~ ^{the} ~~and~~
16 time the PUD performed line notification on Circuit EMS 12-37, that upon such review the
17 PUD would have observed signs of decay and disease on the subject tree and on adjacent
18 trees, and would therefore have had an obligation to remove the subject tree.

19 15. The PUD's expert, Mr. Stephen Cieslewicz, was a certified arborist and a
20 national consultant on vegetation management practices for utility companies.
21 Knowledgeable and current regarding the practices of utility companies around the country,
22 he stated that the vast majority of utility companies, with the exception of some in
23 California near fire areas, do not routinely inspect trees outside the clearance zone simply
24 because the tree is tall enough to fall on the line. He opined that the PUD's practices were
25 consistent with industry standards and met the standard of care relative to its
26 implementation of the vegetation management program during 1999-2003 and that the PUD

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1 did not have a duty to inspect the subject tree. He noted that the objective of line clearance
2 inspections is to review the air space between the lines and along the lines for trees or
3 limbs, and that unless the company knew of a problem tree, by direct observation or by
4 notice from a property owner, it would have no duty to undertake tree inspection.

5 16. There was no evidence that the School District advised the PUD of a danger
6 tree on its property. Testimony from Kevin Knowles (by deposition) indicates that the
7 School District believed the poplar trees were healthy standing trees between 1987 and
8 October 2003.

9 17. The Estate's arborist clearly stated that decay may have been discovered only
10 upon further investigation around the backside of the tree.

11 18. The evidence does not support finding that the tree was an imminent threat
12 to the power line.

13 **B. Electrical Engineering, Design, and Maintenance** A secondary issue advanced
14 by the Estate is whether the PUD was negligent in its design, construction, and operation of
15 its high voltage distribution power line system. The essential question is whether the fault
16 protection devices installed in the particular location of the incident were adequate to
17 prevent exposure to high voltage electricity; or in other words should the downed line that
18 Mr. Connelly stepped on have been de-energized once the tree fell on the wires and the
19 field phase line was broken?

20 19. The mechanical construction of the subject three-phase distribution line was
21 in conformance with the generally accepted national code standards and practices within the
22 electric utility industry for this type of line.

23 20. The PUD properly maintained the power line and system the maintenance
24 performed was in keeping with the generally accepted practices, standards and codes within
25 the utility industry, and PUD personnel responded appropriately to the incident.

1 146 (1983). The Court concludes that Defendant Snohomish County Public Utility District
2 No. 1 is not liable for the death of Mr. Patrick Connelly, as follows:

3 A. Even if the Court were to find that the PUD had a duty to walk or drive up
4 Sunnyside School Road and to find that visual inspection of the line across some 600 feet
5 was inadequate, it does not follow that the PUD had a duty to inspect each tree on that road
6 if such tree was not in the 10'-12' clearance zone on either side of the distribution lines or
7 leaning towards the line. Absent seeing an obvious decaying tree, or having actual notice
8 of a danger tree, the PUD did not have a duty to investigate each and every tree in the row
9 of poplars on the School District property to determine whether each such tree was healthy
10 or posed a threat to the line.

11 B. Considering all of the evidence regarding the condition of the tree and its
12 location, the Court concludes that even if the subject tree was seen in 1999-2000 by a PUD
13 arborist, that individual would not have been able to visually determine whether the tree
14 was rotting or in decay without undertaking further investigation.

15 C. Requiring the PUD to go to the backside of the tree, to hammer the tree or
16 insert diagnostic instruments, based upon the initial impression of this tree far exceeds the
17 duty imposed on a utility company exercising even the highest standard of care. The
18 implication of imposing such a duty on a power company in the Northwest is to require
19 that a utility company ensure that no tree, whether healthy or not, may exist in such
20 proximity to its lines because of the possibility of contact in a windstorm. Thus, the PUD
21 complied with the applicable standard of care with respect to vegetation management.

22 D. Based upon the foregoing Findings and Conclusions, the Court concludes
23 that the PUD did not breach its legal duty and was not negligent with regard to vegetation
24 management.

25 E. With regard to system protection engineering, in hindsight a perfect fault
26 detection and protection device would always de-energize a downed power line so that no

1 member of the public having contact with a downed wire would suffer electrocution.
2 However, given the competing need for service reliability and demand, the PUD's fault
3 protection engineering and device selection, and the operation of the system, was within
4 the applicable engineering standards. Thus, the PUD complied with the applicable
5 standard of care with respect to system protection engineering.

6 F. Balancing the costs of underground placement with an acceptable overhead
7 system, the PUD was within the standard of care in choosing the overhead system.

8 G. Based upon the foregoing Findings and Conclusions, the Court concludes
9 that the PUD did not breach its legal duty and was not negligent with regard to electrical
10 engineering, design and operations.

11 H. The Court concludes that Mr. Connelly was not contributorily negligent.

12 I. Given the Court's Findings and Conclusions and the fact that the Lake
13 Stevens School District is no longer a party, the Court need not reach the question of
14 whether the School District was negligent.

15 NOW, THEREFORE, IT IS HEREBY ORDERED, that based upon the foregoing
16 Findings of Fact and Conclusions of Law, the Court's verdict is that the PUD was not
17 negligent and is not liable for Mr. Connelly's death. Judgment shall enter on behalf of
18 Defendant Snohomish County Public Utility District No. 1.

19 DONE IN OPEN COURT this 21 day of January, ²⁰¹¹~~2010~~

20
21
22 
23 _____
24 HONORABLE MARY I. YU
25
26

1 Presented By:

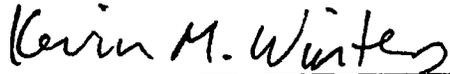
2 ANDERSON HUNTER LAW FIRM, P.S.

3
4 By 

5 Christopher J. Knapp, WSBA #19954
6 Attorneys for Defendant PUD

7 Approved as to Form; *ONLY*

8 HAWKES LAW FIRM, P.S.

9 By 

10 Kevin M. Winters, WSBA #27251
11 Attorneys for Plaintiff

Exhibit A

FILED
KING COUNTY

DEC 02 2010

SUPERIOR COURT CLERK
ANGIE VILLALOVOS
DEPUTY

LIST OF EXHIBITS
(EXLST)

CAUSE NO. 06-2-37337-5 SEA

CAPTION:

Estate of Patrick Nelson Connelly

Plaintiff

v.

Snohomish County Public Utility District #1

Defendant

PAGE 1 of 10

LEGEND:

- Π= Plaintiff/Petitioner
- Δ= Defendant/Respondent
- A = Admitted
- AN = Admitted but not to go to jury
- R = Refused
- Re-O&A = Re-offered and Admitted
- ID = For Identification Only
- Rtn'd = Returned

Caption: Estate of Patrick Nelson Connelly v. Snohomish County Public Utility District #1

No.	II	Δ	Description	A / R	Date	Re-O & A	I D	R t n d	EXHIBIT ROOM USE ONLY
1	X		Certificate of Live Birth for Ashley Marie Kolber	A	11/01/10				
2	X		Certificate of Life Birth for Scott Christian Connelly	A	11/01/10				
3 A-M	X		13 Photos -- 8x10 color copied	A	11/01/10				
4	X		Photo -- 8x10 color copied - "Redmans"	A	11/01/10				
5	X		8/27/03 Uniform Residential Loan Application, including letters	A	11/01/10				
6	X		Snohomish County Online Government Information & Services REAL Property Information	A	11/01/10				
7	X		10/17/03 HeraldNet Local News Article	A	11/01/10				
8	X		Newspaper Obituary/Funeral Announcement	A	11/01/10				
9	X		10/23/03 - 11/16/03 Floral Hills Cemetery Invoices	A	11/01/10				
10	X		Photo -- color copied - Aerial View	A	11/01/10				
11	X		Photo -- 8x10 color copied - Tree	A	11/01/10				
12	X		Photo -- 8x10 color copied	A	11/01/10				
13	X		Medical Examiner Photo of Electrocution Scene -- 8x10 color copied	A	11/01/10				

Caption: Estate of Patrick Nelson Connelly v. Snohomish County Public Utility District #1

No.	II	Δ	Description	A / R	Date	Re-O & A	I D	R t n d	EXHIBIT ROOM USE ONLY
14	X		Certificate of Death	A	11/01/10				
15	X		12/16/03 Snohomish County Medical Examiner Autopsy Report	A	11/01/10				
16	X		Autopsy Photo - 8x10 color copied	A	11/01/10				
17	X		Autopsy Photo - 8x10 color copied	A	11/01/10				
18	X		Medical Examiner Photo of Electrocution Scene - 8x10 color copied	A	11/01/10				
19	X		Medical Examiner Photo of Electrocution Scene - 8x10 color copied	A	11/01/10				
20	X		Medical Examiner Photo of Electrocution Scene - 8x10 color copied	A	11/01/10				
21	X		Photo - 8x10 color copied	A	11/01/10				
22	X		Photo - 8x10 color copied	A	11/01/10				
23	X		Photo - 8x10 color copied	A	11/01/10				
24	X		Photo - 4x6 color copied	A	11/01/10				
25	X		Excerpt of the National Electrical Safety Code	A	11/01/10				
26	X		Westlaw RCW 64.12.035 print out	R	11/01/10				
27	X		Public Utility District Guidelines - Tree Trimming Overhead Distribution & Transmission Lines	A	11/01/10				
28	X		WITHDRAWN Snohomish County Public Utility District Vegetation Management Project Notification Procedures dated 2/11/94	A	11/01/10			X	

Caption: Estate of Patrick Nelson Connelly v. Snohomish County Public Utility District #1

No.	II	Δ	Description	A / R	Date	Re-O & A	I D	R i n d	EXHIBIT ROOM USE ONLY
29	X		Tacoma Public Utilities, Tacoma Power T&D Line Clearance Vegetation Management of Overhead Lines dated 11/2/98	A	11/01/10				
30	X		Excerpts of Snohomish County Public Utility District No.1, Standard Specification For Transmission and Distribution Line Clearance	A	11/01/10				
31	X		10/29/99 letter from Snohomish County Public Utility District No. 1 to Kempt West, Inc.	A	11/01/10				
32	X		Amendment No. 1 to Contract No. 11938 for Circuit 12-37 East Marysville Transmission and Distribution Line Clearance "Danger Trees"	A	11/01/10				
33	X		Excerpts of Snohomish County Public Utility District FWR - Circuit 12-37 Low Volume Basal Bark Treatment	A	11/01/10				
34	X		Contract Master Record 11/13/00 – 11/17/10, including PUD Contact Logs for Circuit 12-37	A	11/01/10				
35	X		11/12/09 Plaintiff's First Set of Discovery Requests to Defendant Snohomish County PUD #1 and Answers and Responses Thereto	A	11/01/10				
36	X		Plaintiff's First Set of Discoveries Requests to Defendant Snohomish County PUD #1 and amended answers thereto	A	11/01/10				
37	X		Photo – 8x10 color copied - Tree	A	11/01/10				
38	X		Photo – 8x10 color copied - Road	A	11/01/10				

Caption: Estate of Patrick Nelson Connelly v. Snohomish County Public Utility District #1

No.	II	Δ	Description	A / R	Date	Re-O & A	I D	R t n d	EXHIBIT ROOM USE ONLY
39 A-I	X		Photos – 8x10 color copied - Tree	A	11/01/10				
40 A-F	X		Photos – 8x10 color copied - Tree	A	11/01/10				
41 A-G.	X		Photos – 8x10 color copied - Tree	A	11/01/10				
42 A-BB	X		28 Photos – 8x10 color copied	A	11/01/10				
43 A-F	X		Photos – 8x10 color copied - Tree	A	11/01/10				
44	X		Article - Seattle Times Snohomish County bureau	A	11/01/10				
45	X		Transcript – 3/18/03 Summary Judgment Hearing	A	11/01/10				
46	X		11/23/98 Snohomish County Sheriff's Office Uniform Incident Report	A	11/01/10				
47	X		Photo of hand drawn diagram	A	11/01/10				
48	X		Photo of hand drawn diagram	A	11/01/10				
49	X		WITHDRAWN Photo – 8x10 color copied - Scene	A	11/01/10			X	
50	X		WITHDRAWN Photo – 8x10 color copied - Pole	A	11/01/10			X	
51	X		WITHDRAWN Photo – 8x10 color copied – Pole/Power Lines	A	11/01/10			X	
52	X		WITHDRAWN Photo – 5x7 color copied - Fuses	A	11/01/10			X	
53	X		WITHDRAWN 6/7/10 Letter from counsel Mr. Knapp to counsel Mr. Winters	A	11/01/10			X	

Caption: Estate of Patrick Nelson Connelly v. Snohomish County Public Utility District #1

No.	II	Δ	Description	A / R	Date	Re-O & A	I D	R t n d	EXHIBIT ROOM USE ONLY
54	X		10/16/03 System Alarms and Events Search Report	A	11/01/10				
55	X		10/17/03 e-mail from Steven Larson Snohomish Construction & Maintenance to Derek Backholm and Paul Vawter, Subject: East Marysville 12-37 Relay Targets	A	11/01/10				
56	X		Public Utility District No.1 of Snohomish County Phase & Ground Overcurrent Relay Settings Basler BE 1-51, East Marysville, 12-37	A	11/01/10				
57	X		Graph - Time-Current Curves	A	11/01/10				
58	X		Graph - Time-Current Curves	A	11/01/10				
59	X		WITHDRAWN 11/12/09 Plaintiff's Second Set of Discovery Requests to Defendant Snohomish County PUD #1 and Answers and Responses Thereo	A	11/01/10			X	
60	X		Table - Synergie Electric Analysis Report	A	11/01/10				
61	X		WITHDRAWN 7/31/01 Snohomish County PUD No.1 Electric Distribution System Protection Engineering Guidelines System Planning & Protection Group	A	11/01/10			X	
62	X		Sketch - Circuit Map East Marysville CIR 12-37 (Phasing) Public Utility District No. 1 Snohomish County—Everett, WA	A	11/01/10				
63	X		Sketch - Circuit Map dated 12/12/84 Public Utility District No.1 of Snohomish County	A	11/01/10				
64	X		WITHDRAWN Sketch - Circuit Map Public Utility District No.1 of Snohomish County	A	11/01/10			X	

Caption: Estate of Patrick Nelson Connelly v. Snohomish County Public Utility District #1

No.	Π	Δ	Description	A / R	Date	Re-O & A	I D	R t n d	EXHIBIT ROOM USE ONLY
65	X		WITHDRAWN Sketch – Circuit Map Public Utility District No.1 of Snohomish County	A	11/01/10			X	
66	X		WITHDRAWN Sketch – Circuit Map Public Utility District No.1 of Snohomish County	A	11/01/10			X	
67	X		Sketch – Circuit Map Public Utility District No.1 of Snohomish County	A	11/01/10				
68	X		Sketch – Circuit Map Public Utility District No.1 of Snohomish County	A	11/01/10				
69	X		WITHDRAWN Sketch – Circuit Map Public Utility District No.1 of Snohomish County	A	11/01/10			X	
70	X		WITHDRAWN Sketch – Circuit Map Public Utility District No.1 of Snohomish County	A	11/01/10			X	
71	X		Sketch – Circuit Map Public Utility District No.1 of Snohomish County	A	11/01/10				
72	X		WITHDRAWN Sketch – Circuit Map Public Utility District No.1 of Snohomish County	A	11/01/10			X	
73	X		WITHDRAWN Excerpts of Construction Standards Snohomish County Public Utility District No. 1	A	11/01/10			X	
74	X		WITHDRAWN 12/12/84 Public Utility District No.1 of Snohomish County Work Order and 10/12/83 Public Utility District No.1 of Snohomish County Work Order	A	11/01/10			X	
75	X		WITHDRAWN 3/7/01 Tacoma Power, Tacoma Public Utilities, Transmission & Distribution Staff Procedure T&D-19	A	11/01/10			X	

Caption: Estate of Patrick Nelson Connelly v. Snohomish County Public Utility District #1

No.	II	Δ	Description	A I R	Date	Re-O & A	I D	R t n d	EXHIBIT ROOM USE ONLY
76	X		6/1/02 Tacoma Power, Tacoma Public Utilities Fusing Type T, 15kV	A	11/01/10				
77	X		WITHDRAWN 6/1/02 Tacoma Power, Tacoma Public Fuse Coordination Guidelines	A	11/01/10			X	
78	X		WITHDRAWN Snohomish County PUD Five-Year Comparative Revenue Data Electric System	A	11/01/10			X	
79	X		WITHDRAWN Plaintiff's Third Set of Discovery Requests to Defendant Snohomish County PUD #1 and Responses Thereto	A	11/01/10			X	
80	X		2003 Electric System Reliability Performance Report dated 1/9/04	A	11/01/10				
81 1-298		X	WITHDRAWN 298 Photos - 4x6 color copied				x	X	
82		X	WITHDRAWN 7-2-77 Sketch "East Marysville Cir 12 -37 (Phasing)"	A	11/01/10			X	
83 A-W		X	WITHDRAWN 48 Photos - 8x10 color copied				x	X	
84		X	Summary of Economic Losses				x		
85		X	WITHDRAWN Diagram - 12-37 PUD RPP 56 000002	A	11/01/10			X	
86		X	10/16/03 Snohomish County Sheriff's Office Incident Report	R	11/01/10				
87		X	Withdrawn 11/7/03 Washington State Toxicology Laboratory				x	X	

Caption: Estate of Patrick Nelson Connelly v. Snohomish County Public Utility District #1

No.	II	Δ	Description	A / R	Date	Re-O & A	I D	R t n d	EXHIBIT ROOM USE ONLY
88		X	10/16/03 CAD Report	A	11/01/10				
89		X	Withdrawn - CD					X	
90		X	ECC System Dispatch	A	11/01/10				
91		X	(pages 3 and 4 are withdrawn) Computer Screen Shot - OMS II - Call Detail Computer Screen Shot - Crew Log	A	11/01/10				
92		X	Request for Proposal No. 178 PWC - Circuit 12-37 East Marysville Transmission and Distribution Line Clearance	A	11/01/10				
93		X	WITHDRAWN Request for Proposal No. 306 FWR - Circuit 12-37 Low Volume Basal Bark Treatment	A	11/01/10			X	
94 A-D		X	Photos - 5x8 color copied - Road/Tree	A	11/01/10				
95		X	WITHDRAWN three Graph Charts - Coordination Analysis				X	X	
96		X	Vegetation Management Notification Procedures	A	11/01/10				
97		X	WITHDRAWN PUD Trouble Ticket Customer Records				X	X	
98 A-V		X	WITHDRAWN Photos - Google Ariel View/Street/Poles/Power Lines				X	X	
99		X	Blank					X	
100		X	Blank					X	
101	X		WITHDRAWN The Economic Loss Sustained by Scotty Connelly, Ashley Kloiber and the Estate of Patrick N. Connelly	A	11/02/10			X	

EXHIBIT 2

HOUSE BILL REPORT

SSB 5154

As Passed House - Amended:
April 14, 1999

Title: An act relating to limiting the liability of electric utilities for efforts undertaken to protect their facilities from damage that might be caused by vegetation.

Brief Description: Limiting the liability of electric utilities.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Hargrove, McCaslin, Goings and Heavey).

Brief History:

Committee Activity:

Judiciary: 4/1/99 [DPA].

Floor Activity:

Passed House - Amended: 4/14/99, 94-1.

Brief Summary of Substitute Bill
(As Amended by House Committee)

- Grants electric utility companies immunity from civil actions for treble damages for cutting or removing vegetation on another person's property under certain conditions.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 12 members: Representatives Carrell, Republican Co-Chair; Constantine, Democratic Co-Chair; Hurst, Democratic Vice Chair; Lambert, Republican Vice Chair; Cox; Dickerson; Esser; Kastama; Lantz; Lovick; McDonald and Schindler.

Staff: Trudes Hutcheson (786-7384).

Background:

When a person trespasses on another's land and injures, cuts, or removes trees, timber, or shrubs, the landowner may bring an action for treble damages against the

trespasser. Treble damages will be awarded if the trespass is willful. Treble damages are not available if the trespass was casual or involuntary, if the trespass was based on a mistaken belief of ownership, or when the vegetation is removed from open woodlands in order to repair a public highway or bridge on adjoining land. Damages are measured in various ways depending upon the type of vegetation affected, including stumpage value, production value, lost profits, and replacement value. Damages may also include damages for emotional distress.

A person who wrongfully causes waste or injury to personal property or improvements on another person's land is liable to the injured party for treble damages. The person acts "wrongfully" if the person intentionally and unreasonably commits the act while knowing that he or she lacks authority to act. In addition to treble damages, the person must pay the injured party's reasonable costs and attorney fees.

Summary of Amended Bill:

Electric utilities are immune from liability for cutting or removing vegetation on or originating from another person's land when:

- the vegetation has come in contact with or caused damage to electric facilities;
- the vegetation poses an imminent hazard to the general public, and the electric utility provides notice and makes a reasonable effort to obtain an agreement from the resident or property owner on the property. Notice may be given by posting a flier in a conspicuous location on the property. The notice must contain certain information, and the electric utility may act without agreement if the resident or owner fails to respond. The electric utility may act without any notice and agreement if it is necessary to protect life, property, or restore electric service; or
- the vegetation poses a potential threat to damage electric facilities, and the electric utility attempts to provide written notice by mail indicating the intent to remove vegetation and secures an agreement with the property owner. If the property owner fails to respond within two weeks, the electric utility may secure an agreement with the resident. The notice must contain certain information.

A hazard exists to the general public if the vegetation has encroached upon electric facilities by overhanging or growing in close proximity to overhead electric facilities that it constitutes an electrical hazard under applicable electrical construction codes. A hazard also exists if the vegetation is diseased or dying, and a qualified arborist or expert employed with the electric utility determines that trimming or removal is necessary to avoid contact between the vegetation and electric facility. When

determining the extent of trimming necessary, the electric utility must consider certain factors.

A potential threat to damage electric facilities exists when vegetation is of such size, condition, and proximity to electric facilities that it is reasonably expected to cause damage and a qualified expert employed by the electric utility determines that the vegetation poses a potential threat.

The term "electric facilities" is defined, and includes all devices and apparatus used, operated, owned, or controlled by an electric utility for the purposes of manufacturing, transforming, transmitting, distributing, selling, or furnishing electricity.

Amended Bill Compared to Substitute Bill: The striking amendment made the following changes: (a) requires that the hazard to the general public which the vegetation poses be an "imminent" hazard; (b) requires that the notice sent to the property owner include a brief statement of the need and nature of the work to be done, a good faith estimate of the time frame in which the work will occur, and how the property owner can contact the utility company regarding the removal of vegetation; (c) narrows the definition of electric facilities by removing references to easements, real estate, and other property; and (d) clarifies that electric utilities are immune from liability for cutting and removing trees and not immune from wrongfully injuring personal property on the land or causing waste.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: This is a reasonable bill. It is difficult for electric utilities to perform maintenance duties because of fear of liability for cutting and trimming vegetation. This will help with worker and property owner safety by letting maintenance crews do effective trimming. Currently, there are a maze of different types of damages the electric utility could be liable for. This bill is a good effort to balance the interests of the property owner and the interests of the utility companies.

Testimony Against: None.

Testified: Collins Sprague and Don Stone, Avista Corporation; Jean Leonard, in behalf of Mike Tracy (Puget Sound Energy); and Donna Roberson, Chelan County Public Utility District.

EXHIBIT 3

RCW 64.12.035

Cutting or removing vegetation — Electric utility — Liability — Definitions.

(1) An electric utility is immune from liability under RCW 64.12.030, 64.12.040, and 4.24.630 and any claims for general or special damages, including claims of emotional distress, for cutting or removing vegetation located on or originating from land or property adjacent to electric facilities that:

(a) Has come in contact with or caused damage to electric facilities;

(b) Poses an imminent hazard to the general public health, safety, or welfare and the electric utility provides notice and makes a reasonable effort to obtain an agreement from the resident or property owner present on the property to trim or remove such hazard. For purposes of this subsection (1)(b), notice may be provided by posting a notice or flier in a conspicuous location on the affected property that gives a good faith estimate of the time frame in which the electric utility's trimming or removal work must occur, specifies how the electric utility may be contacted, and explains the responsibility of the resident or property owner to respond pursuant to the requirements of the notice. An electric utility may act without agreement if the resident or property owner fails to respond pursuant to the requirements of the notice. No notice or agreement is necessary if the electric utility's action is necessary to protect life, property, or restore electric service; or

(c) Poses a potential threat to damage electric facilities and the electric utility attempts written notice by mail to the last known address of record indicating the intent to act or remove vegetation and secures agreement from the affected property owner of record for the cutting, removing, and disposition of the vegetation. Such notice shall include a brief statement of the need and nature of the work intended that will impact the owner's property or vegetation, a good faith estimate of the time frame in which such work will occur, and how the utility can be contacted regarding the cutting or removal of vegetation. If the affected property owner fails to respond to a notice from the electric utility within two weeks of the date the electric utility provided notice, the electric utility may secure agreement from a resident of the affected property for the cutting, removing, and disposition of vegetation.

(2)(a) A hazard to the general public health, safety, or welfare is deemed to exist when:

(i) Vegetation has encroached upon electric facilities by overhanging or growing in such close proximity to overhead electric facilities that it constitutes an electrical hazard under applicable electrical construction codes or state and federal health and safety regulations governing persons who are employed or retained by, or on behalf of, an electric utility to construct, maintain, inspect, and repair electric facilities or to trim or remove vegetation; or

(ii) Vegetation is visibly diseased, dead, or dying and has been determined by a qualified forester or certified arborist employed or retained by, or on behalf of, an electric utility to be of such proximity to electric facilities that trimming or removal of the vegetation is necessary to avoid contact between the vegetation and electric facilities.

(b) The factors to be considered in determining the extent of trimming required to remove a hazard to the general public health, safety, or welfare may include normal tree growth, the combined movement of trees and conductors under adverse weather conditions, voltage, and sagging of conductors at elevated temperatures.

(3) A potential threat to damage electric facilities exists when vegetation is of such size, condition, and proximity to electric facilities that it can be reasonably expected to cause damage to electric facilities and, based upon this standard, the vegetation has been determined to pose a potential threat by a qualified forester or certified arborist employed or retained by or on behalf of an electric utility.

(4) For the purposes of this section:

(a) "Electric facilities" means lines, conduits, ducts, poles, wires, pipes, conductors, cables, cross-arms, receivers, transmitters, transformers, instruments, machines, appliances, instrumentalities, and all devices and apparatus used, operated, owned, or controlled by an electric utility, for the purposes of manufacturing, transforming, transmitting, distributing, selling, or furnishing electricity.

(b) "Electric utility" means an electrical company, as defined under RCW 80.04.010, a municipal electric utility formed under Title 35 RCW, a public utility district formed under Title 54 RCW, an irrigation district formed under chapter 87.03 RCW, a cooperative formed under chapter 23.86 RCW, and a mutual corporation or association formed under chapter 24.06 RCW, that is engaged in the business of distributing electricity in the state.

(c) "Vegetation" means trees, timber, or shrubs.

[1999 c 248 § 1.]

Notes:

Severability – 1999 c 248: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected."
[1999 c 248 § 3.]

EXHIBIT 4

1 of 1 DOCUMENT

**JAY L. ROCCA, Administrator, etc., Respondent, v. TUOLUMNE COUNTY
ELECTRIC POWER AND LIGHT COMPANY (a Corporation), Appellant**

Civ. No. 3052

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

76 Cal. App. 569; 245 P. 468; 1926 Cal. App. LEXIS 501

February 19, 1926, Decided

SUBSEQUENT HISTORY: [***1] A Petition by Appellant to have the Cause Heard in the Supreme Court, after Judgment in the District Court of Appeal, was Denied by the Supreme Court on April 19, 1926.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Tuolumne County. J. A. Smith, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant electric company (company) challenged the decision of the Superior Court of Tuolumne County (California), which denied the company's motion for new trial and entered judgment on a jury verdict in favor of respondent administrator in the administrator's action for wrongful death arising out of electrocution of the decedent by a downed power line owned and maintained by the electric company.

OVERVIEW: A storm caused a broken limb to fall on a power line owned and maintained by the electric company (company). The decedent came into contact with the power line and was electrocuted. A jury found in favor of the decedent's mother, his closest surviving relative. The court affirmed. The court held that the doctrine of res ipsa loquitur applied. The fact that the decedent was injured by coming in contact with an electric wire belonging to the company raised a presumption of negligence. By the exercise of proper care, the company could have known that the tree was decayed and that the limb that gave way would break its wire. The company did nothing either to protect its wires or to protect the public from injury that might be caused by a fallen wire. The failure to take any such precautions in the light of the circumstances were matters of fact going to the question of negligence proper for the jury to consider. The danger could have been reasonably apprehended or safeguarded against. The jury properly considered the pecuniary loss of the comfort, society, and protection afforded the mother by the decedent because he lived with his mother and helped her run her ranch.

OUTCOME: The court affirmed denial of the electric company's motion for new trial on the administrator's action for wrongful death arising out of electrocution of the decedent by a downed power line owned and maintained by the electric company.

CORE TERMS: wire, limb, pole, deceased, feet, power line, electric, storm, ranch, broken, public highway, pine tree, highway, anticipated, excessive, telephone, apprehended, belonging, span, precaution, pecuniary, distance, locality, sagging, comfort, question of negligence, expectancy, falling, coming, distant

LexisNexis(R) Headnotes

Energy & Utilities Law > Electric Power Industry > General Overview
Torts > Negligence > General Overview

[HN1] Electric companies, not being insurers against accidents from their appliances, are not liable for injuries resulting from

an act of God or inevitable accident. The basis of the company's liability is its negligence; but the sagging of wire, under the doctrine of *res ipsa loquitur*, is generally held to make a *prima facie* case of negligence which requires the company to give evidence that the sagging was not the result of its negligence. If the sagging of its wire is occasioned by a cause for which it is not responsible, and it detects the trouble with promptness, and immediately pursues the proper steps to remedy the situation, it is not chargeable for an injury to another by reason of the sagging of the wire. Whenever electric or other wires are maintained in such a location that it may be reasonably anticipated that the sagging thereof will cause injury, the one maintaining the wire must use due care to prevent the sagging thereof. Due or commensurate care in the case of high-tension electric currents means a very high degree of diligence. If a wire strung along or across a highway is negligently permitted to sag so that a traveler is injured thereby as a general proposition, the company maintaining the wire is liable for the resultant damages.

***Energy & Utilities Law > Electric Power Industry > General Overview
Torts > Negligence > General Overview***

[HN2] An electric company maintaining high-tension wires beside a highway is not relieved from the duty of protecting the wires against the decayed limb of a tree which overhangs them, by the fact that they are on its own property, and the tree is on private property of another, if the fall of the limb is likely to break the wires and endanger persons passing along the highway.

***Energy & Utilities Law > Electric Power Industry > General Overview
Torts > Negligence > Duty > General Overview***

[HN3] The obligation of electric companies to exercise proper care is not determined by their right to construct and maintain their lines but rests upon their duty to protect others while in the lawful exercise of their rights.

***Energy & Utilities Law > Electric Power Industry > General Overview
Torts > Negligence > Duty > General Overview***

[HN4] An electric-light company is not relieved from liability for injuries by wires broken by a storm, unless it was one which could not reasonably have been anticipated.

***Energy & Utilities Law > Electric Power Industry > General Overview
Torts > Negligence > Duty > General Overview
Torts > Negligence > Proof > Custom > General Overview***

[HN5] The electric light company, in the construction of its line, is bound to adopt all reasonable precautions for the protection of the public, to prevent casualties which might be reasonably anticipated. This obligation would require it to anticipate the influence of the ordinary storms customary to the locality. But if the falling of the electrically charged wire was caused by a storm of unusual severity, which could not have been reasonably foreseen and its consequences guarded against, the company would not be liable, if it was not otherwise negligent.

***Energy & Utilities Law > Electric Power Industry > General Overview
Governments > Public Improvements > Bridges & Roads
Torts > Negligence > Proof > Res Ipsa Loquitur > General Overview***

[HN6] The fact that a person, while traveling along a public highway, was injured by coming in contact with a highly charged electric wire belonging to an electric light and power company, which was down across the public highway at the point where the accident occurred, raises a presumption of negligence on the part of the company maintaining the wire.

Torts > Negligence > Duty > General Overview

[HN7] Where injury could reasonably have been anticipated it is not a prerequisite to liability that the wrongdoer should be able to anticipate the precise form of the consequential injury. Whether an injury should have been anticipated by defendant as the result of his negligent act depends upon the facts and circumstances of each particular case, and is ordinarily for the jury to determine.

***Civil Procedure > Appeals > Standards of Review > General Overview
Torts > Damages > General Overview***

[HN8] An appellate court is entitled to interfere and set aside a verdict of a jury on the grounds of the damages allowed being excessive, only when it appears that improper causes have led to the verdict.

HEADNOTES CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) **Negligence -- Electric Power Lines -- Danger from Falling Limbs--Protection of Public.** --An electric power company maintaining high-tension wires along a public highway is not relieved from the duty of protecting said wires from a limb from a pine tree standing on private property, if the fall of such limb is likely to endanger persons passing along said highway, but said company must protect its wires and take the ordinary precautions which the circumstances demand.

(2) Id.--Injuries Caused by Storm--Duty to Anticipate. --An electric power company maintaining high-tension wires along a public highway is not relieved from liability for injuries to a person coming in contact with wires caused to sag during a storm, unless it is one which could not reasonably have been anticipated.

(3) Id.--Insufficient Poles--Loosely Hung Wires--Danger to Public. --In this action for damages for the death of plaintiff's intestate through coming in contact with a high-tension wire of defendant power company which had been caused to sag to within three feet of the ground by a limb from a near-by tree which was broken during a storm, the failure of the defendant electric power company to erect an additional pole to the south of the intersecting road along which the decedent was traveling, which would have protected the public in the use of said road from an accident such as happened to the decedent, and the fact that the spans between the poles were of such great distance and the wire so loosely hung that it could be pressed to the ground within about twenty feet of one of the supporting poles without breaking, were matters of fact going to the question of defendant's negligence proper for the jury to consider.

(4) Id.--Injury to User of Highway--Presumption of Negligence. The fact that a person, while traveling along a public highway, was injured by coming in contact with a highly charged electric wire belonging to an electric light and power company, which was sagging down across the public highway where the accident occurred, raises a presumption of negligence on the part of the company maintaining the wire.

(5) Id.--Duty to Anticipate Accident--Absence of Previous Breaking. --The accident having been such as defendant light and power company should reasonably have anticipated and guarded against, the fact that no previous breaking of a limb from the tree in question was shown was wholly immaterial.

(6) Id.--Res Ipsa Loquitor--Nonsuit--Evidence. --In this action for damages for the death of plaintiff's intestate through coming in contact with a high-tension wire of defendant power company which had been caused to sag to within three feet of the ground by a limb from a near-by tree which was broken during a storm, the doctrine of *res ipsa loquitor* was applicable, the denial of defendant's motion for a nonsuit was proper, and the question of negligence on the part of defendant in not properly maintaining its wires and guarding the same against dangers reasonably to be apprehended was one properly to be submitted to the jury.

(7) Id.--Liability of Defendant--Surrounding Conditions--Instructions. --In such action, any error or ambiguity in the instruction that the defendant would be liable in damages to the plaintiff if "the defendant so constructed and maintained its electric pole lines and power wires that a pine tree was permitted to be and remain sufficiently near said power line that a limb from said tree extended over and above said power wires of said defendant, and that said limb under weather conditions that were not unusual for said season of the year in that locality, fell upon the electric power line of said defendant and placed said line sufficiently near the ground as to cause said power line at the point where the same crossed the . . . road to reach a point sufficiently near the ground that the deceased . . . in walking along said road without negligence or fault upon his part, walked against or came in contact with said wire, and as a result thereof was killed, and that the killing of said deceased was due to the negligence of said defendant in the manner and place of the construction and maintenance of its electric power lines, when considered with reference to said tree and overhanging limb," did not constitute reversible error, in view of the succeeding instructions which fully presented to the jury all questions of negligence on the part of the defendant, the dangers to be apprehended and the conditions surrounding the maintenance of the wire and whether the storm was a usual one occurring in that locality, or was of unprecedented violence and of a degree and force not to be reasonably apprehended.

(8) Id.--Excessive Verdict--Evidence. --In this action for damages prosecuted under the provisions of section 377 of the Code of Civil Procedure, in the interest of the mother of plaintiff's intestate, in view of the evidence showing that the mother and the deceased were living together upon the mother's ranch, that the mother was dependent upon the deceased for his management, control, and operation of her ranch properties, as well as enjoying his society, comfort, and protection, that the pecuniary value of the deceased to his mother in the management of her properties was the sum of twelve hundred dollars per year and that her life expectancy was ten years, it could not be said that the jury's verdict of twelve thousand dollars was excessive.

(9) Id.--Excessive Damages--Appeal. --An appellate court is entitled to interfere and set aside a verdict of a jury, on the ground of the damages allowed being excessive, only when it appears that improper causes have led to the verdict.

SYLLABUS

The facts are stated in the opinion of the court.

COUNSEL: J. B. Curtin for Appellant.

Jacobs & Jacobs for Respondent.

JUDGES: PLUMMER, J. Pullen, J., pro tem., and Finch, P. J., concurred. Lennon, J., dissented.

OPINION BY: PLUMMER

OPINION

[*572] [**469] PLUMMER, J. The plaintiff, as the administrator of Lige William Rocca, deceased, prosecutes this action under the provisions of section 377 of the Code of Civil Procedure, in the interest of Marguerite Rocca, mother of the deceased. Plaintiff had judgment in the sum of \$ 12,000. A motion for a new trial being denied, defendant appeals to this court from said judgment.

After setting forth some preliminary matters, the complaint alleges that the defendant is a corporation organized for furnishing electricity for lighting and power purposes and was maintaining a line of wires, poles, etc., for carrying and conveying electricity from Jamestown to Quartz Mountain and thence to Stent, [***2] in the county of Tuolumne, and was so doing on the thirtieth day of January, 1922. It is further alleged that said company maintained an electric power line along a public highway at a point where a certain other road used by the public intersected or connected with said public highway; that said road so intersecting said public highway is known as and called the App Mine road; that said App Mine road was at the time in question and for many years prior thereto had been generally used and traveled by the public. The complaint then sets forth that on or about the thirtieth day of January, 1922, and while the defendant was in the possession and control of said electrical power line, it was so negligent and careless in maintaining and using the same that said wire was allowed to sag to within about three feet of the ground where it passed over the App Mine road; that on the morning of the 30th of January, 1922, the deceased, while walking along said App Mine road, came in contact with said wire without any negligence on his part and was immediately electrocuted. Damages are then alleged in the sum of \$ 15,000.

The answer of the defendant admits the maintenance of the power line, the [***3] death of the deceased as caused by coming in contact therewith, and then alleges that during the night of January 29 and 30, 1922, an unusual storm prevailed over the country where the power line of the defendant was maintained and that, owing to the unusual severity of the [*573] storm, a limb was broken from a tree standing near the said power line; that said limb fell upon one of the wires maintained by the company and thereby caused the same to sag within a few feet of the ground as herein stated. The answer further alleges that the deceased was negligent by passing along said road at an early and unseasonable hour, and further that the defendant did not know, and had no means of knowing, that said limb had by reason of the storm been blown from said trees on to the wires belonging to the defendant.

The testimony set forth in the transcript shows that the deceased and another person had passed along said App Mine road on the evening of January 29, 1922; that at the junction of the App Mine road the deceased and a friend named Hawke had alighted from an automobile in which they were traveling and had gone by way of the App Mine road to visit a family by the name of Stephens; [***4] that said Hawke remained at the Stephens home until about 2 o'clock A. M., when he left and passed down the App Mine road to the public highway with which said road connects; that the deceased remained at the Stephens home until between 4 and 5 o'clock in the morning, when he left said home and started down the App Mine road to meet his brother, at a point where the App Mine road intersects the public highway. It appears that the deceased and a brother of the deceased had made a previous appointment to meet at the point indicated at about the hour of 5 o'clock on the morning of January 30, 1922. When the brother reached the appointed place on the morning of January 30, 1922, he found the deceased lying dead under the power wire herein referred to; that the power wire was about three feet above the body of the deceased, the wire being held down by the limb of the tree hereinbefore referred to, which limb was resting upon the wire near one of the poles on which the wire was strung and at a point where the limb of the tree rested upon the wire, the wire was pressed down to within about six inches of the ground.

The county road to which we have referred runs from Sonora by Jamestown, [***5] thence to the villages of Quartz and Stent. The App Mine road connecting therewith has been traveled by the public for a period of some forty years. The defendant maintained two power wires along the county [*574] road over and above the point where the App Mine road connects therewith. These wires were strung over the App Mine road on poles 245.5 feet apart. These wires ran along the west side of the county road at a distance therefrom where they cross over the App Mine road of about 17 feet. The nearest pole southerly from the App Mine road was distant 94 feet. The nearest pole to the north of the App Mine road was distant about 151 feet. It appears from the testimony also that a telephone company maintained its wires along a line drawn between the power lines maintained by the defendant over the App Mine road and the trees from which the limb was broken, as heretofore stated. The wires of the power line were higher than the telephone wires by some four feet; the power line wires at the pole immediately south of the App Mine road called pole "B" were carried to a height of some 30 feet; at pole "C" to the north the wires were at an elevation of only 22 feet. It also appears [***6] from the testimony that the Pacific Gas and

Electric Company maintained electric power lines over the App Mine road a short distance away and that the poles of the Pacific Gas and Electric Company [**470] where its lines were carried over the App Mine road were 108 feet apart. It also appears that old stumps of poles formerly used by the defendant in maintaining its line indicated that the span over the App Mine road was at one time only 148 feet. It further appears from the testimony that during all of the period of time the defendant has maintained its electric power lines herein referred to, a certain pine tree stood 33 feet distant from the power lines belonging to the defendant and a short distance northerly from the pole "B" carrying the power wires over the App Mine road. In other words, the tree was between the poles carrying the span of wires over the App Mine road. It further appears that this tree which was to the west of the power lines leaned toward the east, so that a line dropped from where the limb was broken from the tree would reach the ground a trifle over eight feet nearer the power line than the base of the tree. At a point from 45 to 48 feet above the ground a limb 10 [***7] or 12 inches in diameter where it joined the tree extended out in an easterly direction, at an angle of about 45 degrees. This limb was from 35 to 40 feet in length and overhung the power lines belonging to the defendant, but was some distance above the power line. The [*575] pole of the power line near the pine tree is called in the testimony "pole B"; the next pole to the south thereof is called "pole A" and was distant from pole B 257 feet; the pole to the north of the App Mine road is called in the testimony "pole C," and, as hereinbefore stated, is distant from pole B 245 1/2 feet; the next pole of the power line north of pole C is called in the testimony "pole D," and is distant from pole C 260 feet; the next pole north of pole D is called "pole E," and is distant from pole D 199 1/2 feet. The power wires of the Pacific Gas and Electric Company over the same corresponding territory, but on the opposite side of the pine tree, have the following spans: 113 feet, 95 1/2 feet, 162 1/2 feet and 98 feet. The two wires maintained by the defendant were strung on crossarms and tied to insulators thereon about four feet apart. The wires of the defendant power company were three or [***8] four feet higher than the highest wire of the telephone company. The branches of the limb of the tree caught the east wire of the defendant company and pressed it to the ground as hereinbefore stated, leaving the butt end of the limb resting upon the west wire maintained by the power company and drawing it down to within some 12 or 14 feet of the ground. (1) The pine tree is 27 inches in diameter and some 83 feet in height. The ground upon which the pine tree stood was elevated a slight distance above the ground where pole B was located. The point where the limb broken from the tree pressed the east wire of the power line to the ground was about 19 1/2 feet north of pole B. All the testimony shows that the night in question was very dark. On the part of the appellant, considerable testimony was introduced to the effect that it was an unprecedentedly stormy and windy night. On the part of the plaintiff, considerable testimony was introduced to the effect that, although it was a stormy night, the storm was not unusual in its violence, and was only such a storm as frequently occurs in the mountainous regions where the power lines were maintained. In this particular, the appellant claims that [***9] the death of the deceased was brought about by inevitable casualty and was the result of causes not to be reasonably apprehended or reasonably guarded against. The testimony shows that the scar on the pine tree where the limb was broken away showed an old break of about one-third of the surface thereof on the upper portion and a clean [*576] fresh break on the remainder. The testimony in the transcript shows that employees of the company knew of the circumstances of the pine tree and limb in question, but there is no evidence in the transcript indicating whether the old crack in the limb where it joined the parent tree was visible from the ground, or could have been discovered by an inspection of the limb, nor is there any evidence in the testimony that any inspection or examination was ever made of the tree prior to the accident in question by anyone connected with the company or otherwise.

The testimony further shows that the deceased was unmarried and about 29 years of age; that the deceased and his mother lived on a ranch near Algerine, in the county of Tuolumne; that this ranch comprised some 600 acres in area; that the deceased had lived upon the ranch with his parents [***10] for a number of years preceding the World War; that during the World War the deceased was in the army and away from home; that upon his return in 1919 he worked for awhile in a bakery near Sonora; that in November, 1920, the deceased returned to the ranch and remained there until the date of his death; that in July, 1921, the father of the deceased died, and after the death of the father of the deceased, the deceased, for about 14 months and up to the date of his death, took charge of the ranch; that the deceased was familiar with farming operations and looked after the ranch in an excellent manner; that during the 14 months the deceased was in charge of the ranch in question the mother of the deceased depended exclusively upon him for the management of her affairs; that during the time the deceased was in charge of the ranch the proceeds thereof were deposited in a bank in Sonora; that the deceased drew from the money deposited in bank and used for his own purposes the sum of about \$ 30 a month; that at the time of the death of the deceased there was in the bank to the credit of the mother, as proceeds of the operation of the ranch, the sum of \$ 1,200, accumulated during [**471] the period [***11] of the deceased's management. There was also testimony introduced to the effect that during the busy season ranch-hands were paid from \$ 4 to \$ 5 per day; that the compensation of the foreman of a ranch was from \$ 100 to \$ 130 per month. At the time of the trial the mother of the deceased was 67 years of age. The deceased was in good health, able-bodied, industrious, considerate of his mother, [*577] with whom he resided. The mother of the deceased had two sons, the deceased, unmarried, and a married son named John J. Rocca. There were several sisters, all married but one. The testimony does not show that the son ever contributed any actual cash to the support of his mother, nor what the arrangement, if any, existed between the mother and the deceased relative to his management of the ranch. It simply sets forth that he was in charge of the 600-acre ranch, upon which grain and hay, garden products, and fruit were produced, poultry raised, and a limited number of cattle and hogs, and the amount of money usually paid for like services rendered by others. The life tables shows an expectancy on the part of the mother of ten years, dating from the day of the trial.

As grounds for [***12] reversal of the judgment in this case, the appellant urges: 1. That the complaint fails to state a cause of action in that it contains no allegation that the mother was dependent upon her son for support and that there is no allegation as to damages, save and except the general statement that the plaintiff was injured in the sum of \$ 15,000; 2. That the death of Lige William Rocca was the result of inevitable casualty and not of any negligence on the part of the defendant and that the deceased himself was guilty of contributory negligence; 3. Erroneous instructions given to the jury by the court, and, finally, that the judgment is excessive. The appellant also moved for a nonsuit on the ground that the testimony did not show any negligence on its part. We do not find anything of merit in the appellant's contention that the complaint does not state a cause of action. The questions presented by appellant's motion for a nonsuit may be treated generally in considering the question of negligence, if any, shown in this case.

The testimony shows that there is no mechanical appliance that will indicate the mere fact of a sagging wire; that there are mechanical appliances which indicate the [***13] circumstance of a broken wire, or of a wire becoming grounded; that the appliances of this character were used by the defendant company and that had the wire in question broken and reached the ground, the company would have been advised thereof immediately. The testimony further shows that the accident in question occurred some time between 2:30 A. M. and 5 A. M. of January 30, 1922, and at an hour when the App Mine [*578] road is seldom frequented and at a time when it is reasonable to infer that the lines of the company were not usually being inspected. Whether the storm in question was of that severity which would have induced an ordinarily prudent person to inspect the power line carrying a highly dangerous voltage to ascertain if any damages were being done thereto does not appear to have been directly presented one way or the other in the trial of this case. It may be here stated that the power line causing the death of the deceased carried 2,300 volts of electricity.

The question of negligence in this case depends upon a combination of factors: 1. Was the leaning position of the pine tree referred to herein and the overhanging limb which broke away therefrom and fell upon [***14] the power lines maintained by the defendant so near the power lines belonging to the defendant and in such a position as to induce an ordinarily prudent person to take precautions against injury resulting from damage that might be inflicted upon the tree by the usual winter storms, reasonably to be anticipated in the mountainous country where the lines were maintained? 2. Also, could the cracked condition of the limb, as shown by the scar after the limb had been wrenched away from the parent tree, have been discovered had any reasonable effort been made to ascertain the condition thereof? 3. Also, whether the distance between the poles on which the wires were strung was so excessive as to permit the bringing down to the earth of a line swung on a crossarm about 30 feet in height to within six inches of the ground at a point only 19 feet from the base of the pole? 4. Also, considering the leaning position of the trees and the overhanging limb, would or would not ordinary care and precaution have suggested to the defendant the advisability and reasonable necessity of erecting a pole between pole B and the App Mine road, so that if the tree or a limb thereof did fall upon the power lines, [***15] it would fall upon a span not swung across the App Mine road? The testimony shows that the spans in the line maintained by the Pacific Gas and Electric Company in the same neighborhood were very much shorter in length. The voltage carried by the Pacific Gas and Electric Company does not appear in the transcript. Much stress is laid upon the fact by the appellant that the broken limb was carried over the telephone wires which were between [*579] the tree and the power lines belonging to the defendant. The telephone lines, however, were much lower and owing to the leaning position of the tree would tend to carry the limb over the telephone wires, even though the storm was not of unusual severity.

In the argument of this case our attention has been called to a number of cases. We will review the same, so far as pertinent, and also some cases not cited in the brief. In Curtis on the Law of Electricity, section 497, it is said generally: [**472] [HN1] "Electric companies, not being insurers against accidents from their appliances, are not liable for injuries resulting from an act of God or inevitable accident. The basis of the company's liability is its negligence; but the sagging of wire, under [***16] the doctrine of *res ipsa loquitur*, is generally held to make a *prima facie* case of negligence which requires the company to give evidence that the sagging was not the result of its negligence If the sagging of its wire is occasioned by a cause for which it is not responsible, and it detects the trouble with promptness, and immediately pursues the proper steps to remedy the situation, it is not chargeable for an injury to another by reason of the sagging of the wire Whenever electric or other wires are maintained in such a location that it may be reasonably anticipated that the sagging thereof will cause injury, the one maintaining the wire must use due care to prevent the sagging thereof. Due or commensurate care in the case of high-tension electric currents means a very high degree of diligence. If a wire strung along or across a highway is negligently permitted to sag so that a traveler is injured thereby as a general proposition, the company maintaining the wire is liable for the resultant damages."

The pine tree referred to herein stands upon private property, but the argument based upon that fact by appellant is untenable and does not relieve the company [***17] from liability for failure to protect its wires or take the ordinary precautions which the circumstances demanded. In *Hagerstown & Frederick Ry. Co. v. State of Maryland, for Use of Bruce A. Weaver*, 139 Md. 507 [19 A. L. R. 797, 115 A. 783], the law on this question is thus stated: [HN2] "An electric company maintaining high-tension wires beside a highway is not relieved from the duty of protecting the wires against the decayed limb of a tree which overhangs them, by the fact [*580] that they are on its own property, and the tree is on private property of another, if the fall

of the limb is likely to break the wires and endanger persons passing along the highway." In this case the poles belonging to the company were just inside and adjacent to a wire fence on the west side of the highway. The road or highway was about 30 feet wide, and standing just inside the fence on the opposite side of the road was a weeping willow tree from five to six feet in diameter; a larger limb of this tree extended out over the highway. This limb broke away and fell one evening, and in its fall struck and broke one of the transmission wires belonging to the company. This wire came in contact [***18] with the wire fence just referred to, and a minor child of the respondent touched this wire fence and was killed. The court, in considering the facts thus presented, declared the law as we have stated and said further: [HN3] "The obligation of such companies to exercise proper care is not determined by their right to construct and maintain their lines, but rests upon their duty to protect others while in the lawful exercise of their rights. As we have said, there was evidence tending to show that the appellant, by the exercise of proper care, could have known that the tree was decayed, and that the limb that gave way would probably fall and break its wire, and that it did nothing either to protect its wires or to protect the public from injury that might be caused by a fallen wire. To hold that the appellant was relieved from all obligation or duty to the public simply because the tree stood on private property would deprive those lawfully and properly using the highway of the protection they were entitled to The appellant's line was on its private right of way where the appellant had a right to construct and maintain it. But it was also along a public highway, where the public and [***19] the little child that was killed had a right to be, and the company was therefore required, in maintaining its line, to exercise that high degree of care commensurate with the danger to which it exposed those using the highway. If the proximity of its line to the decayed tree rendered the highway unsafe for the use of the public, it was the duty of the appellant either to have the limb removed, or to exercise proper care to protect its wires, and, if the injury complained of was the result of its failure to discharge that duty, it should be held liable." (2) In *Boyd v. Portland Gen. Elec. Co.*, 40 Ore. 126 [57 L. R. A. 619, 66 P. 576], a case having to do with a wire broken by storm, the court said: [HN4] "An electric-light company is not relieved from liability for injuries by wires broken by a storm, unless it was one which could not reasonably have been anticipated." In *Warren v. City Electric Ry. Co.*, 141 Mich. 298 [104 N.W. 613], where a telephone wire received a dangerous current from a trolley wire by being pressed down on to a trolley wire by a limb of a tree which was broken down by a severe storm, the court, in considering the subject of inevitable [***20] accident and the claim that the wire was not properly constructed, used this language: "In this connection it is urged that the proximate cause of the injury was not the want of insulation, nor the failure to guard the span wire, but it was the breaking of the tree. It is generally the case that an accident is the result of concurring causes. If the rain and snow never fell and the wind never blew, wires would be less likely to fall and break All of these were things to be anticipated and guarded against. If this was not done to the extent that a prudent man would do it, there was a failure of duty, which might be a concurring cause of the accident, making defendant liable." In *Spires v. Middlesex & Monmouth Electric Light etc. Co.*, 70 N.J.L. 355 [57 A. 424], where a wire was broken by a falling limb from a tree, the court considered the question of the duty of the company to guard against such occurrences and to protect its wires from such possibilities and discussed the question in this manner: "We think the finding of the jury that the company was negligent was justified by the facts shown. The wire which was broken crossed the [***473] highway diagonally at the place [***21] where the accident happened. The parting of the wire was caused by the falling upon it of a heavy limb which had broken from a tree which stood some feet away. In view of the dangerous nature of a wire charged with a powerful electric current, corporations using public highways for wires that are so charged should exercise a high degree of care to keep the wires where travelers will not be likely to come in contact with them. The likelihood of such a wire being broken by the falling of the limb of a tree upon it is much lessened by a guard wire stretched over it and running parallel with it, and juries are justified, in proper cases, in holding that such a safeguard is due to the public, [***582] and that its absence speaks negligence." (3) In the case at bar the erection of another pole on the south line of the App Mine road would have given a span of wire adjacent to the leaning tree and underneath the overhanging bough, which would have absolutely protected the public in the use of the App Mine road. The failure to take any such precautions in the light of the circumstances presented by the tree and overhanging limb are matters of fact going to the question of negligence proper for [***22] the jury to consider; also the fact that the spans between the poles were of such great distance and the wire so loosely hung that it could be pressed to the ground so near to a supporting pole. In *Heidt v. Southern Tel. & Tel. Co.*, 122 Ga. 474 [50 S.E. 361], a case having to do with the falling of a tree by a violent storm, the facts showing that it was one which could not have been reasonably guarded against, the court stated the law applicable, following the rule hereinbefore laid down, to wit: [HN5] "The electric light company, in the construction of its line, was bound to adopt all reasonable precautions for the protection of the public, to prevent casualties which might be reasonably anticipated. This obligation would require it to anticipate the influence of the ordinary storms customary to the locality. But if the falling of the electrically charged wire was caused by a storm of unusual severity, which could not have been reasonably foreseen and its consequences guarded against, the company would not be liable, if it was not otherwise negligent." The telephone company and the power company were made defendants in that action. The telephone company was held liable for not [***23] having properly guarded its wires and the power company held not liable on the theory that defendant (power company) had taken all reasonable precautions and the storm was not one common to the locality where the wires were erected. In *Rowe v. New York & N. J. Tel. Co.*, 66 N.J.L. 19 [48 A. 523], a telephone wire swung above a power wire was blown down during a violent squall and injury occasioned to a boy walking along the sidewalk where said wire reached the ground. Both companies were held liable notwithstanding the storm, by the reason of the fact that neither company had taken precautions to guard the wires from coming in contact. In the case of *Smith v. San Joaquin etc. Power Corp.*, 59 Cal. App. 647 [211 P. 843], the recital of facts [***583] shows that an electric power line strung along the side of a public highway was broken by the leaves of a large palm tree blown against the wire during the storm and the court said:

"The defendant pleaded in its answer, and thereafter offered to prove, facts showing or tending to show that the wire which the plaintiff touched was properly in place the night before, that a wind arose, and the leaves of a large [***24] palm were blown over against the wire and broke it, and that such facts constituted an act of God. If the facts stated constituted an act of God the defendant should have been permitted to show the same as a defense. However, the respondent contends that the alleged facts do not show an act of God within the proper meaning of that rule. (*Fay v. Pacific Improvement Co.*, 93 Cal. 253 [27 Am. St. Rep. 198, 16 L. R. A. 188, 28 P. 943].) In this behalf he contends that if the palm tree stood in such a position as to endanger the defendant's wire that the defendant should have properly protected its wire therefrom and, in failing to do so, the omission was an act of neglect on the part of the defendant, and not an act of God. This contention is supported by the authorities. (*Chidester v. Consolidated Ditch Co.*, 59 Cal. 197.)" This case applies the rule of *res ipsa loquitur*. (4) In *Diller v. Northern Cal. Power Co.*, 162 Cal. 531 [Ann. Cas. 1913D, 908, 123 P. 359], the rule of *res ipsa loquitur* is applied and it is there said: [HN6] "The fact that a person, while traveling along a public highway, was injured by coming in contact with a highly charged [***25] electric wire belonging to an electric light and power company, which was down across the public highway at the point where the accident occurred, raises a presumption of negligence on the part of the company maintaining the wire." Numerous cases are cited in that case and we think definitely establish the rule as applicable to the case at bar. (5) That the evidence does not show any previous breaking of a limb from the pine tree in question is wholly immaterial. The question is, could it have been reasonably anticipated, or, as said in 19 Cal. Jur. 563, "but merely because a particular accident has not happened before does not render it of that class which may not 'reasonably be anticipated,' for if, in the conduct of a certain business, it should be known that unusual or uncommon danger must necessarily coexist with certain conditions, responsibility attaches [*584] for a failure to control such conditions. And [HN7] where injury could reasonably have been anticipated it is not a prerequisite to liability that the wrongdoer should be able to anticipate the precise form of the consequential injury. Whether an injury should have been anticipated by defendant as the result of his negligent [***26] act depends upon the facts and circumstances of each particular case, and is ordinarily for the jury to determine." [***474] See, also, *Teale v. Southern P. Co.*, 20 Cal. App. 570 [129 P. 949], where this rule is held to apply, even though no previous accident had occurred. The law applicable to cases involving circumstances which we are here considering is clearly set forth in the case of *Fairbairn v. American River Electric Co.*, 170 Cal. 115 [148 P. 788], from which we quote the following: "The companies are not insurers of the safety of the public against all dangers arising from the lawful placing in the street of appliances pertaining to the business carried on by them, but they are bound to know the danger which may naturally be caused by such use of the streets, and to guard against them by the exercise of all the foresight and caution which can be reasonably expected of prudent men under the circumstances." (1 Joyce on Electricity, sec. 438; *Denver v. Sherret*, 88 F. 226 [31 C. C. A. 499].) "The degree of care required of such companies, under the rule that they must exercise reasonable care, varies according to the facts and circumstances of the case, [***27] having in view the serious results which may ensue as a consequence of negligence." (1 Joyce on Electricity, sec. 438a.) The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it." The verdict of the jury necessarily included the finding upon conflicting testimony that the storm was not unusual, and, therefore, one that should have been reasonably apprehended, and that finding is conclusive upon appeal.

(6) We think that the foregoing *resume* of the testimony and law applicable to this case shows that the denial of the [*585] defendant's motion for a nonsuit was proper; that the question of negligence on the part of the defendant in not properly maintaining its wires and guarding the same against dangers reasonably to be apprehended was one properly to be submitted to the jury; [***28] that the rule of *res ipsa loquitur* applies and that the cases of *Kleebauer v. Western Fuse & Explosives Co.*, 138 Cal. 497 [94 Am. St. Rep. 62, 60 L. R. A. 377, 71 P. 617], and *Puckhaber v. Southern P. Co.*, 132 Cal. 363 [64 P. 480], have no application, as they do not involve safeguarding against impending dangers.

(7) At the request of the plaintiff, the court instructed the jury as follows: "If you believe that the defendant so constructed and maintained its electric pole lines and power wires that a pine tree was permitted to be and remain sufficiently near said power line that a limb from said tree extended over and above said power wires of said defendant, and that said limb under weather conditions that were not unusual for said season of the year in said locality, fell upon the electric power line of said defendant and placed said line sufficiently near the ground as to cause said power line at the point where the same crossed the App Mine Road to reach a point sufficiently near the ground that the deceased Lige William Rocca, in walking along said road without negligence or fault upon his part, walked against or came in contact with said wire, and [***29] as a result thereof was killed, and that the killing of said deceased was due to the negligence of said defendant in the manner and place of the construction and maintenance of its electric power lines, when considered with reference to said tree and overhanging limb, then I instruct you that the defendant would be liable in damages to the plaintiff herein." Taken by itself, it may be seriously questioned whether this instruction sets forth the law correctly. It is certain that it does not set it forth in very clear language. There is nothing in the instruction relating to whether the dangers impending could have been reasonably apprehended or safeguarded against, but read in connection with instructions immediately following, the ambiguity and error, if any, involved in said instruction are corrected and cleared up, as the jury is immediately advised in the following language: "The jury is instructed that the defendant is charged with the duty of so placing its wires [*586] and keeping and maintaining

them, with reference to adjacent trees and limbs, as to protect said wires in reasonable safety against the danger of being broken or disturbed by falling limbs under ordinary seasonable [***30] weather conditions in the locality where said wires were maintained; and said defendant is charged with the duty of keeping in mind and protecting its power lines in reasonable safety against, the ordinary consequences that may result to adjacent trees or over-hanging limbs from the ordinary seasonable weather conditions in the locality -- including rain, snow, heat, cold and wind." The jury was also instructed that they were to take into consideration all the circumstances and facts which we have hereinbefore set forth, which gave them a full idea of what they were to pass upon. At the request of the defendant, the court gave a number of instructions, among which we find the following: "If you find from the evidence and believe that said storm and wind was the sole cause of the breaking of said limb off said tree, and said limb was sufficient in weight to cause said wire being sagged to or within about three feet of the ground at the point where the body of Lige Rocca was found and if you should further find from the evidence that defendant was not negligent in the construction or maintenance of its power line then I charge you that your verdict should be in favor of defendant." "I [***31] further charge you, that before a verdict for any sum can be found against defendant you must find from a preponderance of the evidence that the death of Lige Rocca was caused by the negligence of the defendant in not properly having constructed said line of power wire leading from Jamestown to Stent or by the negligence [**475] of defendant in not having on January 30th, 1922, properly maintained said wire at a point where a road leading from the App Mine intersects the highway leading from Jamestown to Stent." In view of these instructions and others which were given at the request of the defendant, which fully presented to the jury all questions of negligence on the part of the defendant, the dangers to be apprehended and the conditions surrounding the maintenance of the wire and whether the storm was a usual one occurring in that locality, or was of unprecedented violence and of a degree and force not to be reasonably apprehended, we cannot conclude any prejudicial error [*587] was committed by the court, and, therefore, section 4 1/2 of article VI of the constitution must be held as applicable.

(8) It is finally insisted that the verdict is excessive. That section 377 of the Code of [***32] Civil Procedure, as applied to this case, does not permit the jury to take into consideration the pecuniary value and, therefore, the pecuniary loss of the comfort, society, and protection afforded the mother by her son. In this contention, however, the appellant is not borne out by the facts. The evidence shows that the mother, a widow, and a son were living together upon the mother's ranch; that the son had taken charge of the ranch and that the mother consulted with the son in the management of her properties and depended upon the son for his management, control, and operation of the ranch properties, and as well was enjoying his society, comfort, and protection at her home. It is not a case where an adult child is living away from home and is not contributing anything in the way of society, comfort, and protection to a parent. The life expectancy of the mother in this case, as shown by the tables, is about ten years, and while there does not appear anything in mere dollars and cents as to the contributions made by the son to the support of his mother, it does appear that he was managing the ranch in question, and apparently showing a profit in the management thereof. Whether the [***33] son was entitled to draw down and expend for his own uses and purposes more than \$ 30 a month is not shown by the testimony. The value of the son's services, however, may be reasonably inferred from the testimony as to the ordinary wages paid for like services. This is not all, however, that the jury was entitled to consider, because in the management of the ranch property, skill, knowledge of conditions and industry are important factors and especially the interest in the property, its care and development are highly important. These were factors entering into the profit reasonably to be expected by the mother in having her properties looked after by one who was capable, industrious and interested. In considering the value of these factors and arriving at a just conclusion thereof, we are of the opinion that the jury would arrive at as nearly an accurate approximation of the damages suffered as could be determined by any court. Of course, it cannot be said that the son would live with the mother and manage the ranch and afford all the [*588] profitable matters, which we have herein set forth, during the entire period of her life expectancy, neither could it be said that he would [***34] not do so. In considering these probabilities, the supreme court, in *Parsons v. Easton*, 184 Cal. 764 [195 P. 419], said: "In the absence of anything to the contrary, the presumption would be that the benefit to the parents from the son, if any, would have continued during her survivorship (referring to the mother) the same as during the lives of both of them. Hence, it is proper to consider the value in money of the benefits which, from all the circumstances of the case, the parents might be reasonably expected to derive from the son during their expectancy of joint life and for the remainder of the mother's life expectancy, assuming that the son's life would have continued for that period." From this it follows that if the pecuniary value of the son to the mother in the management of her property was the sum of \$ 1,200 per year and her life expectancy was ten years, her loss in dollars has been the sum of \$ 12,000. To be sure, this is not considering the present worth of the sum involved paid annually in installments of \$ 1,200. Here, however, another element enters into the case and that is the pecuniary value, and hence the pecuniary loss of the society, comfort, and [***35] protection. Our attention has not been called to any rule by which such damages may be mathematically calculated. Such damages must be determined by the enlightened judgment, either of the jury or the court, and, as we have said, we know of no rule which indicates that the judgment of the court is more likely to be accurate in such matters than the determination of the jury.

(9) Again, [HN8] an appellate court is entitled to interfere and set aside a verdict of a jury on the grounds of the damages allowed being excessive, only when it appears that improper causes have led to the verdict. The language of this court, speaking through Presiding Justice Chipman, in *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318 [147 P. 90], states the rule and refers to the cases considering the same. We quote therefrom the following: "There is no evidence aside from the

amount of the damages, from which it can be inferred that the jury were actuated in the slightest degree by passion, prejudice, or by corrupt motives. The amount in itself is not such as 'to suggest at first blush, [*589] passion, prejudice, or corruption on the part of the jury.' (*Hale v. San Bernardino etc. Co.*, [***36] 156 Cal. 713 [106 P. 83]; *Bond v. United Railroads*, 159 Cal. 270, 286 [Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 P. 366].) This [**476] subject has been so frequently discussed by our appellate courts and under so many different conditions of facts that it would be difficult to throw any additional light upon it. We can discover no rule of law which would warrant our holding the verdict in the present case to be excessive and we content ourselves with referring to some of the cases, in addition to the two above cited, which we think fully justify our conclusion: *Redfield v. Oakland Con. Co.*, 110 Cal. 277 [42 P. 822, 1063]; *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233 [73 P. 163]; *Skelton v. Pacific Lumber etc. Co.*, 140 Cal. 507 [74 P. 13]; *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 312 [84 P. 1010]; *McGrory v. Pacific Elec. Co.*, 22 Cal. App. 671 [136 P. 303]." This question was before this court in the case of *Eldridge v. Clark & Henery Construction Co.*, 75 Cal. App. 516 [243 P. 43]. The opinion in that case quotes from *Graham & Waterman on New Trials*, page 451, the following pertinent language: [***37] "It is clear that the reason for holding the parties so tenaciously to the damages found by the jury in personal torts is, that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury, governed by a sense of justice . . ." This applies to all that part of the judgment in this case which rests upon the rule that damages may be allowed for the pecuniary loss, following the deprivation of society, comfort, and protection. Again, if we were to conclude that the judgment is excessive, we have nothing before us upon which to reasonably predicate such a statement. The figures furnished by the appellant, calculated upon the present worth of the damages allowed, cannot be taken as a guide, because the appellant has proceeded upon the theory that the mother has suffered no pecuniary loss on account of being deprived of the society, comfort, and protection of the son, or his judgment in the management of the property, or of their relationship being such as to induce her to place confidence in his judgment and to look to him for guidance, comfort and protection. These are valuable items to a [***38] woman 67 years of age, who has no other [*590] unmarried son to take charge of her property, and is, perforce, required to look elsewhere and possibly to strangers for a ranch manager possessing the necessary qualifications shown to have been possessed by the son. Every man on the jury, having knowledge of the management of ranch properties, appreciates the difficulty of obtaining a competent manager, and is, perhaps, by training better qualified to estimate this loss than either trial or appellate court. A review of the cases upholding and setting aside verdicts on the grounds of being excessive, would not serve any useful purpose, and we content ourselves with a statement that no sufficient reason has been presented to us for setting aside the verdict on any such grounds.

Other objections urged in appellant's brief in relation to instructions, the admission of testimony, and the sustaining of objections which we have considered and found untenable are not set forth in this opinion, because it would unduly lengthen the same.

The judgment of the trial court is affirmed.

Pullen, J., *pro tem.*, and Finch, P. J., concurred.

A petition by appellant to have the cause heard in [***39] the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 19, 1926.

Lennon, J., dissented.

EXHIBIT

5

1 of 1 DOCUMENT

John Robben et al. v. Hartford Electric Light Co.**No. 2281****Appellate Court of Connecticut****1 Conn. App. 109; 468 A.2d 1266; 1983 Conn. App. LEXIS 71****November 4, 1983, Argued
December 27, 1983, Decided**

PRIOR HISTORY: [***1] Action to recover damages for injuries allegedly sustained as a result of the defendant's negligence, brought to the Superior Court in the judicial district of Fairfield at Stamford and tried to the jury before *Curran, J.*; verdict for the plaintiffs and motions by the defendant to set aside the verdict and for judgment notwithstanding the verdict; the court, *Curran, J.*, denied the defendant's motions, reduced the jury's award and rendered judgment for the plaintiffs, from which the defendant appealed and the plaintiffs cross appealed.

DISPOSITION: *Error in part; judgment directed.*

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant electric company appealed a judgment by the Superior Court in the Judicial District of Fairfield at Stamford (Connecticut), which denied the electric company's motions to set aside the verdict and for judgment notwithstanding the verdict. Plaintiff electrocution victims were awarded damages at trial on their negligence claim against the electric company. One of the victims cross-appealed the reduction of the award to her.

OVERVIEW: The victims were electrocuted when they came into contact with electricity from a fallen electrical wire in their driveway. They brought a claim against the electric company alleging that it failed to exercise the requisite degree of care necessary to safeguard its distribution line and that it should have reasonably known of the danger that a nearby tree posed to its wires. The jury returned a verdict in favor of the victims and the electric company appealed. The court held that the jury could have reasonably found that the electric company did not exercise the highest degree of care and skill which was reasonably expected of it and that it failed to take steps necessary to remove the potential danger. The court further held that the jury could have fairly reached the conclusion that the damages awarded constituted reasonable compensation for the victims' injuries. The court further held, on the victim's cross-appeal, that the trial court erred in reducing the jury verdict based on the amount requested in the ad damnum. The court stated that the amendments to Conn. Gen. Stat. § 52-91, eliminating the requirement that a complaint contain an ad damnum, applied to pending actions.

OUTCOME: The court reversed the judgment of the trial court as to the reduction of one victim's award and the trial court was ordered to reinstate the amount of the damages awarded by the jury in the victims' negligence claim against the electric company. The court affirmed the judgment of the trial court denying the electric company's appeal of its motions to set aside the verdict and for judgment notwithstanding the verdict.

CORE TERMS: electrical, wire, shock, red maple', evidence presented, ad damnum, excessive, driveway, jury's verdict, Public Acts, degree of care, postverdict, electric, connected, energized, conductor, manual, dog, public utility, cause of action, present case, year prior, entitled to great weight, credibility of witnesses, pending actions, inspection, inspected, landowners, subjected, easement

LexisNexis(R) Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

[HN1] In reviewing the denial of a motion to set aside the verdict and for judgment notwithstanding the verdict the court will consider the evidence in the light most favorable to the party obtaining the verdict. If the jury could reasonably have reached its conclusion, the verdict must stand. Each ruling of the trial court on the postverdict motions is entitled to great weight. The trial judge can sense the atmosphere of a trial and has an excellent vantage point for evaluating the factors that may have brought the jury to its verdict.

Energy & Utilities Law > Utility Companies > Liability***Torts > Negligence > Standards of Care > Special Care > General Overview***

[HN2] The Connecticut Department of Public Utility Control (DPUC) mandates that a public utility use every effort to properly warn and protect the public from danger and exercise all possible care to reduce the hazard to which employees, customers and others may be subjected by reason of its equipment and facilities. Conn. Agencies Regs. § 16-11-102(A). This regulation, however, does not require the defendant to take precautions which would be unreasonable under the circumstances or which are impossible as a practical matter for a power company to adopt. It merely commands that a power company exercise in the operation of its electric business the highest degree of care and skill which may be reasonably expected of intelligent and prudent persons engaged in such a business, in view of the instrumentalities provided and the dangers reasonably to be anticipated, as well as the general situation confronting the defendant.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

[HN3] The credibility of witnesses and the weight to be accorded to their testimony lie within the province of the jury which in the present case favored the plaintiffs. A reviewing court will not retry a case. It is the jury which decides what is to be believed when the case involves conflicting evidence depending for its solution upon the credibility of witnesses.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview***Civil Procedure > Appeals > Standards of Review > General Overview***

[HN4] Where there has been the concurrence of judgments by the judge and the jury after having seen the witnesses and heard the testimony, there is a powerful reason for sustaining the action of the trial court in denying the defendant's postverdict motions.

Civil Procedure > Remedies > Damages > General Overview***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***

[HN5] The amount of an award is a matter peculiarly within the province of the trier of facts. The court should not interfere with the jury's determination except when the verdict is plainly excessive or exorbitant. The ultimate test which must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury were influenced by partiality, prejudice, mistake or corruption. The ruling of the trial court on a motion to set aside the verdict as excessive is entitled to great weight and every reasonable presumption should be given in favor of its correctness. Its conclusion will not be disturbed unless there is a clear abuse of discretion.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview***Civil Procedure > Remedies > Damages > Monetary Damages***

[HN6] Public Acts 1977, No. 77-497 amended Conn. Gen. Stat. § 52-91 and reads in part that there shall be but one form of civil action and the pleadings therein shall be as follows: The first pleading on the part of the plaintiff shall be known as the complaint and shall contain a statement of the facts constituting the cause of action and a demand for a relief which shall not allege the amount of money damages sought, if any, but shall be a statement of the remedy sought and an allegation that the matter is within the jurisdiction of the court.

Governments > Legislation > Effect & Operation > Prospective Operation***Governments > Legislation > Effect & Operation > Retrospective Operation***

[HN7] Statutes are presumed to operate prospectively and are not to be construed as having a retrospective effect unless their terms clearly show a legislative intention that they should so operate. The exception to this rule is that statutes which are general in their terms and affect matters of procedure are presumed in their intent to apply in all actions, whether pending or not.

COUNSEL: *Anthony M. Fitzgerald*, with whom, on the brief was *Maureen D. Cox*, for the appellant-cross appellee (defendant).

Lawrence M. Lapine, with whom, on the brief, was *Robert S. Bello*, for the appellees-cross appellants (plaintiffs).

JUDGES: Dannehy, C.P.J., Testo and Borden, Js.

OPINION BY: TESTO

OPINION

[*110] **[**1267]** The plaintiffs brought this action to recover damages for personal injuries alleged to have been caused when they came into contact with electricity from a fallen electrical wire in their driveway. The jury returned a verdict in favor of the plaintiffs **[**1268]** **[***2]** and, from the judgment on the verdict, the defendant has appealed to this court. ¹

¹ This appeal, originally filed in the Supreme Court, was transferred to this court. Public Acts, Spec. Sess., June, 1983, No. 83-29, § 2 (c).

The jury could reasonably have found the following facts: Prior to the incident giving rise to this cause of action, the defendant retained tree contractors and linemen ² to inspect lines for trees that posed a threat of danger to them. The defendant had a manual defining "danger trees" ³ and requiring their removal. The National Electrical Safety Code also required the trimming of trees.

² The defendant maintains that those who trimmed the trees were skilled and educated in the nature of trees, but were not required to be tree surgeons.

³ The defendant, in its manual given to the tree trimming coordinator, required the removal of certain trees: "Trees which should be removed regardless of power line function; (1) Danger trees. (a) Dead trees; (b) Diseased trees (advanced decay and/or insect damage present); (c) Structurally weak trees ('poplar', 'willow', 'silver maple', 'red maple', 'chinese elm', etc.); [and] (d) Trees with poor anchorage of roots" HELCO's Reference Manual For: Tree Work and Brush Control.

[*3]** **[*111]** The defendant claimed to have inspected the power lines running over the plaintiffs' property approximately one year prior to the events at issue. The defendant did not notice that a red maple tree growing on adjacent property had cracked as the result of one of the leaders breaking. This crack, however, may not have been visible from the plaintiffs' property. Although the tree was located neither on the plaintiffs' property nor on the defendant's easement, ⁴ there was testimony that the defendant had, in the past, requested and received permission of adjacent landowners to remove danger trees.

⁴ The tree in question was located on property adjoining the defendant's right of way, but was fifty-one and one-half feet from the portion of the line over which it ultimately fell and which connected to the plaintiffs' house.

On August 28, 1971, the red maple tree fell down, taking the defendant's electrical lines with it. When the lines landed on the ground, they struck an electrical wire connected **[***4]** to the plaintiffs' house creating "an energized ground gradient." ⁵ The plaintiffs were awakened by the noise outside. When the plaintiff John Robben attempted to turn on the lights, he was thrown against the wall by an electrical shock. After this occurrence, the plaintiffs proceeded to leave their house. Each of the plaintiffs experienced electric shocks as a result of the energized field. ⁶

⁵ The defendant's electrical power is generally distributed to its customers by means of overhead conductors or wires. The red maple tree knocked a fifteen thousand volt conductor from its poles. When an electrical conductor falls to the ground, the current that escapes from the wires can flow in any direction following no predictable course. The downed wire fell on top of a neutral wire connected to the plaintiffs' house setting up this ground current, an extremely unusual occurrence.

⁶ Margaret Robben, while holding their dog by the collar, was given a shock as the dog stepped on the grass. She fell onto the grass when the dog ran and a shock of electrical current surged through her body. The two children, Susan and Ellen, were shocked on their way to the neighbor's house. John Robben, while attempting to free his wife from the electrical field, was himself subjected to electrical shocks.

[*5]** **[*112]** The jury returned a verdict for the plaintiffs awarding Susan and Ellen Robben \$ 20,000 each, John Robben \$ 10,000 and Margaret Robben \$ 70,000. The defendant moved for judgment notwithstanding the verdict and also filed a motion to set aside the verdict as against the law and excessive. The court denied both motions. The court, however, went on to reduce Margaret Robben's award to \$ 50,000, the amount requested in the ad damnum of the complaint. From the reduction of this award, the plaintiffs cross appealed.

The defendant claims error in the trial court's denial of its motion to set aside the verdict and for judgment notwithstanding the verdict.

[**1269] The same principles are to be applied in the review of the trial court's action on each motion. *Sauro v. Arena Co.*, 171 Conn. 168, 169, 368 A.2d 58 (1976). [HN1] In reviewing the decision, we consider the evidence in the light most favorable to the party obtaining the verdict. *Kostyal v. Cass*, 163 Conn. 92, 94, 302 A.2d 121 (1972). If the jury could reasonably have reached its conclusion, the verdict must stand. *Sauro v. Arena Co.*, supra. Moreover, each ruling of the trial court on the postverdict [***6] motions is entitled to great weight. *Hearl v. Waterbury YMCA*, 187 Conn. 1, 3, 444 A.2d 211 (1982). The trial judge can sense the atmosphere of a trial and has an excellent vantage point for evaluating the factors that may have brought the jury to its verdict. Id.

I

The arguments underlying the defendant's claim that the trial court erred in failing to grant its postverdict motions are essentially twofold. The defendant posits that there was no evidence presented establishing (1) [*113] that it failed to exercise the requisite degree of care necessary to safeguard its distribution line, or (2) that it could have or reasonably should have known of the danger that the red maple tree posed to its wires, and that, even if it had known of the danger, it was powerless to remove a tree located on property to which it had no right of access. We disagree and hold that the evidence presented was sufficient to sustain the jury's verdict.

The standard of measurement of a power company's duty of care has been established by the department of public utility control (DPUC). [HN2] The DPUC mandates that a public utility "use every effort to properly warn and protect the public from danger [***7] and exercise all possible care to reduce the hazard to which employees, customers and others may be subjected by reason of its equipment and facilities." Regs., Conn. State Agencies § 16-11-102 (A); *LaFleur v. Farmington River Power Co.*, 187 Conn. 339, 341-42 n.3, 445 A.2d 924 (1982); *Citerella v. United Illuminating Co.*, 158 Conn. 600, 606, 266 A.2d 382 (1969). This regulation, however, does not require the defendant to take precautions which would be unreasonable under the circumstances or which are impossible as a practical matter for a power company to adopt. *Citerella v. United Illuminating Co.*, supra, 607. It merely commands that a power company "exercise in the operation of its electric business the highest degree of care and skill which may be reasonably expected of intelligent and prudent persons engaged in such a business, in view of the instrumentalities provided and the dangers reasonably to be anticipated, as well as the general situation confronting the defendant." Id.

The defendant agrees that it has a duty to inspect the trees in proximity to its wires. It further submits that it had inspected the area at issue one year prior to the incident [***8] as a part of its three year inspection [*114] program, but that the crack in the red maple tree could not be seen from the plaintiffs' driveway.⁷ To a nonprofessional tree trimmer, as many of the linemen were, it would look like a "big, beautiful tree." The defendant's superintendent of the distribution system testified that the inspectors used by the defendant may not have recognized "danger trees," and that the parameters of their inspection were limited to a ten to twelve foot radius around the wires. There was contradictory testimony, however, as to whether the tree should have been spotted. The plaintiffs' experts testified that the tree was visible from their driveway and from the defendant's poles, and that the callous flare⁸ on the tree would be apparent, to those familiar with "danger trees," as a structural weakness. Other than this testimony, there [**1270] was no additional evidence that someone standing in the driveway could have discerned from the appearance of the tree that it was in a weakened condition. [HN3] The credibility of witnesses and the weight to be accorded to their testimony lie within the province of the jury which in the present case favored [***9] the plaintiffs. See *Rapuno v. Oder*, 181 Conn. 515, 518, 436 A.2d 21 (1980); *Rood v. Russo*, 161 Conn. 1, 3, 283 A.2d 220 (1971). We cannot retry the case. *State v. Haddad*, 189 Conn. 383, 389, 456 A.2d 316 (1983). It is the jury which decides what is to be believed when the case involves conflicting evidence depending for its solution upon the credibility of witnesses. *Kalleher v. Orr*, 183 Conn. 125, 127-28, 438 A.2d 843 (1981); *DeLahunta v. Waterbury*, 134 Conn. 630, 635, 59 A.2d 800 (1948); *Horvath v. Tontini*, 126 Conn. 462, 465, 11 A.2d 846 (1940).

⁷ See footnote 4, supra.

⁸ A callous flare is a growth that results from a tree's attempt to heal itself after there has been a break in its wood and is a sign of a structural weakness in the tree.

In the defendant's second point relating to the sufficiency of evidence presented, it asserts that since it had [*115] no easement on the property on which the "danger tree" was located or other right to enter [***10] upon that property, its failure to do so could not constitute negligence, and, even if the weakened condition of the tree were known to it, it had no right to remove the tree. Some of the defendant's employees testified that if they knew that a tree on another's property was a hazard

to an electric line, they would ask the owner to remove it or otherwise attempt to remedy the condition. They further testified that landowners were most cooperative when a dead or "danger tree" had to be removed. On the evidence presented, the jury could reasonably and logically have found that the defendant did not exercise the highest degree of care and skill which may reasonably be expected of it and failed to take steps necessary to remove a potential danger from its lines. Additionally, [HN4] where there has been the concurrence of judgments by the judge and the jury after having seen the witnesses and heard the testimony, there is a powerful reason for sustaining the action of the trial court in denying the defendant's postverdict motions. *Kalleher v. Orr*, supra; *Sauro v. Arena Co.*, supra, 169.

II

The second claim pursued by the defendant is that the trial court erred in refusing [***11] to set aside the verdict as excessive. The defendant argues that because none of the plaintiffs sustained serious physical injury, the size of the verdict is indicative of the jury being affected by each plaintiff witnessing each other in a life threatening situation. The trial court considered the defendant's motion in this regard and determined that it was unpersuasive. We agree.

The verdict in this case must be reviewed in the light of certain principles. First, [HN5] the amount of an award is a matter peculiarly within the province of the trier of facts. *Kiniry v. Danbury Hospital*, 183 Conn. 448, 461, [*116] 439 A.2d 408 (1981); *Pisel v. Stamford Hospital*, 180 Conn. 314, 342, 430 A.2d 1 (1980). Second, the court should not interfere with the jury's determination except when the verdict is plainly excessive or exorbitant. *Kiniry v. Danbury Hospital*, supra; *Pisel v. Stamford Hospital*, supra. "The ultimate test which must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the [***12] conclusion that the jury were influenced by partiality, prejudice, mistake or corruption." *Pisel v. Stamford Hospital*, supra, 343, quoting *Birgel v. Heintz*, 163 Conn. 23, 28, 301 A.2d 249 (1972). Third, the ruling of the trial court on the motion to set aside the verdict as excessive is entitled to great weight and every reasonable presumption should be given in favor of its correctness; its conclusion will not be disturbed unless there is a clear abuse of discretion. *Kiniry v. Danbury Hospital*, supra, 462.

The trial court in its memorandum of decision stated that on the merits it did [***1271] not find the awards to each of the plaintiffs "to shock the conscience of the court." The evidence adduced indicated that to some degree, all of the plaintiffs sustained physical injuries. The exposure and contact with the "energized ground gradient," however, varied with each of the plaintiffs.⁹ It appears that the jury considered the degree and length of exposure in making its award since Margaret Robben was awarded the highest damages. Moreover, the court cautioned the jury to disregard testimony relating to emotional distress from witnessing the plight of [***13] other family members. If the jurors had disregarded these cautionary instructions, they would have awarded the greater amount to John Robben who witnessed both his daughters' and his wife's contact with the electricity. [*117] The size of the verdict rendered to each plaintiff in no way indicates that the jury misunderstood the law or was swayed by prejudice, passion, bias or sympathy.

⁹ See footnote 6, supra.

We hold that on the evidence presented, the jury could fairly reach the conclusion that the damages awarded constituted fair, just and reasonable compensation for the injuries it reasonably believed the plaintiffs sustained.

III

In their cross appeal, the plaintiffs challenge the reduction of the jury verdict for the plaintiff Margaret Robben from \$70,000 to \$50,000, the amount requested in the ad damnum.

When this case was brought in 1973, the Superior Court's jurisdiction to award damages was determined by the amount of the ad damnum. See *Bridgeport Hardware Mfg. Corporation v. Bouniol* [***14], 89 Conn. 254, 261, 93 A. 674 (1915). During the trial, the legislature enacted No. 77-497 of the 1977 Public Acts¹⁰ which amended General Statutes § 52-91 to eliminate the requirement that a complaint contain an ad damnum. In addition, Practice Book § 131 was similarly amended.

¹⁰ [HN6] Public Acts 1977, No. 77-497 amended § 52-91 of the General Statutes and read in relevant part: "There shall be but one form of civil action and the pleadings therein shall be as follows: The first pleading on the part of the plaintiff shall be known as the complaint and shall contain a statement of the facts constituting the cause of action and a demand for a relief which shall not allege the amount of money damages sought, if any, but shall be a statement of the remedy sought and an allegation that the matter is within the jurisdiction of the court . . ." (Emphasis added.) The emphasized portion is the amendment to § 52-91.

The plaintiffs claim that since the statute and Practice Book amendments affected matters of [***15] procedure, they applied to all pending actions, and the trial court erred as a matter of law in reducing the jury verdict. We agree.

[*118] It is well settled law that [HN7] statutes are presumed to operate prospectively and are not to be construed as having a retrospective effect unless their terms clearly show a legislative intention that they should so operate. *Waterbury National Bank v. Waterbury National Bank*, 162 Conn. 129, 134, 291 A.2d 737 (1972); *McAdams v. Barbieri*, 143 Conn. 405, 414-15, 123 A.2d 182 (1956); see *Rogers v. County Commissioners*, 141 Conn. 426, 429, 106 A.2d 757 (1954). To this rule there is an exception; statutes which are general in their terms and affect matters of procedure are presumed in their intent to apply in all actions, whether pending or not. *Jones Destruction, Inc. v. Upjohn*, 161 Conn. 191, 196, 286 A.2d 308 (1971). In the present case, the amendments to the statute and the Practice Book being entirely procedural in nature, apply to pending actions. *Enfield Federal Savings & Loan Assn. v. Bissell*, 184 Conn. 569, 575, 440 A.2d 221 (1981); *Computaro v. Stuart Hardwood Corporation*, 180 Conn. 545, [***16] 556-57, 429 A.2d 796 (1980). The trial court therefore erred in reducing the amount of the award.

There is error in part, the judgment is set aside as to the plaintiff Margaret Robben and the case is remanded with direction [**1272] to render judgment for the amount of the jury verdict in her favor.

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

ESTATE OF CONNELLY,
Appellant,

No. 66714-9-1

vs.

SNOHOMISH COUNTY PUD #
1,

DECLARATION OF SERVICE
OF APPELLANT'S OPENING
BRIEF

Respondent.

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 Opening Brief of Appellant Estate of Connelly to:

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

2011 AUG 23 AM 10:54

COURT OF APPEALS, DIV I
STATE OF WASHINGTON

3. On this day I sent by U.S. Mail, postage prepaid, a true and correct copy of the Opening 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 August 22, 2011.


Kevin M. Winters

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it found that the issue to be decided was "whether the PUD negligently performed its vegetation management program as outlined in its Transmission & Distribution (T&D) Guidelines (exhibit 27). CP 80 (FOF C). See App. 1.

2. The trial court erred when it found that tall trees adjacent to high voltage power lines, but not in the clearance zone within 12 feet of those lines, only need to be inspected if there is "obvious evidence of decay or rotting or threat to the power line." CP 81 (FOF 9).

3. The trial court erred when it found that the Estate arborist only reviewed photos taken on the night of the incident. CP 81 (FOF 12).

4. The trial court erred when it found that the Estate arborist testified merely that "there would have been *some indication* of damage to the tree that would have warranted further investigation." CP 81 (FOF 12).

5. The trial court erred when it found that the subject downed tree had an "open cavity" only "because it was split open after [it fell]" and that "there were no external indicators that it was unhealthy." CP 82 (FOF 13).