NO. 32094-4-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

RICARDO CASTILLO, APPELLANT

v.

GRANT COUNTY PUBLIC UTILITY DISTRICT, RESPONDENT

Discretionary Review of the Superior Court of Grant County
The Honorable John Knodell
No. 11-2-00388-1

BRIEF OF APPELLANT

LAW OFFICES OF RICHARD McKINNEY

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STATEMENT OF THE CASE

Ricardo Castillo has worked for the Skone & Connor Ranch in Warden, WA for decades. Castillo has managed the ranch's irrigation system. CP 1004-1005, 1012, 1014. An authorized ranch employee phoned Grant County P.U.D. to request disengagement of the power at a specific location at the Skone & Conner Ranch. CP 1089. Castillo had previously called P.U.D. when the power was always disengaged by just one effort by the utility lineman. CP 1090. On the day of the accident John Johnston, the P.U.D. lineman arrived at the requested location on June 5, 2009, prior to Castillo's arrival that day. CP 19, Castillo deposition p. 32 ll. 22-24. Before Castillo arrived and met Johnston at the power panel, Johnston had already disengaged the power running to the panel which was the subject of the original call to P.U.D. CP 19, Johnston deposition, p. 30. Castillo asserts and Johnston does not refute that together they tested the power at the power panel. CP 29 for Castillo testimony, deposition p. 110 ll. 10-14 and Johnston deposition *semble*. They both confirmed that the power was deenergized at the time of their initial meeting on the day of Castillo's injuries. CP 29, Castillo deposition p. 109 line 15 – p. 110 line 1for his testimony and CP 396, 398 for Johnston's testimony to the same effect. There is a dispute as to what conversation the two men had at that point. *Compare* CP 27, 724, which

is Castillo deposition, pp. 48, 50 *with* CP 17, 18 which is Johnston deposition, p. 24 ll. 9-25, p. 26, ll. 15-16. *See also* CP 63-64 which is Castillo declaration summarizing differences in the two men's account of events.

Johnston left the panel, walked across the street to the meter base and re-engaged the power. Johnston intended that the power be re-engaged briefly so that he could affix an apparatus (pie plate) to the meter base. CP 16 which is Johnston deposition, p. 19, ll. 12-13. Both Johnston and Castillo agree that Castillo intended to cause more work to be performed at the electrical panel, thus necessitating continued power interruption. CP 27 which is p. 48 of Castillo deposition and CP 18 which is p. 26, ll. 15-16 of Johnston deposition. The difference in their testimony is that Johnston said that Castillo was going to call an electrician to do further work at a later time. Castillo testified that he intended to perform immediate work at the panel and would only call in an electrician if Castillo's own efforts failed.

Castillo would not have met Johnston at the site if he had merely intended to call in an electrician at some future time after the power was disengaged. After Castillo and Johnston parted company at the panel, Castillo went directly to his nearby truck to get some lubricant then

returned immediately to the panel to start working. CP 724 which is Castillo deposition, p. 52.

When Johnston re-engaged the power, Castillo received a severe 480 volt electrical charge which pushed Castillo backward causing him injuries. CP 66 which is emergency room record. There was evidence that, when Johnston left the power panel to reenergize the power, there was a loose phase (also called a loose conductor) which was within 12 inches of a grounded object (the panel itself). CP 353-56 which is Voss deposition pp.113-17. There is evidence that the contact between the loose phase and the meter box at the power panel caused the explosion which impacted Castillo. CP 304-05 which is Voss deposition pp. 64-65.

Castillo has had substantial medical bills and had an accident-related surgery in November, 2013. CP 750-51, 754-55.

P.U.D. created its own standard for public safety. It specified its "switching and clearance" protocol contained in CP 62 which is an exhibit to first Voss declaration which is CP 49 et seq. On p. 2 of that declaration (CP 50) Voss states, "Switching and clearance is an industry term which relates to the means of hazardous energy source control." That protocol specifically states that in its switching and clearance the Grant County PUD has as its first priority the physical safety of employees and the public (emphasis added).

Castillo filed his lawsuit against P.U.D. in 2011. P.U.D. moved for summary judgment in 2012, but the first of three hearings on the summary judgment did not occur until late May, 2013. CP 126 et seq. The chronology of the hearings is set forth in the clerk's papers transmitted to this Court. The trial judge granted P.U.D. partial summary judgment on all issues which require expert testimony by striking all of Castillo's expert opinions as mere personal opinion. CP 798-802.

James Voss, Plaintiff's expert, is the centerpiece of this appeal. The Court may find his resume at CP 58-60. The trial court found that Voss qualifies as an expert witness. CP 522. He worked until 2012 as a high voltage compliance officer for the Washington Department of Labor & Industries. CP 58. He was field safety and training manager for Potelco, Inc. CP 253 which is Voss deposition p. 13. Potelco is the third largest private utility company in America. CP 50. Prior to his tenure with Potelco, Voss worked for Puget Sound Power & Light where he would refer all safety questions to the safety department. CP 321.

Voss was trained at the OSHA Institute. He has taught OSHA classes. In addition, he successfully completed the OSHA transmission and distribution class. CP 322-23. He has also taught high power safety classes for Potelco and for DOSH (part of Washington L&I). CP 323.

Voss has attended over 20 seminars and instructional courses on the standards for public power safety. CP 326.

Voss has consulted with other experts in developing his understanding of the standard of care for public utilities for public power safety. CP 50, which is within first Voss declaration. One of the experts upon whom Voss relied in developing his understanding of the standard of care was Brian Erga. CP 758-62 which is Erga's declaration setting forth Erga's credentials in public power safety and confirming Voss' attendance at Erga's instructional course. In his declaration Erga also confirmed that Grant County P.U.D. violated the standard of care for public power safety in all those ways which are set forth in Voss' four declarations. Erga adopts the four Voss declarations submitted to the trial court. CP 758. Erga also affirmed Voss' testimony that a violation of the relevant WACs constitutes a violation of the standard of care which a public utility lineman owes to a member of the public. The trial court refused to consider Erga's declaration. CP 826-28.

Voss testified that his last position was "high voltage inspector." CP 326 which is Voss deposition at p. 86. High voltage events start at 600 volts. CP 327 which is Voss deposition, p. 87. The electrical explosion which impacted Castillo in this case was 480 volts. CP 68. Yet Voss was authorized by the Department of Labor & Industries to inspect events

covered by WAC 296-45-325. CP 326-27. By its terms 296-45-325 includes electrical transmissions starting at 50 volts. Voss swore under oath that his title of high voltage inspector was a "bit of a misnomer." CP 326 which is Voss deposition p. 86. For a replication of this same testimony see CP 106-14 which is second Voss declaration. In this declaration Voss testified that his inspection duties with DOSH routinely required him to investigate and issue citations for low voltage electrical accidents ranging from 50 volts to 600 volts. CP 109-110. The trial court found Voss qualified to render expert opinions regarding safety protocol for this 480 volt explosion. CP 522 for trial court ruling. The trial court finding that Voss is an expert has not been appealed by P.U.D. and was not a basis for the granting of discretionary review by the Commissioner.

On five separate occasions Voss testified that P.U.D. violated the standard of care in this case. CP 49 et seq., 106-14, 531-32, 727-28 and deposition references in this brief. He testified that PUD violated the standard of care as follows:

1. All Voss' statements of standard of care violations are stated on a more probable than not basis. CP 51.
2. He referenced the standard of care of 2009 (CP 52-56) and the standard in effect at the time of his declaration (CP 53).

3. He specifically referenced the standard of care for Washington. CP 52, 54-56.
4. Voss stated that it was a violation of the standard of care for PUD's lineman to meet with Castillo and test the power without first permanently "locking out" the power. CP 53.
5. Voss stated that P.U.D. did not adhere to its own standard of giving first priority to the safety of employees and the public in switching and clearance. Adherence to that standard would have required permanent disengagement of the power. CP 53, 55, 57.
6. Voss stated that, given P.U.D.'s error in not permanently disengaging the power when Johnston first visited the meter base on the day of the accident, R.C.W. 19.28.101 requires that the power should not have been reenergized without an electrician's approval. CP 55-56.
7. Voss stated that if, after disengaging the power, the P.U.D. lineman were determined to permit the attachment of pie plate to the meter base, the standard of care required that Johnston should have first precluded any opportunity for the power to have flowed to the power panel. Voss suggested ways which

the lineman could have chosen to prevent power from flowing to the power panel. CP 54-55.

8. Voss stated that it was a violation of the standard of care for Johnston to reenergize the power with a loose phase [wire] which was 12 inches or less from a grounded object (the panel itself). CP 354-56 which is Voss deposition pp. 114-16. In connection with this same issue Voss stated that it was a violation of the standard of care for Johnston to reenergize the power before insisting that Castillo put tape around the loose phase so as to insulate it in the event that the phase had contact with the meter box, a grounded object. CP 56-57.
9. Voss stated that several WACs (applying by their express terms to protect fellow workmen) had become part of the standard of care for protecting members of the public. CP 111. Voss emphasized that the standard of care violations originating with the WACs were separate from the general standard of care violations contained in his first declaration. CP 727-28.

Voss testified that his knowledge of the standard of care is "something that is a culmination of experience, training and application." CP 94 which is Voss deposition, p. 33. Voss acknowledged that the

standard of care for public utility linemen is not written. CP 93-94 which is Voss deposition, pp. 32-33.

However, Voss also said that the WACs, which provide safety standards among fellow workers, provide a written basis for part of the standard of care for public utility linemen vis-à-vis the general public. CP 110-11, 727-28. *See also* CP 94-95 for specific illustration of violation of WACs.

Voss also testified that P.U.D. violated its own internal safety standard. CP 50-53, 55, 57.

Altogether Voss ascertained the standard of care from the following sources apart from his own experience:

1. Over 20 seminars and training courses. CP 326 which is Voss deposition p. 86
2. Consultation with other safety experts including Brian Erga. CP 50, 758.
3. Regular consultation with the safety department of Puget Sound Power & Light while working for that company. CP 321, which is p. 81 of Voss deposition.
4. Status as one of the few enforcement officers of the WACs for DOSH. CP 49. In his second declaration Voss affirmed that specific WACs define a part of the standard

of care which a lineman owes to the general public. CP 106-14.

5. Background as field safety coordinator and training director for high voltage safety for Potelco (third largest private utility in country). CP 50.

6. Voss emphasized that his standard of care opinions were based upon consultation with other experts and upon classes that he has taken. CP 531-32 which is Voss declaration of August 22. 2013.

The trial court found that Voss' views on the standard of care were based solely on this own opinion notwithstanding the aforereferenced sources of knowledge which originated outside of his own opinion. CP 523-24, CP 741-42.[1] Judge Knodell also ruled that Voss' testimony on standard of care was deficient because Voss never said that the standard of care to which he was testifying was "generally accepted in the industry" or "generally recognized." CP 155, 741. *See also* CP 811 of verbatim report of proceedings of 10/31/13.

[1] Notwithstanding the two iterations of the trial court's ruling that Voss' views on the standard of care were solely his personal opinions, the trial court certified to this Court its ruling striking Voss' testimony. The trial court unabashedly stated that it was not sure about its ruling. CP 820.

The trial court disregarded Voss' affirmation that he was testifying to a "recognized" standard of care. CP 324 which is p. 84 line 14 – p.85, l.11 of Voss deposition.

ARGUMENT

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

The Court of Appeals conducts a de novo review of the admissibility of an expert's declaration which the losing party submits in opposition to a summary judgment motion. ***Seybold v. Neu***, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001). Indeed the entire order granting summary judgment is subject to a de novo review on appeal. ***Ross v. Bennett***, 148 Wn.2d 40, 203 P.3d 383 (2008) and cases cited therein; ***Folsom v. Burger King***, 135 Wn.2d 658, 958 P.2d 301 (1998).

It is well settled that the standard of care for a specialized field of endeavor need not be written. ***Nguyen v. Dep't. of Health***, 144 Wn.2d 516, 531, 29 P.3d 689 (2001); ***Haysom v. Coleman Lantern***, 89 Wn.2d 474, 573 P.2d 785 (1978) (standard of care may be based on custom); ***Smith v. Dow***, 43 Wash. 407, 86 P. 555 (1906) (expert testimony on safe method of navigating ship in facts of case at issue); ***Lambert v. LaConner Trading and Transportation Co.***, 37 Wash. 113, 79 P. 608 (1905) (expert

testimony on proper method of tying packages of lumber for hoisting); ***Humes v. Fritz Companies, Inc.***, 125 Wn. App. 477, 105 P.3d 1000 (2005) (accepts without question the standard of care may be based upon verbal promulgation among crane operators); ***Webb v. City of Richland***, 2011 WL 2633905 (E.D. Wash. 2011) (adopts ***Rosecrans v. Dover Images. Ltd.***, 192 Cal. App.4th 1072, 122 Cal. Rptr.3d 22 (2011) permitting an expert to testify to common safety practice as foundation for standard of care). *See also* pattern jury instructions which do not require written criteria for standard of care: WPI 105.01 (standard of care is skill, care, learning required of healthcare providers); WPI 107.04 (standard of care is skill, care, diligence expected of attorneys).

It is axiomatic that a trial judge may strike an expert's testimony ER 104. ***Davies v. Holy Family Hospital***, 144 Wn. App. 483 text following n.2, 183 P.3d 283 (2008) provides the clearest criteria for admitting an expert's testimony on standard of care. ***Davies'*** two criteria are: (1) The expert must state that he is familiar with the standard of care and (2) the expert must state the bases of his familiarity.

Voss complied with both of these criteria. He testified that he had become familiar with the standard of care from all those sources set forth on p. 9 of this brief, *supra.*

The trial judge discredited Voss' standard of care testimony to the extent that Voss stated that he has taught the standard of care. CP 523, which is lower court's first Memorandum Opinion wherein trial judge cites Voss' experience as an instructor as evidence that Voss created his own standard of care.

Contrary to the lower court's reasoning, the law is clear that an expert's work in administering conduct relevant to the standard of care bolsters his credibility as an expert and provides factual support that he must know standard of care. ***Davies***, *supra*, which cites ***Hall v. Sacred Heart Med. Ctr.***, 100 Wn. App. 53, 995 P.2d 621 (2000). *See also* the authorities holding that experts have enhanced credibility in knowing the standard of care when they have taught the standard of care to others. ***McKee v. American Home Products Corp.***, 113 Wn.2d 701, 729-30, 782 P.2d 1045 (1989); ***State v. Farr-Lenzini***, 93 Wn. App. 453, 461, 970 P.2d 313, 319 (1999). The trial judge turned these cases on their head by ruling that experience in teaching the standard of care reinforces the judge's conclusion that Voss created his own standard of care.

Another case which provides very simple, low bar requirements for an expert to testify to the standard of care is ***Elber v. Larson***, 142 Wn. App. 243, 173 P.3d 990 (2007). Division III in ***Elber*** reverses a trial court and instead rules that an expert's testimony is admissible if he testified

that he knows the standard of care applicable in Washington and that the defendant's conduct fell below the standard of care. ***Elber*** also rules that an expert need not state that the standard of care was in effect for a particular calendar year [even though Voss in fact did that]. ***Elber*** rejects a hyper-technical protocol as a pre-condition to permitting the trier of fact to considering the expert's standard of care testimony.

Neither ***Elber*** nor ***Davies*** requires language that the defendant violated the "generally accepted" standard of care. *See* CP 811 wherein the trial court found Voss' expert testimony deficient because Voss did not state that PUD violated the "generally accepted" standard of care. The trial court erroneously imported the "generally accepted" criterion from the cases announcing the standards for an expert testifying to novel scientific evidence. *See e.g.*, ***State v. Gregory***, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006) which reiterates the "generally accepted" standard for the admissibility of novel scientific evidence under ***Frye v. United States,*** 293 F. 1013 (D.C. Cir. 1923).

THERE IS NO KNOWN WASHINGTON CASE WHICH PRECONDITIONS THE TESTIMONY OF AN ACKNOLWEDGED EXPERT ON THE STANDARD OF CARE WITH THE REQUIREMENT THAT THE EXPERT STATE THAT THE

DEFENDANT VIOLATED THE GENERALLY ACCEPTED STANDARD OF CARE.

The trial judge's requirement of "generally accepted" language for admissibility of standard of care testimony from a court-recognized expert establishes new precedent in Washington jurisprudence and overrules decades of established case law. The trial judge erred because formulaic language is not required when an expert testifies to the standard of care. In other words there is no requirement that Voss' and Erga's testimony on the standard of care be burnished with a "general acceptance" strophe.

Contrary to the trial judge's requirement, ***Leaverton v. Cascade Surgical Partners***, 160 Wn. App. 512, 248 P.3d 136 (2001) holds that an expert's testimony on the standard of care does not have to be phrased in standard of care terminology. ***Leaverton*** holds, "To require expert to testify in a particular format would elevate form over substance."

As stated on pp. 6-8 of this brief, Voss testified that P.U.D. violated the standard of care in numerous specific ways. Yet the trial judge required even a stricter, more formulaic phraseology than the "standard of care" phraseology which ***Leaverton*** holds does not need to be intoned. Judge Knodell improperly required the expert to say that P.U.D. violated the generally accepted standard of care.

There is no known Washington case which requires an expert to provide adjectives or modifiers before he recites the standard of care. Nor is the any known Washington case which requires the expert to identify the exact source of his knowledge of the precise standard of care violation to which the expert is testifying.

The trial judge also erred because the case law in Washington has for four decades disclaimed "general acceptance" as the sole criterion for establishing standard of care. ***Helling v. Carey,*** 83 Wn.2d 514, 519 P.2d 981 (1974) is the first Washington case which clearly holds that a standard of care may be more than what is typically done. Despite what was then a lackadaisical practice regarding glaucoma testing, our Supreme Court in 1974 imposed upon the defendant-ophthalmologist a higher standard than customary practice. ***Helling*** quotes with approval the following language of Justice Holmes' opinion for the Supreme Court in ***Texas & Pacific R. Co. v. Behymer***, 189 U.S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905 (1903), "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence whether it usually is complied with or not."

The Legislature modified ***Helling*** with respect to the medical malpractice standard of care. *See* discussion in ***Harbeson v. Parke-Davis, Inc.,*** 98 Wn.2d 460, 656 P.2d 483 (1983). However, outside the medical

malpractice setting, ***Helling*** remains the law in permitting evidence of a standard of care that is more demanding than common practice. ***Ranger Ins. Co. v. Pierce County,*** 164 Wn.2d 545, 192 P.3d 886 (2008); ***Dickinson v. Edwards,*** 105 Wn.2d 457, 716 P.2d 814 (1986).

Every known case which has upheld a trial court in striking standard of care testimony by an acknowledged expert has involved an expert who has provided no evidence as to the required standard of care. *See e.g.*, ***Hayes v. Hulswit,*** 73 Wn.2d 796, 440 P.2d 849 (1968) (only evidence was expert's preferred methodology); ***Versteeg v. Mowery***, 72 Wn.2d 754, 435 P.2d 540 (1967) (plaintiff's doctor could only testify to what he believed treatment should have been); ***Richison v. Nunn***, 57 W.2d 1, 16, 340 P.2d 793 (1959) (plaintiff's doctor could not provide standard of care testimony but said that it does not help merely to treat patient psychiatrically); ***Jankelson v. Cisel***, 3 Wn. App. 139, 473 P.2d 202 (1970) (neither of two experts of plaintiff could provide standard of care testimony).

A more recent case also disallowed an expert from testifying to a violation of the standard of care because the expert did not state or imply that he knew the standard of care in ***Winkler v. Giddings***, 146 Wn. App. 387, 190 P.3d 117 (2008). The expert could only make an "educated assumption" as to the standard of care in Washington. Therefore his

testimony was disallowed. In other cases the expert testified only as to what he would have done under the same circumstances as were presented in the facts of the case. ***Adams v. Richland Clinic***, 37 Wn. App. 650, 681 P.2d 1305 (1984) (specifically cited in trial court Memorandum Opinion, CP 523) disallows expert testimony because the expert could testified only to the practice at the University of Washington but not to statewide practice.

The trial court's first Memorandum Opinion also cited ***White v. Kent Medical Center***, 61 Wn. App. 163, 810 P.2d 4 (1991). CP 523. Yet ***White*** upholds the expert's testimony as knowledgeable of the standard of care. It is not precedent for striking an expert's testimony.

Contrary to those cases striking an expert's testimony on the standard of care, Voss' testimony should be admitted for all of the following reasons:

1. Voss clearly complied with the criteria of ***Davies*** and ***Elber***. Voss stated that he was familiar with the standard of care and he stated how he became familiar with the standard of care.
2. Voss provided particularized facts demonstrating the violation of standard of care by P.U.D. CP 49 et seq. and CP 276-89, 297-302, 310-13 which references include first

Voss declaration and portions of Voss deposition. This particularization is required by some of the cases. ***Morton v. McFall,*** 128 Wn. App. 245, 115 P.3d 1023 (2005). *Cf.* ***Hash v. Children's Orthopedic Hospital and Medical Center,*** 49 Wn. App. 130, 741 P.2d 584 (1987), *aff'd.* 110 Wn.2d 912, 757 P.2d 507 (1988) (moving party in summary judgment must show specific facts demonstrating that defendant did not violate standard of care).

3. The "generally accepted" language required by the trial judge is formulaic and therefore contrary to ***Leaverton***. Furthermore, a requirement that the expert recite the word "generally accepted" is unprecedented in prior Washington case law. That language was improperly imported from cases dealing with the admissibility of novel scientific evidence.

4. The "generally accepted" standard imposed by the trial court is a mistaken insemination from the ***Frye*** test for the admissibility of scientific evidence. In fact the standard of care test in Washington permits evidence of required conduct which is more demanding than customary conduct

(although Voss never explicitly addressed the issue of usual conduct).

5. To the extent that the trial judge was requiring Voss to identify the exact source of his knowledge that P.U.D. violated the standard of care in a particularized manner, this requirement is also unprecedented in Washington.

6. PUD also argued that Voss asserted his standard of care violation as his opinion. CP 78. Voss did state in his deposition that it was his opinion that P.U.D. violated the standard of care with respect to one issue. CP 347. However, Voss previously gave non-opinion testimony that PUD violated an objective standard of care. CP 49-72. Therefore, Voss' standard of care testimony is admissible even though he mixes opinion testimony with non-opinion testimony. ***Eng v. Klein***, 127 Wn. App. 171, 110 P.3d 844 text at nn. 14-15 (2005) permits an expert who testifies that the defendant violated the standard of care may also express his testimony as his opinion that the defendant violated the standard of care. ***Eng*** should be particularly applicable because Voss' initial testimony was phrased in terms of objective standard of care violations. CP 49-57.

Voss then gave his deposition providing objective standard of care testimony. *See e.g.* CP 272-76, 283, 297, 322-24. Finally, Voss provided three additional declarations in which he provided only objective standard of care testimony without any reference to his opinions. CP 106-14, 531-32, 727-28. This factual scenario falls squarely within ***Eng*** and thereby permits Voss' standard of care testimony.

Moreover ***White v. Kent Medical Center,*** 61Wn. App. 163, 810 P.2d 4 (1991) explains the high likelihood that an expert answering deposition questions will answer with an expression of opinion. ***White*** at 172 states:

> "Expert testimony is likely to be mere personal opinion when the questions propounded to the experts are not in standard of care terminology.
>
> . . . This requirement [more than personal opinion] is met so long as it can be concluded from the testimony that the expert was discussing general, rather than personal, professional standards." (Emphasis supplied)

It is noteworthy that ***White*** was one of the two cases specifically relied upon by the trial judge to support his ruling that mere personal opinion of the expert is an inadmissible foundation of his testimony. CP 523.

Notwithstanding that vagary, ***White*** and ***Eng*** make it clear that our courts disapprove the striking of an expert's well-considered standard of care testimony merely because he stated in deposition that his views constituted his opinion of the standard of care.

In addition to the foregoing, there are two doctrines in the case law which further support the admission of Voss' testimony. The trial court (and this Court in a de novo review) should extend leniency to the non-moving party in reading affidavits in opposition to summary judgment. ***PUD No. 1 v. WPPSS***, 104 Wn.2d 353, 705 P.2d 1195 (1985). *See also* ***LeBeuf v. Atkins***, 22 Wn. App. 877, 594 P.2d 923 (1979) which permits an inference from the affidavit of the expert of the non-moving party that there was a violation of the standard of care so as to require denial of summary judgment.

Another canon favoring Castillo is that any inference supporting the non-moving party should result in a decision by the finder of fact even if there are competing inferences in favor of the moving party. ***Carle v. McChord Credit Union***, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992).

While Castillo does not believe that the doctrines from the ***WPPSS*** and ***Carle*** lines of cases are necessary to justify the admissibility of Voss' testimony, these doctrines surely remove the last shred of doubt as to whether the trial judge should be reversed.

As a final nugget on the scale Castillo asks this Court to consider the declaration of Brian Erga. CP 758-62. Erga's declaration was before the trial judge prior to signing the partial summary judgment. At least six cases state that the party has the right to file new evidence after the original summary judgment hearing and before the signing of a final order. ***Mannington Carpets, Inc. v. Thomas R. Hazelrigg III, et al.***, 94 Wn. App. 899 n.8, 973 P.2d 1103 (1999); ***Applied Indus. Materials Corp. v. Melton***, 74 Wn. App. 73, 77, 872 P.2d 87 (1994); ***Sellsted v. Washington Mut. Sav. Bank***, 69 Wn. App. 852 at n.19, 851 P.2d 716 (1993); ***Meridian Minerals Co. v. King County***, 61 Wn. App. 195, 202-03, 810 P.2d 31 (1991); ***Cofer v. Pierce County***, 8 Wn. App. 258, 261, 505 P.2d 476 (1973); ***Felsman v. Kessler***, 2 Wn. App. 493, 498, 468 P.2d 691 (1970).

Felsman reverses the trial court for failing to consider the new materials. Because of the precedent setting nature of the trial court's ruling, Plaintiff filed several supplemental declarations (two from Voss, one from Erga). The trial court considered the additional declarations from Voss, but refused to consider the Erga declaration which affirmed Voss' declarations on the standard of care. CP 744, 746-47, 756-57 for motion regarding Erga and CP 818-20 and 826-28 for trial judge's ruling. In making such inconsistent rulings Judge Knodell said at CP 828, "This will go up to the Court of Appeals, and if I should have considered them

[Erga declaration and attachments thereto], if they should be listed here [materials considered and specified in summary judgment order], they'll put it in there and they'll consider them."

Judge Knodell was correct in the above quoted statement. Despite the trial court ignoring the Erga declaration, appellate courts will consider appropriate materials presented to the trial court even if those materials were not listed in the order as being considered by the trial court. ***Mithoug v. Apollo Radio***, 128 Wn.2d 460, 463, 909 P.2d 291 (1996); ***Goodwin v. Wright***, 100 Wn. App. 631, 6 P.3d 1 (2000). In conducting its de novo review the Court of Appeals should also consider the declaration of Erga. There was no articulable reason for the trial court to have considered new declarations from Voss but not the new declaration from Erga. Indeed the trial judge seemed to have said that he read the Erga affidavit even though he would not list it in the summary judgment order. CP 818-20.

In the present case Voss (and Erga) have repeatedly asserted their knowledge of the statewide standard of care, and Voss was specific in itemizing Johnston's violations of the standard of care. The trial court's ruling is a substantial departure from existing case law in which an expert's testimony was stricken. Castillo is adamant that his first Assignment of Error is enough to justify the admissibility of Voss'

testimony. Nonetheless Castillo will discuss the remaining Assignments of Error.

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

Voss testified that P.U.D. violated its own written policy which mandates that PUD extend every effort to protect members of the public from harm from electrical accidents. CP 50-52, 57. The self-imposed standard of PUD is very similar to the duty imposed upon PUD in case law. ***Keegan v. Grant County PUD No. 2***, 34 Wn. App. 274, 661 P.2d 146 (1983) requires that the utility "conduct . . . its operations under the known safety methods and the present state of the art . . . the fact that the requisite care is expensive . . . does not, of itself, relieve the utility of its duty."

Castillo certainly does not need an expert to present PUD's internal criteria to the trier of fact, but Castillo does need an expert to instruct the trier of fact as to the meaning of "switching and clearance" and what reasonable steps PUD could have and should have taken to fulfill its own internal criteria of "giving first priority to the safety of employees and the public" in switching and clearance.

It is well settled that a governmental entity's own internal guidelines provide evidence of the standard of care. ***Joyce v. Dep't. of Corrections***, 155 Wn.2d 306, 324, 119 P.3d 825 (2005) and cases cited therein; WPI 60.03.

For the trier of fact to understand PUD's internal standard, Castillo must call an expert to explain such terms as "switching and clearing" contained within PUD's guidelines. CP 50-51 for Voss' explanation of that terminology. Therefore, exclusion of Voss as an expert insulates PUD from liability under WPI 60.03. Voss' testimony of PUD's violations of its own standards does not even relate to the general standard of care. Nonetheless the trial judge struck Voss' testimony even insofar as Voss would have explicated PUD's violation of its own standards. When Voss testified to the technical ways in which P.U.D. violated its own standard, he certainly was not testifying to an idiosyncratic, self-created standard of care – the only basis upon which the trial court disallowed Voss' testimony. Therefore, the disallowance of Voss' testimony on the issue of explaining P.U.D.'s internal standards is outside the rationale of the trial court which struck Voss' testimony because Voss did not use the catch phrase that his asserted standard of care was "generally accepted." As previously noted PUD had internal standards on switching and clearing. P.U.D. also had internal standards that required it to wait for an

electrician's approval before reengaging power that was originally disengaged by P.U.D. CP 237-38.

The trial court should be separately reversed on the issue of denying Voss the opportunity to testify to P.U.D.'s violation of its own internal standards. That issue has no imaginable relationship to the trial judge's contention that Voss was merely providing his own opinion of the standard of care for P.U.D.

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

Voss' first declaration specifies negligence of P.U.D. by failing to follow R.C.W. 19.28.101. CP 54-56. Johnston testified that he believed that after parting company from Castillo, Castillo was going to call an electrician to work on the Skone & Connor electrical panel. CP 18. Once there is a need for attention by an electrician, then R.C.W. 19.28.101 provides that a P.U.D. agent cannot reenergize the power without formal approval by an electrician. Voss' testimony was that RCW 19.28.101 applies even though the electrician had not yet visited the site. CP 54, 56. Therefore, Voss testified that P.U.D. was negligent in disobeying this statutory requirement.

WPI 60.03 and cases cited therein provide the authority that a statutory violation constitutes evidence of negligence. Evidence of a statutory violation is sufficient to defeat summary judgment. R.C.W. 5.40.050. *See* ***Owen v. Burlington N. & Santa Fe R.R. Co.,*** 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

However, the interpretation of R.C.W. 19.28.101 would be unclear to a layperson (i.e. a juror or arbitrator) without the benefit of an expert's explanation of that statute. The trial court struck all of Voss' testimony even insofar as he would have merely explained the aforereferenced statutory violation. This part of Voss' testimony also falls outside of the trial court's concern that Voss was simply creating his own standard of care. Therefore, the trial judge should be reversed on this issue even if somehow the Court of Appeals were to find that Voss created a standard of care which did not otherwise exist.

CONCLUSION

There is a natural pining for a written compendium of the prescribed standard of care in a given field of professional endeavor. Again, P.U.D.'s attorney asked Voss about a written standard of care for linemen. CP 93-94. In oral argument defense counsel (inaccurately) carped that the written standards contained in the pertinent WACs do not apply to low voltage events. CP 138 which is p.13, ll.18-20 of May, 2013,

hearing.[2] Defense counsel made the same complaint about an unwritten standard of care in his pleadings. CP 78. In its first Memorandum Opinion the trial court granted P.U.D.'s Motion for Summary Judgment because Plaintiff's case was insufficient "to support a cause of action based upon Defendant's failure to follow the procedures set forth in the WACs." CP 524.[3]

Many commentators have bemoaned the current practice of jurors determining the standard of care after listening to competing experts particularly when there are no written criteria for a given the standard of care. *See e.g.* Thomas Penfield Jackson, Observations On The Search For Objective Proof Of The Standard Of Care in Medical Malpractice Cases, 37 WAKE FOREST L. REV. 953 (2002); John E. Wennberg, M.D., Philip G. Peters, Unwarranted Variations In The Quality of Health Care: Can The Law Help Medicine Provide A Remedy/Remedies?, 37 WAKE FOREST L. REV. 925 (2002); John W. Ely, Arthur J. Hartz, Paul R. James, Cynda A. Johnson M.D., Determining The Standard Of Care In Medical Malpractice: The Physician's Perspective, 37 WAKE FOREST L. REV. 861. 863 TEXT AT N. 7 (2002); John G. De Luca, Dr. Clark L. Johnson, The

[2] Counsel was factually wrong. WAC 296-45-335 imposes a "switching and clearance" protocol for all electrical events covered by WAC 296-45-225 (which includes all electrical transmissions involving more than 50 volts).

Inadequate Standards of Care Governing Psychiatry, 1 J. MED. & L. 81, 91 (1997); Hon. D. Peck, Impartial Medical Testimony: A Way To Better And Quicker Justice, 22 F.R.D. 21, 22 (1958).

Despite the yearning for a crystallized standard of care by the commentators, P.U.D.'s counsel and the trial judge, such a simplistic means of determining the standard of care does not reflect traditional jurisprudence. Mr. Voss testified that there is a recognized standard of care that goes beyond the mere verbiage of the WACs. CP 324 which is Voss deposition p.84 ll. 14-20. Voss testified that the standard of care is a culmination of "experience, training and application." CP 273 which is Voss deposition p. 33 ll. 2-3. Voss affirmed that that the standard of care is the way that a reasonable lineman would respond. CP 325-26 which is Voss deposition p.85 ll. 20-25 and p.86 line 1.

Evidence of competing testimony as to the standard of care is endemic in our jurisprudence. The following cases are illustrative. ***Morrell v. Finke,*** 184 S.W.3d 257 (Tex. App. 2005); ***Torricelli v. Piscano,*** 9 A.D.3d 291, 780 N.Y.S.2d 137 (App. Div. 2004); ***Larson v. Nelson,*** 118 Wn. App. 797 n.17, 77 P.3d 671 (2003). The resolution by the trier of fact of testimony from competing experts reflects the long,

[3] Voss made it clear on more than one occasion that the standard of care for public utility lineman is broader than merely applying the WACs for the protection of the public. See references regarding this issue on pp. 8-9 of this brief.

unbroken precedential means for establishing the standard of care. This Court should not approve a different criterion for demonstrating the standard of care.

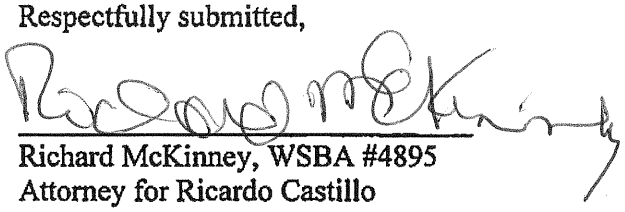
As Justice Hale once wrote in ***State ex rel. State Finance Commission v. Martin,*** 62 Wn.2d 645, 665-66, 384 P.2d 833 (1963):

> "Through stare decisis the law has become a disciplined art - perhaps even a science - deriving balance, form and symmetry from the force which holds the components together. It makes for the stability and permanence, and these, in turn, imply that a rule once declared is and should be the law. Stare decisis likewise holds the courts of the land together, making them a system of justice, giving them unity and purpose, so that the decisions of the courts of last resort are held to be binding on all others.
>
> Without stare decisis, the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions - a kind of amorphous creed yielding to and welded by them who administer it. Take away stare decisis, and what is left may have force, but it will not be law."

In derogation of decades of precedents of permitting the finder of fact to resolve competing testimony on the standard of care, the ruling of Judge Knodell violates stare decisis. The Judge confessed to uncertainty about his [novel] ruling. CP 820. This Court should clearly proclaim that the lower court ruling is erroneous and is not the law.

DATED this 8th day of July, 2014.

Respectfully submitted,



Richard McKinney, WSBA #4895
Attorney for Ricardo Castillo

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2014, one (1) copy of the **Brief of Appellant** was mailed via Certified Mail to the following individual:

J. Scott Miller
Attorney at Law
201 W. North River Drive, Suite 500
Spokane, WA 99201

I also certify that on July 14, 2014, I mailed via Federal Express an original and one (1) copy of the **Brief of Appellant** to the following:

Court of Appeals, Division III
Office of the Clerk
500 N. Cedar Street
Spokane, WA 99201-1905

In addition, I certify that on July 14, 2014, one (1) copy of the **Brief of Appellant** was mail via Regular U.S. Mail to the following individual:

J. Scott Miller
Attorney at Law
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Silverdale, Washington this 14th day of July, 2014.

Richard McKinney