

No. 66714-9-I

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

ESTATE OF PATRICK NELSON CONNELLY,

Appellant,

v.

SNOHOMISH COUNTY PUD #1,

Respondent.

BRIEF OF RESPONDENT

Megan Otis Masonholder, WSBA #29495
Christopher J. Knapp, WSBA #19954
Attorneys for Respondent
Snohomish County PUD #1

2011 OCT 24 PM 1:27
 COURT OF APPEALS
 STATE OF WASHINGTON
 DIVISION I

ANDERSON HUNTER LAW FIRM P.S.
2707 Colby Avenue
P. O. Box 5397
Everett, Washington 98206-3566
Telephone: (425) 252-5161
Facsimile No.: (425) 258-3345

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
A. Standard of Review.....	1
B. Counterstatement of the Facts.....	5
II. RESPONSE TO ASSIGNMENTS OF ERROR.....	27
A. Findings of Fact.....	27
B. Conclusions of Law.....	35
III. ARGUMENT.....	41
A. Issues on Appeal.....	41
B. Review Standard.....	42
C. Court Applied Correct Duty of Care.....	43
D. Appellant’s Argument Misconstrues Authority and Misinterprets RCW 64.12.035.....	46
IV. CONCLUSION.....	48

TABLE OF AUHORITIES

	<u>Page</u>
 <u>Rules</u>	
RAP 10.3(g).....	43
 <u>Statutory Authority</u>	
RCW 4.56.110.....	41
RCW 10.82.090, referenced in RCW 4.56.110(4).....	41
RCW 64.12.035.....	47
 <u>Case Authority</u>	
<i>Bartel v. Zuckriegel</i> , 112 Wn. App. 55, 47 P.3d 581 (2002).....	1
<i>Citerella v. United Illuminating Co.</i> , 266 A.2d 382 (1969).....	45
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 784 P.2d 554 (1990).....	1
<i>Curtis v. Security Bank of WA</i> , 69 Wn. App.12 (1993).....	2
<i>Ellensburg v. Larson Fruit Co., Inc.</i> , 66 Wn. App. 246, 835 P.2d 225 (1992).....	42
<i>Greene v. Greene</i> , 97 Wn. App. 708, 986 P. 144 (1999).....	1
<i>Green v. Normandy Park</i> , 137 Wash. App. 665, 689, 151 P.3d 1038 (2007).....	1
<i>Harrington v. Pailthorp</i> , 67 Wn.App 901, 841 P.2d 1258 (1992)....	43
<i>In re Estate of Havaland</i> , 162 Wash. App. 548, 561, 255 P.3d 854, 862 (2011).....	2

<i>In re Estate of Jones</i> , 152 Wash.2d 1, 8, 93 P.3d 147 (2004).....	43
<i>Johnson v. State</i> , 77 Wn. App. 934 (1995).....	44
<i>Keegan v. Grant County Public Utility District No. 2</i> , 34 Wash. App. 274, 661 P.2d 146 (1983).....	43,44
<i>Korst v. McMahon</i> , 136 Wash.App. 202, 206, 148 P.3d 1081 (2006).....	3
<i>Lea v. Carolina Power and Light Company</i> , 98 S.E.2d 9 (1957).....	45
<i>Lobdell v. Sugar ‘n Spice</i> , 33 Wn.App. 881, 658 P.2d 1267 (1983).....	3
<i>Mitchell v. Straith</i> , 40 Wn. App. 405, 698 P.2d 609 (1985).....	3
<i>Pac. Nw. Life Ins. Co. v. Turnbull</i> , 51 Wash. App. 692, 702, 754 P.2d 1262, 1268 (1988).....	3
<i>Robben v. Hartford Electric Light Co.</i> , 1 Conn. App. 109 (1983).....	47
<i>Rogers Potato Service, LLC v. Countrywide Potato</i> , 79 P3d. 1163 (2003).....	4
<i>Rocca v. Tuolumne County Electric Power and Light Co.</i> , 76 Cal. App. 569 (1926).....	46
<i>Southwestern Gas & Electric Co. v. Deshazo</i> , 138 S.W.2d 397(1940)...	45
<i>Standing Rock Homeowners Ass'n v. Misich</i> , 106 Wash.App. 231, 242–43, 23 P.3d 520 (2001).....	2
<i>State v. Kaiser</i> , 161 Wash. App. 705, 723-24, 254 P.3d 850, 860 (2011).....	2, 3, 42
<i>State v. Souza</i> , 60 Wn.App. 534, 805 P.2d 237 (1991).....	3
<i>SSG Corp. v Cunningham</i> , 74 Wn.App. 708, 875 P.2d 16 (1994).....	3
<i>Sunnyside Valley Irr. Dist. V. Dickie</i> , 149 Wn. 2d 873 (2003).....	2
<i>Thomas v. French</i> , 99 Wn.2d 95, 104, 659 P.2d 1097, 1102 (1983).....	3

I. INTRODUCTION

This lawsuit arises from a fatal electrocution that occurred on the evening of October 16, 2003, near the intersection of State Route 9 and East Sunnyside School Road, in Snohomish County. CP 79 (FOF 1, 2). The electric system involved in the incident was owned and operated by Snohomish County Public Utility District No. 1 (“PUD”).

A. Standard of Review.

The Estate failed to file a jury demand in this case and submitted the case to Judge Yu as a fact finder. Thus, there is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Green v. Normandy Park*, 137 Wash. App. 665, 689, 151 P.3d 1038, 1050 (2007), citing *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wash.2d 364, 369, 798 P.2d 799 (1990).

The discretionary rulings of a trial judge when acting as a trier of fact are given considerable deference and are only reversed on an abuse of that discretion. *Coggle v. Snow*, 56 Wn.App. 499, 784 P.2d 554 (1990). The reviewing court will not substitute its judgment for the trial court's, weigh the evidence, or adjudge witness credibility. *Greene v. Greene*, 97 Wn. App. 708, 986 P. 144 (1999); *Bartel v. Zuckriegel*, 112 Wn. App. 55, 47 P.3d 581 (2002).

Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. When findings and conclusions are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether conclusions of law are supported by the findings. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wash.App. 231, 242–43, 23 P.3d 520 (2001).

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true; and, if that standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Sunnyside Valley Irr. Dist. V. Dickie*, 149 Wn. 2d 873 (2003); *Curtis v. Security Bank of WA*, 69 Wn. App. 12 (1993).

“[W]here there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding.” *In re Estate of Haviland*, 162 Wash. App. 548, 561, 255 P.3d 854, 862 (2011), citing *Lint*, 135 Wash.2d at 532, 957 P.2d 755 (1998). The court views the evidence and all reasonable inferences in the light most favorable to the prevailing party. *State v.*

Kaiser, 161 Wash. App. 705, 723-24, 254 P.3d 850, 860 (2011), citing *Korst v. McMahon*, 136 Wash.App. 202, 206, 148 P.3d 1081 (2006).

In the absence of a finding of fact on a disputed matter, the appellate court will imply a finding against a party having the burden of proof on that issue. *Pac. Nw. Life Ins. Co. v. Turnbull*, 51 Wash. App. 692, 702, 754 P.2d 1262, 1268 (1988), citing *Rhodes v. Gould*, 19 Wn.App. 437, 441, 576 P.2d 914 (1978). Error without prejudice is not grounds for reversal and error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097, 1102 (1983).

The absence of a finding as to a material fact constitutes a negative finding entered against the party with the burden of proof, unless there is *undisputed* evidence which an appellate court can hold compels a contrary finding. *Mitchell v. Straith*, 40 Wn. App. 405, 698 P.2d 609 (1985); *Lobdell v. Sugar 'n Spice*, 33 Wn.App. 881, 658 P.2d 1267 (1983). The absence an express finding of fact gives rise to the presumption that the party having the burden of proof has failed to sustain that burden and requires that fact be deemed to have been found against the party having the burden of proof. *SSG Corp. v Cunningham*, 74 Wn.App. 708, 875 P.2d 16 (1994); *State v. Souza*, 60 Wn.App. 534, 805 P.2d 237 (1991)

(exception exists in cases where end result would be *directly contrary* to evidence presented at trial).

A trial court's findings cannot be supported by speculation or conjecture. *Rogers Potato Service, LLC v. Countrywide Potato*, 79 P3d. 1163 (2003). Here, Appellant is contending that the trial court should have engaged in speculation to conclude that the subject tree which was well outside the clearance zone for utility vegetation management, could have and should have been readily assessed to be failing from decay by the PUD from the road in 1999-2000 when the vegetation management occurred.

Rather than present the appellate court with a show of evidence that was contrary to the trial court's finding, which is what the Appellant has attempted to do, Appellant must show specific findings that are not supported by the evidence. To successfully argue for reversal, Appellant cannot merely disagree with the Judge Yu's decision and speculate that she must have "misunderstood" the disputed evidence. (Appellant Brief, p. 4 ¶II.2). Each and every one of the court's findings are supported in the record and each and every one of the court's conclusions are supported by the findings. Appellant simply disagrees with the outcome. This is not proper grounds for reversal of the trial court's decision.

B. Counterstatement of Facts.

During a storm with high winds, a large poplar tree located on real property owned by the Lake Stevens School District (“School District”) blew over and fell across East Sunnyside School Road onto the PUD’s three phase power lines located on the opposite side of the road. CP 79 (FOF 2, 5). The tree struck a segment of distribution power lines on Circuit EMA-037, between PUD Pole CGC-22 and CGC-023 that serviced the School District bus barn and a few residences. CP 79 (FOF 2). When the tree fell across the road it contacted, stretched, and broke the PUD’s distribution lines. The road phase and the center phase were de-energized. The field phase remained energized, contacted wet earth and vegetation, and started a small fire.

Michael Varnell and Patrick Connelly were driving on westbound on 42nd Street NE and had stopped on the east side of Highway 9, shortly after the tree fell. Mr. Connelly and Mr. Varnell saw the small brush fire in the ditch on the other side of the highway. Mr. Connelly suggested that they stop and attempt to “stomp out” the fire. While Mr. Varnell was getting a fire extinguisher out of his truck, Mr. Connelly attempted to stomp out the fire. Mr. Connelly was electrocuted when he came into contact with the energized field phase conductor. PUD employees responded to the incident immediately and a crew was dispatched to the

scene arriving within minutes. No evidence was raised alleging any negligence involving the PUD's response to the incident.

Two major issues were tried in regard to the PUD's alleged liability: (1) the PUD's vegetation management ("VM") practices for the Circuit EMA-037; and (2) the electrical system's design, maintenance, construction and operation specifically with regard to the protection devices. Much of the trial was devoted to showing from an electrical engineering standpoint how the system's fault protection devices were designed and how they performed. There is no error asserted to the admissibility of evidence or as to the trial court's findings of fact and conclusions of law relating to how the incident occurred or the absence of any negligence involving system's design, construction, or maintenance. Thus, the only issues on appeal relate to vegetation management.

Defense expert Steve Cieslewicz, a utility arborist and industry expert with 25 years of experience, has expertise unmatched by the Estate's witnesses in the area of vegetation management. (RP Cieslewicz, 87-96). Cieslewicz reviewed all relevant discovery relating to vegetation management in this case. (RP Cieslewicz, 96:17-25; 97:1-10).

Cieslewicz expressed his opinions, on a more likely than not basis, based upon his education, training, experience as a utility arborist and concluded that the PUD acted in a manner consistent with the exercise of

utmost care consistent with the practical operation of the utility during 1999 through 2000 with regard to its vegetation management program. (RP Cieslewicz, 97:11-17; 114:9-15).

All states (with the exception of California and Oregon, the only two states with mandatory clearance requirements) rely on the National Electric Safety Code Section 218. (RP Cieslewicz, 100, 101:1-6). NESC-18 does not require or mandate a specific clearance distance, but does require a vegetation management program be implemented to trim or remove trees that may interfere with an ungrounded supply conductor. (RP Cieslewicz 102:1-25; 103:1-2). In Washington, the Public Utility Commission has adopted the NESC, compelling utilities to comply with its requirements. (RP Cieslewicz 103:5-23). The NESC does not set forth specific standards for what elements the vegetation management program entails. (RP Cieslewicz 103:20-104:1).

Cieslewicz explained that utilities are compelled to keep vegetation away from utility wires in order to prevent blackouts and fires, to comply with the laws that vary from state to state, and to protect public safety. (RP Cieslewicz, 98-99). According to Cieslewicz, a vegetation management program for a utility that was “exercising the utmost care consistent with the practical operation of the utility” would have: (1) a schedule; (2) field inspections to identify work needed on a circuit; (3) work performed in a

timely manner; and (4) post-auditing to make sure the work that was identified was completed pursuant to the utility's standards. (RP Cieslewicz, 104-105). The PUD's vegetation management program met this standard of care and was consistent with industry standards (RP Cieslewicz, 105, 106). It was undisputedly a "reasonable program" and "consistent with the constraints that utility companies work under when they're doing UVM work." (RP Cieslewicz, 115:10-17).¹

In Cieslewicz's opinion, utilities are "*absolutely not*" required to inspect every tree that could potentially fall onto a distribution line. (RP Cieslewicz, 106:24-107:1-18). According to Cieslewicz, "No legitimate utility arborist would suggest that they could or would even attempt to inspect every tree that could fall through that line." (RP Cieslewicz, 107:16-18). Such an opinion would suggest that a utility was capable of fulfilling such a duty, had the funding to do it, and even had the right to do it. (RP Cieslewicz, 107:3-12). Utilities are regulated and expenditures must be appropriate and consistent with the practical operation of the utility. (RP Cieslewicz, 107:20-24; 108; 109:1-9). Suggesting every tree

¹ The PUD's forensic electrical engineering expert, Mark Felling, also has significant experience with electrical utilities and is knowledgeable in the standard of care required in utility operations. (Felling, 4-13 re: experience/training). He testified that he reviewed the vegetation management guidelines for the PUD and found them to be very typical. (RP Felling, 71:9-17). In addition, even the Estate's purported vegetation management expert, Austin Bollen, testified that the PUD had "good guidelines" "within the standard of care." (RP Bollen, 60:23-25-61: 1-11).

that could fall through the line needs to be inspected is equivalent to ignoring the cost of electricity because it “would cost hundreds of millions of dollars” thereby affecting rates. (RP Cieslewicz, 109: 10-24). Because of this, utilities are not allowed to “gold plate their systems” or “spend whatever money they think is appropriate” because “a factor in determining what the utility will be doing will be the regulatory oversight and also the control of the money resources to do it.” (Id.)

Cieslewicz concluded it is not merely “impractical” to inspect every tree that could potentially fall onto the power lines, but he suggests it is “impossible” because the majority of trees in an urban environment that could fall into the lines are on private property and the utility cannot undertake unilateral removal of vegetation without an easement or permission. (RP Cieslewicz, 110:3-8). Further, with the limited exception of California for wildfire mitigation, other utilities do not routinely inspect trees outside the clearance zone just because they are tall enough to fall into the power lines. (RP Cieslewicz, 111:2-12).

The PUD’s internal T & D Guidelines do not create a duty for line notifiers to inspect every tree that “may” contact a line. Cieslewicz explicitly and resoundingly rejected that inference or interpretation of the PUD’s vegetation management program. (RP Cieslewicz, 133-135). Cieslewicz explains that safe work practices dictate a 10-12 foot clearance

zone, but the presence of a “Zone D” within the vegetation management program does not compel the PUD to inspect all trees beyond 12 feet. (Id).

Cieslewicz states (RP Cieslewicz 134-135):

The 12 feet marker is because there are trees beyond that 12 foot clearance that *grow into the conductors*. For example, I have seen hundreds of trees with a canopy spread easily to 50 feet wide. The tree itself, the trunk of the tree would be 30-40 feet away from the conductors. The only people who can work around those conductors are electrically qualified people to do this. So, yes, the *trunk of the tree* would be well beyond the 12 feet section there. And if that particular tree contained dead or rotten limbs weakened by decay, disease or erosion, the utility would be compelled to do those. The trunk would be further than 12 feet away from the conductors but it would still be the utility that would look for that and respond to that.

In conclusion, trees can be located farther away than the 12 foot clearance zone into “Zone D” that “could by virtue of growth into the conductors or over-hanging above the conductors be a threat to the line” and which Cieslewicz would consider potentially hazardous. (RP Cieslewicz, 135:22 – 136:2). This tree was not one of those trees. The photos of the trees in the location of the incident do not appear to be encroaching beyond a safe distance of the energized lines. (RP Cieslewicz, 126:20-22). It is undisputed the canopies of these poplars were not near the clearance zone.

Cieslewicz, from the perspective of operating a utility vegetation management program, rejects the Estate’s arborist, Scott Baker’s suggestion that the tree required further investigation because the purpose

and intent of utility vegetation management identifiers is to insure line is clear between trees and conductors and to confirm there is appropriate airspace between the line and vegetation. (RP Cieslewicz, 116:13-25). Cieslewicz stated with certainty that line notifiers are looking at air space and not the other side of the street into someone's back yard or private property. If the notfier does not see air space, they make note of the location for the work to be performed, typically by a contractor. (RP Cieslewicz, 117:1-18).

If a utility is made aware of a hazard posed by a particular tree it is within the standard of care to address it to resolve the hazard, including notifying the property owner. (RP Cieslewicz, 110:20-111:1). The PUD employs "line clearance notifiers" to communicate with property owners regarding such hazard trees and coordinate their trimming or removal. In this case, the PUD was not made aware or given any notice of any hazard trees or problems with trees located on the School District property. (RP Cieslewicz, 118:19-24).

In fact, Cieslewicz's found no evidence to suggest that the PUD line clearance notifiers or his own experienced notifiers, who he considers to be "some of the best out there," would have had any reason to identify the particular tree that caused the downed line three years later even if

they had been walking very slowly down East Sunnyside School Road doing their job. (RP Cieslewicz, 119:1-16).

The Estate attempted to create an inference that because there were no documents for work performed on the subject area, the line had not been notified to standard. However, Cieslewicz specifically rejected that contention as well and concluded that there “would not be records if there was no work required.” (RP Cieslewicz, 122:17-23). The fact that the particular section of the circuit was not included in the third party contract for trimming and removal also does not support a conclusion that the section of line was disregarded in the vegetation management program because the parameters of the contract would be dictated by the work required; if there was no work to be performed on that section, it would not be included in the contract. (RP Cieslewicz, 123:14-19). Cieslewicz concluded, based on the documents he reviewed, that there was no work to be done at that span or reference to any work required at that location because there was nothing seen that required any work. (RP Cieslewicz, 123:20-124:7).

Cieslewicz could not conclude that the PUD should have identified the particular tree that fell as a tree that needed to be removed because that conclusion would require the application of a standard that does not exist. (RP Cieslewicz, 115:18-23).

Michael Munsterman, also an arborist, was the PUD's line clearance coordinator for the subject line (Circuit 12-37) when it was notified in 1999-2000. (RP Munsterman, 25:21-26:2; 26:5-9; 26:18-22). A line clearance coordinator works with the vegetation superintendent in coordinating and implementing the tree trimming program by working with notifiers, contractors, various PUD entities and the public. (RP Munsterman, 27:13-19).

"Notifiers" are also arborists who inspect vegetation along the circuit and make paper records of trees that need trimming or removal. (RP Munsterman, 30:13-20). Those paper records are then used to develop a request for proposal to provide to independent tree trimming contractors. (RP Munsterman, 31:8-16). If vegetation does not have the clearance as outlined in the guidelines, the line clearance notifier identifies and contacts property owners and obtains permission for needed line clearance work. Before the bid goes out, the scope of the job is estimated by Munsterman and another PUD coordinator or superintendent to determine the bid price. (RP Munsterman, 34:1-16; 35:1-17; 43:1-7). Then, upon performance of work, the line clearance coordinator, in this case Munsterman, drives the circuit with the contractor to audit the work to confirm that the identified trees have been trimmed or removed. (RP Munsterman, 32:15-33:3). This process satisfied the elements of a

vegetation management program that would meet the standard of care, per the opinions expressed by Cieslewicz, the vegetation management expert.

Munsterman was knowledgeable about what constituted a “danger tree” that would compel the PUD to remove it if it posed a hazard to the line, even if it was located outside the 12-foot clearance zone (“Zone D”), provided, it was identified and visible. (RP Munsterman, 43:8-22; 47:1-12). Munsterman testified that during his estimation and audit of the line, if he observed a tree that was not included in the contract that needed to be trimmed or removed, he would start the notification process to inform the property owner to obtain permission and make a change order to get the tree removed with danger tree pricing, if applicable. (RP Munsterman, 40:7-23). He recalls no such danger to the section of the circuit where the subject tree fell. (RP Munsterman, 59:14-17).

Munsterman viewed the line standing near pole 25 on that circuit and testified that if there was an indication there that work needed to be performed, he would have notified the property. (RP Munsterman 58:20-33; 59:14-17). Munsterman himself observed that line segment from pole 21 through 24 in 2000, and saw the line was clear and there was nothing present within the 12 foot clearance zone. (RP Munsterman, 61:21-62:5; 62:18-63:4). Munsterman assessed that area himself twice; first, to establish an estimate for the trees that were notified and a second time

after the contractor trimmed or removed the identified trees to make sure all of the trees included in the bid were appropriately trimmed and/or removed. (RP Munsterman, 34:1-16; 35:1-17; 38:19-39:11; 58:16-25; 61:23-62:5).

Munsterman acknowledged that the area between poles 21 and 24 on the subject circuit was not included in the “packet maps” that were created for the tree trimming contractors, the area was not included in the contract, and there was no record of any change orders for the area between poles 21 and 24. (RP Munsterman, 52:1-10, 15-19; 56:1-22; 58:16-59:17).

Despite the Estate’s attempt to create an inference from the lack of documents regarding this segment of the circuit, Munsterman stated that he would not rely on records to conclude the area had not been notified. (Id). Based on the documentation alone, the plaintiff is unable to prove on a more probable than not basis that the circuit was not looked at because the lack of notifier records indicates that the notifier did not find any need for line clearance activities in that area at that time. In practice, if a notifier comes across a segment of line where there is no work to be done, they do not contact anyone and just keep going. (RP Munsterman, 61:8-13). If there is no work to be done, the contact log may say “open, open, open,” indicating there is no work to be done, but if the notifier comes

across a spot that was not notified because there is nothing present, there would not be any record. (RP Munsterman, 61:14-62:1).

Munsterman testified that the work done in 1999 and 2000 on circuit EMA 37 was to the standard of the PUD and its guidelines. (RP Munsterman, 55: 9-25).

Libby Soden, vegetation management superintendent for the PUD, also outlined the PUD's vegetation management program guidelines, acknowledging that the right of way or "clearance zone" is the primary focus of vegetation management. (NRP Soden, 16:8-12; 17:14-23). She confirmed that the PUD acts on observed "danger trees" outside the clearance zone to determine if they are an imminent hazard that might threaten the lines. (NRP Soden, 18:2-3, 15-20; 26:1-4). A notifier, line clearance notifier, line clearance coordinator and even the superintendent herself can make a determination that action needs to be taken on a danger tree. (NRP Soden, 18:21-25). Soden also testified that she has never had to second guess any PUD notifiers' or coordinators' determinations regarding danger trees. (NRP Soden, 19:7-9).

As for recognizing or identifying a "danger tree," Soden testified that there "may be other things that you might see on close examination of a tree" but that the list provided in the T & D Guidelines is a good way to determine what a danger tree is. (NRP Soden, 23:8-14). Soden describes

why troublesome trees include “alder, big leaf maple and hemlock” due to their rooting system and tendency to break in the wind. (NRP Soden, 21:1-11). She also explains that Lombardy Poplars tend to grow tall and narrow and can break under some conditions, but “unless they were extremely close to our lines we wouldn’t look at them...unless they are within our spec and/or giving an *obvious threat* from outside our spec” because “our goal is to make sure our lines are clear.” (NRP Soden, 21:21-22:6).

In conclusion, the certified arborists for the PUD are “looking at our clearance zone and anything that might provide a direct threat to our lines.” (NRP Soden, 38:18-20). However, Soden confirms that it is not PUD policy or practice to “look at every tree on the other side of the road that was tall enough to fall on the lines to see if it was a danger tree or a hazard tree but that if you noticed something then you would go take another look.” (NRP Soden, 26:15-20).

Soden confirms that if the PUD had been asked to remove this subject row of poplars because of the potential threat to the power lines, the PUD would have declined to do the work and would have referred the property owner to a private contractor at the owner’s expense because they were not close enough to the lines to justify the cost to the PUD to perform the work. (NRP Soden, 22:7-15).

The line notifiers, who are also arborists assigned to this portion of the circuit in 1999-2000, substantiated Munsterman and Soden's testimony in explaining the parameters and practices involved in the vegetation management program. The notifiers confirmed that they look at all trees within the clearance zone, but visible indicators are necessary in order to make a determination regarding a danger tree outside the clearance zone. (RP Petty, 87:18-24).²

The Estate failed to introduce any evidence that the PUD was ever advised of a danger tree on the School District's property. CP 83 (FOF 16). Moreover, Kevin Knowles, the representative from the School District with personal knowledge, testified that he believed the trees were healthy, standing trees between 1987 and October 2003. (Id.) Findings of Facts relating to Knowles testimony, submitted to the trial court on behalf of the Estate, were not challenged as part of this appeal and are undisputed on appeal.

Specifically, Knowles testified that he visually inspected the trees on a regular basis looking for rotting limbs and the absence of disease.

² Indicators include: "leaning trees" (RP Shayne, 70:1-19); "leaning trees ready to obviously fall over" "presenting an imminent danger or hazard to the line" something "that's really obvious (RP Petty, 80; 82:3-5; 83:16-18); "extreme cases" outside the clearance zone are acted upon a "tree in decline", a "heavy lean, a "dead tree" and "scenarios that would cause you to have reason for concern" including a tree you could tell was rotted from its exterior. (RP S. Packebush, 94:5-16).

(NRP Knowles,7-8). Knowles typically parked near the bus barn approximately 30 feet from the tree that fell over onto the power line. (NRP Knowles, 8:23-9:5). Knowles noticed “nothing” about the subject poplars stating, “They were healthy, standing trees.” (NRP Knowles, 17:23-25). As to the other trees in the line (upon which arborist Baker bases his assessment and opinion), Knowles further stated that after the incident the remaining trees did not need to be cut down to a stump because “they were all healthy trees, so we just took the top canopy off that would pose any danger and may fall across a power line.” (NRP Knowles, 22:21-25). As to the subject trees, Knowles confirmed that from 1987 until 2003 there was never any trimming or pruning of the trees on the bus barn property; no one ever told Knowles there was a problem or a potential problem with any of the trees on the bus barn property prior to October 16, 2003; and no one advised him at any time that an arborist should have looked at the trees. (NRP Knowles, 48).

Additional evidence regarding the healthy condition of the trees was provided by Randy Packebush, a certified arborist and line clearance notifier for the PUD in 2003, who went to the location of the incident within a few days to a week after the incident. (RP R. Packebush, 5:13-18; 6:6-8). Packebush “found no signs on the exterior part of the trees” that had not fallen that would have been an indication that School District

needed to be contacted regarding removal of the trees. (RP R. Packebush, 6:9-17). As for the fallen tree, Randy Packebush testified that he saw the open cavity of the stump where the tree broke that exposed interior rot, but after the accident there was no external indicator that it was unhealthy. (RP R. Packebush, 6:18-7:2). In Randy Packebush's opinion, "That tree or group of trees would not have been something we would have pursued as a tree we would have done work on. No, that tree or group of trees had no external indicators." (RP R. Packebush, 7:7-20).

The canopies of the Lombardy Poplars located 40 feet away from the power lines on the opposite side of the road did not have any branches extending across the road into the clearance zone. (RP R. Packebush, 17:7-14). At that time, Randy Packebush ordered trimming on some fast-growing alder trees that had trunks outside the clearance zone but branches with the potential to encroach on the clearance zone. (RP R. Packebush, 16:14-17: 6).

Notably, Baker, the Estate's arborist, has no experience in utility vegetation management and lacks certification as a utility arborist. (RP Baker VRP 11/03, 4:1-18). Prior to trial, Baker had only opined as to the tree's condition and had not expressed any opinions on utility vegetation management practices and procedures. However, testimony was elicited from Baker at trial regarding PUD standards and his opinion regarding the

subject tree's classification as a "danger tree" despite the fact that Baker had not previously opined regarding this standard in his initial opinions prior to trial. (RP Baker, VRP 11/02, 38:14-17; VRP, 11/03, 6:10-25). In fact, Baker had not identified the subject tree as a "danger tree" until after settlement was reached with the School District years after litigation commenced. (RP Baker, VRP, 11/03 7-8; 13:19-14:18).

At first, Baker declared the subject tree's obvious decay should have been observed by the School District and testified that other trees on the School District's property were removed prior to 2003. (RP Baker, 11/3, 9: 9-17; 12:23-13:14). Then, after settlement was reached with the School District, he changed his opinion to declare the decay should have been observed by the PUD in 1999-2000. (RP Baker, 11/3, 13:11-14:18).

Baker testified that this tree was not dead and was not visibly leaning towards the line. (RP 11/02, Baker, 39:7; 39:20-23). Baker further testified "the tree was *good*" on the "road side of the tree" but that if "you had looked a little closer, *if you had gone around the back side of this tree, it would have been noticed*" and that the "the bark was, you know, dead and *might* have even been *falling* off the *back* of this tree." (RP 11/02, Baker, 34:23-25; 35:6-9). He stated again, "*this tree from the road had the live side on the road*...but very likely had signs that would draw

you to it.” (RP 11/02, Baker, 30:1-7). He also assesses that 40% or so of the circumference was rotten. (RP Baker, 11/02, 36: 12-13).

Baker testified that he looked at the subject tree which was rotten “in the middle” when it broke, but was pretty much gone and had been cut off flush with the ground by the time he viewed the site. (RP 11/02, Baker,14:15-25). So, Baker viewed pictures of the tree when it originally broke and went to the area in March 2007 and March 2009. (RP 11/02, Baker, 14:25; 19:2-14). He concluded the tree had “severe *internal* decay” in 1999-2000. (RP 11/02, Baker,19:22-25). In forming his opinion, Baker relied on the condition of some of the adjacent trees. (RP 11/02, Baker, 21). As to whether or not any photos of the tree taken at the time of the incident show any visible signs of a problem that could be seen from the road, Baker testified, “Actually, the tree is broken in these photos. There’s only two of the stump of the tree and there’s nothing clear here that you can point to.” (RP 11/02, Baker, 24:20-25:2, Exhibit 39).

Baker also gave conflicting testimony undermining his credibility. On the one hand, Baker testified that in a Lombardy Poplar you would have “probably up to a decade or more post-wounding, depending on the vigor of the tree before you would be worried about decay.” (RP 11/02, Baker, 31:17-25). Then, on the other hand he states that Lombardy Poplars are not very resistant to decay, but decay very easily if they are

wounded and they are “very good strong trees when healthy but once they have been compromised by wounding and decay they tend to fall apart rather rapidly.” (RP 11/02, Baker, 16:11-25).

Baker undermined his credibility and reliability by claiming that the School District had the bus barn site inspected by an arborist in 2000. (RP 11/03, Baker, 5:16-6:9). However, he then acknowledged that he did not, in fact, review an arborist’s report, or have the name of the School District’s arborist or any knowledge regarding what the arborist observed, admitting that the fact came solely from Mr. Winters, the Estate’s counsel, and not his own personal knowledge. (RP, 11/03, Baker 16, 17).

Therefore, it was not error for the trial court to reject Baker’s testimony based on his lack of expertise in the field of utility vegetation management and his contradictory testimony.

Austin Bollen, Appellant’s electrical engineer and purported vegetation management expert, had his final opinions criticized and rejected by the PUD’s qualified experts and, ultimately, by the court. Bollen himself rejected and criticized his own prior engineering opinions, admitting a lack of knowledge and mistaken conclusions. Bollen is not a vegetation management specialist or arborist and his only experience involving vegetation management programs was in Arkansas decades ago,

before the applicable NESC section was in effect. (RP Bollen 56-57 and 58:13-16).

Bollen opined that the PUD's vegetation management program had "good guidelines" that "do meet the national standard of care." (RP Bollen, 60:23-61:11). However, he incorrectly testified that the duty of care for a utility vegetation management is the National Electric Safety Code. (RP Bollen, 51:20-25, 52:7-12). Bollen testified that the NESC "just basically says that you are to keep trees out of unground electrical systems" (RP Bollen, 53:12-17) and requires utilities implement a program that meets the NESC standards. (RP Bollen 60:4-7).

Bollen gave contradictory testimony regarding the PUD's vegetation management practices. Bollen opined that "as long as it's in good condition" a tree outside the clearance zone, across the road from a distribution line, does *not* require the PUD to do anything about it." (RP Bollen, 63:4-10). He initially stated that Zone D on Exhibit 27 did not apply to trees across the two lane road from the PUD distribution line; then, enlarged his opinion to include "danger trees" within Zone D, and enlarged his opinion even farther to conclude the utility has a duty to *inspect* and determine whether or not a tree outside the clearance zone poses a threat or hazard to its lines. (RP Bollen 65:8-12; 65:19-25).

Bollen also attempted to assert the portion of circuit in question was excluded from the PUD's vegetation management program, but stated unconvincingly, "If you inspect it and say there's nothing to be done that's one thing, but if you don't inspect it and don't include it in the program, well, it may be something it may not be something. You don't know." (RP Bollen 68:4-8). This testimony is speculative and insufficient to conclude on a more probable than not basis that the lack of documentation equated to negligent performance of the vegetation management program.

Bollen simplistically concluded that the rot "should have been noticed" relying solely upon Baker's opinion, and that the PUD needed to have inspected it in a "more thorough" way without providing further detail. (RP Bollen, 71:6-22). Bollen did not acknowledge that he reviewed either Knowles' or R. Packebush's testimony regarding their personal observations of the health of the tree in 2003 or the fact that Baker opined the decay was observable from the back side of the tree. Bollen contradicted his previous deposition testimony upon cross-examination and provided this confusing and ambiguous testimony:

Okay. Let me change my answer just a little bit. ***I have no reason to believe that the tree was a danger tree in 1999 except for the fact that it was at that time tall enough to fall across the line. The imminent danger arose several years after that according to the arborist.*** It was several years before the accident that the tree was in danger condition, so it ***may or may not*** have been in one when it was easily recognized in 1999. Certainly several years according

to his testimony before the accident it should have been recognized as a danger tree.

(RP Bollen, 124:1-126:1). He confirmed prior testimony revealing that he does not know when the subject tree would have been considered a danger tree and deferred to the arborist admitting that he, “didn’t see the tree and don’t know anything—don’t know much about the trees” ultimately concluding, “*I would just have to plead ignorance*” on that point. (Id.)

Bollen’s final opinion is encapsulated in his direct testimony:

Q: Mr. Bollen, if the PUD had met their duty of care and inspected the subject tree that blew over the line in October of 2003, what, in your opinion, on a more probable than not basis would have been the result of that inspection?

A: ***If the tree had been determined to be a danger tree, then it should have been removed and this accident would not have occurred.***

RP Bollen 72:24-73:10.

Bollen’s testimony in the area of his expertise, electrical engineering, was explicitly rejected by the trial court and said rejection is not a subject of this appeal. (FOF 21, CP 84, states, in part, Bollen’s testimony was “not helpful” was “contradictory” and “confusing and difficult to understand.”) This conclusion was likely based on Bollen’s mea culpa in his testimony where he admits he made a “big mistake” in his initial opinions and deposition and that he had since changed his mind,

acknowledging that his analysis was “absolutely incorrect” and that he “never should have even put it out there.” (RP Bollen 130: 12-22).

Finding of Fact 21 provides context and support to the trial court’s rejection of Bollen’s testimony in the area of vegetation management, a topic about which he has less and more outdated experience (and to which he literally plead ignorance) than he does in electrical engineering. The court’s reliance on the substantial, thorough testimony of Cieslewicz, an eminently qualified arborist, was not error.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Each Finding of Fact is supported by sufficient evidence in the record. The findings of fact and conclusions of law, as actually stated by the trial court—and not as characterized by the Appellant in its brief—with a summary of evidence in support, are discussed below.

A. Findings of Fact.

Assignment #1 Re: FOF C: “Vegetation Management One liability issue in contention in this case is whether the PUD negligently performed its vegetation management program as outlined in its Transmission & Distribution (T&D Guidelines) (exhibit 27). ...”

Appellant challenges only the use of the word “negligently.” That term is correct. This is a tort claim of negligence requiring elements of duty, breach, causation and damages. The legal duty is heightened for a public utility from a “reasonable standard of care” to the “utmost prudence

consistent with the practical operation of the utility.” The trial court explicitly outlined the legal duty owed by the electrical utility company in Washington, cited the undisputed authority establishing the heightened legal duty, and concluded the PUD is “not liable” for Connelly’s death. CP 84, (COL II). The Appellant’s argument that the undisputed, correct legal standard was not applied by the judge is meritless, speculative, and contrary to the record and explicit ruling provided by the trial judge.

Assignment # 2 Re: FOF 9:...“However, the PUD does not require the inspection of all trees along the road right of way or on private property simply because they might fall on a line absent some obvious evidence of decay or rotting or threat to the power line.”

The testimony of both lay and expert witnesses for the PUD supports the finding that industry standard, and the PUD’s own vegetation management practices are not interpreted to require that every tree that could fall on a power line must be inspected. Cieslewicz’s testimony was explicit and emphatic on this point. None of the industry personnel supported the conclusion that the PUD’s T & D Guidelines required all trees outside the clearance zone that could potentially touch the line must be inspected to determine if they are a potential danger tree. As Cieslewicz explained, the primary focus of vegetation management is on the clearance zone or trees outside the clearance zone that have canopies or branches that encroach upon the clearance zone. In order to be a real

potential threat, there must be some obvious signs of the potential hazard that the vegetation may encroach upon the clearance zone even if the subject tree is located outside that zone. All PUD witnesses testified that in the event a danger tree posing a hazard to the line was observed, measures would be taken to manage that danger.

Close diagnostic inspection of all trees to determine if any level decay is present because they are tall enough to contact the line is not required. This was supported by the testimony of the personnel involved with the vegetation management program and the expert Cieslewicz. A duty does not extend to each and every tree, because that practice would not be consistent with the practical operations of the utility, and is, therefore, outside the scope of the PUD's legal duty as the court correctly decided.

Assignments #3 & 4 re: FOF 12: “The Estate’s arborist testified that after reviewing photos of the subject tree taken on the night of the incident *and upon visual inspection of the stumps and site in 2007 and 2008*, he believes there would have been some indication of damage to the tree that would have warranted further investigation. There was no evidence that the tree was leaning towards the line or that any limb was within the clearance zone.”

The Estate’s misleading contention is that the court erred by finding that, “the Estate arborist *only* reviewed photos taken on the night of the incident.” (Appellant Brief, p.1, I.3.). This finding of fact explicitly identifies the two later visual inspections occurring four and five years

after the incident in 2007 and 2009. By the time Baker personally observed the tree, he admitted it was “cut off flush with the ground by the time I got there.” (RP 11/02, Baker, 14:22-25). He based his conclusion on the condition of the adjacent trees assuming the subject tree would have had similar identifiers. The trial court did not err in finding the testimony of Randy Packebush and Kevin Knowles reliable and compelling because they both personally observed the tree in 2003 and saw no exterior signs of decay.

It is also not error for the trial court to use the word “some” to describe the purported level of decay present on the subject tree. Baker outlined the damage he believed would have been present on the back side of the tree, away from the road, that perhaps could have warranted “further investigation” by the property owner to whom it may have been visible. The Estate failed to carry its burden in showing that the alleged decay in 1999-2000 was obvious enough to warrant further investigation by the PUD in the ordinary course of its vegetation management practices to assess whether or not the tree was a hazard or danger tree.

Notably, the Estate does not challenge the undisputed fact contained in FOF 12 that the tree was not leaning towards the line and that the canopy did not infringe upon the clearance zone. The lack of those indicators supports the trial court’s conclusion that it was not potentially

hazardous to the clearance zone in 1999-2000 and it was not a breach of the PUD's duty to fail to observe this tree as "potentially hazardous" out perhaps millions of trees along its power lines.

Assignment #5 Re: FOF 13: The PUD's arborist, a PUD employee, inspected the tree within a week of the incident and opined that it would not have been a tree that he would have notified. He observed the open cavity of the tree because it was split open after the fall and noted that there was some rot in the interior of the tree but that there were no external indicators that it was unhealthy. His inspection of the actual tree so near in time to the time it came down is persuasive and credible to the court.

R. Packebush was consistent in his testimony that internal decay was present where the tree was broken, but he did not observe any external indicators on the subject tree when he personally observed it between days to a week after the incident. The Estate misrepresented Packebush's actual testimony. Upon cross-examination Packebush specifically stated in his testimony he did not see any signs of decay in the bark or rot to the edge of the tree in the photo of the subject tree; that a dark vertical line pointed out to him was an indication of internal rot, not external rot; that the tree had solid wood on either side; and there was no ailing bark. (RP R. Packebush, 14:18-15:15). After looking at multiple 2003 photos, and standing firm in his opinion that there were no external indicators of decay, he stated there was "only" "some white" on the tree in question that could be an external indicator of decay in 2003. (Id.) There is no evidence

that this single, small indicator was present in 1999-2000 or that it was observable from the road by PUD personnel.

R. Packebush's observations are consistent with Knowles' undisputed testimony further bolstering its reliability. Knowles parked 30 feet away from the trees on a regular basis and believed the trees to be healthy, standing trees from 1987-2003 and that after the subject tree fell in 2003, there was no need to eliminate the other trees in the row because they were also "healthy" "standing" trees.

Notably, the Estate does not challenge the portion of FOF 13 which states that Randy Packebush's "*inspection of the actual tree so near in time to the time it came down is persuasive and credible to the court.*"

Assignment #6 Re: FOF 17: "The Estate's arborist clearly stated that decay may have been discovered only upon further investigation around the backside of the tree."

The challenge to this finding of fact completely ignores the multiple statements by Baker about where the visible signs of decay would have been noticed upon a "closer look"—on the "back side"—and that the "live side" was facing the road, away from where a PUD notifier would have been able to observe them. (RP, Baker, 11/02 34:23-35:9). Baker was an arborist and was not testifying from the perspective of a utility line clearance notifier and had no utility experience or certifications when he opined that the condition of the subject tree would have drawn an

“arborist” closer for further inspection (as opposed to a PUD notifier in the ordinary course of vegetation management duties).

Baker’s testimony also shows that he had been pointing the finger the School District for not identifying the decay in the trees (undisputedly observable from the back side of the tree away from the road). However, after the Estate reached settlement with the School District, Baker rendered “supplemental” opinions redirecting his blame at the PUD. This late opinion pointing the finger at the PUD harms his reliability.

Assignment #7 Re: FOF 18: “The evidence does not support finding the tree was an imminent threat to the power line.”

The record established that a tree located on private property well outside the clearance zone is removed only when it has been determined to be a danger tree and an imminent threat to the line. This tree was not known to be a danger tree because signs of its decay were not readily observable by PUD employees who have a duty to focus on the clearance zone and likely encroachments to it, not the overall health of every tree along the circuit. In Cieslewicz’s opinion the PUD personal did not have “any reason” to notify the subject tree. The testimony of Cieslewicz regarding the function of a notifier and application of the vegetation management guidelines was reliable and persuasive.

The Estate concedes that the subject tree was not leaning, that the canopy was not within the clearance zone, and that Kevin Knowles testified he observed these “healthy standing” trees on a weekly basis and parked 30 feet away from the subject tree. R. Packebush, an arborist, testified there were no external indicators of decay on the tree within a week of the incident, therefore, negating the inference that such indicators would have been readily observable in 1999-2000. The Estate’s own expert testified the tree was not dead and gave differing opinions of how rapidly poplars decline. Since the tree was not an imminent threat to the line, any issues regarding the PUD’s vegetation management program or practices cannot be found to be a proximate cause of Connelly’s death.

Of note, the School District, according to Bollen, “*should have immediately contacted the PUD and made arrangements to get the tree removed*” if it was aware that the tree had rot prior to October 2003. An appropriate inference from the fact that the School District did not notice the alleged decay of the “healthy, standing” tree in 2003 is that it was not an imminent threat to the power line in 1999-2000. Additionally, if the School District was not capable of observing the decay on the back side of the tree in 2003, the PUD did not breach a duty by failing to observe it from the road in 1999-2000.

B. Conclusions of Law: Assignments Nos. 8-14.

Assignment #8, #13, and #14 Re: COL D and Verdict CP 86:16-17.

The PUD was not negligent. Even if the alleged breach of duty was found to exist, it did not proximately cause Connelly's death. The trial court did not apply an "ordinary care" standard. Judge Yu referenced *Keegan* in the Finding and Conclusions and also referenced the "highest degree of care" in her conclusions. The accusation that the wrong legal standard was applied is an affront to the court given its explicit ruling.

Assignments #9 and 10 Re: COL A: "Even if the Court were to find that the PUD had a duty to walk or drive up Sunnyside School Road and to find that visual inspection of the line across some 600 feet was inadequate, it does not follow that the PUD had a duty to inspect each tree on that road if such tree was not in the 10'-12' clearance zone on either side of the distribution lines or leaning towards the line. Absent seeing an obvious decaying tree, or having actual notice of a danger tree, the PUD did not have a duty to investigate each and every tree in the row of poplars on the School District property to determine whether each such tree was health or posed a threat to the line."

Munsterman testified that he personally viewed that segment of line and did not observe the presence of any "danger trees" that presented a hazard to the line. All notifiers testified if they see a hazard or danger, they take action. However, none was observed in this instance and the facts support the conclusion that none was capable of being observed in 1999-2000. Exclusion of this segment of line from the trimming contract proves that there was no work to be done on that segment, not that this

segment of line was excluded from the PUD's vegetation management program.

Cieslewicz resoundingly rejected the purported standard of care presented by Bollen that any tree capable of reaching a power line should be inspected. COL A is consistent with Cieslewicz's opinion and common sense that it is not part of the vegetation management program or the PUD has no legal duty to inspect each tree outside the clearance zone unless it was encroaching on the line or, in the absence of actual notice, the PUD observed obvious signs of decay. It is not the industry standard in Western Washington or anywhere in North America to eliminate all trees that could potentially reach a power line.

The testimony of PUD witnesses show the PUD did not have a duty or create a duty with its internal policy or practices to carefully inspect every tree outside the clearance zone that is tall enough to fall onto the line. The PUD does not have a legal duty or the right to remove every imperfect tree that could contact a power line from someone's private property. The duty to act arises when a tree is observed to be a danger or hazard tree. The Estate's own arborist admits that it may have become a noticeable danger tree to the PUD after the regular vegetation management round occurred on that line. This tree was never observed to be a hazard

or danger tree and sufficient evidence supports the conclusion that there were no observable signs of its internal decay before it fell.

The absence of a document or record for that stretch of line does not lead to the conclusion that it was not notified. The absence of a document or record for that portion of the line is evidence that no trees were determined by the PUD to be in need of removal after the portion of line was observed by PUD personnel. The exclusion of the circuit from the packet map provided to the tree trimming contractor is evidence that there was no work to be performed by the contractor on that section of the circuit. A reasonable inference from the evidence is that no work was to be performed because no trees were identified by the PUD as in need of clearance in that area. The lack of documentation does not prove that the segment of line in question was excluded from the vegetation management program. No trees were identified or tagged on that circuit, so no documents exist to prove that negative.

If the school district had either actual or constructive knowledge that the tree in question was in such poor health that it presented a hazard, it was the school district's duty and independent obligation to take action to remove it. The facts at trial determined the PUD had no notice that the tree presented a hazard.

Thus, the Estate failed to carry its burden of proving more probably than not the tree was, in fact, a noticeable danger tree when the last round of vegetation management occurred on that line in 1999 or 2000. Therefore, the Estate is also unable to show that the alleged breach in the PUD's vegetation management practices were a proximate cause of Connelly's death.

Assignment #11 re: COL B: "Considering all of the evidence regarding the condition of the tree and its location, the Court concludes that even if the subject tree was seen in 1999-2000 by a PUD arborist, that individual would not have been able to visually determine whether the tree was rotting or in decay without undertaking further investigation."

This conclusion is consistent with the Estate's own arborist that testified the location of the purported visible decay was on the "back side" of the tree. Also, Baker testified not that the purported observable signs clearly indicated tree was an obvious "danger tree," but merely that the signs would have indicated a "closer look" should have been undertaken. (Brief of Appellant, p. 14-15; RP Baker 11/02, 22:16-23:10; 30:16-24). The trial court declined to extend the heightened duty to require PUD personnel to take a "closer look" at a tree that lay and arborist witnesses testified was apparently healthy. The court drew the line before requiring that step.

The cross-examination of R. Packebush does not prove there were obvious observable external indicators of rot and decay that would have required this tree be assessed as a “danger tree” or an imminent threat to the clearance zone. Even upon cross examination, looking at multiple pictures, at most he acknowledged “some white” on the tree that could have been an indicator of decay in 2003. The fact that there may have been some inconsequential decay on a portion of the tree may have helped the Estate in a summary judgment standard, but in this trial, that decay was not proven to be present or observable in 1999-2000 by PUD personnel.

External indicators in 2003 on the other trees in the line of poplars did not reveal the vantage point upon which the indicators of decay could be seen or the date by which they would have been apparent. The disputed evidence precluded the court from concluding that external indicators were evident in 1999-2000 and, even if present, that those indicators would have been readily observable to the PUD. The Appellant states, “there was no *persuasive* contrary evidence” (Brief of Appellant, p. 16). regarding the condition of the tree, conceding that contrary evidence was presented. Despite the Estate’s dispute with the persuasiveness of such contrary evidence, it was sufficient, and the trial court was entitled to rely on it.

Assignment #12 re: COL C: “Requiring the PUD to go to the backside of the tree, to hammer the tree or insert diagnostic instruments, based upon the initial impression of this tree far exceeds the duty imposed on a utility company exercising even the highest degree of care. The implication of imposing such a duty on a power company in the Northwest is to require that a utility company ensure that no tree, whether healthy or not, may exist in such proximity to its lines because of the possibility of contact in a windstorm. Thus, the PUD complied with the applicable standard of care with respect to vegetation management.”

Requiring further inspection or a “closer look” of a tree that is not visibly decayed or dangerous because it is tall enough to fall on the line is outside the duty owed by a utility even under application of the heightened duty set forth in *Keegan*. The trial court did not equate the standard set forth by the Estate with “cutting down all trees near power lines.” (Appellant Brief p. 49). The court concluded that “*the implication*” of imposing that duty would require utilities to ensure no tree could impact the line. In this scenario, a healthy tree that had no visible signs of decay from the PUD’s area of observation would still need to be assessed, and removal would be required of trees with inconsequential levels of decay or disease that were still alive and well outside the clearance zone to prevent a potential hazard in high winds. This level of vegetation management is not consistent with the practical operation of a utility company in the Northwest. In fact, it may not even be possible as stated by Cieslewicz.

Assignment #15 re: Rate of Post Judgment Interest

RCW 4.56.110(3)(a) does not apply. The judgment entered in favor of the defendant was not “founded upon the tortious conduct of public agency.” The agency was found *not* to have engaged in any tortious conduct. The judgment was entered upon an award of costs to a prevailing party pursuant to RCW 4.56.110(4). Thus, an award of costs (\$117.28) and statutory fees awarded to a prevailing party (\$200) is appropriately subject to a 12% interest rate given that the 12% rate is consistent with the “rate applicable to civil judgments” for purposes of RCW 10.82.090, referenced in RCW 4.56.110(4).

III. ARGUMENT

A. Issues on Appeal.

1. Did the trial court apply the proper standard of care when it concluded that the Estate failed to prove by a preponderance of evidence that the PUD breached its duty and failed to prove that any alleged breach was a proximate cause of Connelly’s death?

2. Was there sufficient evidence in the record, when viewed in the light most favorable to the prevailing party, to support the trial court’s credibility determinations (in favor of Cieslewicz, R. Packebush and Knowles) and conclusion that: (a) Appellant failed to prove by a preponderance that the subject tree’s decay was obvious and observable by

the PUD in 1999-2000 and, (b) the PUD's performance of its vegetation management activities were not a proximate cause of Mr. Connelly's death?

3. Did the court apply the proper interest rate to a judgment for costs?

B. Review Standard.

On appeal, the context of the findings of fact must be read in the context of other findings of fact and conclusions of law. *Ellensburg v. Larson Fruit Co., Inc.*, 66 Wn. App. 246, 835 P.2d 225 (1992). Thus, the trial court dismissed Bollen's testimony with regard to his purported electrical engineering expertise. This provides context and support to the court's refusal to rely upon Bollen's testimony regarding vegetation management. Likewise, the credibility and persuasiveness of Randy Packebush and the testimony of Kevin Knowles provide significant context for the court's finding that the Estate's arborist, Baker, was less persuasive on the critical issue that there were no apparent signs of the tree's decay observable by the PUD when the circuit was last notified in 1999-2000.

It is not the role of the appellate court to review credibility determinations on appeal. *Kaiser, supra*, citing, *Miles v. Miles*, 128 Wash.App. 64, 70, 114 P.3d 671 (2005). The trial court made credibility

determinations and sided with PUD expert witnesses and personnel over Austin Bollen (who admitted to a big mistake and plead ignorance on matters within the arborist's expertise) and Scott Baker (who has no experience in utility vegetation management programs and confirmed if there was any visible signs of decay they would not have been visible from the road).

Findings of fact to which no error has been assigned become verities on appeal. *Harrington v. Pailthorp*, 67 Wn.App 901, 841 P.2d 1258 (1992); *In re Estate of Jones*, 152 Wash.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g). No assignment of error was made regarding the findings that Randy Packebush was credible and persuasive in his testimony, that based on his personal observation close in time to the incident, there were no external signs of decay on the subject tree, and that Kevin Knowles saw no signs that the subject tree was unhealthy before the 2003 incident. Those facts are verities in this matter.

C. The Court Applied The Correct Duty Of Care.

The undisputed legal duty is presented in *Keegan v. Grant County Public Utility District No. 2*, 34 Wash. App. 274, 661 P.2d 146 (1983). PUD owes a duty of "...the highest degree of care, the utmost care and prudence, consistent with the practical operation of the Defendant's electrical distribution facilities, to avoid accident or injury." The court in

Keegan held, “Although not a model instruction, we find it adequately instructed the jury on the standard of care for an electrical supplier.”

The court properly ruled as a matter of law that this heightened duty applied and the Estate failed to carry its burden in proving the other elements of negligence: breach and causation. The allegation that the court applied duty of ordinary care per the WPI Negligence instruction is wholly unfounded and blatantly contrary to the court’s ruling. This question of law was properly decided and the facts were applied to the proper standard.

Existence of a duty is a threshold question in a negligence action and is a question of law. Once a duty is established, any issues of fact regarding breach of that duty and whether the breach was a proximate cause of the plaintiff’s injuries are fact questions. *Johnson v. State*, 77 Wn. App. 934 (1995).

The PUD presented evidence regarding the scope of the applicable standard of care and that it met that standard in all regards.

There is nothing to show that any PUD procedures or industry standards were not followed that, as a result, proximately caused this occurrence. There is no industry or PUD standard that would have required removal of the tree prior to the 2003 incident or inspection of every tree that is tall enough to impact the line to inspect it for potential

decay. Evidence supports the factual conclusion that the subject tree was not visibly in decline prior to the 2003 incident. Even if the decline would have been visible by the PUD, the vegetation management does not create a duty that all trees with the ability to impact the line be inspected when the tree and its canopy are well outside the clearance zone, and in this case, on the opposite side of the road.

The PUD is not an absolute insurer of the public's safety from any and all electrical events that occur during storm conditions when natural events disrupt the operation of the electrical lines and the natural event is beyond the control of the PUD.³

In *Citerella v. United Illuminating Co.*, 266 A.2d 382 (1969), the court affirmed the judgment for the defendant. The plaintiff's car was contacted by a fallen street light wire during a storm and she was injured as she attempted to exit the vehicle. The court held that the applicable state regulation imposed on the electric company a duty similar to that found in Washington: "The highest degree of care and skill that might be

³ In *Lea v. Carolina Power and Light Company* (98 S.E.2d 9 (1957)), the court used the same legal standard of imposing a duty of the "utmost care and prudence consistent with the practical operation" of the utility. The plaintiff was shocked as a result of a downed line that fell when a tree was cut down onto it. Also, in *Southwestern Gas & Electric Co. v. Deshazo*, (138 S.W.2d 397(1940)) the court refused to allow the theory of res ipsa loquitur to proceed against the public utility concluding, "...**our decision would be tantamount to a declaration that the electric and telephone industries must operate under the burden of being insurers against injury to anyone who might come in contact with wires or appliances anywhere and be thereby shocked or injured.**"

reasonably expected of intelligent and prudent persons engaged in such a business.” However, the also ruled that in applying that duty, it did not require unreasonable precautions or those that were not possible as a practical matter, even if theoretically possible. The utility was not required to safeguard all of its wires against every tree branch that might possibly fall on them in a storm, or that it safeguard instantly every wire that might come down during a storm.

The qualification of the applicable duty in Washington that the care exercised must be “consistent with the practical operation of the utility” precludes the PUD from being required to engage in impractical and potentially impossible tasks to protect the public.

D. Appellant’s Argument Misconstrues Authority and Misinterprets RCW 64.12.035.

Appellant’s reliance on *Rocca v. Tuolumne County Electric Power and Light Co.*, 76 Cal. App. 569 (1926) is misplaced. First, that case dealt primarily with the issue of whether *res ipsa loquitur* applied, which is not a legal issue presented in this case at trial. Second, the utility appealed an adverse jury verdict that the appellate court ruled there was sufficient evidence to support jury’s verdict. Third, the evidence in that case differed. Through the exercise of proper care, the utility in that case would have known that the tree was rotten, but the company did “*nothing*”

to protect its wires or to protect the public from injury by the fallen wire that was *impacted by a limb that was on a leaning tree that overhung the power line* (not across the street outside the utility's right of way). Finally, the utility was aware of the tree and no inspection was ever made of it. The court in that case refused to reverse the trial court decision and the same result should occur here.

Likewise, in *Robben v. Hartford Electric Light Co.*, 1 Conn. App. 109 (1983), there was contradictory testimony as to whether the subject tree should have been spotted and the trial court ruled in favor of the plaintiff. Regardless, the appellate court affirmed the jury verdict and the trial court's denial of post-trial motions. The appellate court held the evidence was sufficient to sustain the verdict as it should here.

Different facts result in different trial verdicts. The fact that two other plaintiffs tried successful cases for personal injuries resulting from trees falling on power lines does not support a conclusion that Judge Yu misapplied the law or erroneously decided the facts of the case at hand.

Appellant continues in its misplaced attempt to rely upon RCW 64.12.035, the timber trespass immunity statute, in order to imply a duty of care. This section of the timber trespass chapter provides immunity to a public utility from a private claim of timber trespass if it trims or removes trees from private property in accordance with the statutory requirements.

It simply creates a procedure for utilities to follow in order to avoid liability for a timber trespass. This section does *not* create a duty or standard of care or an affirmative duty to the public. The experts in the fields of vegetation management are capable and qualified to express the industry standard of care for public utility vegetation management programs. Moreover, no cases have interpreted this statute as creating a duty to remove encroaching vegetation or vegetation that is visibly diseased, dead or dying. The use of the statutory language in attempt to create a public safety duty beyond a timber trespass immunity scenario is not supported in the law or by industry experts in the field of electrical utility vegetation management. Evidence of the statutory language does not create standard of care or a duty owed by the PUD.

IV. CONCLUSION

The standard of care for utilities does not require that they look at every tree that may affect a power line or be responsible for every tree regardless of the location or condition. No utilities in the U.S. to Cieslewicz's knowledge routinely inspect every tree that may fall on overhead distribution lines. It also does not obligate the PUD to inspect and enter private property for any tree that could fall through a line. The clearance zone is the applicable area to which the vegetation management program applies. If a tree is beyond the clearance zone it is outside the

scope of the standard of care unless the PUD has notice that it presents a danger to the clearance zone. The line clearance inspection prior to 2003 by the PUD was consistent with the standard of care and what Cieslewicz would expect to see of a prudent utility in that location.

Appellant failed to carry its burden of proving observable signs of decay on the subject tree were present and capable of observation by the PUD in 1999-2000 and that this tree, therefore, was a hazard. It is undisputed that none of the PUD personnel or the School District's representative with personal knowledge observed this tree as diseased or dying before the incident. This evidence led the expert Cieslewicz to conclude there is no reason to believe that [PUD] would have necessarily seen or required to assess the tree that ultimately fell over. Cieslewicz testified that he did "*not believe they should be held liable for the hazard, property or responsibility of the actual tree owner.*" The court agreed.

In sum, the Estate failed to carry its burden that the subject tree was, in fact, a hazard in 1999-2000 and even if it was, the ability to assess that particular tree as a hazard tree in 1999-2000 is beyond the scope of the PUD's vegetation management practices and legal duty owed to Mr. Connelly under the circumstances.

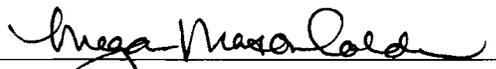
This is not a summary judgment standard where the evidence is viewed in the light most favorable to the Appellant. On appeal, the

evidence must be viewed in light most favorable to the PUD as the prevailing party. The issue is whether Appellant has shown there was insufficient evidence in the record to support the trial judge's findings and conclusions. However, there was ample evidence to support each and every one.

There was no breach by the PUD of the applicable standard of care of utmost prudence consistent with the practical operation of the utility, and, even in the event of a purported inadequacy in the vegetation management work performed, that inadequacy was not a proximate cause of Mr. Connelly's death. The Estate's disagreement with the outcome is not grounds to overturn the trial court's decision and verdict. The trial court's findings of fact, conclusions of law, and verdict should be affirmed in its entirety.

RESPECTFULLY SUBMITTED this 20th day of October, 2011.

ANDERSON HUNTER LAW FIRM P.S.

By 
Megan Otis Masonholder, WSBA #29495
Christopher J. Knapp, WSBA #19954
Attorneys for Respondent
Snohomish County PUD #1

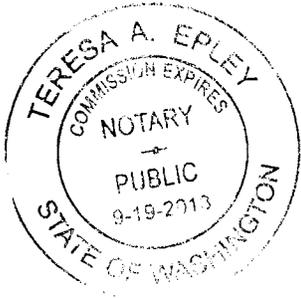
DECLARATION OF SERVICE

Laurie Gibson, being first duly sworn, upon oath deposes and says: That on October 24, 2011 I provided to ABC Legal Messengers the original and copy of Brief of Respondent to be filed with the Court of Appeals, Division I, One Union Square, 600 University Street, Seattle, WA. 98101.

Also, a copy of said Brief of Respondent was provided to ABC Legal Messengers to be served on October 24, 2011 on Kevin Winters (Attorney for Appellant): Hawkes Law Firm, 19929 Ballinger Way NE, Suite 200, Shoreline, WA. 98155.

Laurie Gibson

Subscribed and sworn to before me this 24th day of October, 2011.



Teresa A. Epley
Notary Public in and for the State of Washington,
Residing at: Everett WA
Commission expires: 9/19/2013