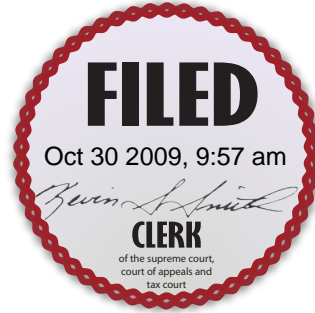


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEES:

**KURT A. WEBBER**  
Carmel, Indiana

**JAMES W. ROEHRDANZ**  
**ERIC D. JOHNSON**  
**NICHOLAS W. LEVI**  
Kightlinger & Gray, LLP  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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TINCEY J. WRIGHT, as the Personal )  
Representative of the Estate of Douglas D. )  
Wright, )

Appellant-Plaintiff, )

vs. )

No. 89A01-0906-CV-287

CITY OF RICHMOND, INDIANA; COMMON )  
COUNCIL OF THE CITY OF RICHMOND, )  
INDIANA; RICHMOND POWER & LIGHT )  
COMPANY; RICK WRIGHT d/b/a THE )  
WRIGHT TOUCH PAINTING COMPANY; )  
GLEN W. THORNBURG and CAROLYN E. )  
THORNBURG, )

Appellees-Defendants. )

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APPEAL FROM THE WAYNE SUPERIOR COURT  
The Honorable Gregory A. Horn, Judge  
Cause No. 89D02-0704-CT-8

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October 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

**BAKER, Chief Judge**

Appellant-plaintiff Tincey J. Wright, as the personal representative of the estate of Douglas D. Wright (the Estate), appeals the trial court's grant of summary judgment in favor of appellees-defendants City of Richmond (City), Common Council of the City of Richmond (Common Council), and Richmond Power & Light Company (RPL), claiming that a genuine issue of material fact exists as to whether RPL was negligent for not insulating its power lines, resulting in Douglas's electrocution and death. More specifically, the Estate argues that the designated evidence would permit a jury to conclude that RPL was negligent in failing to insulate its power lines and in failing to take additional preventive measures to avoid the electrocution. Concluding that the trial court properly entered summary judgment for RPL, we affirm.

FACTS

Sometime in 2006, Richmond resident Glenn Thornburg hired Rick Wright, d/b/a/ The Wright Touch Painting Company (Wright Touch), to paint his house. Thereafter, Rick subcontracted the project to Douglas, his brother, to complete the project. Douglas brought his own twenty-four-foot aluminum ladder to the Thornburgs' home and began work on September 21, 2006.

On October 3, 2006, at approximately 3:40 p.m., Douglas was painting the south side of the residence. Thornburg heard an explosion and buzzing and saw a red flash of

light. It was determined that Douglas's aluminum ladder came into contact with an overhead power line. As a result, Douglas was electrocuted and subsequently died. Douglas was found on the ground under the power line, and his spray gun and connecting hose were hanging over the line.

Rick Wright inspected the premises and determined that Douglas had not yet reached the area between an antenna tower and the Thornburgs' house when the ladder came into contact with the power line. Rick acknowledged that Douglas would often leave the spray gun hanging over the top rung of his ladder when he moved it. Thus, Rick surmised that Douglas left the gun on the ladder, climbed down, and moved the ladder while the gun and hose were hanging over the top rung.

At the time of the accident, RPL provided electrical service to the Thornburgs. RPL is a wholly owned subsidiary of the City, and is operated, managed, and controlled by the Common Council. Two RPL utility lines, which were installed in 1970, run parallel to the southeast side of the Thornburgs' residence. One of the lines was "hot," and the other was "neutral." Appellant's App. p. 31. The primary line carries 7200 volts of electricity and that line is located approximately eighteen and one-half feet above the ground. The neutral line is about sixteen and one-half feet above the ground. Both lines are located approximately ten feet from the Thornburgs' residence. When the accident occurred, the location of the power lines relative to the house and the television antenna complied with the National Electric Safety Code (NESC) requirements.<sup>1</sup>

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<sup>1</sup> The NESC is an industry standard that RPL is required to follow to maintain proper clearances. Appellant's App. p. 344.

The designated evidence established that the Thornburgs had lived at their residence for seventeen years before the accident occurred. During that period, Thornburg and one independent contractor had used a ladder on the side of the residence prior to the painting project. Thornburg had used a ladder on only three occasions, and the contractor had used a ladder one time approximately fifteen years prior to the accident.

On April 12, 2007, Tincey—Douglas’s wife and personal representative of the Estate—filed a wrongful death action against the Thornburgs, Rick Wright, the City, the Common Council, and RPL. The Estate maintained that Douglas’s death was caused by the “wrongful act or omission of one or more of the defendants . . . and was entitled to recover damages proximately caused by the wrongful act or omission.” Appellant’s App. p. 24.

On June 30, 2008, RPL moved for summary judgment on the grounds that it did not breach any duty that it owed to Douglas. RPL further maintained that it was a governmental entity and that Douglas was contributorily negligent as a matter of law, which precluded any recovery by the Estate.

In response, the Estate alleged that (1) RPL was negligent per se because the designated evidence demonstrated that it violated NESC requirements regarding the placement of its electrical wires; (2) even if RPL complied with the NESC requirements, a jury could still find that RPL was “at fault” in light of the other designated evidence that was submitted, appellant’s app. p. 460; (3) the designated evidence establishing that

RPL complied with the NESC was not credible; and (4) RPL is not a governmental entity and, therefore, was not entitled to a defense of contributory negligence.

Following a hearing, the trial court granted RPL's motion for summary judgment. The trial court entered detailed findings in its order of May 18, 2009, and concluded that RPL "owed no duty to Doug Wright to insulate its line around the Thornburg property or to otherwise protect him from its danger." Appellant's App. p. 21. The trial court also determined that because the City and Common Council had no responsibility or duty to Doug greater than that of RPL, those governmental entities were also entitled to summary judgment.<sup>2</sup> The trial court did not address whether RPL was a governmental entity because "Plaintiff's decedent was at least somewhat at fault thereby barring his recovery." *Id.* The Estate now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

When reviewing a grant of summary judgment, our standard of review is the same as that of the trial court. Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1269 (Ind. 2009). Considering only those facts that the parties designated to the trial court, we must determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C). In answering these questions, we construe all factual inferences in the non-moving party's favor and resolve all doubts as to the existence of a material issue against

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<sup>2</sup> The trial court also granted summary judgment in the Thornburgs' favor, and the Estate voluntarily dismissed Rick Wright from the action with prejudice. Appellant's App. p. 13, 15.

the moving party. N. Ind. Pub. Serv. Co. v. Bloom, 847 N.E.2d 175, 180 (Ind. 2006). The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Once the movant satisfies that burden, the burden shifts to the non-moving party to designate and produce evidence of facts showing the existence of a genuine issue of material fact. Mullin v. Mun. City of South Bend, 639 N.E.2d 278, 281 (Ind. 1994). Negligence cannot be established by inferential speculation alone. Ogden Estate v. Decatur County Hosp., 509 N.E.2d 901, 903 (Ind. Ct. App. 1987). In other words, speculative allegations in support of the non-moving party's position are not sufficient to survive summary judgment. Id.

We also note that we do not owe deference to the findings and conclusions entered by the trial court in a summary judgment order. Trans-Care, Inc. v. Comm'rs of Vermillion, 831 N.E.2d 1255, 1258 (Ind. Ct. App. 2005). Although such findings and conclusions may assist our review, we will affirm if the trial court's grant of summary judgment can be sustained on any theory or basis in the record. Beck v. City of Evansville, 842 N.E.2d 856, 860 (Ind. Ct. App. 2006).

## II. The Estate's Claims

The Estate contends that the trial court erred in granting summary judgment for RPL, the City, and the Common Council, because the designated evidence creates a genuine issue of material fact as to whether RPL breached a duty to Douglas and whether its alleged acts or omissions were the proximate cause of Douglas's death. Specifically, the Estate argues that the designated evidence established that RPL breached a duty to

Douglas because it failed to comply with NESC standards. The Estate also asserts that RPL's designated evidence regarding its compliance with those standards was not credible, and that RPL should have taken "other preventive measures against electrocution." Appellant's Br. p. 22-24.

To prevail on a claim of negligence, the plaintiff must show (1) a duty owed by the defendant to the plaintiff; (2) a breach of the duty; and (3) injury proximately caused by the breach. Williams v. Cingular Wireless, 809 N.E.2d 473, 476 (Ind. Ct. App. 2004). Whether a duty exists is a question of law for the trial court. Spudich v. N. Ind. Pub. Serv. Co., 745 N.E.2d 281, 291 (Ind. Ct. App. 2001). In the absence of a duty there can be no breach, and therefore, no recovery in negligence. Williams v. Cingular Wireless, 809 N.E.2d 473, 476 (Ind. Ct. App. 2004).

Under the common law, companies engaging in the generation and distribution of electricity have a duty to exercise reasonable care to keep electrical lines safely insulated in places where the general public may come into contact with them. Goodrich v. Ind. Mich. Power Co., 783 N.E.2d 793, 795-96 (Ind. Ct. App. 2003). Insulation is not required when lines are sufficiently isolated so that it is not reasonably foreseeable that the general public would be exposed to the danger presented by the lines in the course of daily events. Id. In this context, the word "public" means:

"a great multitude of persons who would, in the course of daily events, be exposed to danger by the presence of an uninsulated wire carrying a dangerous voltage of electricity. The word has no reference to an individual whose particular employment requires him to work in the proximity of a live wire with which there would be no likelihood of his coming in contact except for such employment. The exposure must be

common to the concourse of people who make up the general public in any locality.”

S. Ind. Gas & Elec. Co. v. Steinmetz, 177 Ind. App. 96, 100, 377 N.E.2d 1381, 1383-84 (1977) (quoting Jakob v. Gary Rys., Inc., 118 Ind. App. 13, 16, 70 N.E.2d 753, 754 (1947)).

In light of the above, we have determined that an electric utility generally is not required to insulate its wires to protect only those persons who might come into contact with power lines in the course of their employment. Spudich, 745 N.E.2d at 291. In Spudich, we affirmed the trial court’s grant of summary judgment in favor of NIPSCO when it was shown that the chances of the general public coming into contact with power lines that were nearly forty feet above the ground was “virtually nonexistent.” Id. Moreover, the designated evidence did not show that the plaintiff, who was stringing Christmas lights in front of an East Chicago administrative building as part of his employment, would be regularly exposed to the lines. We observed that “[o]nce a year work in the vicinity of power lines . . . does not constitute regular contact by a particular segment of the population.” Id.

Notwithstanding this rule, we note that an exception exists when it is established that the utility company knows or has knowledge of such facts from which it should know that a particular segment of the population will be regularly exposed to uninsulated wires for one reason or another. Goodrich, 783 N.E.2d at 796.

In this case, there is no evidence establishing that the general public would likely come into contact with the power lines because the “hot” line was located eighteen and



one-half feet above the ground on private property. Moreover, the only reason that Douglas was near the power lines was due to his employment. As a result, the designated evidence fails to establish that RPL owed Douglas any duty under the “general public” rule. Furthermore, the designated evidence in this case fails to show that RPL knew that Douglas would be working near the wires on the day in question. Moreover, there is no way that RPL should have known that “a particular segment of the population would be regularly exposed” to the wires because work occurred near the wires only four times over a seventeen-year period. Id. As a result, the Estate has failed to show that RPL breached any common law duty to Douglas.

Notwithstanding the above, the Estate maintains that RPL’s motion for summary judgment was improperly granted because the designated evidence established that RPL purportedly failed to follow an administrative regulation—the NESC requirements—regarding the power line height requirements. As a result, the Estate maintains that this purported breach amounted to negligence per se, which precludes the entry of summary judgment. However, we observed in Vandenbosch v.

Daily that:

In Hodge [v. NorcCen, Inc., 527 N.E.2d 1157, 1160 n.3 (Ind. Ct. App. 1988)], . . . [i]n noting that the unexcused or unjustified violation of a duty prescribed by statute or ordinance constitutes negligence per se, the court observed that “[t]he same is not true of an administrative regulation, the violation of which has been held to be only evidence of negligence.” Id. at 1160 n.3. The court went on to hold that the “appellants claim of negligence could not survive a motion for summary judgment if the duty element of their claim rested solely upon the existence of an applicable administrative regulation.”

785 N.E.2d 666, 669 (Ind. Ct. App. 2003).

Here, because the Estate contends that RPL's duty to Douglas arose from a purported violation of an administrative regulation, the rules announced in Hodge and Vandenbosch make it clear that the Estate's negligence per se argument does not prevail.

However, the Estate further maintains that summary judgment was improperly granted in RPL's favor because the designated evidence established a violation of the NESC provisions regarding the horizontal clearance requirements of the electrical cable. In particular, the Estate argues that

[T]he designated evidence creates at least an inference that [RPL] violated the NESC's horizontal clearance standards. Reasonable jurors could logically conclude that the spur line was 7' 3" or closer to the TV antenna, which violates the 7' 6" clearance standard imposed by the NESC. In addition, reasonable jurors could logically conclude that the spur line could be blown within 3' 3" of the TV antenna, which violates the 4' 6" wind deflection standard imposed by the NESC by over 1' 3."

Appellant's Br. p. 14.

Notwithstanding the Estate's contentions, the designated evidence established that the power line on the Thornburgs' property is an "open supply conductor" that contains a voltage between 750 volts and 22 kilovolts. Appellant's App. p. 32-33. Based on the location of the power line, the NESC requires a vertical clearance of fourteen feet, six inches for the "hot" line, a vertical clearance of nine feet, six inches for the neutral line, and, for both lines, a horizontal clearance from the house of ten feet and a horizontal clearance from the antenna of seven feet, six inches. Id. at 32-33. The power line at issue here complied with the vertical clearance requirements since the "hot" line was eighteen feet, six inches above the ground and the neutral line below the "hot" line was sixteen feet, six inches above the ground. Id. at 31-32. Moreover, the power line

complied with the horizontal clearance requirements because the designated evidence showed that it was located ten feet from the side of the house, and at least seven feet, six inches from the antenna. Id. at 31-33.

Although it was established that the power lines complied with these NESC clearance requirements, the Estate attempts to counter the designated evidence by engaging in speculation that allegedly contradicts the undisputed evidence. More particularly, the Estate's argument that "a jury could conclude that the power lines were seven feet, three inches from the antenna and that they could be blown within three feet, three inches of the antenna," appellant's br. p. 14, is refuted by the affidavit of Sheldon Moore, the Chief Electrical Engineer at RPL. After RPL performed the various measurements, Moore determined that the distance between the antenna and the power line was in compliance with the NESC requirements. Appellant's App. p. 31-33. The Estate performed no measurements of its own.

Additionally, we note that while the Estate directs us to a somewhat confusing portion of Moore's testimony regarding the location of the power lines, it fails to point out that Moore subsequently clarified his testimony regarding the location of the power line and antenna. Appellant's App. p. 334. Moreover, even though the Estate posits that the power lines must have "sagged" by nearly four feet and blown closer to the antenna, appellant's br. p. 14, there is no evidence that the amount of "sag" would translate to an equal distance when the lines are blown in the wind. If the Estate sought to establish that the sagging lines would be four feet closer to the house when blown by the wind, it

should have obtained and offered evidence to that effect rather than relying only on the speculation of counsel.

On a related note, the Estate's attacks on the credibility of RPL's witnesses is likewise unavailing. The mere fact that a certain period of time passed from the accident until RPL representatives measured the distance does not raise an inference that they were untruthful or that the measurements were inaccurate. Again, if the Estate desired to show that the measurements performed by RPL were not accurate, it should have retained an expert to measure the distances and presented its own evidence. Because the Estate failed to do so and relies only on speculation as the basis for its claims, it cannot avoid the grant of summary judgment. Ogden Estate, 509 N.E.2d at 903.

In a final effort to avoid summary judgment, the Estate asserts that even if RPL complied with the NESC requirements, RPL can still be held liable for failing to take additional precautions, such as installing insulated wires or reducing the voltage in the wire. Appellant's Br. p. 4. However, the Estate's contention that RPL could have taken actions to make the power lines safer misses the mark. The question is not whether RPL could have made the lines safer, it is whether RPL had a duty to do so.

Neither the common law nor the NESC imposes such a duty on RPL. Even more compelling, the Estate fails to cite any evidence—from an expert or otherwise—that a utility should take steps above and beyond those required by the NESC. Absent evidence to establish that RPL should have taken additional precautionary steps, the Estate has failed to show that RPL had a duty to do so. Thus, the Estate's argument fails.

In sum, the designated evidence establishes that RPL did not breach any duty that it owed to Douglas in this instance. For all the above reasons, we conclude that the trial court properly entered summary judgment for RPL.

The judgment of the trial court is affirmed.<sup>3</sup>

FRIEDLANDER, J., and RILEY, J., concur.

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<sup>3</sup> Because we have determined that RPL did not breach a duty that it purportedly owed to Douglas and the designated evidence supports the grant of summary judgment on this basis, we—like the trial court—need not discuss whether RPL was precluded from asserting the defense of contributory negligence on the grounds that it is not a governmental entity. See Beck, 842 N.E.2d at 860 (holding that a trial court’s grant of summary judgment will be affirmed on any theory or basis that the record supports).