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

REPLY OF APPELLANT

LAW OFFICES OF RICHARD McKINNEY

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There are so many misleading statements or actual misstatements of the record, the facts and the law that Castillo will simply refute them as they appear in PUD's brief.

1. TRIAL COURT FOUND VOSS QUALIFIED AS EXPERT

On p. 7 of its brief PUD states that the trial court never found that Voss qualified as an expert. Yet at CP 522 the trial court denied PUD's motion to strike Voss based upon lack of expertise. (CP 75-79 for PUD's motion) When the trial court denied PUD's motion to strike Voss due to his background and when the trial court stated that Voss' background goes to the weight, not the admissibility, of his testimony, it is accurate to state that the trial court found that Voss qualified as an expert. It is misleading to deny that conclusion.

2. PAUL WAY'S TESTIMONY IRRELEVANT

On page 7 of its brief PUD carps that Castillo's opening brief did not reference PUD's expert, Paul Way, whose "credentials and background" are allegedly superior to Mr. Voss.

In a summary judgment proceeding the analysis should focus on Castillo's evidence as that is obviously the most favorable to the non-moving party. It is enough to say that Voss effectively deconstructed Way's declaration at CP 106-114. In reply at CP 124 Way formally

retreated on two points based upon Voss' criticism of Way's earlier declaration. Way even went so far as to claim that even though he referred to the wrong regulatory code, Voss knew what Way meant and so it did not matter that Way referenced the wrong code.

3. ERGA CORROBORATED BUT DID NOT VOUCH FOR VOSS

Erga's declaration (referenced on page 7 of PUD's brief) was submitted to demonstrate that Voss' opinions are not idiosyncratic, self-created opinions of Voss. Erga testified that Voss was correct in articulating the public utility industry standard of care. The submission of Erga's declaration was in support of admitting Voss' declaration.

PUD also complains that Erga had not been listed as an expert before the summary judgment motion. The law is clear that a witness need not have been previously identified in discovery in order to use his opinion in a summary judgment proceeding. ***Blair v. TA-Seattle East No. 176***, 171 Wn.2d 342, 254 P.3d 797 (2011). Contrary to ***Blair***, Judge Knodell articulated no reason for disregarding Erga's declaration. He simply ignored it.

It is inane codswallop for PUD to dismiss Erga's declaration as an opinion of another witness' (Voss') credibility. The cases on page 16 of PUD's brief prohibit an expert from vouching for a crime victim (i.e.

stating that the expert believes the victim's rendition of the facts of a crime). In contrast Erga provided facts independent of Voss' testimony. Those facts are that:

3.1 The standard of care referenced in "Voss' four declarations is not simply Voss' own opinion, but is an objective standard of care that is widely recognized among public power safety experts." (CP 758)

3.2 "I [Erga] have taught classes, attended by Mr. Voss, setting forth the standards of care referenced by the four Voss declaration in this case." (CP 758)

3.3 "I have personally dealt with Grant County PUD and have found its employees to have been repeatedly resistant to adopting and implementing safety standards dealing with public power." (CP 759)

Counsel for PUD disingenuously states on page 16 of his brief, ". . . it is unknown who this purported witness [Erga] really is . . ." Yet counsel previously told Judge Knodell in open court at CP 826, "I don't even know who this guy is. I know who he[1] is but he hasn't been disclosed." (emphasis supplied)

In summary Erga says that he has had negative dealings with Grant County PUD on power safety issues. Attorney Miller knows who Erga is

[1] If counsel knows Erga, he knows that his educational and experiential attainments far exceed Mr. Way in the area of public power safety. See Erga C.V. at CP 760-762.

but he wrote in his brief to the Court of Appeals that he doesn't know who he is. There could be no more incisive précis of PUD's entire case before this Court![2]

4. VOSS WAS CONSISTENT

Voss did not subsequently contradict his deposition testimony as contended on pp. 11-14 of PUD brief.

As a minor point Voss provided his first declaration on November 21, 2012. CP 49-57. In that declaration Voss said that his knowledge of the standard of care came from educational courses for public utility personnel and from discussions with utility company officials and industry safety experts. CP 50. At CP 52-53 Voss began his explanation as to the ways in which PUD's lineman violated the standard of care in this case.

Voss' deposition testimony came after the first of his four declarations. His deposition was in April, 2013. CP 241. For this reason

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[2] PUD also states on p. 7 of its Brief that Erga's declaration was stricken by the trial court in an order that is not within the scope of the discretionary review granted in this case.

Again, PUD misstates the record. There was no separate order disallowing Erga's declaration. The order referenced by PUD is the Order Denying New Legal Theory. The motion associated with that Order was filed on September 20, 2013 at CP 574-593. The motion to allow Erga's declaration was filed on October 24, 2013 at CP 744-745. There was no separate order disallowing Erga's declaration. The trial court simply said that it would not consider Erga's declaration, but the Court of Appeals would consider it if the trial judge should have. CP 858. That conclusion is consistent with cases on p. 24 of Castillo's initial brief.

alone the cases forbidding subsequent declarations which modify deposition testimony are inapplicable.

More importantly Voss has been consistent in all of his testimony. On p. 83 of his deposition (CP 323-324) Voss testified to the various sources of the standard of care. Then at CP 324 Voss said "Yes" in answer to the question as to whether there is a recognized standard of care for a lineman. At CP 325 Voss said that the sources for the standard of care are those objective sources which he had just named.[3]

In addition to his attending about 20 educational courses on the standard of care and frequent conversations with industry safety experts (referenced in Voss' first declaration at CP 50) Voss' knowledge of the standard of care is based upon:

1. His years of working for Puget Sound Power and Light where he was the management representative at all the safety meetings with responsibility for documenting and reporting any proposed mitigation for safety failures. CP 320 ll. 9-16.

[3] In ruling that Voss' standard of care testimony was self-created, Judge Knodell said that the test for admissibility of Voss' testimony is for him to state **what a reasonable person would do and what are the recognized norms.** (CP 741) That is **precisely** what Voss said was the basis of his standard of care testimony in his deposition. CP 324 ll. 14-20 for his testimony that he was identifying the **recognized standard of care.** CP 325 line 20- CP 326 line 1 for his testimony that standard of care is **what a reasonable person should do.**

2. His responsibility at Puget Sound Power and Light for regularly submitting safety questions to the internal safety department of that organization. CP 321 ll. 4-7.

3. His years as a lineman, supervisor and field safety specialist. CP 322 ll. 18-19.

4. His responsibility for safety issues at Potelco on a day to day basis. CP 321 ll. 11-14. Potelco is the third largest high voltage utility contractor in the United States. CP 50.

5. Successfully taking the OSHA certification class which permitted Voss to be a certified instructor in the OSHA class for transmission and distribution (of power). CP 323 ll. 2-9.

Again, Voss' extensive experience is summarized in his resume. CP 58-61.

In its section on the alleged inconsistency of Voss' deposition and declarations PUD inserts at pp. 11-12 the statutory mandate that L&I regulations only protect co-workers. It is in this section of its brief that PUD first raises the central issue in this case- whether Voss' expert testimony about PUD's tortious conduct reflects his own idiosyncratic opinions or whether it reflects testimony regarding PUD's departure from a recognized standard of care. Castillo will return to that issue in a later

section of this brief and focus here on the WACs as part of the standard of care protecting the public

Voss has stated that the general standard of care extends to the general public the same safety protections as protect fellow workers under the Washington Administrative Code. CP 111 and see portion of his deposition quoted on p. 12 of PUD's brief. This is just one of those occasions when Voss used the word opinion but he said at CP 111 he was explicating the general standard of care. (Again, Erga confirmed that all of Voss' identified violations of the standard of care are violations of an objective standard of care that is widely recognized by experts on public power safety.)

This is very similar to the rule that the ethical code for attorneys is to regulate and guide attorneys, but that code may in some instances define the standard of care which attorneys owe to the public. ***Hizey v. Carpenter***, 119 Wn.2d 251, 265, 830 P.2d 646 (1992) (Expert may state that violation of attorneys' RPC may be evidence of violation of broader standard of care to public, but express terms of RPC prohibits explicit use of RPC to be standard of care for civil liability.)

Therefore it is no answer to say that Voss' testimony that PUD violated the standard of care by violating L&I regulations is barred by WAC 245-045-015 which is quoted extensively on p. 13 of PUD's brief.

In the same way the RPC and the old CPR specifically proclaimed that their standards were not for establishing rules of civil liability. ***Hizey*** at 258. Yet the Supreme Court in ***Hizey*** nonetheless allowed an expert to testify that a violation of the attorneys' ethical code was evidence of violation of the broader standard of care. Analogously Voss should be allowed to testify that the WACs are part of the standard of care for protection of the public by linemen notwithstanding the disclaimer language of WAC 245-045-015.

Moreover Voss was very clear that his testimony that PUD violated the standard of care in the present case was based upon application of the WACs and , separately and independently, upon criteria that are outside the WACs. CP 727-728 and references therein.

Finally Castillo reiterates those cases on p. 22 of his original brief which extend every presumption in favor of the admissibility of the affidavits of the expert of the non-moving party on the issue of whether the defendant violated the standard of care. Among those cases is ***Carle v. McChord Credit Union*** which requires that the non-moving party receive the benefit of all inferences justifying denial of summary judgment even if the evidence contains inferences justifying the granting of summary judgment. While Voss' evidence on the standard of care is far more definitive than if it contained only inferences, there is <u>at the very least</u> an

inference that Voss based his testimony upon the recognized, objective standard of care.

5. REDUX: WAY IS IRRELEVANT IN SUMMARY JUDGMENT

Paul Way appears again at pp. 14-15 of PUD brief. Way is simply an opposing expert. It is ironic that PUD, inaccurately bemoaning that Erga improperly provided an opinion of Voss' testimony, asks the Court of Appeals to consider Way's opinion of Voss' testimony.

Most of Way's declaration is simply his view of the standard of care. That is irrelevant in a summary judgment proceeding.

PUD's encomium of Way in its brief simply repeats or embosses Way's factual misrepresentations. In his deposition Voss fully answered the outrageous assertion that he is not qualified to testify to the standard of care for low voltage events. (CP 110, 326-27)

More significantly PUD uses Way as a shill to make factual misrepresentations. These misrepresentations are:

1. PUD's assertion on p. 15 of its brief that the WAC standards do not apply to low voltage events. At CP 113, 327 Voss explains that the WACs regulate events of 50 volts or more. See also CP 223 et seq. The incident in question involved 480 volts according to Voss. CP 53, 68, 109, 271. While

Castillo is certain that the WAC regulates events of more than 50 volts, including the 480 volt incident at issue, the evidence in favor of this proposition creates an issue of fact at the very least.

2. Way's other views on the correct standard of care, referenced on pp. 14-15 of PUD's brief, simply create an issue of fact between two opposing experts.

3. It altogether misrepresents Voss' background for Way to have said that Voss was testifying regarding a low voltage event which is beyond Voss' expertise. Castillo again cites CP 109- 110. 326-27 because PUD so often misrepresents that Voss has no expertise with low voltage accidents. These portions of the record show that Voss is well experienced with low voltage accidents.

4. Contrary to the statement on p. 15 of PUD's brief, Voss did not "admit" that he was applying his personal experience for his standard of care opinions. To justify that statement PUD quoted Way at CP 84. In the cited paragraph from his declaration Way did not say that Voss was applying only his personal experience. Thus PUD misrepresented what Way said. Way repeated his ill-founded contention that Voss is

not qualified to testify to low voltage events. Castillo has repeated his response to that contention throughout each of his briefs, including this one. Again see CP 109-110 among other references previously provided.

Contrary to Way's misrepresentation of Voss' testimony, Voss also explained why PUD is responsible for this accident even though it occurred on private property. CP 343-355. The short explanation is that PUD's negligence at its own meter base caused an unsafe power flow which struck Castillo on private property.

The trial court did not state that it relied on Way's declarations which are fraught with misrepresentations of Voss' testimony.

Castillo will turn to PUD's more substantive issues, such as they are.

6. SWITCHING AND CLEARANCE STANDARDS APPLY TO LOW VOLTAGE WORK

Voss testified extensively to the defective switching and clearance protocol in Grant County for low voltage events. CP 329-344.

In essence Voss testified that PUD did not comply with its own safety standards set forth at CP 62, 201-222 which at CP 62 commits to adopt switching and clearance standards that protect the physical safety of the public (emphasis supplied). (Recall ***Keegan v. Grant County PUD***

No. 2, cited on p. 25 of Castillo's initial appellate brief, which requires a utility to apply state of the art safety standards.) As stated on pp. 25-26 of Castillo's initial brief, Castillo needs an expert to explain the concept of switching and clearance and the available switching and clearance safety standards that protect the public (as promised by PUD on CP 062). This facet of Voss' testimony does not depend upon Voss identifying a recognized standard of care. This aspect of Voss' desired testimony would require him to testify to the available standards for protecting the public. Even if the trial court's basis for excluding Voss from testifying were somehow upheld, the logic of that decision (i.e. Voss' alleged failure to lay a foundation for standard of care testimony) should not exclude Voss from testifying to PUD complying with its own switching and clearance standards or testifying to the applicability of R.C.W. 19.28.101 to PUD's conduct. This latter issue is referenced again on p. 21 of this Reply.

PUD resists Voss' testimony even on these two issues of PUD's internal standards and R.C.W. 19.28.101. First at p. 17 of its brief PUD returns to the well and again cites its expert, Paul Way, who, without reference to any source, states that switching and clearance criteria do not apply to low voltage events. Without authority Way proclaimed that

switching and clearance standards apply only to high voltage events.[4] Way should have cited some authority besides himself for this conclusion, particularly after his sworn reference to erroneous voltage requirements and to the wrong safety code. CP 124.

Ultimately, in a summary judgment motion Way's opinion, cited without authorities, may not negate Voss' opinion of the applicability of switching and clearance standards to the low voltage event at issue in this case. Voss states that PUD made no distinction in its own internal standards between high voltage and low voltage switching and clearance standards. CP 331. Yet Voss says that in practice PUD had no protocol for low voltage switching and clearance. CP 275. Finally Voss says that it is a violation of the standard of care not to have switching and clearance standards for low voltage accidents. CP 275-277. A fortiori it is a violation of PUD's self-promulgated standards (CP 62, 201-222) not to adopt a switching and clearance protocol for low voltage transmission when its own standards do not exempt low voltage events from the need for switching and clearance.

Second at p. 18 of its brief PUD references power contracts between PUD and other parties, provided to Castillo in discovery in this

[4] In contrast Voss' testimony at CP 329-344 provides precise WAC standards for switching and clearance and shows that there is no exclusion of low voltage events from those standards. See also CP 223 et seq.

case. CP 183-222. These contracts impose switching and clearance standards only at specific high voltage levels. Obviously these contracts do not ipso facto establish a standard of care for the imposition of switching and clearance standards.

More importantly PUD's reference on pp. 18-19 of its brief to CP 183-222 as establishing some sort of standard of care or pattern of conduct is a new legal argument, never raised at the trial court level - not even in one of Mr. Way's discursive declarations.

It is well established that a party may not raise arguments on appeal which were not presented to the trial court. ***Sneed v. Barna***, 80 Wn. App. 843, 912 P.2d 1035 (1996); ***Woodcreek Partnerships v. Puyallup***, 69 Wn. App. 1, 847 P.2d 501 (1993). This rule restricts respondents as well as appellants. ***Seattle-First v. Shoreline Concrete***, 91 Wn.2d 230, 588 P.2d 1308 (1978).

This rule forbidding new arguments on appeal is particularly binding if the new argument involves facts concerning which both parties might have presented evidence before the trial court. ***International Tracers v. Hard,*** 89 Wn.2d 140, 570 P.2d 131 (1977).

In the present case there might have been substantial evidence concerning the discovery documents at CP 183-222 which PUD produced concerning other power contracts. There was no reference to these

contracts in the written pleadings below or in the three oral arguments before the trial judge. Specifically full exploration of the facts regarding these contracts would have likely revealed that the contracts involved purchase of large quantities of power from Bonneville Power by Grant County PUD. Full development of the evidence regarding these contracts at the trial level would probably have shown that, because the power purchased comes in high voltage quantities, the switching and clearance must take effect at high voltage levels. Moreover discovery, which never occurred because this issue was not raised below, would have revealed whether the contracting parties on those other contracts insisted on switching and clearance only at a high voltage level, whether members of the public who were unfamiliar with electrical accidents (such as Castillo) were exposed to the power, whether the contracting parties on those other contracts already had safety protections which rendered additional PUD switching and clearance to be duplicative. There was no occasion to develop such evidence as part of the record in the present case because PUD did not rely on those documents in any pleading until filing its recent Response on appeal. Therefore PUD's reliance on other contracts in its files should not now be considered in reference to the issue of Voss' qualifications or the validity of his opinions.

7. VOSS PROVIDED STANDARD OF CARE TESTIMONY APART FROM HIS PERSONAL OPINIONS

Castillo discussed this issue extensively on pp. 12-22 of his initial appellate brief. Footnote 2 of this Reply contains irrefutable evidence that Voss precisely complied with the trial court's criteria for the admissibility of his standard of care testimony. See also Erga testimony which is reiterated on p. 3 of this brief that Voss testified "to an objective standard of care that is widely recognized among public power safety experts."

On pp. 20-22 of its brief PUD is correct that [after unqualifiedly testifying to an objective standard of care in his first declaration and in his deposition] Voss sometimes expressed his standard of care testimony in terms of his opinion. Yet ***Eng v. Klein***, 127 Wn. App. 171, 110 P.3d 844 (2005) speaks to that issue. ***Eng*** permits the opinion testimony of an expert on the standard of care without nullifying his prior testimony establishing an objective standard of care.

As stated on p. 21 of Castillo's opening brief, ***Eng*** relies on ***White v. Kent Medical Center,*** 61 Wn. App. 163, 810 P.2d 4 (1991). ***White*** specifically holds that expert testimony may be couched in personal opinion phraseology so long as the context makes it clear that the expert was not confabulating his own standard of care. Ironically ***White*** was one

of the two cases upon which Judge Knodell relied in ruling that Voss' expert testimony was inadmissible. (CP 523)

In its Reply PUD blithely ignored these cases, particularly the specific language of ***White*** quoted on p. 21 of Castillo's initial appellate brief. That language in ***White*** is essential to analyzing the central issue in this case. Nonetheless PUD simplistically reiterated the canard that Voss' use of the word opinion at various places should nullify his testimony.

PUD also ignored those canons of construction favoring the non-moving party's evidence in a summary judgment proceeding. Those cases are on p. 22 of Castillo's initial appellate brief. Finally Castillo relies on ***Leaverton,*** referenced in the Conclusion of this Reply, which enjoins courts against elevating form over substance in construing the affidavit of the expert's affidavit.

8. STANDARD OF REVIEW IS DE NOVO

Castillo has already shown that Voss' testimony was not just his personal opinion. However, at pp. 22-23 of its brief PUD cites cases holding that admission of an expert's testimony is within the discretion of the trial court and that the trial court will not be reversed except for an abuse of discretion.

PUD knows full well that every one of its cited cases refer to a trial court's decision whether to admit an expert's testimony at trial. At

CP 782 Castillo provided unrebutted authority to the trial court on this issue. That authority holds that PUD's cases on abuse of discretion as the standard of review for a trial court's decision on expert testimony are inapplicable cases in a summary judgment setting where all evidence is reviewed de novo. ***Folsom v. Burger King,*** 135 Wn.2d 658, 958 P.2d 301 (1998); ***Ross v. Bennett,*** 148 Wn. App. 40, 203 P.3d 383 (2008). This rule also extends to requiring a de novo review of expert witness affidavits. ***Seybold v. Neu,*** 105 Wn. App. 666, 19 P.3d 1068 (2001). PUD has never presented countervailing authority related to a summary judgment hearing, but nonetheless doggedly continues to cite the abuse of discretion standard.

9. PUD MISREPRESENTS L&I INVESTIGATION

There was no L&I investigation of PUD's responsibility for the accident at issue as contended on pp. 25-27 of PUD's brief.

PUD's argument is not only factually inaccurate. but its reliance on the L&I investigation found at CP 240 contradicts other pleadings of PUD. On pp. 14-15 of its recent brief PUD endorses the contention of its expert, Paul Way, who asserted that the entire accident was the fault of Mr. Castillo. However, L&I at CP 240 found that Castillo was not at fault for his own accident. Therefore, by accepting PUD's arguments at pp. 25-26 of its recent brief to the effect that the L&I decision is determinative in

the present case, Castillo should be exonerated from causing his own accident.

Castillo suggested to the trial court that the L&I investigation should be a binding elimination of any comparative fault of Castillo, but PUD opposed that result at trial! CP 164-165. Now on pp. 25-27 of its appeal brief PUD argues, without missing a beat, that the L&I investigation should exonerate PUD.

The problem is that L&I never investigated the conduct of PUD. For the PUD investigation to have any binding effect in the present case collateral estoppel must apply. ***Christensen v. Grant County Hospital District No. 1,*** 152 Wn.2d 299, 96 P.3d 957 (2004). Castillo will discuss two of the many reasons why the L&I investigation in the present case did not create a collateral estoppel which exonerates PUD.

First, ***Christensen*** holds that the issue must have been determined by the administrative agency. L&I did not give an iota of attention to the issue of PUD's responsibility. Second, there must have a judgment on the merits in the earlier proceeding. There was no formal hearing and no judgment entered by L&I.

Instead of relying upon collateral estoppel, PUD on p. 25 of its brief misleadingly cites well known case law which announces the familiar doctrine that courts will give deference to an agency's

interpretation of its own rules. However, that doctrine applies in the context of a judicial review of a contested administrative decision which was a final judgment. This principle is exemplified by PUD's citation of ***J & S Servs., Inc. v. L&I***, 142 Wn. App. 502, 174 P.3d 1190 (2007). However, that case law does not extend to an agency's investigation which did not result in entry of a judgment. *See* ***Williams v. Leone & Keeble,*** 171 Wn.2d 726, 254 P.3d 818, 822-23 (2011) (Factual investigation by administrative agency which does not result in judgment does not have res judicata or collateral estoppel effect.)

More fundamentally it is evident that the L&I report at CP 240 did not conduct an investigation or express an opinion as to whether PUD was at fault for this accident. The L&I report simply concluded that Castillo and his employer had no fault for the accident. PUD's implication in its brief that it was exonerated by the L&I investigation is sheer fabrication.

Voss explained in his deposition why L&I conducted no investigation of PUD. (CP 090-092) Voss testified that L&I did not even investigate PUD's wrongdoing because the inspectors sent to the scene were not trained in electrical power accidents and because the PUD personnel at the scene disclaimed responsibility. CP 091 (see Voss deposition p. 19 ll. 6-13, p. 20 line 1).

Even if this case involved the interpretation of part of the WAC, rather than mere fact finding (partial though it was), then the standard of review is the de novo standard. ***Maplewood Estates v. L&I,*** 104 Wn. App. 299, 17 P.3d 621 (2000).

Ultimately, Castillo's comparative fault or lack thereof is just another misleading red herring in this case where the issue is the admissibility of Voss' opinions that PUD violated the standard of care so as to cause Castillo's injuries.

10. PUD MISSTATES R.C.W. 19.28.101

On p. 27 of its brief PUD inaccurately attempts in one sentence to refute Voss' expert opinion that PUD improperly failed to comply with R.C.W. 19.28.101. (CP 054 which is Voss' initial declaration.) Note that R.C.W. 19.28.101 requires a specific protocol before power, once disengaged, may be re-engaged. PUD at p. 27 of its Response says that the "clear language" of this statute applies only to final inspections. Perhaps this writer is purblind, but Castillo's counsel finds no such reference in that statute. PUD has simply misrepresented the terms of the statute.

11. NONDELEGABLE DUTY DOCTRINE IS RED HERRING

In its final parry at pp. 27-28 of its Response PUD cites familiar authority that a utility does not have an automatic nondelegable duty to assure the safety of the workers of an independent contractor that is working for the utility.

Once again this is a new argument, never made to the trial court, which this Court should disregard under the line of cases represented by ***Sneed*** and ***Woodcreek Partnerships,*** *supra.* However, unlike the other new argument of PUD, at least this new argument does not require new evidence in order to analyze it.

Tauscher v. Puget Sound Power & Light Co., cited on p. 27 of PUD's Response, merely holds that a utility does not automatically have a nondelegable duty to protect the employees of an independent contractor working for the utility. Once again PUD fights against a straw man. Castillo has never claimed, and does not now claim, that PUD had a duty to oversee or manage the safety performance of Castillo's employer, Scone & Connor.

Instead Castillo has simply contended that PUD is responsible for negligently reconnecting the power as it did. Castillo is suing PUD for what it actually did – not for what it failed to do in light of a nondelegable

duty. Voss at CP 343-355 explained why PUD is responsible for this accident even though it occurred on Scone & Connor property. In short, PUD's fault is premised upon its negligently re-engaging the power at PUD's meter base from which the power flowed so as to injure Castillo.

It is well established that a utility is liable to members of the public for its own negligence. ***Campbell v. Bellevue***, 85 Wn.2d 1, 530 P.2d 234 (1975) (duty based on violation by electrical inspector of city ordinance which was very similar to R.C.W. 19.28.101. at issue in the present case).

CONCLUSION

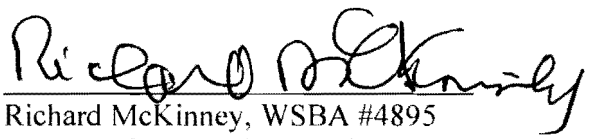
Voss clearly stated that his standard of care testimony relied upon objective criteria that are recognized by other industry experts. Erga confirmed that conclusion. Once again ***Leaverton v. Cascade Surgical Partners,*** 160 Wn. App. 512, 248 P.3d 136 (2011) holds that an expert's testimony need not be phrased in any particular format lest a court elevate form over substance.

Ignoring the substantive authorities in this case, PUD wanders through a mélange of issues that are based upon imagined facts or legal authorities that are only relevant within its own solipsistic musings. At the same time PUD denigrates Voss as undereducated (PUD brief p.7) and tastelessly mentions the loss of his arm due to an electrical accident in its brief p.19. (Many socially beneficial outcomes have occurred because the

victims of a baneful policy have arisen to change the source of suffering, viz. civil rights, MADD, America's Most Wanted program by John Walsh.) PUD's counsel misrepresents to this Court that Erga is unknown to him and then devolves into a discussion of the extraneous doctrine of nondelegable duty. Rather than dwell further on the lacunae in PUD's brief, Castillo will summarily close his Reply and commend this Court to the respective logic, consistency and force of precedent of both parties' positions. There is no basis for this case to set precedent by becoming the first and only case in Washington jurisprudence wherein our courts strike the testimony of a qualified expert who testifies to the statewide standard of care, which he asserts comes from legitimate third party sources that are knowledgeable of the standard of care. There is even less basis (if that is logically possible) to disallow Voss from testifying to the means available for PUD to adhere to its own self-proclaimed standard of care and to disallow Voss from testifying to the means of complying with R.C.W. 19.28.101.

DATED this 16th of September, 2014

Respectfully submitted,



Richard McKinney, WSBA #4895
Attorney for Ricardo Castillo

CERTIFICATE OF SERVICE

I hereby certify that on September 16th , 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 September 16th , 2014, I delivered 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

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 16th day of September, 2014.

Richard McKinney