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No. 64835-7-I

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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WESTERN NATIONAL ASSURANCE COMPANY,

*Plaintiff/Appellant,*

v.

PUGET SOUND ENERGY, INC.,

*Defendant/Respondent.*

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STATE OF WASHINGTON  
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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The purpose behind a summary judgment motion is to “examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (citations and internal quotations omitted). Where the party bearing the burden of proof has no evidence to support its formal allegations—or any one essential element of its case—summary judgment is appropriate. *Id.* at 225–26.

The above is the established approach, and this appeal is a textbook case. When Puget Sound Energy, Inc. (“PSE”) moved for summary judgment because plaintiff lacked evidence to support every element of negligence, plaintiff Western National presented no evidence to support the challenged elements. After the summary judgment was granted, Western National tried another theory on reconsideration, but *still* failed to submit evidence in support of that theory. Because there is no evidence to support essential elements of Western National’s claim under either theory, the trial court’s rulings on summary judgment and reconsideration should be affirmed.

## II. STATEMENT OF THE CASE

### A. Factual Background

PSE, an investor-owned public utility, maintains electrical lines and provides electrical service to customers in eleven counties in Washington. CP 5, 82. PSE's lines often are located on property owned by others, such as the State, counties, cities, businesses, and individuals. CP 82. In such cases, private owners and/or members of the general public may have access to PSE equipment 24 hours a day. *Id.*

On October 4, 2008, a storm with heavy winds hit northwestern Washington. CP 12. Before midnight, PSE was called upon to respond to 29 power outages resulting from the storm in Skagit and Island Counties. *Id.*; *see also* CP 15–29 (references to trees falling on lines, etc.). Each of the entries on PSE's system operations log—the report in which PSE records its service calls daily—references winds, high winds, or the storm. *Id.* Ten of the outages are titled “Hi Wind Outages” specifically. CP 12–13.

The Jeretzskys, a family residing in Anacortes, were apparently affected by one of these events. CP 4. A power line is alleged to have fallen and damaged their home. *Id.* The power line that fell was not on PSE property; it was on the road right-of-way near the Jeretzskys' home. CP 82. As such, members of the public, including the Jeretzskys, could

access the line at any time. *See id.* Western National insured the Jeretzkys' home and, therefore, paid their homeowners' insurance claim for \$22,169.56. CP 4. Western National then looked to PSE for reimbursement of the claim amount. CP 3–4.

**B. Procedural Background**

In December 2008, Western National initiated a negligence action in Skagit County against PSE. CP 3–4.

**1. The Trial Court Entered Summary Judgment in Favor of PSE.**

On November 9, 2009, PSE filed a motion for summary judgment against Western National. CP 7–11. PSE argued that (a) PSE did not have a duty to prevent lines from falling during a windstorm, either under the Tariff governing PSE's relationship with Washington consumers or under its general tort duty; and (b) Western National had no evidence to support the elements of breach or causation. CP 9–11. Therefore, PSE argued, under *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), summary judgment dismissal of Western National's claim was proper. *Id.*

In its opposition to the motion for summary judgment, Western National addressed *only* the question of PSE's duty. CP 31–36. *Western National failed to submit any evidence supporting breach or causation.*

*Id.* In fact, it only submitted evidence related to damages, the one element PSE had not challenged in its motion.<sup>1</sup> CP 44–58. Without using the term “strict liability,” Western National appeared to argue the very fact that a power line fell during a windstorm is sufficient to impose liability on PSE. CP 33–35.

The trial court granted PSE’s motion for summary judgment on December 7, 2009. CP 64–65.

**2. The Trial Court Denied Reconsideration of the Summary Judgment Order.**

Western National filed a motion for reconsideration of the trial court’s ruling on summary judgment. CP 66–73. For the first time, Western National raised a *res ipsa loquitur* argument. *Id.*

PSE opposed the motion for reconsideration on both substantive and procedural grounds. CP 74–81. Substantively, Western National’s only evidence in the record failed to support application of the doctrine of *res ipsa loquitur*. CP 76–80. Procedurally, Western National had provided no reason or basis under CR 59(a) for reconsideration, and never explained why it failed to timely raise *res ipsa loquitur* in its opposition to the summary judgment motion. CP 76.

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<sup>1</sup> PSE does not concede damages have been proven, only that Western National has some evidence to support this single element of the claim.

On January 4, 2010, the trial court denied Western National's motion for reconsideration. CP 84–85. This appeal followed. CP 86–93.

### **III. ARGUMENT**

#### **A. Summary of Argument**

Western National's failure to submit any evidence to support the challenged elements of negligence—under either a traditional negligence approach or the doctrine of *res ipsa loquitur*—means there is no genuine issue of material fact for trial. Further, PSE does not have a duty to prevent electrical lines (energized or no) from falling during a storm with high winds.

#### **B. Standard of Review**

A trial court's order on summary judgment is reviewed *de novo*, and its denial of a motion for reconsideration<sup>2</sup> is reviewed for abuse of discretion. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989) (summary judgment); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245, 1252 (2003) (reconsideration). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons." *Go2Net*, 115 Wn. App. at 88.

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<sup>2</sup> Western National omits from its brief the standard of review for denying a motion for reconsideration, although its motion for reconsideration was the first time it had raised *res ipsa loquitur*.

**C. Western National Cannot Support Its Negligence Claim Because It Has No Evidence of Breach or Causation.**

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d at 225. “The moving defendant may meet the initial burden by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.*, n.1 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)) (internal quotations omitted). A “complete failure of proof” of *any one element* of a claim defeats the claim. *Id.* at 225.

Once the moving party makes the initial showing, the burden shifts to the party that has the burden of proof at trial. *Id.* A nonmoving party has specific requirements when responding to a summary judgment motion. Namely:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial*. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

CR 56(e) (emphasis added); *accord*, *Young v. Key Pharms., Inc.*, 112 Wn.2d at 225. If the plaintiff cannot make a showing sufficient to establish the existence of an element essential to that party’s case, the

motion should be granted. *Young v. Key Pharms., Inc.*, 112 Wn.2d at 227 (quoting *Celotex*, 417 U.S. at 322).

Whether proceeding under the classic elements of negligence or the doctrine of *res ipsa loquitur*, Western National did not meet the requirements of CR 56(e) or *Young v. Key Pharmaceuticals*. The complete failure of proof on essential elements supports the trial court's decisions on the motion for summary judgment and motion for reconsideration. Even viewing the facts in the light most favorable to Western National, *e.g.*, *Young*, 112 Wn.2d at 226, there is an absence of evidence to support a negligence claim. Without evidence to support a negligence claim, there is no genuine issue of material fact. Western National's claim was properly dismissed on summary judgment.

**1. Western National Failed to Produce Evidence to Support the Traditional Negligence Elements.**

Western National could survive summary judgment only if it had evidence that PSE's negligence was the proximate cause of the Jeretzky's damages. *E.g.*, *Citoli v. City of Seattle*, 115 Wn. App. 459, 478, 61 P.3d 1165 (2002). PSE pointed out to the trial court that Western National had *no* evidence to support two factual elements of its negligence claim: breach and causation. In response, Western National merely presented

evidence regarding the Jeretzkys' claimed *damages*—an element PSE did not challenge in its motion.

Western National has provided no evidence regarding specific acts or omissions by which PSE breached a duty, or how such alleged conduct caused the Jeretzkys' property damage. Without such evidence, summary judgment was appropriate and should be affirmed.

Further, PSE's conduct was not the cause in fact of alleged damages to the Jeretzkys' home. PSE's acts or omissions did not cause the line to fall. Instead, the line fell because of the harsh weather. Western National does not meaningfully dispute that high winds caused the power line to fall,<sup>3</sup> and it provides no "specific facts" showing that PSE's negligence caused the power line to fall if not—or even in addition to—the wind.

Western National has set forth no "specific facts," as required by CR 56(e), showing that any PSE act or omission breached a duty or that such breach was the proximate cause of the Jeretzky's damages. Without such evidence on two essential elements of the case, there is "a complete failure of proof," rendering all other facts immaterial. *Young v. Key Pharms., Inc.*, 112 Wn.2d at 225 (quoting *Celotex*, 417 U.S. 322–323).

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<sup>3</sup> The undisputed evidence in the record is that windstorm caused the line to fall. CP 12–13. Western National submitted no evidence to counter that fact.

**2. Western National Failed to Produce Evidence to Support the Elements of Res Ipsa Loquitur.**

On reconsideration, Western National asserted it was entitled to invoke the doctrine of res ipsa loquitur in place of the classic negligence elements. On this theory, Western National alleges that PSE must have been negligent in maintaining the lines; otherwise, the line would not have fallen down in a windstorm. However, Western National failed to present evidence to support a finding of negligence under res ipsa loquitur, and the trial court was correct to deny reconsideration.

A plaintiff may employ the doctrine *only* where the elements of res ipsa loquitur are satisfied. *Pacheco v. Ames*, 149 Wn.2d 431, 444, 69 P.3d 324 (2003). Whether the doctrine applies is a question of law. *Id.* at 436.

This is not a case in which res ipsa loquitur applies:

The doctrine of res ipsa loquitur spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, *the cause of which cannot be fully explained and the injury is of a type that would not ordinarily result if the defendant were not negligent . . . .* [¶]

The doctrine 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 . . . .* [¶]

We have repeatedly stated that res ipsa loquitur is applicable *only* when the evidence shows:

“(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of

someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.”

*Id.* at 436 (emphasis added; citations omitted). Plaintiff must first make out a prima facie case on these three elements; only then will the burden shift to the defendant to offer an explanation. *Id.* at 440–41; *Robison v. Cascade Hardwoods*, 117 Wn. App. 552, 563–64, 72 P.3d 244 (2003). Here, Western National did not submit *any* evidence to support *any* element, and PSE challenges each one.<sup>4</sup>

**a. Western National Presents No Evidence That This Occurrence Ordinarily Would Not Happen Absent PSE's Negligence.**

The occurrence in this case is *not* the kind which ordinarily does not happen in the absence of someone's negligence. In order to support this element, Western National has to show that one of three conditions exists:

- (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 the wrong member; [¶]
- (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and [¶]

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<sup>4</sup> Western National is mistaken when it assumes, “Only the first element of the test is at issue here.” Br. of Appellant at 5. All three elements are at issue, and Western National has presented evidence to support none of them.

- (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

*Pacheco*, 149 Wn.2d at 438–39. None of these conditions exist.

The effect of windstorms on power lines is hardly an “esoteric field.” Expert testimony is not necessary or appropriate. ER 702. Almost anyone living in this region for more than one year has experience with windstorms causing downed lines and power outages.<sup>5</sup> Other regions face more disastrous storms than the Northwest; downed power lines are practically an inevitable result.<sup>6</sup> Thus, the general experience and observation of mankind teaches that downed wires would certainly be expected without PSE’s negligence in the event of high winds, which

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<sup>5</sup> We believe this is an appropriate subject for judicial notice. ER 201. The “Inauguration Day Windstorm” of 1993 and the December 2006 windstorm that left millions without power for days are extreme examples, but it is only the lucky few who have not been affected by power outages in windy weather. A sampling of headlines from *The Seattle Times* across ten years illustrates the point: *High Winds Cut Electricity to Thousands*, *The Seattle Times*, December 26, 2005 (“High winds downed trees and power lines . . .”); *Winds Fell Trees, Knock Out Power*, *The Seattle Times*, December 13, 2004 (“ . . . trees downed by high winds snagged power lines around Western Washington.”); Maria Gonzalez, *140,000 Without Power as Heavy Winds Sweep Region*, *The Seattle Times*, December 4, 2003 (“ . . . strong winds continued to knock down power lines across King County and surrounding areas.”); Jim Brunner, Charles E. Brown, Nancy Montgomery, *Officials: Stay Clear of Downed Power Lines*, *The Seattle Times*, November 24, 1998 (“With high winds expected to continue this week, possibly toppling more trees, utility officials were warning residents to watch out for downed electrical lines.”); Dave Birkland, *High Winds Down Trees -- More of the Same Expected For Tomorrow, Say Forecasters*, *The Seattle Times*, December 11, 1995.

<sup>6</sup> *E.g.*, *The Associated Press, High-voltage Power Line Downed in California Storm*, October 13, 2009 (“California’s electricity grid manager has declared a power emergency after strong winds knocked down a high-voltage transmission line in Monterey County”).

undisputedly were a factor in the downed power line at the Jeretzky's property.

A downed line is also not "so palpably negligent" that it would compare to, for instance, the amputation of the wrong body part. Where, as here, the wind and falling trees/branches were causing outages and downed lines throughout the area, it is not surprising that this line would fall. It is not a given that PSE had to have been negligent for the event to occur.

Western National cannot show that the occurrence—the line downed by the windstorm—causing damage to the Jeretzky's property is of a kind which ordinarily does not happen in the absence of someone's negligence.

**b. Western National Presents No Evidence That the Weather and the Lines Are in PSE's Exclusive Control.**

The *only* evidence in the record is that the public had *full-time* access to the PSE line that fell. Therefore, Western National's conclusory assertion, Brief of Appellant at 6, that the line was under PSE's exclusive control is meritless. Instead of bringing evidence to satisfy *its* burden, Western National attempts to shift the burden of producing evidence to negate this element to PSE. This is not a correct reading of the analysis. *Pacheco*, 149 Wn.2d at 441 (plaintiff must establish prima facie case

first). Res ipsa loquitur is a legal shortcut wherein the elements of negligence may be inferred—*only if* the plaintiff can prove the elements of res ipsa loquitur. *Id.* at 436. Western National appears to want the court, and later, the jury, to infer the elements of res ipsa loquitur. This is not permitted:

The reason for the prerequisite of exclusive control of the offending instrumentality is that the purpose of the rule is to require the defendant to produce evidence explanatory of the physical cause of an injury which cannot be explained by the plaintiff. If the defendant does not have exclusive control of the instrumentality producing the injury, he cannot offer a complete explanation, and *it would work an injustice upon him to presume negligence on his part and thus in practice demand of him an explanation when the facts indicate such is beyond his ability.*

*Id.* at 437 (emphasis added).

Here, the injuries were not caused by an agency or instrumentality within PSE's exclusive control. The line was on the road right-of-way, which is neither on PSE property nor exclusively accessible by PSE. PSE can be as careful as possible, but it does not maintain exclusive control over the instrumentality of the power line. It also does not maintain exclusive control over the weather or any other causal factor in this case.

Western National cannot—and does not even attempt to—show that the occurrence was caused by an agency or instrumentality in PSE's

exclusive control. An inference of negligence in the circumstances would work an injustice.

**c. Western National Presents No Evidence That the Falling Line Was Not Due to Any Contribution by the Jeretzky's.**

Again, Western National attempts to shift the burden onto PSE to prove this element. Br. of Appellant at 6. In fact, Western National must present evidence that the Jeretzky's *did not* contribute to the line falling. *Pacheco*, 149 Wn.2d at 441. Plaintiff ought to have the burden in this case, as the Jeretzky's are the ones who know whether this is true or untrue. The line was close to or connected to the Jeretzky's' property, and their actions on or around their property could have loosened the line. Western National fails to present any evidence of this element, and cannot therefore make out a prima facie case.

**D. PSE Had No Duty to Prevent the Line from Falling in the Storm.**

Whether a defendant has a duty is a question of law. *E.g.*, *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 562, 104 P.3d 677 (2004). As a matter of law, PSE does not have the duty Western National suggests.

**1. PSE's General Duty of Care Does Not Extend to Preventing Lines from Falling in a Windstorm.**

Western National claims PSE has a duty to exercise "a very high degree of care" or "the highest that human prudence is equal to." Even if

true, Western National does not even hint how “human prudence” could have prevented the electric line from falling during a storm in which high winds caused multiple outages. Indeed, Western National provides no parameters for PSE’s alleged duty in this case.

The case Western National cites for the proposition that PSE is liable for “acts of God” is factually inapposite. In that case, *Wells v. Vancouver*, 77 Wn.2d 800, 467 P.2d 292 (1970), an airplane hangar blew apart in high winds and injured a person beside the hangar. The plaintiff in that case alleged that the City had statutory and common law duties to design the building to withstand certain wind speeds. Western National never says *what* PSE could have done to prevent the occurrence.

## **2. The Tariff Immunizes PSE from Liability.**

The Tariff governs PSE’s relationship with its customers, and has the force and effect of law:

Utilities must file tariff schedules with the Washington Utilities and Transportation Commission (WUTC) showing “all forms of contract or agreement, all rules and regulations relating to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed” by the gas company. RCW 80.28.050. ***A filed tariff has the force and effect of law.*** *General Tel. Co. of N.W., Inc. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986). “[S]tandard principles of statutory construction apply to the interpretation of the tariff.” *National Union Ins. Co. v. Puget Sound Power & Light Co.*, 94 Wn. App. 163, 171, 972 P.2d 481 (1999).

*Citoli v. City of Seattle*, 115 Wn. App. 459, 484–85, 61 P.3d 1165 (2002) (emphasis added). The Tariff, effective beginning in 2000, supersedes the cases cited by Western National, as they were decided in 1937, 1938, 1970, and 1972.

The Tariff itself states:

Neither [PSE] 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* if such disruption is attributable to the causes, work, or actions from any of the following:

a. *Causes beyond [PSE's] reasonable control* including, but not limited to . . . [¶]

winds . . . [¶]

breakdowns of or damage to facilities of the company, . . . [or ¶]

electrical disturbances originating on or transmitted through electrical systems with which [PSE's] system is interconnected.

CP 42–43 (Rule 12 of Electric Tariff G) (emphasis added).

Western National claims that a live power line fell and caused damage to the Jeretzky's home. This squarely falls within the scope of the Tariff quoted above: a disruption in PSE's service occurred when the line fell.<sup>7</sup> The line fell because of winds, damage to PSE's lines, or electrical

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<sup>7</sup> Although Western National dismisses the Tariff's effect offhandedly, Brief of Appellant at 13, a downed power line is the *ultimate* "disruption in service."

disturbances transmitted through PSE's lines. That, in turn, caused loss or damage to the Jeretzky's home.

The Tariff immunizes PSE against liability for “*any loss or damage*” caused thereby. “[A]ny loss or damage” includes alleged damages attributable to the fall of the line itself (the disruption right as it occurs), as well as to power outage in the home (the longer-term effects of the disruption). The Jeretzky's claimed harm is attributable to “[c]auses beyond [PSE's] reasonable control”—and the Tariff is meant to prevent runaway liability for such causes. Therefore, PSE “shall have” no liability to the Jeretzky's under the Tariff.

Western National merely has a subrogated interest in the Jeretzky's claim. *See Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424 (2008) (“An insurer entitled to subrogation stands in the shoes of the insured and is entitled to the same rights and subject to the same defenses as the insured.”). Because PSE “shall have” no liability to the Jeretzky's for this occurrence under the Tariff, PSE shall have no liability to Western National, the Jeretzky's subrogee.

**E. Western National Asserted No Bases for Its Motion for Reconsideration, Which Was Properly Denied.**

An additional reason justified the trial court in denying Western National's motion for reconsideration: the motion was procedurally

defective. A motion for reconsideration does not exist in a vacuum. To be granted, it must be based upon enumerated factors, as set forth in the Civil Rules:

On the motion of the party aggrieved, . . . any . . . order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties.

CR 59(a) (listing nine causes supporting reconsideration). In addition, the Civil Rules and the Local Rules require the moving party to set forth the basis for reconsideration in its motion. CR 59(b) (“identify the specific reasons in fact and law as to each ground”); SCLCR 3(h)(2) (“set forth specific grounds for the reconsideration”).

In its motion—and again in this appeal—Western National ignored the procedural requirements of CR 59(a) and (b) and offered no “causes,” “reasons,” or “grounds” for the trial court to reconsider its order granting summary judgment. Western National did not—and does not now—even *suggest* that any of the enumerated bases existed to justify the trial court’s reconsideration of its ruling. PSE believes no basis for reconsideration exists. Further, if Western National believed *res ipsa loquitur* applied in this case, it should—and could—have argued as much in opposition to the motion for summary judgment. The trial court did not abuse its discretion, as its denial of Western National’s motion for reconsideration was neither

manifestly unreasonable nor based upon untenable grounds or untenable reasons.

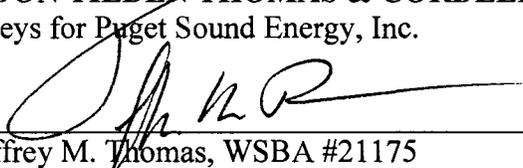
#### **IV. CONCLUSION**

A plaintiff asserting a claim simply cannot survive summary judgment without evidence to support that claim. Before the trial court, Western National relied solely on evidence supporting an unchallenged element, with a sprinkling of attorney argument, to further its negligence claim against PSE. The glaring insufficiency of the evidence at the summary judgment stage was not remedied when Western National moved for reconsideration. On the basis of the sufficiency of the evidence, the trial court had no choice but to grant summary judgment and deny reconsideration. That decision should be affirmed.

Independent of the lack of evidence to support breach and causation, this Court may rule as a matter of law that PSE had no duty to prevent power lines from falling during a storm with high winds.

RESPECTFULLY SUBMITTED this 3rd day of May, 2010.

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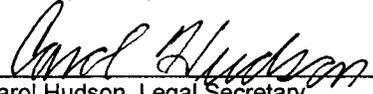
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered via hand delivery to: JOEL W. BACKUS, counsel for plaintiff/appellant, at the regular office address thereof.

Dated this 3rd day of May, 2010 at Seattle, Washington.

  
Carol Hudson, Legal Secretary  
Gordon Tilden Thomas & Cordell LLP