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AUG 26 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 32094-4-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

FILED

SEP 1 2015

RICARDO CASTILLO, APPELLANT

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
OF

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

PETITION FOR DISCRETIONARY REVIEW UNDER RAP 13.4

By: Ricardo Castillo, Pro Se
P.O. Box 2162
Warden, WA 98857
509/760-1795

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IDENTITY OF PETITIONER

Petitioner, Ricardo Castillo, seeks review of the decision of the Court of Appeals, Division III, in the case of Castillo v. Grant County PUD, No. 320944, filed on June 23, 2015, with the denial of Castillo's Motion for Reconsideration filed on July 30, 2015.

ISSUES PRESENTED FOR REVIEW

1. Is the trial court ruling subject to de novo review when the trial court excluded the expert of the responding party within the context of a summary judgment motion?

2. Under the de novo review standard, or even under the abuse of discretion standard, did the trial court err in excluding the testimony of Castillo's expert (James Voss) in the summary judgment hearing?

3. Did the majority of the Court of Appeals fail to follow established case law permitting a recognized expert to express part of his testimony as "his opinion"?

4. Did the majority of the Court of Appeals improperly expand the scope of the trial court ruling in striking Voss' testimony so that the ruling affects issues beyond the scope of the summary judgment hearing?

STATEMENT OF THE CASE

Ricardo Castillo managed the extensive irrigation system of the large Skone & Connors Ranch in Grant County. A ranch employee requested the Grant County PUD to disengage the power so that Castillo could work on the power panel on the ranch. The lineman arrived near the ranch and disengaged the power at the meter base controlled by the PUD.

Then the lineman and Castillo met at the power panel on ranch property. Without incident Castillo touched the disconnect at the power panel during this meeting. The two men miscommunicated as to whether the lineman intended to re-engage the power before disengaging it again. Castillo continued to work at the power panel when the lineman re-engaged the power. Castillo received a 480 volt charge which hurled him backwards onto a rocky ground surface.

Castillo suffered a severe back injury resulting in one surgery to-date and a recommendation for a second surgery.

Castillo sued for damages. PUD moved for a summary judgment ruling that a violation of the Washington Administrative Code cannot comprise a basis of liability of PUD to Castillo. In the same motion PUD moved to strike all expert testimony of Voss. The Motion to Strike was based upon PUD's assertion that Voss' opinions were not reflective of an objective standard of care. Because he always conceded that the WACs

do not constitute a basis for PUD's liability, Castillo did not oppose the summary judgment on that issue. However, Castillo opposed the striking of Voss' testimony because that ruling could obviously prevent Voss from testifying as to the general standard of care which PUD violated. The trial judge struck Voss' testimony. The Court of Appeals granted discretionary review on the admissibility of Voss' testimony, and a 2-1 majority of the Court of Appeals agreed that it was not an abuse of discretion for the trial court to strike Voss' testimony.

ARGUMENT

ISSUE 1: DE NOVO REVIEW IS REQUIRED

The Court of Appeals applied an abuse of discretion standard in upholding the striking of Voss' testimony. However, the trial court ruling was within the context of a summary judgment motion. At that time the case was within the MAR process.¹ The trial court has no power to rule on evidentiary matters which are pending in MAR except to rule on summary judgments. MAR 3.2 (b) (1).

There must be a de novo review of the trial court ruling on the admissibility of expert testimony which the losing party submits in opposition to summary judgment. *Seybold v. Neu*, 105 Wn. App. 666,

¹ Since 2013 when this appeal commenced, Castillo has had one surgery and a recommendation for a second surgery resulting from the incident at issue. Therefore, there is every likelihood that Castillo will seek to remove this case from MAR.

19 P.3d 1068 (2001). All aspects of a summary judgment proceeding are subject to de novo review. *Ross v. Bennett*, 148 Wn.2d 40, 203 P.3d 383 (2008) and cases cited therein. The abuse of discretion standard which the Court of Appeals applied in this case also contradicts another decision of the precise panel of Division III which decided the present case. *Keck v. Collins*, 181 Wn. App. 67 n.2, 325 P.3d 306 (2014), *review granted* 181 Wn.2d 1007, 335 P.3d 941 (2014).

Thus the present Court of Appeals decision contradicts both Supreme Court and Court of Appeals precedents, making discretionary review appropriate under RAP 13.4 (b) (1) and (2).

ISSUE 2: MISREADING OF RECORD BY COURT OF APPEALS

The Court of Appeals ruled as follows on pp. 6-7 of the majority opinion.

“. . . relying on the rule governing high voltage power operation for the protection of the linemen, Mr. Voss asserted that . . . PUD [was] required to follow similar procedures for the low voltage situation presented in this case. He never presented any authority for that view He never identified a recognized industry standard other than his own idiosyncratic standard of care.”

There is not one whit of evidence supporting this finding. The record utterly belies this finding.

Both the trial court and the Court of Appeals found Voss to be a qualified expert in electrical utility safety. Majority at n.4 and Concurrence at p. 5. However, the record demonstrates that Voss testified very differently than asserted by the Court of Appeals.

2.1 Voss did not state that there are separate standards for high voltage and low voltage switching and clearance (engagement of the power). He said that the standards are the same for all events of 50 volts or more. CP 273-74 defines switching and clearance. At CP 274 Voss stated that, within the WAC itself, switching and clearance standards are governed by WAC 296-45-335. At CP 274-75 Voss stated that PUD had no switching and clearance standards for low voltage events. CP 326-27 confirmed that all WACs in the 296-45 series regulate events of 50 volts or more [thereby making no distinction between most low voltage and all high voltage events, as the line of demarcation is 600 volts per CP 257-58].

2.2 Voss did not rely on the WACs as the basis for his standard of care (SOC) testimony. He denied that the WAC established any SOC for liability purposes. CP 111, 346.

Instead Voss said that the SOC is gleaned outside the WAC. CP 111, 324, 728. He also said that the WAC proscribes conduct which is

included within conduct prohibited by the SOC (CP 347), but the prohibited conduct does not violate the SOC because of the WAC.

This is precisely the same as *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) which permits an expert in a legal malpractice case to testify that conduct prohibited by the RPCs is also a violation of the attorney SOC even though the RPCs may not themselves establish the SOC for civil liability.

2.3 Voss testified that the SOC which he identified was generally recognized. CP 324, ll. 14-20. Voss also said that the SOC is what a reasonable person should do. CP 325, l. 20 – CP 326, l. 1.

Despite Voss' clear testimony, Judge Knodell ruled that Voss' SOC was self-created, and the test for admissibility of Voss' testimony would have been for him to state what a reasonable person would do and what are the recognized norms. CP 741.

This case has the unique characteristics of expert testimony being stricken because the expert met the trial court's precise criteria for expert testimony.

A Court of Appeals decision which relies on non-existent facts to uphold the denial of Castillo's right to call an expert infringes on Castillo's right to a jury trial. Summary judgment is constitutional only because it is limited to cases where there is a complete lack of evidence to

support an element of the non-moving party's claim. *La Mon v. Butler*, 112 Wn.2d 193, 199 n.5 770 P.2d 1027 (1989). Striking Voss' testimony, based upon on non-existent record, infringes upon Castillo's constitutional right to a jury trial, thus qualifying this case for review under RAP 13.4 (b) (3).

In the present case Voss provided all the admissible evidence necessary to permit his testimony to be considered by the jury. That evidence was that he ascertained the SOC from numerous objective sources outside of himself. He attended over 20 seminars and training courses. CP 326. He apprehended the SOC by consulting with other electrical power safety experts including Brian Erga. CP 50, 758-62. While working for Puget Sound Power & Light he regularly consulted with the Safety Department of that company. CP 321. He worked as one of the few enforcement officers of the WACs for DOSH, part of the Department of Labor & Industries. CP 49. He was Field Safety Coordinator and Training Director for electrical safety for Potelco (third largest private utility in U.S.). CP 50. Voss emphasized that his SOC opinions were based upon consultation with other experts and upon classes that he had taken. CP 531-32.

Voss articulated many PUD violations of the SOC. Most importantly he stated that it is a violation of the SOC for a lineman to meet

with Castillo at the power panel and test the power without having permanently “locked out” the power. CP 53. Voss also stated that if the lineman was going to re-engage the power, after just disengaging the power, the SOC required that the lineman select one of several available means to prevent the power from flowing from the PUD meter base to the power panel where Castillo worked. CP 54-55. Another example of PUD’s violation of the SOC occurred when the lineman re-energized the power without recommending that Castillo place tape around the loose phase at the power panel so as to insulate it in the event that the phase had contact with the meter box, a grounded object. CP 56-57.

This testimony is all that is necessary under our case law to permit Voss to testify to the SOC. *Davies v. Holy Family Hospital*, 144 Wn. App. 483 text following n.2, 183 P.3d 283 (2008). The sufficiency of Voss’ testimony as reflective of a recognized, objective SOC is particularly clear because Brian Erga, an electrical engineer who is one of Voss’ mentors, confirmed that Voss accurately stated the SOC. CP 758-63. Erga’s declaration confirms that Voss did not have an “idiosyncratic” view of the SOC. At the very least all of the foregoing evidence suggests that there is an issue of fact as to whether Voss articulated an objective SOC.

ISSUE 3: VOSS' REFERENCE TO HIS OPINIONS OR BELIEF DOES NOT RENDER HIS TESTIMONY INADMISSIBLE

Voss testified repeatedly that PUD violated the SOC. CP 49, et seq., 106-14, 531-32, 727-28 and throughout his deposition. However, his testimony often contained such predicates as “I think” or “It would be my opinion,” etc. See the summary of such examples on p. 4 of concurring opinion.

The trial court disallowed Voss' opinions because his SOC testimony was based solely on his personal opinion (Concurrence p. 5). However, two cases permit an expert to use such phrases as “In my opinion” so long as it is clear that the expert is basing his testimony on an objective SOC. *Leaverton v. Cascade Surgical Partners, PLLC*, 160 Wn. App. 512, 248 P.3d 236 (2011); *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 810 P.2d 4 (1991). As noted by the Concurrence at p. 5, Voss' SOC testimony should not have been dismissed because of the phraseology of his opinion. The majority offered no riposte to this view of the Concurrence except to say that the trial court did not abuse its discretion in excluding Voss' testimony. Yet, as noted above, abuse of discretion is not the test for reviewing Voss' expert opinion in opposition to summary judgment. Even if the test were abuse of discretion, it is clear that Voss' opinions should still be admitted because of the emphasis in

Leaverton and *White* in evaluating the substance rather than the precise verbiage of the expert's opinion. The Court of Appeals decision permits a future trier of fact to disallow Voss' testimony because he has previously used the phrases "in my opinion" and "I think" to preface certain parts of his standard of care testimony.

Because the majority ignored *Leaverton* and *White* its opinion conflicts with unbroken precedent of the Court of Appeals, again inviting discretionary review under RAP 13.4 (b) (2).

ISSUE 4: STRIKING OF VOSS' TESTIMONY SHOULD ONLY ELATE TO MOTION BEFORE TRIAL JUDGE

Motions to strike testimony have been repeatedly disfavored by Washington case law. *Parks v. Fink*, 173 Wn. App. 366, 293 P.3d 1273 n.7 (2013); *Engstrom v. Goodman*, 166 Wn. App. 905, 271 P.3d 959 n.2 (2012); *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009).

However, when the trial judge struck Voss' testimony in the motion for summary judgment regarding the WACs constituting a SOC, Castillo's counsel repined that Voss could not testify for any purpose at all. However, at n.4 the majority of the Court of Appeals stated that Voss may still testify to the "industry standard" on remaining negligence

claims. One remaining negligence claim is that PUD violated the industry standard of care.²

The trial court stated that Voss can still testify to PUD's general negligence which the court categorized as a failure to warn. CP 812, 820. The Concurrence of the Court of Appeals stated that it agreed with the Majority that Voss can still testify that PUD violated its internal safety standards (p. 6 of concurrence). Yet the Majority never said what the Concurrence attributed to it. The Majority at n.4 stated that Voss can still testify to industry standard of care on remaining negligence claims.

In summary, the parties have spent nearly two years in Court of Appeals proceedings but there remains prolific uncertainty about the meaning of its decision. That is because the significance of "striking testimony" is unclear. Both the Majority and Concurrence suggest that Voss is still able to testify regarding all claims except the (never asserted) claim that PUD is liable for violating the WAC.

If Voss is able to testify to all claims except the (non-existent) claim that PUD violated the WAC, then the parties have completed nearly two years of appealing and have resolved nothing. Castillo requests that,

² The Majority at p. 3 and the Concurrence at p. 1 both stated that Castillo asserted two-theories of liability: violation of the WACs and ordinary negligence. Yet a part of the confusion in this case is that Voss never asserted that violation of the WACs was one of his bases for attributing fault to PUD. Instead, Castillo's claims ultimately were: violation of the industry standard of care (excluding the WACs), violation of R.C.W. 19.28.101, violation of PUD's internal standards of care, failure to warn.

under RAP 13.4 (b) (4), this Court clarify the significance of striking an expert's testimony.

There is no known Washington case which defines the impact of striking testimony, but the Majority and Concurrence suggest that striking testimony means simply that the testimony is inadmissible solely with reference to the motion at issue.

Such an interpretation is supported by numerous Federal decisions. *See e.g. In re Digital Equip. Corp. Securities Litigation*, 601 F. Supp. 311 (D. Mass. 1984).

Motions to strike emanate from Rule 12 (f) and they should not be granted “unless the matter sought to be omitted has no possible relationship to the controversy, may confuse the issue or otherwise prejudice the party.” *Reyher v. Transworld Airlines, Inc.*, 881 F. Supp. 574 (M.D. Fla. 1995) and cases cited therein.

It is also the law that a stricken expert declaration may be redrafted in order to comply with the requirements of a motion that is different, but related to, the original motion where the expert testimony was stricken. *In Re Conagra Foods, Inc.*, 2015 WL 1062756 (C.D. Cal. 2015).

Thus, even if this Court does not grant discretionary review for the first three reasons cited, it should grant review to clarify the scope and meaning of an order striking testimony in relationship to proceedings

beyond the motion originally at issue. Providing such guidance in this case fits within RAP 13.4 (b) (4). There have been numerous Washington cases involving motions to strike, and there have been frequent recent appellate criticisms of such motions. Yet there has never been any appellate guidance in Washington as to the meaning and scope of granting a motion to strike.

CONCLUSION

Ricardo Castillo is now without any attorney to represent him. This is mostly because of the uncertainty surrounding the admissibility of Voss' expert testimony. If this Court does not clarify the issues presented herein, there is every likelihood of a misguided decision at the trial court level on the admissibility of Voss' testimony. For example it is imaginable that a finder of fact would feel constrained to reject Voss' testimony with respect to remaining theories of liability because a 2-1 majority of the Court of Appeals sustained the trial court in rejecting his testimony. That could prevent Castillo from meeting his burden of proof as to some of the extant theories of liability. That in turn would lead to another appeal and considerable wasted expense. The issues set forth herein need to be resolved so that this litigation can proceed without a substantial inherent risk of a second appeal before the case is even called for trial. A primary reason urged for the Court of Appeals to grant discretionary review was to

clarify the ability of Voss to testify in this case. That purpose is still unfulfilled.

DATED this 24 day of August, 2015.

Respectfully submitted,

Ricardo Castillo
RICARDO CASTILLO, Pro Se

DECLARATION OF SERVICE

I hereby certify that on August 24, 2015, one (1) copy of **Petition for Discretionary Review Under RAP 13.4** was mailed to the following individual:

J. Scott Miller
Attorney at Law
201 W. North River Drive, Suite ~~205~~ ³⁰⁵
Spokane, WA 99201

I also certify that on August 24, 2015, one (1) copy of **Petition for Discretionary Review Under RAP 13.4** was mailed 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 Warden, Washington this 24 day of August, 2015.

Ricardo Castillo
Ricardo Castillo, Pro Se

APPENDIX

TRIAL COURT SUMMARY JUDGMENT
ORDER

FILED

OCT 31 2013

KIMBERLY A. ALLEN
GRANT COUNTY CLERK



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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF GRANT

RICARDO CASTILLO,

Plaintiff,

v.

GRANT COUNTY PUBLIC UTILITY
DISTRICT,

Defendants.

CASE NO: 11-2-00388-1

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION

THIS MATTER having come before the Court on May 29, 2013, upon Defendant's Motion for Summary Judgment; and Plaintiff supplemented the record with new materials; the Court also having heard Plaintiff's Motion for Reconsideration on September 27, 2013; J. Scott Miller of the Law Offices of J. Scott Miller, P.S., appearing on behalf of Defendant and Richard McKinney appearing on behalf of Plaintiff, and the court having considered all of the documents submitted in the above-captioned matter, including the following:

ORDER GRANTING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT - 1

Law Offices of J. Scott Miller, P.S.
201 W. North River Drive
Suite 500
Spokane, WA 99201
(509) 327-5591

1 //

- 2 1. Defendant's Motion for Summary Judgment;
- 3
- 4 2. Defendant's Identification of Undisputed Facts in Support of Summary
- 5 Judgment;
- 6 3. Defendant's Memorandum of Authorities in Support of Motion for Summary
- 7 Judgment;
- 8 4. Declaration of Paul T. Way In Support of Defendant's Motion for Summary
- 9 Judgment (dated 11/12/12);
- 10 5. Declaration of J. Scott Miller in Support of Defendant's Motion for Summary
- 11 Judgment;
- 12 6. Plaintiff's Memorandum in Opposition to Summary Judgment;
- 13 7. Declaration of James Voss in Opposition to Summary Judgment (11/21/12);
- 14 8. Defendant's Renewed Motion for Summary Judgment (4/30/13);
- 15 9. Defendant's Motion and Brief in Support of Motion to Disqualify James Voss as
- 16 Plaintiff's Second Liability Expert (4/30/13);
- 17
- 18 10. Declaration of Paul T. Way in Support of Motion to Disqualify James Voss
- 19 (dated 4/30/13);
- 20 11. Declaration of J. Scott Miller Re: Deposition Testimony of James Voss
- 21 (4/30/13);
- 22 12. Declaration of Paul T. Way in Support of Defendant's Motion for Summary
- 23 Judgment (dated 4/30/13);
- 24 13. Second Declaration of James Voss in Response to Refiled Motion and In
- 25 Response to Motion to Strike (5/9/13);
- 26 14. Declaration of Authentication (undated); *and attachments*
- 27 15. Declaration of Paul T. Way in Reply to Second Declaration of James Voss and
- 28 in Support of Defendant's Motion for Summary Judgment (5/24/23);
- 29 16. Defendant's Reply Brief in Support of Motion for Summary Judgment
- 30 (5/23/13);

- 1 17. Deposition testimony of Ricardo Castillo (submitted 6/12/13);
- 2
- 3 18. Deposition testimony of John Johnston (submitted 6/12/13);
- 4
- 5 19. Verbatim Report of 5/29/13 Proceeding (submitted 6/12/13);
- 6
- 7 20. Defendant's Motion for Summary Judgment – Supplemental Materials
- 8 (6/13/13);
- 9
- 10 21. Rebuttal Declaration of Paul T. Way in Support of Defendant's Motion for
- 11 Summary Judgment (6/19/13);
- 12
- 13 22. Evidence Refuting Defendant's Special Submission (6/20/13);
- 14
- 15 23. Defendant's Objection to Plaintiff's Supplemental Materials Regarding
- 16 Summary Judgment (6/25/13);
- 17
- 18 24. Declaration in Repsonse to Motion to Strike (06/26/2013);
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- 20 25. Court's Memorandum Opinion Granting Plaintiff's Motion for Summary
- 21 Judgment (08/20/2013);
- 22
- 23 26. Supplemental Declaration of James Voss (08/22/2013);
- 24
- 25 27. Amended Brief in Support of Motion for Reconsideration (08/25/2013);
- 26
- 27 28. Defendant's Brief in Opposition to Plaintiff's Motion for Reconsideration
- 28 (09/05/2013);
- 29
- 30 29. Reply re Reconsideration (09/09/2013);
- 31
- 32 30. Motion to Consider Additional Materials Before Entry of Judgment
- 33 (09/19/2013);
- 34
- 35 31. Declaration of McKinney to Consider New Material (09/19/2013);
- 36
- 37 32. Summary of Cases Relating to Right to Present New Legal Theory and New
- 38 Evidence (09/19/2013);
- 39
- 40 33. Defendant's Objection to Plaintiff's Motion to Add New Legal Theories and
- 41 New Evidence (09/24/2013);
- 42
- 43 34. Plaintiff's Brief Following Haring of 9/27/13 (09/30/2013);

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2 35. Declaration of James Voss of October 2013 (10/01/2013);
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4 36. Defendant's Response to Court's Request for Supplemental Discovery
Materials (10/03/2013);
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6 37. Declaration of J. Scott Miller in Support of Defendant's Response for
Supplemental Discovery Materials (10/03/2013)
7
8 38. Objection to Submission to PUD in Response to Court Request (10/04/2013);
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10 39. Defendant's Motion to Strike and Objection to Plaintiff's Improper
Submission (10/04/2013); and
11
12 40. Court's Memorandum Opinion Granting Summary Judgment (10/09/2013)

13 and the Court having received oral argument of plaintiff's counsel stating that the
14 Plaintiff is proceeding only on a theory that the lineman in this case failed to follow the
15 de-energizing procedure called for under the Washington Administrative Code and not on
16 any theory that the lineman failed to warn Mr. Castillo he was re-energizing and not on
17 any theory that he proceeded to reenergize even though Mr. Castillo had told him he was
18 going to work on the circuit (transcript of 5/29/2013 proceedings at 31), and the Court
19 having previously issued Memorandum Opinion (Amended) on 08/23/2013 determining
20 that the testimony of Mr. James Voss is insufficient to establish a standard of care based
21 on violation of the WACs, and is, therefore, irrelevant,
22

23 NOW, THEREFORE, it is HEREBY ORDERED AS FOLLOWS:

- 24
25 1. Defendant's Motion to Strike the Declarations of James Voss is **GRANTED**;
26
27 2. Defendant's Motion for Summary Judgment based on violations of the WACs
is **GRANTED**;
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29 3. Defendant's Motion for Summary Judgment based on alleged negligence is
DENIED;
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ORDER GRANTING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT - 4

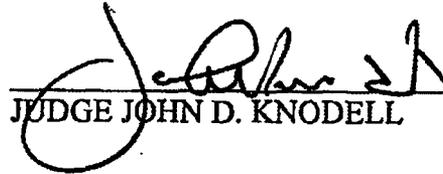
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201 W. North River Drive
Suite 500
Spokane, WA 99201
(509) 327-5591

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4. Plaintiff's Motion to Add New Legal Theories and New Evidence is **DENIED**;

5. Plaintiff's Motion for Reconsideration is **DENIED**.

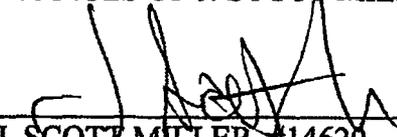
DATED this 21 day of October, 2013. .



JUDGE JOHN D. KNODELL

Presented by:

LAW OFFICES OF J. SCOTT MILLER, P.S.

By: 

J. SCOTT MILLER, #14620
Attorney for Defendant

Copy Received:

By: _____
RICHARD MCKINNEY, WSBA #4895
Attorney for Plaintiff

COURT OF APPEALS RULING

FILED
JUNE 23, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RICARDO CASTILLO,)	
)	
Appellant,	)	No. 32094-4-III
)	
v.)	
)	
GRANT COUNTY PUBLIC UTILITY	)	UNPUBLISHED OPINION
DISTRICT,)	
)	
Respondent.)	

KORSMO, J. — This interlocutory appeal involves a certified question concerning the admissibility of the plaintiff’s expert’s testimony following the trial court’s granting of a partial summary judgment on one of plaintiff’s theories of the case. We affirm and remand for trial.

FACTS

Appellant Ricardo Castillo was injured when, due to miscommunication, a circuit breaker exploded after an employee of defendant Grant County Public Utility District (PUD) energized the breaker while Mr. Castillo was working on it. He suffered serious injuries and ultimately filed suit against the PUD, alleging two different theories of liability.

Some discussion of the incident and ensuing litigation is necessary to understand the circumstances. Mr. Castillo is a longtime employee of Skone & Connor Ranch in Warden. His responsibilities include managing and maintaining the irrigation system. In order to address corrosion in the wiring of the system's circuit breaker, Mr. Castillo needed the PUD to temporarily disconnect the power so that he could perform the repairs and then have the PUD reengage the power.

Anticipating that only 20 minutes would be needed to perform the repairs, a PUD lineman, John Johnston, was to wait out the repair period and then turn the power back on in order to avoid a second trip to the ranch. Mr. Johnston arrived at the location first and disconnected the power by removing the meter from its base. The electrical system in question directed the power from the power lines through a transformer to the meter and then across the street to the circuit breaker. From there the power flowed to the irrigation equipment. In order to disconnect the meter base, Mr. Johnston had to flip a meter bypass lever up. By lifting the lever up, he could then disconnect the meter. Another effect of bypassing the meter, however, was to send the power directly to the circuit breaker.

Mr. Castillo arrived and started working. However, he could not entirely disconnect all of the corroded wiring within the circuit breaker and it appeared that he was going to need to bring an electrician to continue the repairs or to replace the breaker. He temporarily stopped his repair efforts and notified Mr. Johnston that the power would

need to remain off indefinitely. What happened next is in dispute between the two sides. According to Mr. Johnston, Mr. Castillo told him that the breaker would need replacing and the power should remain disconnected until that work was done. Mr. Johnston responded that he would have to temporarily reenergize the system in order to put in a nonconductive “pie plate” in place of the meter. According to Mr. Castillo, he did not definitively tell Mr. Johnston that an electrician was needed and Mr. Johnston did not tell him about the need to temporarily reenergize the system in order to install the “pie plate.”

What happened next is undisputed. Mr. Castillo went to his truck to pick up some lubricant and returned to the breaker. Meanwhile, Mr. Johnston crossed the street and moved the lever in order to install the “pie plate.” The power flowed to the circuit breaker, causing it to explode and injure Mr. Castillo.

Mr. Castillo sued the PUD, alleging that his injuries were caused by the negligence of Mr. Johnston in energizing the circuit breaker while he was working on it and by the PUD’s failure to abide by Washington Administrative Code (WAC) regulations governing high voltage power. He retained James Voss as an expert witness. Mr. Voss had spent his career in electricity, starting as a linemen for Puget Sound Energy before becoming a field safety coordinator and high voltage safety training director for Potelco. Voss finished his career as a high voltage safety inspector for the Department of Labor and Industries. During his career, he had taught courses related to the standard of care for public utility linemen. Voss contended that the lineman should have cut the

power to the transformer rather than at the meter as would have been required by the Washington Administrative Code.¹

The PUD eventually moved for summary judgment on both theories of liability and, if only the WAC-based theory was dismissed, to exclude the testimony of Mr. Voss because his testimony was based solely on that theory of the case. After hearing argument and a motion for reconsideration, the court ultimately granted summary judgment on the WAC violation theory and denied summary judgment on the negligence theory. The court determined that Mr. Voss was qualified as an expert by his experience and training. Clerk's Papers (CP) at 522. The court also ruled that Mr. Voss's testimony was irrelevant because he related his personal view of where the power should have been cut rather than identify an industry standard of care governing that action. CP at 741-42.

At the request of Mr. Castillo, the trial court certified the question of its exclusion of Mr. Voss to this court but did not certify the summary judgment dismissal of the WAC violation theory of liability. This court accepted the certification of the witness exclusion ruling.

¹ Both Mr. Voss and defense expert Mr. Way described in general terms the "switching and clearance" protocol, a process by which high voltage lines are taken off-line in a coordinated effort between the workers in the field and controllers at headquarters who are communicating with each other. Clerk's Papers (CP) at 123, 279-80.

ANALYSIS

Although there is only one issue presented by this appeal, it overlaps the summary judgment order dismissing the WAC violation theory and has been argued as an indirect attack on the summary judgment ruling.² The correct focus, in light of the certified issue, is on the trial court's evidentiary decision to strike Mr. Voss's testimony due to irrelevance.

As a general principle, a trial court's evidentiary rulings concerning expert testimony under ER 702 are reviewed for abuse of discretion. *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999); *Moore v. Harley-Davidson Motor Co., Grp.*, 158 Wn. App. 407, 417, 241 P.3d 808 (2010). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A claim in negligence is premised on the elements of duty, breach, injury, and causation. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). Duty has three facets: (1) who owes the duty (2) to whom, and (3) what is the standard of care. *Gall v.*

² The argument suggests that summary judgment was granted due to lack of expert testimony to support the theory after Mr. Voss's testimony was stricken. We do not agree. The summary judgment argument focused on the inapplicability of the high voltage power line regulations, which Mr. Voss admitted were designed to protect linemen, to the situation at hand in which the customer was injured by low voltage. While lack of expert testimony on this topic would be an additional basis for dismissing that theory, it does not appear to have been the theory used by the trial court.

McDonald Indus., 84 Wn. App. 194, 202, 926 P.2d 934 (1996). Here, James Voss was employed as an expert to establish the standard of care owed. Expert testimony is admissible if the specialized knowledge will assist the fact finder in understanding the evidence or determining a fact in issue. ER 702.

Mr. Castillo argues that the trial court applied hyper-technical requirements to Mr. Voss, requiring him to use a particular form for his opinion. We disagree. The trial court painstakingly reviewed—on two occasions—the deposition of Mr. Voss and his declarations. As the trial judge noted, “It is the substance of Mr. Voss’ testimony and not its form which is dispositive.” Report of Proceedings at 741. This was not a question of the judge requiring the expert to use magic words. Instead, the judge rightly required the expert to identify a standard of care that reflected general professional standards rather than the expert’s own personal opinions. *See Leaverton v. Cascade Surgical Partners, PLLC*, 160 Wn. App. 512, 520, 248 P.3d 136 (2011); *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 172, 810 P.2d 4 (1991).

The trial judge’s careful review could discern no indication in the record that Mr. Voss ever identified an industry standard governing this situation. Instead, relying on the rules governing high voltage power operations for the protection of linemen, Mr. Voss asserted that Mr. Johnston and the PUD were required to follow similar procedures for

the low voltage situation presented in this case.³ He never presented any authority for that view nor any basis for opining that the industry standards required a similar process. In short, he never identified a recognized industry standard of care rather than his own idiosyncratic standard of care. As the trial judge summarized the matter: “Mr. Voss describes what he believes, perhaps rightly, the generally accepted standard should be.” CP at 742. A statement of what the standard should be is not a statement of what the standard is.

We conclude that the trial judge had a tenable basis for excluding Mr. Voss’s testimony. His own view of the standard of care was irrelevant to the issues for the jury.⁴ The court properly excluded Mr. Voss’s testimony at trial.⁵

³ Our courts have long recognized that a greater duty of care applies to high power voltage lines than to lower power voltage. *See Scott v. Pac. Power & Light Co.*, 178 Wash. 647, 649-50, 35 P.2d 749 (1934).

⁴ The trial court opined that the parties probably did not need experts to try the remaining negligence claim. CP at 524. If that view of the case changes, Mr. Voss is qualified as an expert and presumably, if needed, could testify to an industry standard rather than his personal standard.

⁵ Mr. Castillo also argues, and respondent addresses, a claim that Mr. Voss should have been allowed to testify that RCW 19.28.101 applies to this case and that Mr. Voss’s testimony was necessary to interpret the statute. As the trial court was not presented with the issue and did not certify it to this court, we likewise will not address the argument. We note, however, that the applicability of a statute typically presents a legal issue for the bench and question whether expert testimony to interpret a statute ever would be relevant.

No. 32094-4-III
Castillo v. Grant Co. PUD.

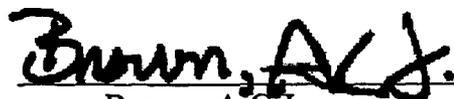
Affirmed and remanded for trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Korsmo, J.

I CONCUR:



Brown, A.C.J.

32094-4-III

FEARING, J. — (Concurrence) I agree this reviewing court should affirm the trial court's dismissal of claims forwarded by Richard Castillo based directly on alleged violations of Washington regulations by the Grant County Public Utility District (PUD). I write this separate opinion because I disagree with some of the reasoning used by the majority in arriving at the affirmance. In particular, I disagree with the majority's ruling that the trial court did not err when striking the declaration of James Voss, Castillo's expert witness, on the ground that his declaration testimony was based on his idiosyncratic view or a normative opinion of the standard of care. I would not reach the validity of the striking of the declarations since the dismissal of the regulations claims can be affirmed on other grounds. An affirmation of the summary judgment dismissal moots the need to address the striking of the declarations.

The parties assume and write as if Richard Castillo asserts two distinct causes of action: (1) violation of Washington regulations, and (2) negligence. Washington no longer recognizes negligence per se. Under RCW 5.40.050, violation of a statute or administrative rule, except for a limited scope of statutes and regulations, does not constitute negligence per se. Instead a breach of a duty imposed by statute or regulation may be considered by the trier of fact as evidence of negligence.

The trial court dismissed, on summary judgment, Richard Castillo’s cause of action “based on violations of the [Washington Administrative Code] WACs.” Clerk’s Papers (CP) at 801. Despite Washington no longer recognizing negligence per se, the trial court’s dismissal of claims based on Washington regulations is a helpful ruling, since the parties now know that Richard Castillo may not argue to the jury that violation of a Washington regulation is evidence of negligence according to RCW 5.40.050.

In addition to being helpful, the trial court’s granting of summary judgment on any negligence claim based directly on Washington regulations was also a correct ruling. Richard Castillo contended that Grant County Public Utility District violated WAC 296-45-085, WAC 296-45-095, WAC 296-45-135, WAC 296-45-325, and WAC 296-45-335 when employee John Johnston reenergized the circuit breaker. The five regulations respectively impose an obligation on lead workers to understand, inform employees of, and implement safety rules; impose a duty on lead workers to report hazardous conditions; impose an obligation on the electrical utility employer to conduct a job briefing before the start of a job; create safety standards for working on or near exposed energized parts; and establish protocol for deenergizing electrical lines and equipment for employee protection.

Chapter 296-45 WAC, from which all five regulations arise, applies only to protection of electrical utility employees. The scope of the chapter is defined in WAC 296-045-015, which provides in relevant part:

(6) Any rule, regulation or standard contained within this chapter, if subject to interpretation, shall be interpreted so as to achieve employee safety, which is the ultimate purpose of this chapter.

....

(8) Neither the promulgation of these rules, nor anything contained in these rules shall be construed as affecting the relative status or civil rights or liabilities between employers and their employees and/or the employees of others and/or the public generally; nor shall the use herein of the words “duty” and “responsibility” or either, import or imply liability other than provided for in the industrial insurance and safety laws of the state of Washington, to any person for injuries due to negligence predicated upon failure to perform or discharge any such “duty” or “responsibility,” but failure on the part of the employees, lead worker, or employer to comply with any compulsory rule may be cause for the department of labor and industries to take action in accordance with the industrial insurance and safety laws.

In his declarations filed in opposition to Grant County PUD’s summary judgment motion and his deposition testimony filed in support of and in opposition to the motion, James Voss testified that the PUD violated the five regulations. Voss’ testimony on purported violations of the regulations was irrelevant, since the court may decide as a matter of law the applicability of regulations. A trial court should dismiss a claim that a regulation is violated when the plaintiff seeks to apply the regulation outside its intended purpose. *Potter v. Wilbur-Ellis Co.*, 62 Wn. App. 318, 324-25, 814 P.2d 670 (1991). A statute or regulation may become the standard of conduct of a reasonable person only when the statute’s or regulation’s purpose is found to be exclusively or in part: (a) to protect a class of persons which includes the one whose interest is invaded, (b) to protect the particular interest which is invaded, (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from

which the harm results. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 269, 96 P.3d 386 (2004). Richard Castillo does not seek review of Judge Knodell’s summary judgment order dismissing claims based on the WACs on the ground that the regulations do not apply to injury of a member of the public.

The trial court struck the declarations of James Voss on the ground that his testimony is insufficient to establish a standard of care based on violations of the WACs and is thus irrelevant. I agree to the extent the trial court referred to Voss testifying to the legal extent of the regulations. But the majority of this court and the parties also maintain the trial court struck the declarations of James Voss on the ground that he failed to testify to an industry standard of care. Some of the trial court’s oral rulings support this understanding. I disagree that James Voss failed to testify to an industry standard of care.

Grant County PUD claims, based mainly on deposition excerpts, that James Voss postulated a standard of care based on his learning as he worked in the electrical field. The PUD faults Voss for failing to cite to any written industry standards. The PUD highlights portions of Voss’ deposition where he states: “I *think* the standard of care [is] . . .” and “It would be my opinion” as establishing Voss’ opinions to be merely his personal view. CP at 346-47 (emphasis added). In his second declaration, Voss also averred: “It is my belief that PUD . . . violated the general standard of care apart from the precise fact patterns covered by the WAC. . . . It is my opinion that those same standards of same conduct are required by the general standard of care for the protection of members of the public such as Mr. Castillo.” CP at 111.

The trial court agreed with the Grant County PUD and found that Voss' views on the standard of care were based solely on his own opinion. The trial court ruled Voss' testimony on the standard of care lacking because Voss never said that the standard of care to which he was testifying was "generally accepted in the industry" or "generally recognized." CP at 741-42. The trial court also concluded that Voss testified to a desired standard of care, rather than an actual industry standard of care.

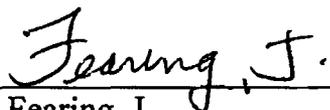
Grant County PUD concedes that James Voss has vast experience in the electrical utility field and is qualified as an expert. Voss testified that there is a "recognized standard of care for a lineman." CP at 324. He testified that he bases his opinions on this recognized standard of care. He further declared that he taught those standard of care concepts in safety classes.

An expert must identify a standard of care that reflected general professional standards rather than the expert's own personal opinions. *Leaverton v. Cascade Surgical Partners, PLLC*, 160 Wn. App. 512, 520, 248 P.3d 136 (2011); *White v. Kent Med. Ctr., Inc. PS*, 61 Wn. App. 163, 172, 810 P.2d 4 (1991). James Voss' testimony readily met this standard for expert testimony. He may have inartfully phrased some opinions in words that connoted he spoke only to his personal views. But his testimony read as a whole shows his personal view is also the standard of care in the industry. Expert testimony on the standard of care does not have to be in standard of care terminology. *White v. Kent Med. Ctr., Inc. PS*, 61 Wn. App. at 172. We look instead to the substance of the allegations and the substance of what the expert brings to the discussion.

Leaverton v. Cascade Surgical Partners, PLLC, 160 Wn. App. at 520. To require experts to testify in a particular format would elevate form over substance. *Leaverton*, 160 Wn. App at 520.

Richard Castillo assigns error to the trial court purportedly precluding James Voss from testifying that the PUD violated its own internal safety standards and violated a purported standard found in RCW 19.28.101. I agree with the majority that the trial court never issued such a ruling. The trial court struck James Voss' declarations in opposition to the summary judgment motion. The trial court did not strike James Voss as a trial witness. Absent any further trial court ruling, James Voss may testify to negligence of the PUD and its employee and base his opinion testimony on a standard of care that may be found in various sources, including statutes, regulations, and internal policies.

I CONCUR:



Fearing, J.

**COURT OF APPEALS DENIAL OF
RECONSIDERATION**

FILED
JULY 30, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RICARDO CASTILLO,	)	No. 32094-4-III
)	
Appellant,)	
)	
v.	)	ORDER DENYING
	)	MOTION FOR
GRANT COUNTY PUBLIC UTILITY	)	RECONSIDERATION
DISTRICT,)	
)	
Respondent.)	

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 23, 2015 is hereby denied.

DATED: July 30, 2015

PANEL: Judges Korsmo, Brown, Fearing

FOR THE COURT:


LAUREL SIDDOWAY
Chief Judge

**PAGES FROM RECORD REFERENCED IN
PETITION FOR DISCRETIONARY REVIEW**

1 In my past I was a relief dispatcher for linemen working for Puget Sound Energy. In
2 that capacity I needed to understand the requirements for most all of the precise tasks for
3 public utility linemen.

4 I have also worked for many years Potelco, Inc., the third largest high voltage utility
5 contractor in the U.S. One of my positions with Potelco was field safety coordinator and
6 training director for high voltage safety.

7
8 During my career I have overseen and trained linemen who worked for public and
9 private utility companies. I have attended many educational courses relating to the standard
10 of care for public utility linemen. I have taught public utility linemen regarding the standard
11 of care for their profession. I have discussions with numerous utility company officials and
12 industry safety experts regarding the standard of care for public linemen.

13
14 My declaration herein analyzes the standard of care for public utility linemen in
15 relation to the actions of John Johnston, the linemen from the Grant County PUD (GCPUD)
16 who interacted with Ricardo Castillo on the day of the accident at issue in this case.

17 I also note that, apart from the general standard of care, GCPUD assumed a
18 responsibility to adhere to a standard of conduct to which it did not adhere on June 5, 2009,
19 the day of the Castillo accident. The "Switching and Clearance" protocol of GCPUD has
20 been provided in discovery responses from PUD. That protocol is attached as **Exh. 2**.
21 Switching and clearance is an industry term which relates to the means of hazardous energy
22 source control. **Exh. 2** states that the switching and clearance protocol of GCPUD has as its
23 first priority the physical safety of employees and the public. As set forth below,
24 Mr. Johnston of the GCPUD did not on 6/5/09 comply with the general standard of care for
25
26

27 DECLARATION OF JAMES VOSS IN
28 OPPOSITION TO SUMMARY
JUDGMENT - 2

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225,
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5275

1 public utility linemen, nor did Johnston's conduct comply with the switching and clearance
2 standards of GCPUD.

3 In my opinions set forth below I am relying upon those facts set forth in the moving
4 papers of GCPUD and I am relying upon the declaration of Ricardo Castillo submitted as
5 **Exh. 3.** Finally I am relying upon a conversation with the L&I inspector who responded to
6 the report of this accident, upon the one page hospital record from Kadlec Hospital submitted
7 herewith as **Exh. 4,** upon a discovery response proving transmission of 480 volts in the
8 system at issue (**Exh. 5**), and Johnston's testimony that he had to avoid harm to his eyes
9 during the explosion which he caused at the time of the accident (**Exh. 6**). I am stating on a
10 more probable than not basis all my opinions regarding the duty of Johnston and GCPUD to
11 Castillo, regarding violations of the standard of care by Johnston and GCPUD, and regarding
12 causation of harm to Castillo by Johnston's actions which violated the standard of care. I am
13 also stating on a more probable than not basis all of my opinions regarding the duty of
14 Johnston and GCPUD under the switching and clearance standards of GCPUD, regarding
15 Johnston's violation of those switching and clearance standards and regarding causation of
16 harm to Castillo because of Johnston's violation of the switching and clearance standards of
17 the GCPUD. My opinions are:

18
19
20
21 **AGENCY**

22 While ultimately a matter of law, my opinion is that it is customary and standard in the
23 high voltage electrical industry to attribute fault to the PUD for any wrongdoing of a lineman
24 of the PUD. Accordingly it is my opinion that GCPUD is responsible for the actions of John
25 Johnston on 6/5/09.

26 **DUTY**

27 **DECLARATION OF JAMES VOSS IN**
28 **OPPOSITION TO SUMMARY**
JUDGMENT - 3

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5275

1 When on 6/5/09 Me. Johnston of the GCPUD made the service call to the ranch of
2 Scone & Connors (Castillo's employer according to the L & I investigation). It was the
3 standard of care in the utility industry in the state of Washington in 2009 for a utility lineman
4 to act reasonably to protect the public, particularly the customer which called the PUD, from
5 unreasonable actions of the lineman.
6

7 Moreover, as stated above, GCPUD assumed a duty of protecting the general public in
8 its switching and clearance protocol. Thus, under both the general standard of care and under
9 the switching and clearance protocol of GCPUD, Johnston owed to Castillo a duty of
10 reasonable care to avoid harm to Castillo caused by Johnston's unreasonable decisions at or
11 near the Scone & Connors Ranch on June 5, 2009.
12

13 **JOHNSTON'S VIOLATION OF THE STANDARD OF CARE**

14 It was a violation of the standard of care for public utility linemen when, on 6/5/09,
15 Johnston tested the power with Castillo at the Skone & Connor breaker panel without first
16 "locking out" all power from the meter base controlled by GCPUD. The standard of care for
17 public utility linemen in Washington State in 2009 required that before testing the power with
18 Castillo at the S&C breaker panel, Johnston should first have locked out the power from the
19 meter base by inserting the pie plate over the meter and locking the pie plate in place.
20 Johnston was attempting to complete the steps for isolating the power when Castillo was
21 injured. However, when Johnston was attempting to permanently close up the meter base,
22 Johnston first had to close the bypass switch thus temporarily reenergizing the customer
23 breaker panel. This was necessary in order to install the pie plate. It is clear from his actions
24 that, after Johnston left the breaker panel, Castillo did not understand that Johnston had more
25 work to do at the meter base in order to secure the system. It is because of the distinct
26

27 **DECLARATION OF JAMES VOSS IN**
28 **OPPOSITION TO SUMMARY**
JUDGMENT - 4

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5275

1 prospect of verbal miscommunications that the standard of care in 2009 (and today) required
2 that the power be locked out without temporary reenergization when a workman has been
3 working at the breaker panel and expresses an intention to continue doing so. It was when
4 Johnston temporarily reenergized the system that Castillo was injured because the reenergized
5 meter base conveyed 480 volts of power to the breaker panel where Castillo was working.
6 Had Johnston correctly deenergized the meter base upon first arriving at the scene by locking
7 out the energy source, there would not have been the dangerous progression of temporary
8 deenergization followed by reenergization which occurred on 6/05/09.

10 Had the pie plate been fastened and locked at the inception of Johnston's visit, there
11 would have been no need for Johnston to go back to the meter base and temporarily
12 reenergize it.

14 It is apparent that both Johnston and Castillo genuinely believed their reported
15 versions of the last conversation between the men before the electrical explosion. One can
16 reasonably infer this because immediately after that conversation, Castillo suffered an
17 electrical shock, and Johnston had a flashing electrical arc in front of his face. 480 volts were
18 transmitted in the accident. I am submitting as **Exh. 7** a brief video which demonstrates the
19 violent explosive force of a 480 volt transmission leading to an accident. The great danger to
20 the safety of both Castillo and Johnston emphasizes the need for Johnston to permanently
21 "lock out" the power at the meter base before ever meeting with Castillo at the breaker panel.
22 The self-appointed standard of conduct in the GCPUD switching and clearance protocol also
23 requires that the lock out of power occur when Johnston first arrived at the scene. There was
24 no other way to give first priority to the safety of GCPUD employees and the public.
25
26

27 DECLARATION OF JAMES VOSS IN
28 OPPOSITION TO SUMMARY
JUDGMENT - 5

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5275

1 Johnston also violated the standard of care when he (even temporarily) reenergized the
2 meter base connected to the breaker panel when Johnston believed that an electrician was
3 needed to address problems at the breaker panel. Johnston's reenergization of the meter base
4 under these circumstances is a clear violation of RCW 19.28.101 which prescribes behavior
5 for the utility when work requiring an electrical permit is required. The relevant portions of
6 that statute, with emphasis on the duty of the utility, are set forth in an appendix to this
7 declaration.
8

9 It is of no consequence that Johnston had previously utilized these same careless
10 procedures without causing an accident (implicit in the reference to Johnston's reference to
11 "temporarily" deenergizing the power on other occasions). That L&I issued no citations is
12 irrelevant because only Skone & Connor was investigated. Because of personnel issues in
13 Eastern Washington at the time of this accident, Grant County PUD was to its great good
14 fortune never investigated for this accident which clearly involved numerous WAC violations
15 by the PUD.
16

17 2. Johnston has admitted that he did not initially "lock out" the power from the meter
18 base. However, even at the time when Johnston parted company from Castillo at the breaker
19 panel, the standard of care in 2009 for public utility linemen in the State of Washington
20 required "fall back" behavior which Johnston did not exhibit on 6/5/09. The fall back
21 behavior required of Johnston by the standard of care was that Johnston avoid at all costs the
22 reenergization of the meter base under the circumstances that he did. The appropriate fall
23 back behavior under the standard of care for a public utility lineman in Washington in 2009
24 should have been for Johnston to physically open and remove the fuses feeding the
25 transformers. This procedure would have killed the power from the transformers to the rest of
26

27 DECLARATION OF JAMES VOSS IN
28 OPPOSITION TO SUMMARY
JUDGMENT - 6

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5275

1 the system, and would have allowed the meter base to be secure from power transmission
2 during the deenergization process.

3 The fall back behavior required of Johnston by the standard of care for public utility
4 linemen in Washington in 2009 necessitated the use of an insulated switch stick to
5 permanently disengage the power without the possibility of any temporary reenergization.
6 The standard of care in 2009 could alternatively permit the use of switch sticks from the
7 bucket truck or from the power pole or by using an extending switch stick from the ground.
8 As the professional in charge of the site during deenergization, Johnston had the prerogative
9 of calling flaggers to protect his truck if Johnston felt that the bucket truck was the optimal
10 means of removing the fuses. The standard of care for public utility linemen in Washington
11 in 2009 required that the lineman at the site in question have discretion as to the means of
12 removing he fuses, but that the fuses should be removed by some means. If Johnston did not
13 have the equipment or available flaggers to permit him to exercise his discretion as to the
14 means of removing the fuses, then the safety program of GCPUD fell below the standard of
15 care for public utilities in Washington in 2009.
16
17

18 The foregoing fallback position was also mandated by the self-imposed GCPUD
19 “switching and clearance” protocol which announces as the highest priority the safety of PUD
20 employees and the public during deenergization of the power.
21

22 The foregoing discussion of the appropriate means of deenergizing the meter base
23 requires a discussion of the correct means in 2009 of reenergizing the meter base and breaker
24 panel when the customer and the PUD lineman both expected the reenergization to occur.
25 Under the circumstances of this case, reenergization of the power at S&C Ranch by a public
26 utility lineman should, under the standard of care in 2009, only have occurred after the

27 DECLARATION OF JAMES VOSS IN
28 OPPOSITION TO SUMMARY
JUDGMENT - 7

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5275

1 lineman knew that there had been an electrical inspection of the work being performed by
2 Castillo. R.C.W. 19.28.101 as applied and interpreted by the Dep't. of L&I imposes this
3 requirement.

4 3. Finally Johnston violated the standard of care for public utility linemen in
5 Washington in 2009 when Johnston did not insist that Castillo install insulating tape on the
6 exposed conductor (loose wire) at the S&C breaker panel. Johnston should have insisted on
7 this action by Castillo before Johnston would temporarily reenergize the breaker panel in the
8 process of locking out the energy source. Once again, this step by Johnston would only have
9 been required by the 2009 standard of care under a scenario when Johnston failed to kill the
10 power permanently as set forth in item number "1" in this declaration. Therefore the required
11 insistence by Johnston that Castillo apply insulating tape over the loose wire is further "fall
12 back" behavior required by the standard of care.
13
14

15 Had the loose wire been taped, it would have been insulated thereby avoiding contact
16 with the metal breaker panel when Johnston reactivated the power by closing the bypass
17 switch at the meter base. Insistence by Johnston that Castillo tape the wire would also have
18 provided clarification to Castillo that Johnston intended to temporarily reactivate the power at
19 the meter base.
20

21 The failure of Johnston to insist on Castillo taping the loose wire was also a violation
22 of the GCPUD switching and clearance standards which placed as first priority the safety of
23 PUD employees and the public while the PUD was involved in deenergization.

24 CAUSATION

25 When Johnston violated the standard of care for public utility linemen in Washington
26 in 2009, his actions caused harm to Castillo. Put another way, had Johnston "locked out"

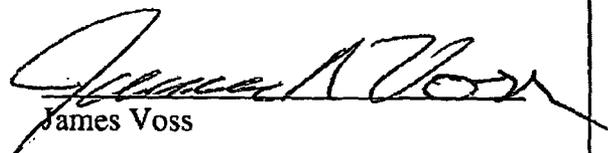
27 DECLARATION OF JAMES VOSS IN
28 OPPOSITION TO SUMMARY
JUDGMENT - 8

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5275

1 the power in the approved manner as set forth in this declaration, Castillo would not have
2 been injured by a 480 volt charge on 6/05/09. Further, had Johnston opened and removed the
3 fuses feeding the transformers, Castillo would not have been injured by 480 volts on 6/05/09.
4 Finally, had Johnston insisted that Castillo apply insulating tape on the loose wire on the day
5 of the accident, Castillo would not have been injured.
6

7 The causation of Castillo's injuries by Johnston relate both to causation due to
8 Johnston's several violations of the standard of care as set forth in this declaration and relate
9 to causation due to Johnston's several violations of the switching and clearing protocol of the
10 GCPUD. That Castillo was injured from the 480 volt shock of 6/05/09 is at the very least
11 confirmed by his declaration (Exh. 3).
12

13 Executed at Puyallup, Washington, this 21 day of November, 2012.
14

15 
16 James Voss
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27 DECLARATION OF JAMES VOSS IN
28 OPPOSITION TO SUMMARY
JUDGMENT - 9

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5275



07-654290

FILED

MAY 14 2013

KIMBERLY A. ALLEN
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LAUREN A. RUANE

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON,
IN AND FOR THE COUNTY OF GRANT

RICARDO CASTILLO,)	
	)	NO. 11-2-00388-1
Plaintiff,)	
vs.	)	SECOND DECLARATION OF
	)	JAMES VOSS IN RESPONSE
GRANT COUNTY PUBLIC UTILITY	)	TO REFILED MOTION AND IN
DISTRICT,	)	RESPONSE TO MOTION TO
	)	STRIKE
Defendant.)	
)	
)	

James Voss makes the following declaration under penalty of perjury under the laws of the State of Washington. This declaration combines to refute allegations of my lack of expertise and substantive allegations that there is no issue of fact for trial in this case. I adopt and resubmit my declaration of November 21, 2012 and my resume.

SECOND DECLARATION OF JAMES VOSS
IN RESPONSE TO REFILED MOTION -1

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5276

1 The defense has blatantly mischaracterized my deposition testimony with important
2 omissions of my testimony from the summaries presented to this Court by Mr. Miller and Mr.
3 Way.

4 There are at least four labeling distinctions which were covered in my deposition but
5 which are blurred in the refiled Motion of PUD relating to my qualifications.

6
7 1. Distinction between agricultural rules and PUD rules.

8 As accurately recited by Mr. Way, I referenced this distinction on pp. 16-17 of my
9 deposition. However, Way omits my reference to the agricultural standards on pp. 20, 21 and
10 74 of my deposition. I include those pages with this declaration.

11 I will summarize important points relating to the standard of care in the agricultural
12 and non-agricultural portions of this case.

13
14 1.1 In this case lineman Johnston (PUD) worked at the meter base on one
15 side of the road and farm worker Castillo worked at the same time at the breaker panel on the
16 other side of the road.

17 I specifically disclaimed expertise as to the rules which should have guided
18 Castillo, an agricultural worker (my deposition p. 20, ll. 22-28, p. 74, ll. 1-14). My opinions
19 in this case relate to the primary negligence of PUD not to the possible comparative
20 negligence of Castillo.

21
22 1.2 Mr. Way is altogether wrong when he attests (p. 2, ll. 15-17 of Way
23 declaration in Support of S.J. of 4/30/13) that "Voss acknowledges the issues in this case are
24 to be handled by the Agricultural Division within the Department of Labor & Industries."

25 While Castillo's conduct needed to be assessed according to agricultural rules,
26 I stated in my deposition that I would have opened an investigation of PUD in this case (p. 20,
27

28 SECOND DECLARATION OF JAMES VOSS
IN RESPONSE TO REFILED MOTION - 2

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5276

1 ll. 20-23), but that was not the decision made at the time of the accident investigation (p. 16,
2 l. 16 thru p. 17, l. 9 of my deposition).

3 The above lines from my deposition recite how the investigation was in fact
4 handled, but not how it should have been handled. At the time of this incident I was a high
5 voltage inspector for the Department of Labor & Industries. Had I known of the facts of this
6 incident and had I been assigned to this case, I would have investigated PUD's improper
7 actions in this case and found numerous probable violations by Grant County PUD. I
8 specified those violations in my deposition and will recapitulate them in this declaration.
9

10 1.3 In my deposition I explained the failure of my department (high
11 voltage) to investigate PUD in this case. The reason was that the PUD lineman (Johnston)
12 told the L&I inspector that the agricultural worker (Castillo) had caused this entire incident
13 (p. 21, ll: 1-18 of my deposition). I learned the reason for the lack of L&I investigation of
14 PUD after my retirement from L&I and after my involvement as an expert in this case. PUD
15 should have been investigated in this case and likely cited for those probable violations set
16 forth in the following pages of my deposition: pp. 92-100 (lack of switching and clearance
17 standards and/or failure of lineman to follow existing standards). 100-01(failure to follow
18 WAC by "killing" power without need to re-energize power temporarily, 106 (WAC 296-45-
19 085 violation), 107 (296-45-095 violation), 109 (296-45-135 violation), 109-110 (296-45-325
20 violation), 111 (296-45-335 violation). All of these pages reference probable PUD violations
21 of specific WAC sections.
22
23

24 These pages are included with this declaration, but these pages were not
25 referenced in the recent declaration of Way or in the submission of deposition pages provided
26 to the Court by Mr. Miller. It was only by omitting my testimony regarding PUD violations
27

28 SECOND DECLARATION OF JAMES VOSS
IN RESPONSE TO REFILED MOTION - 3

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5276

1 that Mr. Way could give his skewered opinion that I felt this entire matter was subject to the
2 jurisdiction of an investigator of agricultural standards of care.

3 2. Distinction between my title as High Voltage Inspector and my duty to
4 oversee, inspect and understand low voltage explosions.

5 I accurately stated that the line of demarcation between high voltage and low voltage
6 incidents is 600 volts (my deposition, p. 18, l. 23). For confirmation of this line of
7 demarcation see WAC 296-45-035 which is submitted herewith for the Court's reference.
8 The accident in this case was a low voltage incident (deposition, p. 18, l. 24 through p. 9, l. 1).

9
10 Despite this clear delineation in my testimony between high voltage and low voltage,
11 Mr. Way mysteriously attributes to me a self-confessed limitation of my expertise to incidents
12 involving more than 1,000 volts (recent Way declaration of 4/30/13 in Support of S.J., p. 2, ll.
13 1-3). As with so many of Way's statements, the 1,000 volt benchmark is unsubstantiated and
14 is contrary to 296-45-035 which defines low voltage as ranging from 50 volts to 600 volts.
15 Section 035 does state that "high voltage tests" are those tests with a practical minimum
16 voltage of 1000. That reference is for quality control type testing and not for definitional
17 purposes. See last page of published version of 296-45-035 submitted herewith. In my
18 previous declaration submitted to this Court, prior to PUD striking its initial motion for
19 summary judgment, I identified the accident in this case as a 480 volt accident. In my
20 deposition I advised Mr. Miller that investigation of the PUD's role in the present accident
21 should not have been relegated to a general L&I inspector even though this was a low voltage
22 incident (deposition, p. 19, ll. 2-5).

23
24 In a portion to my deposition which PUD failed to provide to this Court, I referred to
25 the superficial contradiction between my (former) title of High Voltage Inspector and my
26

27
28 SECOND DECLARATION OF JAMES VOSS
IN RESPONSE TO REFILED MOTION - 4

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5276

1 department's responsibility for investigating electrical accidents under the jurisdiction of
2 WAC 296-45 involving 50 volts or more (See my deposition, p. 86, l. 15 through p. 87, l. 8).
3 I will try to say the same thing again in another way. I had the title of High Voltage
4 Inspector, but my duties also extended to inspecting and possibility issuing citations for both
5 low and high voltage accidents involving 50 volts or more. Specifically I stated that one of
6 my jobs was to enforce WAC 296-45-325 which is attached hereto. This section clearly
7 covers accidents and incidents involving 50 volts or more.
8

9 I can say unqualifiably that despite my title of High Voltage Inspector, my duties
10 routinely required me to investigate and issue citations relating to low voltage accidents
11 involving 50 volts through 600 volts.
12

13 I stated in my deposition that my title of High Voltage Inspector was a bit of a
14 misnomer. (deposition p. 86 line 19) I analogize the inconsistency between my duties and the
15 name of my title as being the same as a deep sea navigator who still exercises all reasonable
16 precautions when steering his vessel in shallow water.

17 3. Allegations that my standard of care opinions involve no objective standards,
18 but are simply matters of my own creation.

19 This charge against me comes directly from the recent Way declaration of 4/30/13 in
20 Support of S.J. (p. 2, ll. 9-12). Way goes so far as to accuse me of relying upon the standard
21 of care that Voss "created by himself."
22

23 This allegation is so far off the mark that it must be considered either fantasy or
24 chicanery. For testimony regarding specific WAC violations (not concocted in my own
25 imagination) see pp. 70-72 of my deposition which pages were omitted from Miller's
26 submission to this Court of my deposition extracts and which were not referenced at all in
27

28 SECOND DECLARATION OF JAMES VOSS
IN RESPONSE TO REFILED MOTION - 5

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5276

1 Way's deposition. I include all these sections for the Court's easy reference as well as
2 WAC 296-45-325 referenced above. Once again, pp. 86-87, 93, 100-01, 111, 115-16 of my
3 deposition refer to other specific WAC violations committed by the PUD. Each of these
4 violations individually and all of these violations cumulatively place a stake in the heart of
5 PUD's allegation that I concocted my own standard of care. It is my belief that PUD violated
6 the WAC in numerous ways and, as stated in my original declaration, that PUD violated the
7 general standard of care apart from the precise fact patterns covered by the WAC. In other
8 words portions of the WAC impose standards of safe conduct for the protection of PUD
9 employees. It is my opinion that those same standards of same conduct are required by the
10 general standard of care for the protection of members of the public such as Mr. Castillo. As
11 stated in my deposition, I have taught that concept in safety classes which I have conducted.
12 (p. 85 of my deposition)

13
14
15 The WAC standards are objective but exist in most instances to protect workers. I
16 referenced this in illustrative instances in my deposition. See e.g. deposition p. 106 ll. 12-14.
17 However, the standard of care includes the WAC but is far more expansive. See my
18 deposition p. 83 line 16- o.84 line 4; p. 84 ll. 14-18 et seq.; p. 85 ll.13-18; p.106 ll.15-21; p.
19 107 ll. 6-10; p. 109 ll.2-14. As stated in my deposition I have taught the standard of care for
20 years. (My deposition p. 85 ll.18-25) I have attended more than 20 seminars and instructional
21 courses on electrical safety for utilities. (deposition p. 86 ll.2-7) That Mr. Way would accuse
22 me of creating an idiosyncratic standard of care is an unsubstantiated slur. Indeed there is
23 reason to question the qualifications of Mr. Way when he says that high voltage incidents are
24 those exceeding 1000 volts. This is not the standard governing utilities as set forth in the
25 National Electrical Safety Code and the WAC.
26
27

28 SECOND DECLARATION OF JAMES VOSS
IN RESPONSE TO REFILED MOTION - 6

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5276

1 4. Jurisdiction of National Electrical Code

2 Way confuses the National Electrical Code and the National Electrical Safety Code by
3 referring to them interchangeably on p. 3 lines 1-5 of his recent declaration in support of S.J.
4 Further, Way inaccurately states that high voltage inspectors have no jurisdiction in enforcing
5 the NESC. WAC 296-45-045 specifically incorporates part of the NESC into the L&I
6 enforcement mechanism for regulating utilities. I spoke to that issue on p. 103 ll. 3-17 of my
7 deposition (another portion not part of Miller's submission to the Court). I testified and
8 reaffirm that as a high voltage inspector for L&I, I utilized the NESC in my enforcement
9 duties AND I used the WAC. For Way to say otherwise is sheer confabulation.
10

11 The section of my deposition (p. 19 ll.6-13) referenced by Way at p. 3 ll 1-5 of recent
12 Way declaration states how the investigation was conducted not how it should have been
13 conducted.
14

15 5. Miscellaneous

16 5.1 PUD had responsibility to prevent accidents caused by unanticipated and
17 uncontrolled energy flowing from the PUD controlled meter base to the
18 breaker panel where Castillo was working. I testified to this on pp. 60 line 23
19 through p. 61 line 22 of my deposition. It is a red herring for Way to state
20 (declaration of 4/30/13 in Support of S.J. p. 4 ll.9-11) that Johnston had no
21 duty to tell Castillo how to do his job. I suggested that Johnston recommend
22 that Castillo tape the loose electrical phases on order to emphasize to Castillo
23 that Castillo's worksite would be re-energized. (My dep. p. 61 ll.8-22). It is
24 clear that both Johnston and Castillo had differing but good faith
25 understandings of their conversation. Castillo received an electrical charge of
26
27

1 480 volts because he believed that Johnston would be leaving the area without
2 re-energizing the power. Johnston was subjected to a dangerous arc of
3 electricity near his face because he believed that Castillo was not going to
4 return to work on the breaker panel while Johnston was still on the scene. The
5 good faith of both men is confirmed by the danger to the safety of both of
6 them. It is precisely because of the risk of miscommunication that the standard
7 of care required that Johnston follow those steps of protocol set forth in my
8 original declaration
9

10 5.2 The primary, if not sole, cause of this accident was the deviation by Johnston
11 and PUD from the standard of care.

12
13 5.3 Mr. Way is categorically, unqualifiedly wrong when he states that Switching
14 and Clearance standards apply only to high voltage systems. (Way Declaration
15 In Support of S.J. of 4/30/13 p. 5 ll. 7-11) I testified regarding this issue on
16 pp. 34-38 of my deposition, and therefore Way should know better. WAC
17 296-45-325§1 states that lines operating at 50 volts or more are considered
18 energized unless the requirements of 296-45-335 are met (or other sections not
19 relevant here). 296-45-335 is the section which imposes upon Grant County
20 PUD the switching and clearance standards which the PUD did not meet in this
21 case. "Expert witness" Way does not even have a rudimentary understanding
22 of switching and clearance protocol when he posits that that protocol only
23 applies to high voltage incidents.
24

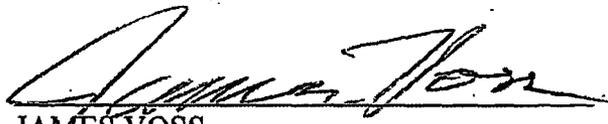
25 5.4 Way is again wrong when he says the equipment used by Castillo was safe
26 when lineman Johnston left Castillo. (Way declaration of 4/30/13 in Support
27

28 SECOND DECLARATION OF JAMES VOSS
IN RESPONSE TO REFILED MOTION - 8

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5276

1 of S.J. p. 4 ll.1-8) I will not comment on Castillo's comparative negligence as
2 that issue is beyond my expertise. However, I do note my testimony in my
3 first declaration that Johnston should have taken additional steps to
4 communicate to Castillo that Johnston was going to leave Castillo and re-
5 energize the power flowing to the breaker panel where Castillo had been
6 working. There were at least two loose phases (wires) at the breaker panel
7 when Johnston left Castillo. That was not a safe working environment given
8 Johnston's actions in re-energizing the power flowing to the breaker panel. To
9 call Castillo's equipment "safe" presupposes that Castillo was not working on it
10 during Johnston's re-energization of the equipment.
11
12

13
14 EXECUTED at Fife, Washington, this 9 day of May, 2013

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17 JAMES VOSS
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28 SECOND DECLARATION OF JAMES VOSS
IN RESPONSE TO REFILED MOTION - 9

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5276

1 A. The codes are divided into many, many, many
2 different chapters that -- and there are specific codes to
3 different areas that apply. So there are specialists that
4 respond to some of the different areas such as high voltage
5 and communications. And there's a whole section on
6 agriculture. Now, it doesn't take a specialist,
7 necessarily, to do the agriculture. But certainly it's the
8 high voltage and the communications people; they stay in
9 their own designated areas. So...

10 Q. At what voltage does it become within the
11 parameters of the job -- I can't think of the right
12 word -- to become high voltage as opposed to low voltage?

13 MR. MCKINNEY: You mean within the Department of
14 Labor and Industries?

15 MR. MILLER: Right.

16 A. It isn't divided by voltage.

17 BY MR. MILLER:

18 Q. Is there a distinction between high voltage and
19 low voltage that you're familiar with?

20 A. Yes, there is.

21 Q. And what's that? Where is the line drawn?

22 A. Well, it depends on which code book you want to
23 look at.

24 Q. Okay. What's your familiarity with that?

25 A. Well, in the -- out of the utility industry, the

1 high and low voltage is divided at 600 volts.

2 Q. Okay. For utility?

3 A. For utility.

4 Q. Okay. What else are you familiar with?

5 A. I'm somewhat familiar with the National
6 Electrical Code.

7 Q. Does it have a different voltage?

8 A. They have a different description. Yes.

9 Q. Do you know what that is?

10 A. To be honest with you, I'm not certain.

11 Q. Okay.

12 A. But they conflict a little bit.

13 Q. Okay. And then for utilities at 600 volts, this
14 would be a utility involved incident?

15 A. No. Like I say, it's not divided by voltage.
16 It's divided on jurisdiction.

17 Q. What jurisdiction are we talking about in this
18 incident then?

19 A. The utility people work under the jurisdiction of
20 WAC 45.

21 Q. Okay. And what is WAC 45 used in terms of high
22 voltage versus low voltage?

23 A. High voltage begins at 600 volts, 601 volts.

24 Q. Okay. And so this would be a low voltage
25 incident?

1 you pick up as you go along?

2 A. Standard of care is something that is a
3 culmination of experience, training, and application.

4 Q. So if I were to ask you where can I go buy a copy
5 of the standard of care, there isn't one?

6 A. No.

7 Q. How about the general standard of care for a PUD?
8 Is there such a document?

9 A. There's no document.

10 Q. Okay. There is, however, document for switching
11 and clearance protocol; correct?

12 A. There are several different documents for that.

13 ~~Q. Okay. What is a switching and clearance~~
14 ~~protocol?~~

15 A. Well, I guess, where that would begin is
16 determining ~~who has jurisdiction over the lines.~~ Obviously,
17 you're referring to the switching protocol of the Grant
18 County PUD? Or just in general?

19 Q. Well, I'm looking at your page 2, line 19,
20 switching and clearance protocol?

21 A. Line 19. Let me read exactly what I said here.

22 Q. Sure.

23 A. ~~Grant County PUD provided a copy of their~~
24 ~~switching and clearance protocol, which is in my documents~~
25 that I brought here in the documents that I reviewed. ~~And I~~

1 found that there were -- it's not that -- what they had
 2 wasn't accurate, but it was the things that were not
 3 included in their standard protocol that I do have a problem
 4 with.

5 Q. Now, the Grant County PUD switching and clearance
 6 protocol was approved by the state of Washington; correct?

7 A. I don't believe so.

8 Q. You believe it was not approved?

9 A. I don't see why it would have been.

10 Q. Okay. It was reviewed by the Department of L&I;
 11 correct?

12 A. I don't think so.

13 Q. You believe that it doesn't comply with
 14 requirements?

15 A. I'm quite certain.

16 MR. MCKINNEY: You don't have to -- go ahead.

17 A. Okay. I'm quite certain it doesn't.

18 BY MR. MILLER:

19 Q. Okay. Why do you say that?

20 A. Because it doesn't line up with the requirements

21 in WAC 45, Washington Administrative Code, WAC 45-335 and

22 325.

23 Q. Three-two-five?

24 A. Three-two-five. And 3-3-5.

25 Q. Okay. And what regard does it not comply?

1 A. Well, again, they have omitted certain parts of
2 it.

3 Q. ~~What's omitted?~~

4 A. ~~In their authority statement they give authority~~
5 ~~over all lines to the system operator.~~

6 Q. And that doesn't comply with state requirements?

7 A. ~~Well, there are lines that they have out there~~
8 ~~that are being operated that aren't controlled by the system~~
9 ~~operator.~~

10 Q. ~~What lines are those?~~

11 A. ~~It would be the low voltage lines.~~

12 Q. ~~So the switching and clearance protocol, as~~
13 ~~promulgated by the PUD, does not comply because it doesn't~~
14 ~~affect the low-voltage lines?~~

15 A. ~~They have given no instruction to their employees~~
16 ~~on how to manage the predictable hazards involved in the~~
17 ~~low-voltage line.~~

18 Q. And what are the predictable hazards in your
19 opinion?

20 A. One of them is the result of -- resulted in this
21 instance.

22 Q. What hazard was that?

23 A. High-voltage explosions. Unsecured energy source
24 controls.

25 Q. Okay. You just used the term "high voltage." Is

1 MR. MILLER: No. That's the direct examination
2 question.

3 MR. MCKINNEY: Go ahead.

4 A. When I was at Puget Sound Power and Light they
5 had a huge safety organization internally. So most of my
6 questions, in fact, all of my questions would go upstairs
7 into the safety department at Puget Sound Power and Light.

8 BY MR. MCKINNEY:

9 Q. Okay. What was your next capacity where you
10 worked on safety issues?

11 A. When I left Puget Sound Power and Light, I went
12 to work at Potelco Incorporated and at that time they had no
13 safety manager. So the safety issues involved with the
14 crews on the day-to-day basis were also my responsibility.

15 Q. Okay. Describe what Potelco does.

16 A. Potelco is a high-voltage utility contractor.

17 Q. Okay. And did Potelco work in other states
18 besides Washington?

19 MR. MILLER: Object to the form of the question.

20 A. Yes, they did.

21 BY MR. MCKINNEY:

22 Q. Now, you've given a lot of testimony, in this
23 case, regarding standard of care; correct?

24 A. Yes.

25 MR. MILLER: Object to the form of the question

1 write prescriptive rules or prescriptive procedures to
2 follow are an attempt to -- are being driven by what the
3 standard of care actually is.

4 Q. Okay. Now, in this case, we're getting -- with
5 the question of conduct of Mr. Johnston with respect to a
6 member of the public; correct?

7 MR. MILLER: Objection. Leading.

8 A. Yes.

9 BY MR. MCKINNEY:

10 Q. So is it or is it not true that some of the WACs
11 deal with prescribed conduct to protect their employees?

12 A. There are some indications in there that safety
13 measures need to take place when the public is exposed.

14 Q. Right. But my question is: Is there a
15 recognized standard of care for a lineman, with respect to
16 protecting the public, that goes beyond the mere verbiage of
17 the WAC?

18 A. Well, yes.

19 Q. Okay.

20 A. Absolutely.

21 Q. All right. And you are aware that through these
22 different sources you've been talking about?

23 MR. MILLER: Objection. Leading.

24 BY MR. MCKINNEY:

25 Q. Is that correct?

1 MR. MILLER: Objection. Leading.

2 MR. MCKINNEY: You said it once. I mean, are you
3 going to say it six times?

4 MR. MILLER: You asked two questions.

5 MR. MCKINNEY: I asked the same question.

6 Go ahead.

7 A. That and, boy, ask me the question again. I'm
8 sorry.

9 MR. MCKINNEY: She can read it back.

10 (The Court Reporter reads back the last question.)

11 A. And I said yes. Yes, there is.

12 BY MR. MCKINNEY:

13 Q. ~~Okay. And can you say, either way, as to whether~~
14 ~~the protection of fellow workers in the WACs is part of the~~
15 ~~standard of care that a lineman should follow in protecting~~
16 ~~members of the public?~~

17 A. ~~I would say yes.~~

18 Q. ~~Okay. Have you taught that in any of the classes~~
19 ~~that you've taught?~~

20 A. ~~It's a subject that comes up all the time. You~~
21 ~~know the standard of care, as I understand it, is what a~~
22 ~~reasonable person would do in a given situation, and when~~
23 ~~that reasonable person is trained to the degree of a lineman~~
24 ~~is supposed to be trained, we have to actually substitute~~
25 ~~the reasonable person as what would a reasonable lineman~~

1 with a proper training, how would he respond. And yes.

2 Q. Have you also attended seminars and instructional
3 courses?

4 A. Yes.

5 Q. How many would you say over the years? Just give
6 an estimate.

7 A. In excess of 20.

8 Q. Okay. Now, I want to get down to the specifics
9 of this case. I was a little confused because you said you
10 were a high-voltage inspector with DOSH; correct?

11 A. Correct.

12 Q. Yet you said that this was a low-voltage
13 accident?

14 A. That's correct.

15 Q. And it was never clear to my understanding, at
16 least, as to why a high-voltage inspector would potentially
17 be involved with a low-voltage accident?

18 A. Well, the use of the term high voltage probably
19 is a little bit of a misnomer with the state. Specifically,
20 what my duties were, were to be, at first, a compliance
21 officer for the crews that work under the requirements of
22 WAC 45, which would be the utility industry. And then I
23 would contain all of the voltages under the jurisdiction of
24 the utility community.

25 Q. I thought you said WAC 45 started at 601 volts?

- 1 A. No. ~~WAC 45s, basically, starts at 50 volts.~~
- 2 Q. And can you point to the place in WAC 45 where it
- 3 says --
- 4 A. ~~It's in WAC 235~~ Section 1 in the --
- 5 Q. It's 245, section 1?
- 6 A. Two-thirty-five. 225. Excuse me.
- 7 Q. So it's 45-225?
- 8 A. Three-twenty-five.
- 9 Q. Okay.
- 10 A. Probably be one of the back tabs there.
- 11 Q. Is this it?
- 12 A. Open that one up.
- 13 Q. This is 255.
- 14 A. Well, see. I wrote 325 there.
- 15 Q. ~~Oh, 325.~~ All right. I got it.
- 16 A. Where it says "general." ~~"Only qualified workers~~
- 17 ~~may work in areas containing unguarded, uninsulated~~
- 18 ~~energized lines or parts of the equipment operating at 50~~
- 19 ~~volts or more."~~
- 20 Q. Okay. So what was the distinction you made when
- 21 Mr. Miller was questioning you about 601 volts?
- 22 A. Six-hundred-one volts up to 230,000 volts is
- 23 considered high voltage.
- 24 Q. Okay.
- 25 A. In excess of 230,000 is extra-high voltage.

1 A. You know, I can't. I imagine some of the records
2 that they provided may have a start and stop time. But I
3 don't remember. I'd have to go back and review some more.

4 Q. Okay. Let's go to 45-085. What was the issue
5 there?

6 A. This was the section 085 that puts the onus on
7 the serviceman to apply the provisions of this chapter on a
8 day-to-day basis. And his disregard of the energy source at
9 the meter base, you know, exhibits his non-applying it to
10 day-to-day basis because he did even make the comment that
11 he does -- that's the way he does it all the time.

12 Q. Okay. Now, 085 was designed to protect the
13 employees of the PUD?

14 A. That's what its defined for.

15 Q. Okay. Does the standard of care reach farther
16 than that?

17 A. I'd say the standard of care reaches way farther
18 than just the employees involved. I think the standard of
19 care implies a duty to any worker that's trained to be able
20 to act in a -- rely on the training.

21 Q. I'm talking about the standard of care in
22 reference to the individuals' protected. Because I think
23 that the WACs simply are designed to protect other
24 employees?

25 A. Correct.

1 Q. Okay. Does the standard of care have a broader
2 -- does it or does it not -- have a broader sweep in terms
3 of the people that are supposed to be protected by correct
4 actions?

5 A. It would be my opinion. Yes.

6 Q. Okay. And whatever this, the standard of care,
7 protect Mr. Castillo with reference to the kind that's
8 required in 085?

9 A. Yes. The standard of care would protect
10 Mr. Castillo in this instance.

11 Q. Okay. What does 095 require?

12 A. Well, before 095, it says "before leaving any job
13 site, the lead worker shall correct or arrange to give
14 warning of any condition which might result in injury to
15 employees." You know, and if the utilities done their
16 standard of duty to train their employee correctly this
17 would be one of the things that they train. And, you know,
18 the distance between the meter base and the panel was a
19 considerable length of distance. And obviously, he couldn't
20 clearly see because he actually energized on a guy out there
21 without seeing him. So must have been some problem with the
22 distance involved there that and there was a condition that
23 really needed a clear warning there of what to do.

24 Q. On a 095 just applies to if you're leaving the
25 job site? You're about to leave; is that correct?



07-690387

FILED

AUG 23 2013

**KIMBERLY A. ALLEN
GRANT COUNTY CLERK**

KATIE KERR

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON,
IN AND FOR THE COUNTY OF GRANT**

RICARDO CASTILLO,

Plaintiff,

vs.

GRANT COUNTY PUBLIC UTILITY
DISTRICT,

Defendant.

) NO. 11-2-00388-1

) SUPPLEMENTAL DECLARATION
) OF JAMES VOSS

James Voss makes the following declaration under penalty of perjury under the laws of the State of Washington.

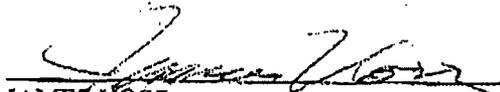
On three prior occasions I testified to the bases of my knowledge of the standard of care for public utility companies as that standard applies to the facts of this case. I believed that I testified that my knowledge of the standard derives from conversations with other utility safety experts and from classes and seminars which I have attended. I mentioned my teaching the standard applicable in the present case to emphasize my certainty that Mr. Johnston violated the standard in this case.

SUPPLEMENTAL DECLARATION OF
JAMES VOSS - 1

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5276

1 To the extent that my prior testimony was in any way unclear, I now confirm that my
 2 knowledge of the standard of care having been violated by Johnston in the present case is
 3 based upon advisories of the relevant standard of care which came to me from other utility
 4 safety experts and from classes which I took before giving my opinions on the standard of
 5 care in this case.

6
 7 EXECUTED at *Puyallup*, Washington, this 22nd day of August, 2013.

8
 9
 10 
 11 JAMES VOSS

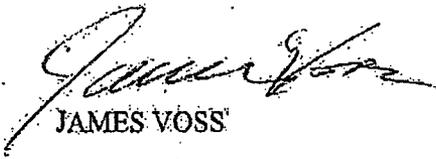
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SUPPLEMENTAL DECLARATION OF
 JAMES VOSS - 2

RICHARD MCKINNEY
 ATTORNEY AT LAW
 2701 CALIFORNIA AVENUE S.W., #225
 SEATTLE, WASHINGTON 98116
 PHONE: 206-933-1605; FAX: 206-937-5276

1 objective basis. I am now stating unqualifiedly that the behavior of Johnston, which I
2 criticized in my first declaration as violative of the standard of care owed to members of the
3 public, and which I criticized in my second declaration as violative of the WAC's which are
4 the basis of a standard of care owed to the public, constitutes of a violation of the standard of
5 care for private and public utility linemen. In other words, the WAC's, which expressly
6 protect fellow workers, constitute part of the standard of care which both private and public
7 utility linemen owe to members of the public in the State of Washington.

9 EXECUTED at Bellevue, Washington, this 1 day of October, 2013.

10
11 
12 JAMES VOSS

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DECLARATION OF JAMES VOSS OF
OCTOBER, 2013-2
(ILM1105256.DOC; 1/99925.001111/)

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5276



07-702174

The Superior Court of the State of Washington
In and for the County of Grant

35 C Street NW
P.O. Box 37
Ephrata, WA 98823
(509) 754-2011

EVAN E. SPERLINE, Judge, Dept. 1
JOHN D. KNOELL, Judge, Dept. 2
JOHN M. ANTOSZ, Presiding Judge, Dept. 3
MELISSA K. CHLARSON, Court Commissioner

MINDI FINKE, Court Administrator
CRYSTAL BURNS, Ass't Court Administrator

October 9, 2013

YESENIA HERRERA

FILED

OCT 09 2013

KIMBERLY A. ALLEN
GRANT COUNTY CLERK

Richard McKinney
Attorney at Law
2701 California Avenue S.W., #225
Seattle, WA 98116

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

RE: Castillo v. Grant Co. PUD
Grant County Cause No. 11-2-00388-1

Counsel:

Plaintiff's motion for reconsideration is before the court. Associated with this motion is Plaintiff's motion for the court to consider additional materials.

The court's ruling was based on its conclusion that the testimony of Plaintiff's expert witness, Mr. James Voss, was insufficient to establish a standard of care.

It is the substance of Mr. Voss' testimony and not its form which is dispositive. White v. Kent Medical Center, Inc., 61 Wash. App. 163, 172, 810 P.2d 4 (1991). But what any single person thinks the standard of care in any relevant community is or should be is not relevant. Industry standards establish a standard of care only if they are generally accepted in the applicable field. Id.

It is, after all, the Defendant's duty to do that which a reasonable person would do and generally includes following generally recognized norms. The Defendant must comply with Mr.]



07-705329

FILED

YESENIA HERRERA

2013 OCT 24 P 1:15

KIMBERLY A. ALLEN
GRANT COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT.

RICARDO CASTILLO,

Plaintiff,

vs.

GRANT COUNTY PUBLIC UTILITY
DISTRICT,

Defendant.

) NO. 11-2-00388-1

) DECLARATION OF BRIAN ERGA

Brian Erga makes the following Declaration under penalty of perjury under the laws of the State of Washington.

I am an expert witness on issues of safety standards of public utility linemen in the State of Washington and other locations. My resume is attached and incorporated by reference. I have read the four declarations of James Voss submitted in the captioned case. I agree with his statements of the standard of care violations by John Johnston and can state that those violations occurred on a more probable than not basis. I agree with his recitation as to what the standard of care is with reference to this case. The standard of care referenced by Mr. Voss' four declarations is not simply his own opinion, but is an objective standard of care that is widely recognized among public power safety experts. I have taught classes, attended by Mr. Voss, setting forth the standards of care referenced by the four Voss declarations in this case.

DECLARATION OF BRIAN ERGA - 1

RICHARD MCKINNEY

ATTORNEY AT LAW

2701 CALIFORNIA AVENUE S.W., #225

SEATTLE, WASHINGTON 98116

PHONE: 206-933-1605; FAX: 206-937-5275

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I have personally dealt with Grant County PUD and have found its employees to have been repeatedly resistant to adopting and implementing recommended safety standards dealing with public power.

Hartford, CT 7:15 PM

Executed this 22 day of October at ~~7:04 PM~~ ~~EST~~


BRIAN ERGA

DECLARATION OF BRIAN ERGA - 2

RICHARD MCKINNEY
ATTORNEY AT LAW
2701 CALIFORNIA AVENUE S.W., #225
SEATTLE, WASHINGTON 98116
PHONE: 206-933-1605; FAX: 206-937-5275



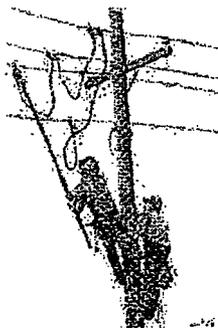
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Curriculum Vitae

Brian Ega

Education:

- Bachelor of Science in Electrical Engineering (BSEE), Power Option, June 1978, University of Washington, Seattle, Washington.
- Advanced Project Management, 1979, Seattle University, Seattle, Washington.
- Applied Protective Relaying, 1982; Westinghouse Electric Company, Coral Springs, Florida.
- NELPA Meter School, 1983, Washington State University, Pullman, Washington.
- Numerous electrical training courses and safety courses.



Professional Affiliations:

- National Electrical Safety Committee C2 (NESC), voting member assigned to NESC Subcommittee 8 "Work Rules"
- Institute of Electrical and Electronic Engineers (IEEE), Senior Member, Engineering in the Safety, Maintenance, and Operations Subcommittee (ESMO).
- Chairman of the ESMO Underground Grounding Task Force.
- Active ESMO Committee Member:
 - Live Work Guide Working Group
 - Conductive Clothing Task Force
 - Fall Protection Task Force
 - Insulator Cleaning Task Force
 - IEC TC-78
 - Worker in the Air Gap Working Group
 - Maximum Transient Overvoltage Task Force
 - Work Methods Working Group
 - Broken Insulator Task Force
 - IEEE 1048 Grounding Task Force
 - ESMO/NESC Coordinating Working Group ASTM, Member
- Active Member of ASTM F18 Subcommittee.
- Vice Chairman of ASTM F 855 "Temporary Protective Grounds to be Used on De-energized Electric Power Lines and Equipment"
- Quad States Instructors Association, Member.
- National Utilities Safety and Education Association (NUSEA), Member.
- Northwest Public Power Association (NWPPA), Member.

Professional Experience:

Electrical Safety Consultants International, Inc. (ESCI) 1994-Present
President:

- Oversees a staff of 12 professional safety, training and wellness experts.
- Oversees the safety and training needs of 40 plus electric utilities.
- Expert in the operations, maintenance and construction of electrical utility systems in the United States.
- Teaches grounding theory and application courses to utility workers.
- Considered the industry expert in equipotential grounding.
- Provides safety and training consulting services to the electric utility industry.
- Provides expert witness services relating to electrical cases.
- Involvement in many accident investigations of utility workers and the general public.

Puget Sound Power & Light Company, 1978-1996

- District Engineer.
- Substation Design, Operation and Maintenance Engineer.
- Training Supervisor.
- Safety, Standards and Work Methods Engineer.
- Oversaw the entire company's operation, maintenance and construction work methods and standard development.
- Distribution and Transmission Engineer.
- Designed hundreds of distribution and transmission line extensions.
- Designed and oversaw the construction, maintenance and operation of the electrical system in Whatcom County, Washington.
- Supervisor, Lynden Service Center.

Snohomish County PUD #1, 1973-1978

- Underground Construction Coordinator
- Line crew helper

760

- Underground Locator

Federal OSHA

- Technical consultant and advisor to the maintenance and revisions of Federal OSHA 1910.269 and 1926 Subpart V.
- Technical expert and consultant to Federal OSHA on OSHA citations and investigations.

Protective Grounding Systems

- Leading industry expert in all aspects of protective grounding.
- Conducted more than 1,000 courses on grounding across the US.

Electrical Service Entrance Systems

- Developed Puget Sound Energy's electrical service entrance specifications and metering requirements for residential, commercial and industrial facilities.
- Designed and oversaw the installation hundreds of electrical services to residential, commercial and industrial facilities.

Electric Utility Systems

- Designed and oversaw the construction, operation and maintenance of major electrical substations energized at 4kV, 15kV, 55kV, 115kV and 230kV.
- Designed and oversaw the construction, operation and maintenance of overhead and underground distribution and transmission systems energized at 4kV, 15kV, 55kV, 115kV and 230kV.

Residential and Commercial Wiring Systems

- Designed and wired several new residences, and rewired a number of existing homes and commercial facilities.

Publications:

- "Test Results of Personal Protective Grounding on Distribution Line Wood Pole Construction" IEEE 88 SM 558-9 PWRD.
- "Test Results of Grounding Un-Insulated Aerial Lift Vehicles Near Energized Distribution Lines" IEEE 91 SM 312-9 PWRD.
- "Worker Protection While Working De-Energized Underground Distribution Systems" IEEE/ESMO Task Force 15.07.09.01
- "Guide for Maintenance Methods on Energized Power Lines" IEEE 516.
- "Guide to Grounding of Power Systems" IEEE 1048.
- "Temporary Protective Grounds to be Used on De-energized Electric Power Lines and Equipment" ASTM F855.
- A number of articles in professional magazines and newsletters.

Consulting and Training:

<ul style="list-style-type: none"> • Snohomish County PUD #1 • Puget Sound Energy • Seattle City Light • Tacoma City Light • San Diego Gas & Electric • Northeast Utilities Group • US Department of Labor • Quanta Services • Peninsula Light Company • Orcas Power and Light • Chelan County PUD #1 • City of Richland • Big Bend Co-op • Benton County PUD #1 • Franklin County PUD #1 • Benton County REA • Bonneville Power Administration • Washington Water Power • Wilson Construction • Washington State Department of Labor and Industries • State of Alaska Office of the Attorney General • Bogle and Gates, Attorneys at Law • Douglas Ehke, Attorney at Law • Dayton Power and Light • Pacific Gas and Electric Company • PacificCorp • Portland General Electric • Colorado River Commission • Tennessee Valley Authority • Citizens Electric • City of Blaine • Clallam County PUD • Columbia Basin Electric Co-op • Douglas County PUD • Ferry County PUD • Grays Harbor PUD • Hood River Electric Co-op 	<ul style="list-style-type: none"> • Kootenai Electric • Lincoln Power District • Flathead Electric Co-op Assn • Florida Power and Light • Great Southwestern Construction Company • Grand Canyon State Electric Co-op Association • City of Bay City, Michigan • Chelan County PUD #1 • Hubbell Power Products • Dairyland Power Co-op • Florida Power Corp • Iowa Lakes Electric Co-op • International Brotherhood of Electrical Workers • Montana Power Company • Association of Missouri Electric Co-ops • Michigan Electric Cooperative Association • Nevada Power Company • Ohio Rural Electric Cooperatives • Nebraska Rural Electric Association • Navopache Electric Co-op • Pacific Power • City of Roseville, Calif. • Salt River Project • Valley Electric Association • Utah Power Company • General Electric Company • Northwest Public Power Association • City of Bellingham • EnergyAustralia, Australia • Washington State Governors Safety Conference • Edison Electric Institute • Quad States Instructors, Inc. • National Utilities Safety and Education Association • Association of Illinois Electric Cooperatives
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Expert Witness:

- WISHA v. Washington Water Power.
- Haggerty v. Nevada Power Company.
- Blanchard v. A.B. Chance Company.
- Tamí Price v. Interstate Travel Facilities, Inc, The Beard Company, Staffpro Plus, LLC, Toby Tindell, Christine Tindell, Public Service Company of Oklahoma, J. Dennis Green, Green's Remodeling, Inc.
- Garamedi v. Nevada Power Company.
- Irby Construction Company v. State of Alaska.
- US Department of Labor v. Commonwealth Electric Company.
- WISHA v. Wilson Construction Company.
- Tabak v. Nevada Power
- US Department of Labor v. Winco, Inc.
- US Department of Labor v. Harp Construction Company.
- US Department of Labor v. Great Southwestern Company.
- US Department of Labor v. Pike Construction.
- L.E. Myers v. US Department of Labor.
- Cleavenger v. Monongahela Power Co, Fairchild Cable TV, Time Warner Cable Inc.
- Steve Cservak v. San Diego Gas & Electric.
- Tanner Electric v. Washington State Department of Labor and Industries
- Barbour v. Nevada Power
- Hicks v. Piedmont Electric Membership Corporation
- WISHA v. Potelco Construction Co.
- and more ... see Expert Witness page

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