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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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Western National Assurance Company  
Appellant

v.

Puget Sound Energy, Inc.  
Respondent

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

### A. Assignment of Error

1. The trial court erred in granting Puget Sound Energy's (PSE) motion for summary judgment dismissal on December 7, 2009, and by subsequently denying Western National Assurance Company's (Western National) motion for reconsideration on January 4, 2010.

### B. Issue Pertaining to Assignment of Error

1. Where serious accidents or death are likely to result, a "utility is held to the highest degree of care human prudence is equal to."<sup>1</sup> Thus, where a 7,200 – 12,470 volt power line under PSE's exclusive control remained energized after falling onto a family's home, does *res ipsa loquitur* apply so as to preclude dismissal of Western National's lawsuit upon summary judgment?<sup>2</sup>

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<sup>1</sup> *Keegan v. Grant County Pub. Util. Dist. No. 2*, 34 Wn. App. 274, 279 (1983).

<sup>2</sup> Assignment of Error Number 1.

## II. STATEMENT OF THE CASE

Respondent, PSE, is an energy supplier that provides electrical power throughout the Puget Sound region.

On October 4, 2008, PSE's high-voltage line fell onto Frank and Sharon Jeretzky's Anacortes home, striking the Jeretzkys' fence, exterior power outlets, and driveway. Still energized, the line melted the home's wiring and destroyed home's outlets, switches, and fixtures.<sup>3</sup> It also burned the Jeretzkys' fence and caused the driveway's aggregate surface to explode.<sup>4</sup>

At the time of the loss, the Jeretzkys were insured by Western National who paid for the Jeretzkys' damages, took an assignment of claim, and then filed suit for negligence in Skagit County Superior Court in December 2008.

On November 6, 2009, PSE moved for summary judgment on the basis that: (1) it was immune from liability under RULE 12 ELECTRIC TARIFF G; (2) it did not breached its duty of care to the

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<sup>3</sup> CP 47, 49, 51, 53, 55.

<sup>4</sup> CP 57.

Jeretzkys because it had no duty to prevent its lines from falling in a windstorm; and (3) assuming there were a duty, there was no evidence regarding specific acts or omissions by which PSE breached its duty, or how such alleged conduct caused the Jeretzkys' property damage.<sup>5</sup>

On December 7, 2009, the trial court entered its order without explanation granting PSE's motion and dismissing Western National's lawsuit with prejudice.<sup>6</sup> Thereafter, on December 15, 2009, Western National moved for reconsideration noting that under *res ipsa loquitur* there was an inference of negligence sufficient to warrant reinstating the case.<sup>7</sup> The motion for reconsideration was denied, again without explanation.<sup>8</sup> This appeal now follows.

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<sup>5</sup> CP 7 - 11, 30.

<sup>6</sup> CP 64 - 65.

<sup>7</sup> CP 66 - 73.

<sup>8</sup> CP 84 - 85.

### III. ARGUMENT

#### A. Standard of Review.

“Appellate review of a trial court’s decision on summary judgment is *de novo*.”<sup>9</sup> Upon review, the appellate court engages in the same inquiry as the trial court, construing all facts and reasonable inferences in the light most favorable to the nonmoving party.<sup>10</sup> Thus, summary judgment should only be upheld if no genuine issues of material fact are presented, and the moving party is entitled to judgment as a matter of law.<sup>11</sup>

Whether the procedural rule of *res ipsa loquitur* applies to a particular case is a question of law, and is likewise reviewed *de novo*.<sup>12</sup>

#### B. The Trial Court Erred in Dismissing Western National’s Claim Because *Res Ipsa Loquitur* Supplies the Necessary Inferences of Negligence and Causation to Circumstantially Establish Prima Facie Negligence on PSE’s Part.

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<sup>9</sup> *Troxell v. Rainier Public School Dist. No. 307*, 154 Wn.2d 345, 350 (2005).

<sup>10</sup> *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860 - 861 (2004).

<sup>11</sup> *Id.*

<sup>12</sup> *Pacheco v. Ames*, 149 Wn.2d 431, 436 (2003).

*Res ipsa loquitur* spares a plaintiff the requirement of proving specific acts of negligence.<sup>13</sup> The doctrine recognizes “that the occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of the defendant, without further or direct proof thereof,”<sup>14</sup> and therefore, “permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person.”<sup>15</sup>

For the doctrine to apply, three criteria must be met: (1) the incident producing the injury must be the kind that ordinarily does not occur in the absence negligence; (2) the injury must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the injury causing incident must not be due to any contribution on the part of the plaintiff.<sup>16</sup>

Only the first element of the test is at issue here.

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<sup>13</sup> *Id.*

<sup>14</sup> *Morner v. Union Pac. R.R. Co.*, 31 Wn.2d 282, 291 (1948).

<sup>15</sup> *Pacheco, supra.*

<sup>16</sup> *Id.*

Addressing the criteria in reverse order, the third element is not in question because there is no evidence suggesting (and PSE offers none) that the Jeretzky's either caused or contributed to the line falling. Indeed, PSE has always maintained that wind caused the line to fall.<sup>17</sup>

The second element is also satisfied because the line was PSE's and under PSE's exclusive control. Further, as an electrical supplier, PSE had a nondelegable duty to protect persons from harmful contact with the electricity that it supplies.<sup>18</sup>

Finally, the first element, that the occurrence producing the injury is not the kind that ordinarily happens in the absence of negligence is satisfied when one of three conditions is met:

- (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member;
- (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and
- (3)

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<sup>17</sup> CP 7 – 11.

<sup>18</sup> *Keegan, supra.*

when proof by experts in an esoteric field creates an inference that negligence caused the injuries.<sup>19</sup>

Here, the facts fall under the second condition; the reasons for which are as follows:

**1. PSE's nondelegable duty: The highest degree of care human prudence is capable of.**

Under Washington law, an electrical supplier's duty of care varies according to the danger posed by the utility's activity:<sup>20</sup>

. . . if the wires carry a strong and dangerous current of electricity, so that negligence will be likely to result in serious accidents, and perhaps death, . . . a very high degree of care, indeed, the highest that human prudence is equal to, is necessary.<sup>21</sup>

According to PSE, the line in question was a high-voltage line that was transmitting "7,200 volts phase to ground" and "12,470 volts phase to phase."<sup>22</sup> Therefore, its nondelegable duty required that PSE exercise the highest degree of care "that human prudence is equal to" in order to avoid creating an unreasonable

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<sup>19</sup> *Id.*, 555 – 556. [Citations omitted.]

<sup>20</sup> *Scott v. Pacific Power & Light Co*, 178 Wash. 647 (1934).

<sup>21</sup> *Id.* 651.

<sup>22</sup> CP 40.

risk of harm to people and property. In other words, PSE's duty defined the scope of protection that was owed to the Jeretzkys.

While it is not suggested that PSE breached its duty because of where it placed the line, at the same time, the line's location was neither in a remote area nor underground, but instead, overhead and adjacent to the residential neighborhood where the Jeretzkys lived. Therefore, because of its location, there was a reasonable probability that were the line to fall, it would end up landing on one of the neighboring homes (or, as it turned out in this case, the Jeretzkys').

Under a different set of facts, however, had the line ceased transmitting power before striking the Jeretzkys' home, damages would likely have been nonexistent; in which event, no harm no foul. But as the photographs<sup>23</sup> of the Jeretzkys' home show, because the line remained energized after it fell, it damaged everything that it came into contact with -- right down to the driveway's aggregate surface. Thus, as the photographs document,

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<sup>23</sup> CP 47, 49, 51, 53, 55, 57.

the damages here were simply not the kind that would be expected in the absence of negligence.

**2. There is no evidence that the weather was an intervening factor.**

Second, a weather condition that is common to a given area and reasonably foreseeable is not an intervening cause sufficient to break a chain of proximate causation.<sup>24</sup> Yet despite PSE's attempt to portray the Jeretzky's loss as an unavoidable casualty of weather, there is no evidence in the record suggesting that the wind on October 4, 2008 was anything more than a condition common to the area.

Further, the rule is that

One who is under a duty to protect others against injury cannot escape liability for injuries to the person or property of such others on the ground that it was caused by an act of God, unless the natural phenomenon which caused the injury was so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against, and it is not

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<sup>24</sup> *Teter v. Olympia Lodge No. 1, I. O. O. F.*, 195 Wash. 185 (1938). *DeYoung v. Swenson*, 6 Wn. App. 452 (1972).

sufficient that such phenomena are unusual or of rare occurrence.<sup>25</sup>

But again, there is no evidence that the weather was an intervening factor so as to absolve PSE from its duty of care.

It is also the case that

When two causes combine to produce an injury, both of which are, in their nature, proximate and contributory to the injury, one being a culpable negligent act of the defendant, and the other being an act of God for which neither party is responsible, then the defendant is liable for such loss as is caused by his own act concurring with the act of God, provided the loss would not have been sustained by plaintiff but for such negligence of the defendant.<sup>26</sup>

Nevertheless, even assuming that the line fell because of a weather anomaly, that does not explain why the line was allowed to continue transmitting electricity after falling onto the Jeretzky's home. Thus, despite of PSE's insistence on faulting harsh weather as the reason the line fell, even assuming weather conditions constituted an intervening cause, the fact remains that the weather

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<sup>25</sup> *Wells v. Vancouver*, 77 Wn.2d 800, 803 (1970).

<sup>26</sup> *Tope v. King County*, 189 Wash. 463, 471-72 (1937). [Citations omitted.]

had nothing to do with the line remaining energized, and hence, why the resulting damages here would not have occurred in the absence of negligence.

As stated in *Brashear v. Puget Power & Light*,<sup>27</sup>

Our prior cases have restricted the highest degree of care standard to high voltage cases for good reason. In high voltage cases, the risk of death is so great that the utilities are obligated to exercise the utmost care.<sup>28</sup>

In sum, the duty was nondelegable: PSE was required to take the highest precautions necessary to avoid exposing the Jeretzkys to an unreasonable risk of harm from an energized high-voltage line falling onto their home. The fact that the line fell and in the process destroyed the home's electrical system and fixtures is simply something that, in "the general experience and observation of mankind," would not be expected to happen in the absence of negligence.

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<sup>27</sup> *Brashear v. Puget Power & Light*, 100 Wn.2d 204 (1983).

<sup>28</sup> *Id.* 211.

**3. The three arguments offered by PSE on summary judgment were an insufficient basis for the trial court's ruling.**

Finally, at summary judgment, PSE offered three arguments as to why Western National's case merited dismissal: (1) That it was immune from liability under RULE 12 ELECTRIC TARIFF G; (2) that it did not breached its duty of care to the Jeretzkys because it had no duty to prevent its lines from falling in a windstorm; and (3) assuming there were a duty, there was no evidence regarding specific acts or omissions by which PSE breached its duty, or how such alleged conduct caused the Jeretzkys' property damage.<sup>29</sup>

According to PSE's first argument:

Western National claims that a live power line fell and caused damage to the Jeretzkys' home. This squarely falls within the scope of the Tariff quoted above: a disruption in PSE's service, attributable to winds, damage to PSE's lines, or electrical disturbances transmitted through PSE's lines caused loss or damage to the Jeretzkys' home.<sup>30</sup>

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<sup>29</sup> CP 7 -11.

<sup>30</sup> CP 10.

But as Western National pointed out to the trial court (a point that the trial court agreed with), the TARIFF only addresses the issue of “continuity of service” and the kind of claims that occur when, so to speak, the lights-go-out:<sup>31</sup>

CONTINUITY OF SERVICE - Electric Service is inherently subject to disruption, including interruption, suspension, curtailment and fluctuation. Neither the Company nor any other person or entity shall have any liability to any Customer . . . for *disruption in service or for any loss or damage caused thereby* . . . [due to] Causes beyond the Company’s reasonable control [to include] . . . winds.<sup>32</sup>

By contrast, the damages sustained by the Jeretzkys had nothing to do with whether electrical service was disrupted (e.g., a loss of heat, lights, or refrigeration) but in having their property destroyed by PSE’s errant high-voltage line. In short, the Jeretzkys’ damages were not the result of a “disruption in service” and in view of which the TARIFF’s immunity clause does not shield PSE from liability in this case.

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<sup>31</sup> CP 32 - 33.

<sup>32</sup> CP 44. [Emphasis supplied.]

As for PSE's second argument, that its general duty of care did not extend to preventing its lines from falling in a windstorm, this argument ignores the nature of PSE's legal duty in reference to the events of October 4, 2008 and the fact that this case is not just about a line falling off a pole, but the resulting harm because the line remained energized after it fell.

Lastly, according to PSE "even if there were a duty to prevent electrical lines from falling in a windstorm," there is no evidence of breach or causation by which Western National can establish a prima facie case of negligence. But this argument is flawed in two respects:

First, there is no need to employ the subjunctive by assuming a duty of care where, as here, the duty was already established.<sup>33</sup> Second, the argument seemingly fails to understand the fact that under *res ipsa loquitur*, Western National was not required to establish prima facie proof of fault because the doctrine

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<sup>33</sup> *Scott, supra.*

spared Western National the requirement of proving specific acts of negligence on PSE's part.

In the ordinary course of things, the damages caused to the Jeretzkys' home by PSE's energized line was of a kind that would not occur in the absence of negligence, and in view of which the doctrine of *res ipsa loquitur* applies in this case. It was therefore, error for the trial court to dismiss Western National's claim.

#### IV. CONCLUSION

The doctrine of *res ipsa loquitur* supplies the necessary inferences of negligence and causation to circumstantially establish prima facie negligence.

In this case all three of the elements required for *res ipsa loquitur* are satisfied: (1) the Jeretzkys neither caused nor contributed to the injury producing harm; (2) the power line in question was under PSE's exclusive control, and (3) the harm caused by the energized power line falling onto and striking the Jeretzkys' home was not the type that normally occurs in absence of negligence.

The doctrine of *res ipsa loquitur* thus applies in this case, and in view of which, Western National was not required to establish a prima facie case at summary judgment.

It was therefore error for the trial court to grant PSE's motion for summary judgment and dismiss Western National's case.

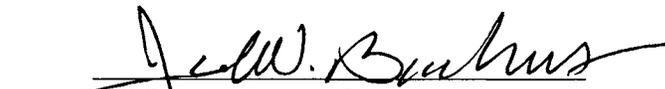
The trial court's order granting PSE's summary judgment motion should be reversed and the case remanded with instructions. And

Western National should be awarded its costs on appeal.

DATED at Seattle, March 31, 2010.

Respectfully submitted,

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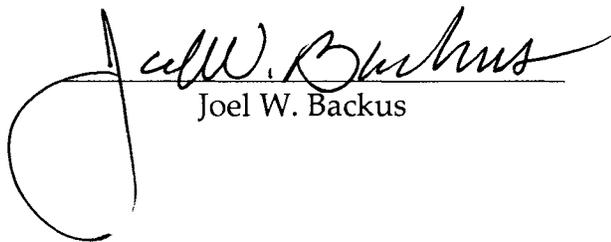
**CERTIFICATE OF SERVICE**

On April 1, 2010, the original and one copy of the APPELLANT'S OPENING BRIEF was sent via Washington Legal Messengers, for filing with the Court of Appeals, Division I, 600 University Street, Seattle, Washington 98101, and that one copy was sent via Washington Legal Messengers for service on attorneys for Respondent:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle April 1, 2010.

  
Joel W. Backus