

No. 64403-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Farmers Insurance Company of Washington
as subrogee for Paul Moldon,

Plaintiff/Appellant

v.

D Square Energy Systems, Inc., a Washington Corporation, et al.

Defendant/Respondent

BRIEF OF RESPONDENT MAGNUM PRODUCTS, LLC,
a foreign limited liability company

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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I. IDENTITY OF RESPONDING PARTY

Magnum Products, LLC (“Magnum”) the manufacturer of the subject generator involved in this house fire and one of the defendants in the trial court proceedings, responds for the sole purpose of alerting this Court to an issue that has not been decided by the trial court and to suggest that the issue – the application of UL 2200 – need not and should not be reached by this Court.

II. STATEMENT OF RELIEF REQUESTED

Respondent Magnum respectfully requests that this Court refrain from rendering an opinion or commenting on whether or not UL 2200, an electrical standard for generators developed by the private, for-profit corporation Underwriters Laboratory, applies in the state of Washington or, more specifically, to this case or the generator involved.

The trial court certified a summary judgment decision releasing one of the defendants, D Square Energy Systems, Inc., from the case. The court released D Square on the grounds that it had no duty to warn the homeowner as there were no open and obvious dangers. Magnum remains as a defendant, and the case will proceed to trial once this appeal has concluded.

D Square is the company that serviced the generator involved in the house fire out of which is action arises. While at the residence, the D Square service technician had to “worm” his way around a large pile of

what amounted to cedar kindling to get to the generator in order to perform the service. CP 475. It is appellant's position that highly combustible cedar siding stacked within the three foot perimeter of safety required by Magnum installation instructions constituted an open and obvious danger, and that D Square, which held itself out as an expert in generator installation and service, had a duty to warn or remedy the defective installation.

D Square asserts that Magnum's failure to obtain alleged "proper" UL certification regarding a design feature is irrelevant as to the liability of D Square. *See*, Respondent's Brief, pp. 19-20. Magnum agrees. More to the point, and contrary to the assertion made by appellant Farmers, UL 2200 has not been "adopted" in Washington. (*See* Brief of Appellant, page 13.) Indeed, appellant cited no authority in support of its contention. This Court need not consider claims that are inadequately argued or unsupported by authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

All electrical equipment must conform to the statutes of the state of Washington or to the rules issued by the Department of Labor & Industries. RCW 19.28.010. There is no statute indicating that UL2200 has been adopted in Washington, therefore, appellant Farmers must show that a "rule" applies. A "rule" is any agency order, directive or regulation

of general applicability which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale. RCW 34.05.010(16)(e). Agency rules must be promulgated pursuant to the rule making requirements of the Administrative Procedure Act (APA). *J.E. Dunn Northwest, Inc. v. Washington State Department of Labor and Industries*, 139 Wash.App. 35, 156 P.3d 250 (2007). Any rules not so promulgated are invalid. *Hillis v. State*, 131 Wash.2d 373, 932 P.2d 139 (1997).

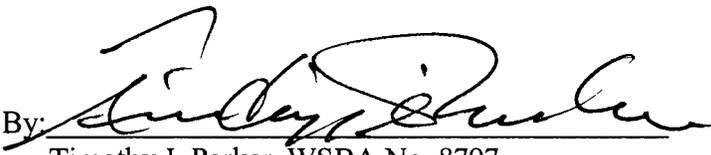
It is Magnum's position that UL 2200 has not been adopted under the rulemaking process set out in RCW 34.05. Farmers may disagree. However, to determine whether or not the rule was properly developed would require a review of the agency's rulemaking file, among other things. *Washington Independent Telephone Ass'n v. Washington Utilities & Transp. Com'n*, 148 Wash.2d 887, 906, 64 P.3d 606 (2003). This evidence has yet to be developed, full arguments have not been made and the issue has not been decided by the trial court.

III. CONCLUSION

Because determination of whether or not UL 2200 applies in this case is irrelevant to the determination of D Square's liability; because appellant Farmers has cited no authority for the proposition that UL 2200 applies in the State of Washington, this Court need not consider it, and;

because the record is not fully developed as to whether the purported adoption of UL 2200 followed the rulemaking procedure set out in the APA, respondent Magnum respectfully requests that this Court defer ruling or commenting on the application of UL 2200 in Washington or to this case.

RESPECTFULLY SUBMITTED this 28 day of June, 2010.

By: 
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DECLARATION OF SERVICE

I declare under penalty of perjury that I caused copies of *Brief of Respondent Magnum Products, LLC*, and this Declaration of Service by causing a true copy thereof to be served to counsel of record on June 28, 2010, as follows:

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