

**ESTATE OF PATRICK NELSON CONNELLY, by
its Personal Representative Richard G. Connelly, Jr.
on behalf of the Estate's beneficiaries, Appellant,**

v.

**SNOHOMISH COUNTY PUBLIC UTILITY
DISTRICT # 1, a Washington municipal corporation,
Respondent, LAKE STEVENS SCHOOL DISTRICT
4, a Washington municipal corporation, Defendant.**

No. 66714-9-I

Court of Appeals of Washington, Division 1

December 10, 2012

UNPUBLISHED OPINION

Schindler, J.

During a powerful wind storm, a large poplar tree located on the Lake Stevens School District (School District) property fell across the road onto high-voltage distribution power lines. Patrick Connelly was electrocuted when he came in proximity of a downed, energized power line. The Estate of Patrick Connelly filed a wrongful death action against the Snohomish County Public Utility District No. 1 (PUD). The Estate alleged the PUD negligently performed vegetation management, and negligently designed and operated the electrical distribution system. Following a three-week bench trial, the court ruled that the PUD did not have a duty to inspect trees that did not obviously pose a danger, and did not breach the duty of utmost care in the design, operation, or maintenance of the distribution power line system. We affirm.

FACTS

During a high wind storm on October 16, 2003, one of the Lombardy poplar trees located on the property owned by the School District fell approximately 40 feet across East Sunnyside School Road onto three high-voltage electrical distribution power lines. Two of the power lines shut off. One of the power lines broke off and landed in a ditch on the north side of the road. The power line remained energized and started a small brush fire.

Michael Varnell and Patrick Connelly were driving westbound on 42nd Street NE when they saw the brush fire. Connelly suggested they stop and "stomp out" the brush fire. Connelly was electrocuted when he came into contact with the energized field created by the downed power line.

The Estate of Connelly filed a wrongful death action against the School District and the PUD. The

Estate alleged the PUD negligently performed vegetation management, and negligently designed, constructed, and operated the electrical distribution system. The Estate also alleged the School District negligently failed to take necessary steps to prevent the poplar tree from falling across the road. The Estate and the School District entered into a settlement agreement before trial.

During the three-week bench trial, the court admitted into evidence nearly 100 exhibits and heard testimony from approximately 30 witnesses, including Austin Bollen, the Estate expert on electrical engineering and utility practices; Scott Baker, an arborist who testified on behalf of the Estate; Stephen Cieslewicz, the PUD expert on utility company practices; Michael Munsterman, PUD arborist and vegetation program coordinator; and PUD arborist Randy Packebush.

The parties agreed the PUD owed a duty of the utmost care. The parties disputed whether the PUD had a duty to inspect every tree outside of the 10- to 12-foot power line "clearance zone" and whether the protection devices the PUD used were sufficient to meet the duty to protect the public and prevent exposure from high-voltage power lines.

Bollen testified that the standard of care required the PUD to inspect every tree outside the 10- to 12-foot power line clearance zone that was tall enough to fall on a power line. Relying on Baker's testimony regarding the condition of the poplar tree, Bollen also testified that the PUD had a duty to remove the poplar tree located on the School District property. However, on cross-examination, Bollen admitted that he did not know when the tree would have been an imminent danger and that "I, of course, didn't see the tree and don't know anything -- don't know much about the trees." Bollen also admitted the last time he oversaw a vegetation management program was from 1951-56. Bollen further testified that because there was no record of the vegetation management inspection in 1999 or 2000 on East Sunnyside School Road, the PUD breached the standard of care. Baker examined the tree in 2007 and 2009, and reviewed photos of the fallen tree. Baker testified the poplar tree that fell showed signs of preexisting rot, decay, and disease.

PUD arborist Packebush inspected the tree within a week of the accident, and testified there were no external indicators of rot or decay. Packebush testified that he would not have identified the tree as a hazard for removal or trimming.

Cieslewicz is a certified arborist and a national consultant on vegetation management practices for utility companies. Cieslewicz testified that the vegetation management practices of the PUD were consistent with industry standards and met the standard of care from

1999-2003. Cieslewicz testified that the objective of "line clearance inspections is to review the air space between the lines and along the lines for trees or limbs." Cieslewicz said that the PUD periodically inspected the trees within the 10- to 12-foot clearance zone of the power lines, and removed trees or tree limbs that posed a threat to the power lines. Cieslewicz testified the PUD also identified "danger trees" outside the clearance zone that pose a threat to the electrical lines. Cieslewicz said that the vast majority of electrical utility companies do not routinely inspect trees outside the clearance zone simply because the trees are tall enough to fall on the line. Cieslewicz testified that absent an obvious danger or notification from a property owner, the PUD had no duty to inspect every tree outside the clearance zone. Cieslewicz also testified that inspecting every tree outside the clearance zone in Snohomish County was impossible. Cieslewicz also testified that "[t]here likely would not be records" of the inspection of East Sunnyside School Road "if there was no work required."

PUD line clearance coordinator Munsterman testified that the PUD inspected the East Sunnyside School Road area in 1999 or 2000. Munsterman testified that "he visually looked down the line segment . . . and saw that the line was clear; that no tree was in the line." The School District did not notify the PUD that any of the poplar trees located on East Sunnyside School Road posed a hazard. Kevin Knowles was the School District employee responsible for vegetation management. Knowles testified that between 1987 and October 2003, the poplar trees "were healthy standing trees."

The court found the testimony of the PUD witnesses more credible than Bollen and Baker, and concluded that absent obvious signs or notice that a tree posed a danger, the standard of care did not require the PUD to investigate every tree outside the 10- to 12-foot power line clearance zone. The court also concluded the PUD did not breach its duty of utmost care in the design of the electrical power distribution system.[1]

The court's conclusions of law state, in pertinent part:

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 healthy or posed a threat to the line.

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.

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 standard 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.

D. Based upon the foregoing Findings and Conclusions, the Court concludes that the PUD did not breach its legal duty and was not negligent with regard to vegetation management.

On January 21, 2011, the court entered extensive written findings of fact and conclusions of law, a judgment in favor of the PUD for \$117.28, statutory attorney fees of \$200.00, and interest of 12 percent.

ANALYSIS

The Estate contends the trial court did not apply the utmost standard of care, and substantial evidence does not support the findings that the PUD did not breach the standard of care by failing to remove the poplar tree that fell across the road.[2]

Standard of Care

To prevail on a negligence claim, the plaintiff must establish duty, breach, causation, and damages. *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002). The nature of the duty owed and the standard of care is a question of law we review de novo. *Keller*, 146 Wn.2d at 243. The trier of fact decides "whether the particular harm should have been anticipated and whether reasonable care was taken to protect against the harm." *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 54, 914 P.2d 728 (1996).

Under *Keegan v. Grant County Public Utility District No. 2*, 34 Wn.App. 274, 661 P.2d 146 (1983), a PUD must exercise "the utmost care and prudence consistent with the practical operation of its plant, to prevent such injury." *Keegan*, 34 Wn.App. at 278[3] (quoting *Scott v. Pac. Power & Light Co.*, 178 Wash. 647, 650, 35 P.2d 749 (1934)).

The Estate relies on use of the word "negligence" in Finding of Fact C that "[o]ne liability issue in contention in this case is whether the PUD negligently performed its vegetation management program." The Estate claims the court did not apply the "utmost care" standard. The

Estate's argument is without merit.

The trial court's findings of fact and conclusions of law clearly show the court used the utmost care standard as set forth in *Keegan*. The findings of fact and conclusions of law state, in pertinent part:

There is no dispute as to the legal duty owed by an electrical utility company in the State of Washington. In the design, maintenance and operation of their facilities, such utilities must exercise the *utmost care*, consistent with the practical operation of the utility. *See, Keegan*[], 34 Wn.App. [at] 661.[4]

The Estate also claims the trial court improperly emphasized the practical operation of the utility in determining the standard of care for vegetation management. The practical operation of the utility is a relevant factor in determining "whether the utility has conducted its operations under the known safety methods and the present state of the art." *Keegan*, 34 Wn.App. at 280. "The extent to which a utility is allowed to present evidence relating to its practical operation will be determined by the circumstances of each case, " and is within the "sound discretion of the trial court." *Keegan*, 34 Wn.App. at 280-81. *See also Martinez v. Grant County Pub. Util. Dist. No. 2*, 70 Wn.App. 134, 138, 851 P.2d 1248 (1993). Here, the court did not abuse its discretion in allowing the PUD to present testimony about whether it was practical to inspect trees outside the clearance zone that did not obviously pose a danger. And the findings and conclusions show that the court did not overemphasize the practical operation of the utility.

The out-of-state cases the Estate cites are distinguishable. In *Rocca v. Tuolumne County Electric Power & Light Co.*, 245 P. 468 (Cal. Dist. Ct. App. 1926), a storm brought down the limb of a tree located on private property onto the utility's power lines. *Rocca*, 245 P. at 469. Unlike the tree in this case, in *Rocca*, the limb of the tree was leaning over the power lines. *Rocca*, 245 P. at 471. In *Robben v. Hartford Electric Light Co.*, 468 A.2d 1266 (Conn. App. Ct. 1983), the plaintiffs were electrocuted after a tree on adjacent property fell onto power lines. *Robben*, 468 A.2d at 1268. The experts disagreed about whether the utility company should have noticed a crack in the tree when it inspected the lines. *Robben*, 468 A.2d at 1269-70. On appeal, the court upheld the jury's verdict, noting that credibility determinations and resolution of contradictory testimony are questions for the trier of fact. *Robben*, 468 A.2d at 1270-71.

Challenges to Findings of Fact

The Estate challenges a number of the court's findings supporting the conclusions that absent an obvious danger or notice of a "danger tree, " the PUD did not have a duty to inspect trees outside the clearance zone to determine whether "each such tree was healthy or

posed a threat to the line."

We review a trial court's findings of fact and conclusions of law to determine whether substantial evidence supports the findings of fact and, in turn, whether the findings support the conclusions of law. *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The court views the evidence and all reasonable inferences in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn.App. 202, 206, 148 P.3d 1081 (2006).

Where there is substantial evidence, this court will not substitute its judgment for that of the trial court "even though we might have resolved a factual dispute differently." *Korst*, 136 Wn.App. at 206. We defer to the trial court's determination regarding conflicting evidence and credibility of the witnesses. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn.App. 59, 65, 96 P.3d 460 (2004); *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990).

"The party challenging a finding of fact bears the burden of showing that it is not supported by the record." *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn.App. 422, 425, 10 P.3d 417 (2000). Unchallenged findings of fact are verities on appeal. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

The Estate argues substantial evidence does not support the last sentence of Finding of Fact 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.

We disagree. The evidence established the PUD vegetation management met the standard of care, and the PUD was only required to inspect trees outside the clearance zone if there is "obvious evidence of decay or rotting or threat to the power line." Unchallenged Finding of Fact 15 states:

[Cieslewicz] opined that the PUD's practices were consistent with industry standards and met the standard of care relative to its implementation of the vegetation management program during 1999-2003 and that the PUD did not have a duty to inspect the subject tree. He noted that the objective of line clearance inspections is to review the air space between the lines and along the lines for trees or limbs, and that unless the company knew of a problem tree, by direct observation or by notice from a property owner, it would have no duty to undertake tree

inspection.

Further, the unchallenged portion of Finding of Fact 9 states:

Circuit 12-37 East Marysville, the circuit in question, was "notified" for vegetation management in 1999 and 2000. Line clearance notifying is the process by which the PUD informs property owners that it intends to remove certain vegetation that has the potential to come into conflict with the PUD's power lines. Once this is done, a contractor is hired by the PUD to do the work and supervised for quality control by the PUD line clearance coordinator. PUD employees who had served as Line Clearance Notifiers testified that they are primarily looking for trees and limbs that are within the 10'-12' "clearance zone" on either side of the power lines, as defined by the T&D Guidelines ["Transmission and Distribution Guidelines"], or for trees that clearly endanger the lines such as leaning trees which can be seen. When the Line Clearance Notifiers observe an unhealthy tree that poses a threat to the power lines, they pursue removal even if it were outside the clearance zone and not in the right of way.

Cieslewicz also testified that he did not know of any utility company that had a practice of inspecting trees outside the clearance zone because the trees were tall enough to fall on the line.

I am unaware of any utility that would suggest they would be capable of [inspecting every tree that could potentially fall into a power line]. It's been estimated that upwards of 25 percent of all the trees within an urban environment could have the potential of influencing the power line. . . . No legitimate utility arborist would suggest that they could or would even attempt to inspect every tree that could fall through that line.

PUD employee John Petty testified that the PUD inspects trees within the clearance zone and trees that clearly endanger the lines, "such as leaning trees which can be seen." Petty stated that the PUD employees "try to look at all trees within the 12 foot zone, and if we see something that is beyond that 12 foot zone and we feel is a threat, then we would consider those." Arborist and current PUD line clearance coordinator Packebush testified, "We would have looked for external indicators as in open cavities and rot and those type[s] of things." PUD line clearance coordinator Munsterman testified that the PUD removes trees that are "identified and visible" and pose a hazard to the lines outside the clearance zone. In sum, substantial evidence supports the findings of fact and the conclusion that there was no duty to inspect the trees that were not leaning or within the clearance zone absent obvious signs of decay.[5]

The Estate also challenges a number of the findings that support the court's conclusion that the poplar tree did not obviously pose a threat to the power lines.[6]

The Estate argues substantial evidence does not support the finding that the "Estate arborist testified merely that 'there would have been *some indication* of damage to the tree that would have warranted further investigation.'" [7] The Estate also claims the evidence does not support the finding that Baker "clearly stated that decay may have been discovered only upon further investigation around the backside of the tree, " and that Baker "only reviewed photos taken on the night of the incident."

Finding of Fact 12 states, in pertinent part:

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 2009, he believes there would have been some indication of damage to the tree that would have warranted further investigation.[8]

Substantial evidence supports Finding of Fact 12. Baker testified that his opinion was "[b]ased on what I saw in my two site visits . . . and my review of the photographs of the remains of that tree that broke." Baker's testimony supports the finding. Baker testified, in pertinent part:

This is on the road side of the tree where most of the tree was good, but there was a good sign that something [was] going on. If you looked a little closer, if you had gone around the back side of this tree, it would have been noticed.

The Estate asserts substantial evidence does not support the findings that the poplar tree "had an 'open cavity' only 'because it was split open after [it fell]' and that 'there were no external indicators that it was unhealthy.'" [9] Finding of Fact 13 states:

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.

Finding of Fact 18 states, in pertinent part: "The evidence does not support finding that the tree was an imminent threat to the power line."

Substantial evidence supports Findings of Fact 13 and 18. Packebush testified that a few days after the accident, he observed both the tree that had fallen and the row of poplars that it had fallen from.

The tree that fell we could see it because of the open cavity. They're not open cavity -- excuse me, the broken part of the tree was exposed and no external indicator that

it was unhealthy, but the stump itself was at a level you can see the break point of the tree. . . . The interior could have some rot going on but there w[ere] no signs on the exterior to indicate that.

Packebush also testified that a photograph of the fallen poplar tree taken after the accident did not show signs of external decay.

Q Do you see any external signs of decay of the subject tree in this photograph?

A Don't see external but you can see some internal there because the tree is broken now.

Q Do you see this dark vertical line?

A Correct.

Q Are you saying that's internal not external?

A I would say that's internal. It's breaking solid wood on either side here.

Q How about here? Do you see any signs of decay in the bark or rot all the way to the edge of the tree?

A Not that I can tell from that photo.

Q Can you look at the next photo, 40D Do you see any external signs of decay . . . ?

A There is some white down below will be some indicators.

.....

Q You don't see any ailing bark?

A Not opening bark other than when this had broken.

Further, the unchallenged findings establish that the School District never advised the PUD of a danger tree on its property, and that the School District "believed the poplar trees were healthy standing trees between 1987 and October 2003."

Next, the Estate claims the findings are inconsistent with the T&D Guidelines. The T&D Guidelines are evidence of the standard of care. *See e.g., Joyce v. Dep't of Corrections*, 155 Wn.2d 306, 324, 119 P.3d 825 (2005) (internal policies are merely evidence of the standard of care). The statute the Estate relies on does not require the PUD to comply with the T&D Guidelines. RCW 64.12.035 provides electric utilities immunity for cutting or removing vegetation. The statute does not set a standard of care for the utility, and as the PUD points out, no cases have interpreted the statute as creating a duty or setting a standard of care.

The T&D Guidelines state that the PUD must determine whether a danger tree is "a potential threat to

the continued operation of the line" and, if so, cut down the tree. The T&G Guidelines define "danger trees" as:

Forked trees.

Dead or rotten trees.

Trees weakened by decay, disease or erosion.

Trees visibly leaning toward the line.

Trees or parts of trees which may contact the line under snow, ice or wind loads.

Trees originating from fallen decaying logs, old growth stumps or other unstable rooting positions.

Troublesome trees such as alder, big leaf maple and hemlock.

The T&D Guidelines do not impose a duty to inspect every tree that may come in contact with the power lines. The PUD vegetation management superintendent Libbie Soden testified that under the T&D Guidelines, the PUD must focus on the clearance zone and the 12-foot marker on either side of the distribution lines, and obvious "danger trees."

Cieslewicz also testified that the T&D Guidelines do not require the PUD to inspect all trees beyond the 12-foot marker:

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.

As previously addressed, substantial evidence supports the court's findings that the PUD does not have a duty to inspect "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."

Postjudgment Interest

The Estate contends the trial court erred by imposing a 12 percent interest rate under RCW 4.56.110(4). The Estate claims RCW 4.56.110(3)(a) applies. But RCW 4.56.110(3)(a) only applies to a judgment based on the "tortious conduct of a 'public

agency." Because the court ruled in favor of the PUD, the judgment is not based on the tortious conduct of the PUD, and the court did not err by imposing a 12 percent interest rate under RCW 4.56.110(4).

within the clearance zone."

[9] (Alteration in original.)

We affirm.

Notes:

[1] The court found Bollen's testimony was "not helpful[,] confusing and difficult to understand."

[2] On appeal, the Estate does not challenge the trial court's findings or the conclusion that the PUD did not breach the duty of utmost care in the design, construction, and operation of the electrical system.

[3] (Emphasis omitted) (internal quotation marks and citation omitted).

[4] (Emphasis added.)

[5] The conclusions of law state, in pertinent part:

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 healthy or posed a threat to the line.

[6] Findings of Fact 12 and 17 state:

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 2009, 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.

....

17. The Estate's arborist clearly stated that decay may have been discovered only upon further investigation around the backside of the tree.

[7] (Emphasis appellant's, not trial court's.)

[8] The Estate does not challenge the portion of Finding of Fact 12 that states: "There was no evidence that the tree was leaning towards the line or that any limb was