2d Civil No. B249714

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SIMONA WILSON,

Plaintiff and Respondent,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,

Defendant and Appellant.

Appeal from Los Angeles Superior Court,
Case No. YC065545
Honorable Stuart M. Rice, Judge Presiding

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

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APPELLANT/PETITIONER: SOUTHERN CALIFORNIA EDISON COMPANY RESPONDENT/REAL PARTY IN INTEREST: SIMONA WILSON	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Southern California Edison Company

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) Edison International	Parent company of Southern California Edison Company
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 17, 2014

Robin Meadow
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION

Simona Wilson recovered over $4 million, including $3 million in punitive damages, because she felt a slight tingle of electricity on a showerhead—a tingle so subtle that it took her weeks to identify the source as electricity—a level of current so low that it was but a fraction of what her physician administered when he tested her for the symptoms that she claimed the electricity had caused.

Wilson bought her home, adjacent to Southern California Edison's Topaz substation in Redondo Beach, in 2007. During her first four years in the house she felt no current. But after a bathroom remodel in 2011, she started feeling the tingle on her new showerhead. The parties' experts agreed that the source was low-level stray voltage from Edison's electrical distribution system; that in a properly-grounded system like Edison's, this kind of stray voltage always exists; and that the system complied with all technical requirements of the Public Utilities Commission.

There are simple ways to eliminate the kind of "touch potential" that Wilson experienced in her house, and Edison told her about those. But Wilson's position, then and at trial, was that Edison had to do the impossible: It had to completely eliminate all stray voltage. The jury agreed, finding Edison liable for negligence, intentional infliction of emotional distress, and nuisance.

The verdict fails on multiple grounds:

- Most fundamentally, the trial court did not have jurisdiction. The PUC's exclusive jurisdiction over the design, construction, operation, and safety of electrical distributions precludes claims like Wilson's. The only exception is when a plaintiff can show that a utility has violated an unambiguous PUC regulation whose interpretation and application do not fall within the PUC's technical expertise, but there was no such evidence here.
- There was no legal basis for any of Wilson's theories. The evidence was undisputed that over the course of many years, both when Edison owned the property before 1999 and afterwards, Edison had appropriately responded to occupants' reports of stray voltage, and that for most of the time since 1998 Edison appeared to have eliminated touch potential in the house.
- Although the million-dollar verdict shows that the jury must have agreed with Wilson that the current caused physical injury that contributed to her emotional distress, there was no substantial evidence of causation. It is all but certain that the jury's erroneous belief was influenced by the trial court's refusal to instruct on the need for expert evidence of medical probability. The compensatory award is therefore excessive both as a matter of evidence and as the product of instructional error.

- The punitive damages award fails because there was no substantial evidentiary basis for it; it is constitutionally excessive; and in any case the necessary reduction of compensatory damages will require a reevaluation of the punitive damages.

The judgment cannot stand. The Court should reverse with directions to dismiss the action, or at least for a new trial.

STATEMENT OF THE CASE

A. Edison's Topaz Substation And Stray Voltage.

1. The Topaz substation.

Edison's Topaz electrical distribution substation in Redondo Beach is adjacent to Wilson's former home at 904 Knob Hill Drive. (4AA1097; 4RT1807.)

The substation reduces the voltage of electricity it receives from a power plant before distributing electricity along local overhead distribution lines. (4RT2150-2151; 6RT2721-2722, 2726.) These primary distribution lines conduct the stepped-down electricity to secondary distribution transformers located on poles along the lines, which in turn step the voltage down further to provide electricity to nearby homes. (4RT2150-2151; 6RT2722, 2726; generally see *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 903-909 [describing how distribution systems operate] (*Covalt*).)

For electricity to flow, it must complete a circuit by returning to its source. (4RT2151-2152.) Electricity returns from the distribution transformers to Topaz along an overhead line called the "neutral" (or "primary neutral"), which retraces the distribution path back to the substation transformers. (4RT2151-2152; 6RT2721-2722, 2726; Augmented Reporter's Transcript (ART) 26.) There are also "secondary neutral" lines that return electricity from individual homes to the distribution transformers that supply them. (6RT2737-2738.)

2. Grounding of distribution systems.

As described in detail in Argument section I.B.2. below, the Public Utilities Commission (PUC) has issued specific requirements for the design, siting, operation and safety of electrical distribution systems. These include requirements that relate to "grounding."

"Grounding" means a connection to the earth by an electrically conductive path. (PUC General Order (G.O.) 95, Rule 21.4.)[1] Edison's electrical system is grounded at the substation, along the neutral, and elsewhere. (4RT2153-2154; 6RT2726; ART26-27.) Grounding prevents dangerous voltage levels from building up and allows fault current and

[1] The cited General Orders appear in full at 1AA181-3AA768 (G.O. 95), 3AA770-871 (G.O. 128), and 3AA873-876 (G.O. 174), and are available online at http://www.cpuc.ca.gov/PUC/documents/go.htm.

lightning strikes to dissipate in the earth with minimal harm. (4RT2155; 6RT2727; G.O. 95, Rules 21.4 & 33.2; ART31.)

In 2005, Edison expanded the grounding along a portion of the Topaz distribution system by creating a "common neutral"—an electrical connection between the previously non-connected primary and secondary neutral lines. (5RT2419-2420; 6RT2737-2738; G.O. 95, Rule 20.8.) This allowed the system to utilize the grounding of all the homes tied to the common neutral, thereby increasing total grounds and reducing voltage levels around the substation. (6RT2737-2738.)

It is undisputed that the Topaz distribution system complies with all of G.O. 95's technical specifications and safety regulations, including its requirements for grounding. Edison's witnesses so testified (6RT2729-2730, 2737; ART24-25), and Wilson's expert Bennett confirmed that he could not identify any specific defect in the Topaz infrastructure, or any violation of a regulation (5RT2439-2442, 2473).[2]

[2] Bennett's only contrary testimony was that because stray voltage still existed at the property, he believed Edison was in violation of G.O. 95, Rule 31.1, which he said imposed a duty "to run their system furnishing safe and proper service." (5RT2473.) We demonstrate below that this claim is itself subject to the PUC's exclusive jurisdiction and that in any case there is no basis for the opinion. (§ I.C., *post*)

3. The phenomenon of stray voltage.

Edison's employee Matthew Norwalk and its expert John Loud explained that in a grounded system some current always flows back to the substation through the earth, resulting in a form of stray voltage called "neutral-to-earth voltage" or "NEV"; this always exists in a grounded system. (6RT2723-2724; ART25, 29-32.) Wilson's expert Bennett agreed that the "small voltage" at Wilson's house was present because "the way the system exists, electrical current from the distribution system returns not only through the wires but through ground, and it will always do that." (4RT2170-2171; see 4RT2152-2155.)[3]

Conductive objects or equipment buried in the earth, such as metal sewer or water pipes, pick up electric potential—voltage—from multiple ground connections along the return path as current is dissipated from the neutral into the earth. (4RT2170-2171 [Bennett]; 6RT2723-2724

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[3] Current, measured in amperes or "amps," is a group of electric charges moving in the same direction, like water flowing through a pipe. (4RT2154-2155; ART6-7; *Covalt*, *supra*, 13 Cal.4th at p. 905.) Voltage is the force that causes current to flow. (4RT2154.) Just as total water flow through a pipe depends on the size of the pipe, the amount of current in a given circuit depends on the circuit's resistance, which is measured in ohms. (6RT3071; ART46.) "[V]oltage alone doesn't tell you anything meaningful about what current would be present." (6RT3089 [Loud].) Rather, knowing two components allows one to calculate the third, using Ohm's Law: Current (in amps) equals volts divided by resistance (in ohms). (6RT3074; ART46; see 6RT3072 [measurements of voltage without a resistor that replicates the resistance of the human body do not accurately show the amount of current that a person will actually experience].)

[Norwalk]; ART31 [Loud].) As Norwalk put it, "Voltage can be measured anywhere there is electrical distribution." (6RT2730.)

Norwalk and Loud testified that "stray voltage" in the electrical industry generally refers to low-level voltage (typically 10 volts or less) appearing on objects that are not ordinarily energized or part of an electrical system. (6RT2719, 3076.) Bennett confirmed that in Wilson's case "we're talking about voltages less than 10 volts." (4RT2170-2171; see 6RT2750, 2753 [voltage on Wilson's shower fixtures was less than 2.5 volts]; Ex. 1159 [2.9 volts at shower].)

Although there can be other sources of stray voltage, it is undisputed that this case involves neutral-to-earth voltage of less than 10 volts that arose from the normal operation of Edison's system rather than from any defect in the system or other source. (4RT2170-2171; 5RT2439-2441, 2473 [Bennett]; 6RT2830 [Norwalk]; ART24-25, 31-32 [Loud].)

4. Touch potential and mitigation.

"Touch potential" exists when a person can simultaneously touch two energized conductive objects at different voltage levels; this completes a circuit, allowing current to flow through the body. (4RT2155; 6RT2724-2725, 3070, 3076.) A single point of contact cannot create a circuit. (6RT3070.) Touch potential between objects in a home can exist if, say, the water and sewer lines are both conductive (i.e., metal), they have picked

up different voltages from different points in the earth, and a person can simultaneously touch both a faucet and a drain. (6RT2723-2725.)

Although one can never totally eliminate stray voltage in a properly grounded system (ART25, 31; 5RT2425), touch potential can be mitigated by installing nonconductive materials such as plastic piping or insulators to prevent the flow of current onto metal fixtures, or by connecting ("bonding") conductive materials to equalize any potential between them (4RT2171-2172; 5RT2455; 6RT2759-2760; see G.O. 95, Rule 20.2).

5. Physiological effects of electrical current.

Wilson testified that she felt a "tingling" on her showerhead after she installed a new shower. (§D, *post.*) Bennett, Norwalk and Loud agreed that there is no known physiological injury possible from brief exposure to very-low-perception levels of electrical current like those Wilson described. (5RT2452-2453; 6RT3093; ART20.)

The best-known references for how different levels of current affect the body are the Dalziel standards and the International Electrical Commission/Underwriters Laboratory (IEC/UL) standards. (4RT2159, 2178; 5RT2429, 2460; 6RT3079, 3085-3086; ART7-8; see 4AA1105 [IEC/UL chart]; 4AA1146 [Dalziel chart].)

Bennett testified that Wilson's description of the "tingling sensation" she felt reflected a "perception" level of current between 0.7 and 1.2 milliamps according to the Dalziel chart, although no one could know for

sure.[4] (5RT2432, 2469-2470.) Bennett had never seen any documented cases of injury at the perception level of current, and he was unaware of any physiological injury that could occur from contact with current under 6.0 milliamps (over five times the perception level). (5RT2452-2453.) Bennett explained that "six milli-amps is essentially the threshold or dividing line between serious injury and not serious injury" under the IEC/UL standards. (5RT2428-2429; see also 6RT3093; ART20-21 [Loud opines that current level just under 6 milliamps is not harmful, and that nothing supports the notion that current under 5 milliamps would ever cause any injury].) Bennett described tingling perception of current, along with "startle" reflexes from low-level current (often including an involuntary pulling away from the shock), as "essentially nonmedical injuries that could occur." (4RT2158; 5RT2436; 6RT3082.)

B. The History Of 904 Knob Hill.

1. 1995-1997: The Pantuccis report shocks; Edison investigates.

Edison owned 904 Knob Hill until 1999. In 1995, it rented the property to the Pantucci family. (4RT1930-1931.) In preparing the property for rental, Edison hired Precision Electric to "go through the electrical panels and go through the house to make sure everything was

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[4] The level Wilson felt could have been lower. Loud noted that one may feel current at levels even below 0.4 or 0.3 milliamps, especially with a smaller contact point (e.g., finger versus palm). (6RT3081-3083 [explaining that Dalziel's tests used a full-palm grip]; see 4AA1105.)

okay," because a tenant had once complained of a shock in the kitchen and an Edison agent had felt a shock at the dishwasher while standing in water on the floor. (6RT2837-2839.) The inspection revealed zero volts in the kitchen and at the dishwasher, and no problems with the electrical panel or anywhere else in the house. (*Ibid.*)

Shortly after moving in, the Pantuccis told Edison that they were feeling shocks in various areas of the property. (4RT1930-1932, 1934.) Edison sent representatives out to the house a couple of times in response. (4RT1933.) Although the shocks continued throughout the time the Pantuccis lived there, Ms. Pantucci told Edison that they were "mild" and "nobody got hurt." (4RT1932-1934.)

In 1997, Tina Van Breukelen (née Drebushenko), then Edison's lease administrator for 904 Knob Hill and the point-person for tenant relations, emailed several Edison employees about the Pantuccis, including her supervisor Gene Trowbridge and facilities manager Glen Donley. (4RT2102-2110; 4AA1002.) She wrote that she had received calls from the Pantuccis reporting that the shocks were getting stronger and that they no longer used the bathtub. (4AA1002.) The Pantuccis told her that the problem hadn't been resolved, but that "they just put up with it and stopped calling." (*Ibid.*)

Drebushenko felt that Edison should "get this matter resolved once and for all or determine if it cant [*sic*] be solved. . . . If we cant [*sic*] sell and we need it as a buffer and we cant [*sic*] fix the problem, perhaps we should think about demolishing the structure. . . . Again, this has been an ongoing problem. . . ." (4AA1002.) In a follow-up email, Drebushenko wrote that "the problem has gotten worse and [Ms. Pantucci] didn't feel her family could cope with it over the weekend." (*Ibid.*; 4RT2118.)

The Pantuccis moved out in September or October of 1997. (4RT1930.)

2. 1998: Having apparently eliminated stray voltage by repairing a bad ground connection, Edison prepares 904 Knob Hill for sale.

In January 1998, a group of Edison employees, including facilities manager Jerry Miller and Mark Raidy (who was responsible for preparing 904 Knob Hill for possible sale) conducted tests at the property. (4AA1005; see 4RT2131-2139.) Raidy summarized the results in an email the next day: "If we can solve these problems and feel comfortable that they won't recur, we will proceed to market the home. If constant maintenance is needed to prevent the re-occurrence of the problem, we should probably retain the property so we can control the maintenance. If we can't solve the problem, we should not allow the property to be inhabited." (4AA1005.)

Further investigation appeared to yield a solution. An Edison line crew "found a bad ground neutral" at the transformer pole that served the property. (6RT2840.) The crew fixed what Miller described as a "lose [*sic*] connection," after which Miller and Precision Electric took a ground reading and measured zero amps. (6RT2840-2841.) Miller also touched faucets and sinks with wet hands and didn't feel anything. (6RT2841.) They felt "pretty confident that that lose [*sic*] connection was the problem." (6RT2841.)

Edison sales manager Charles Kraushaar inspected the property with Raidy in June 1998. (6RT2845-2846.) Raidy told Kraushaar about the prior tenant's reports of shocks, explaining that "the source of the shocks was a faulty transformer on a distribution pole" and that after its replacement there were no more shocks. (6RT2846.) Kraushaar also touched the faucet and showerhead and "verif[ied] physically that there was no shock." (6RT2846-2847.) Kraushaar authorized the property's sale, having no concerns about stray voltage. (6RT2845-2846.)

3. 1999: Edison sells 904 Knob Hill. The next five years pass without problems.

In 1999, Edison sold 904 Knob Hill to the Ozerans. (6RT2823, 2845.) Kraushaar and Raidy both testified that they believed there was no longer any stray voltage problem. (4RT2144-2145; 6RT2847.) For the

next five years, Edison received no reports of any electrical current issues at the property. (6RT2823.)

Then, around May 2004, the Ozerans' tenants reported feeling electricity at outside spigots, at one of the showers, and in the laundry area. (6RT2731.) Norwalk took part in an investigation as part of a team that included representatives from Edison's substation, field engineering, and power quality departments, along with consultants, support organizations, and troublemen (workers qualified to perform measurements on the high voltage system). (6RT2731-2735.) Norwalk performed initial voltage measurements (without a resistor, per then-standard practice), and measured 11-15 volts within and outside the home. (6RT2731-2732.)

Edison personnel investigated the design and integrity of all connections on the distribution system, the connections and design of the substation, and the substation grounding. (6RT2734.) They de-energized and inspected each circuit to Topaz one at a time to see if any particular circuit had issues. (6RT2735.) They found no problems, although they replaced a few circuit connections that had normal corrosion. (6RT2735-2736.) They also conducted a ground analysis to determine how well the substation grounding was connected to the earth. (6RT2736.)

The team "concluded that the system was fully intact and operating as required by [PUC] General Order 95," but that grounding could be improved. (6RT2736-2737.)

4. 2005: Edison installs a common neutral. The next six years pass without problems.

Edison's team decided that the best solution was to install a common neutral. (6RT2736-2738; see §B.2., *ante*.) Edison did so in February 2005. (6RT2739.) Voltage measurements taken at 904 Knob Hill afterwards showed that voltage had dropped to approximately 3.5 volts (again without a resistor). (6RT2740.) Edison concluded that this level was safe for the residents, because, when one accounted for the resistance of a human body, "3.5 volts would not produce any harmful level of current." (6RT2740-2741.) In addition, the team considered the Underwriter's Laboratory standard for ground fault circuit interruption for residential bathrooms and other wet areas, which sets the much higher level of 6.0 milliamps for triggering circuit breakers at outlets (6RT2741)—the level Bennett posited for possible harm (5RT2428-2429).

Edison received no further complaints from the tenants. Norwalk testified that they told him they were very grateful for Edison's work. (6RT2741.)

Bennett acknowledged that Edison's implementation of the common neutral solution seemed to have lowered the voltage in 2005. (5RT2420.) Indeed, he "d[id]n't have any criticisms of things that [Edison] did": "All the things they did over the decades that they have owned this house have all been—appear to be appropriate measures to take to address this voltage issue." (4RT2168; see 5RT2419-2420.) But he thought Edison should have taken more steps earlier. (4RT2168; 5RT2419.)

In July 2005, Dr. Ozeran told Edison that he was planning to sell the property and wanted a letter to give to the buyer confirming that the voltage levels were safe. (4AA1006; 6RT2741-2742.) Edison's response referred to "your concerns regarding electrical sensations and shocks you reported at your home"; described the work Edison had done and its results; advised that voltage measurements were less than 3.5 volts, which "equates to a value of electrical current of 3.5 milli-amperes (mA)"; and concluded that "it appears that the voltage between grounded and ungrounded conductive objects in your home does not pose a safety hazard at this time." (4AA1147; 6RT2762-2764.)

The Ozerans sold the home to the Boekers, who never complained of any shocks. (6RT2741-2742 [misspelled "Bouker"].) In fact, there was no evidence that anyone ever felt any current on the property at any time from February 2005 until 2011. (See *ibid.*; 4RT1844.)

C. Wilson's Experiences With Electrical Current At The Property.

In March 2007, Wilson and her then-husband Ryan Fisher bought 904 Knob Hill and moved in with their son. (2RT623; 4RT1810.)

Fisher and Wilson were concerned about the substation next door. (5RT2515-2516.) They asked the sellers' realtor about it and had a certified home inspector inspect the house, and no one reported any concerns or history of electrical issues at the property. (5RT2516.) Wilson asked the seller whether there had ever been any safety hazards in the home related to the substation, and he told her no, describing Topaz as "the quietest neighbor." (4RT1808-1809.) When Wilson called Edison to have the electricity turned on in March 2007, Edison did not mention any prior history of stray voltage. (4RT1810-1811.)

1. Edison and Southern California Gas Company investigate and address voltage on gas lines in the neighborhood.

In August 2008, Southern California Gas Company placed tags on Wilson's gas line and meter stating that it had found electricity on the meter and "electricity of 7 volts" on the pipes and that it had shut off the gas. (4AA1098-1100; 4RT1813; see 4RT1911, 1917-1918 [Gas Company

employees are supposed to shut off the gas and notify a supervisor if they find any alternating current at a meter].)

According to Norwalk, two to three times a year Edison responds to reports of stray voltage on gas meters across its service territory, and if the utilities believe it is neutral-to-earth voltage, the Gas Company generally accepts some level of voltage on a meter. (6RT2745-2746; see 4AA1157-1158 [another utility, Southwest Gas, only requires action "[i]f the AC voltage is 12 volts or more"].) After Norwalk learned that Fisher had reported the matter, Edison representatives went out to 904 Knob Hill and measured 1.8 volts on the gas pipe without a resistor. (6RT2743.) Edison told the Gas Company that the voltage appeared to be neutral-to-earth but that Edison would investigate its source to see if it could reduce the voltage further. (6RT2744.) Disconnecting the common neutral decreased the voltage on the gas meter but increased it on a hose bib, so Edison restored the common neutral. (6RT2744.)

The Gas Company turned the gas back on a few days later, after Edison agreed to install a voltage monitor on the gas line. (4RT1814-1815, 1879; 5RT2512; 6RT2744-2745.) The monitoring confirmed that the voltage at Wilson's gas line was indeed neutral-to-earth voltage, because voltage levels varied in direct relationship to the substation's output. (6RT2744-2745, 2758, 2830; 4RT2165.) Wilson testified, without further explanation, that the monitoring concerned her. (4RT1815.)

In April 2010, the Gas Company again notified Wilson that it had detected electricity on the gas meter. (4AA1101; 4RT1817.) It did not turn off the gas, and it never again did so while Wilson lived at the house. (4RT1879-1880.)

In 2011-2012, Gas Company and Edison representatives began meeting to figure out a response to voltage on gas lines in the neighborhood. (4RT1912-1913, 1918, 1922, 1941.) Stray voltage had appeared on gas lines at multiple homes in the neighborhood; the Gas Company measured a high of 30-90 volts at 920 Knob Hill after several days of rain in March 2011. (4RT1912-1913, 1946-1948.) Norwalk and Gas Company representatives took measurements at six homes where the Gas Company had recorded voltages. (6RT2766-2768.) The highest voltage they measured at a gas meter was 7 volts (using a resistor), at the same location where the Gas Company had previously found 30-90 volts. (6RT2768.) Edison's later measurements at four nearby homes showed voltage levels near zero except for the gas meters, with no reports of feeling electricity. (6RT2765-2767.)

Edison explained to Gas Company representatives why neutral-to-earth voltage was appearing on the gas lines and why Edison could not remove the common neutral. (6RT2769.) Edison believed that the best way to mitigate voltage on gas lines and meters was to install plastic insulators on gas facilities, and over the next several months Edison negotiated the scope and cost of this work with the Gas Company. (6RT2769-2773.)

Edison ultimately agreed to pay several hundred thousand dollars for the installation of plastic insulators and anodes, completing the work in early 2012. (4RT1922-1923, 1928-1929, 1938-1939, 1944-1945; 6RT2772.) Most follow-up measurements were under 1 volt. (6RT2773-2774; see 4AA1163 [Gas Company advises customers that "average voltage had declined to 0.94 volts (AC)"].) Shortly after that, the Gas Company replaced the gas main line with nonconductive plastic pipe, notifying customers in October 2012 that it was doing so to address stray voltage. (4RT1939-1940, 1944; 4AA1102.) (Gas Company documents indicated that pipe age and condition, not caused by electricity, were also factors (4AA1163-1164), and Norwalk testified that he had observed corrosion and was told that this was the reason for the main line replacement (6RT2772, 2774-2775).)

2. After remodeling her bathroom in March 2011, Wilson begins to feel current.

In March 2011, Wilson completed a full remodel of her master bathroom. (4RT1817-1818, 1884-1885.) Her father, a contractor, did the remodel to code, but without a permit. (5RT2532-2533, 2541-2544.) Wilson soon began to feel a tingling sensation in her arms when she touched the new showerhead, which she initially thought was a pinched nerve. (4RT1818, 1884-1885; 5RT2431-2432.) Wilson showered a couple of times a day, and touched the showerhead for a few seconds each time. (4RT1884.) She told her then-boyfriend, Jason Stelle, about the tingling;

he touched the shower head numerous times and confirmed the sensation. (4RT1818; 5RT2481-2482.)[5]

Stelle realized the sensation was coming from the fixture and told Wilson it was probably electrical current. (5RT2481-2482.) He discovered that if he cupped a showerhead with his hand while he was wet and touching the shower drain, he could feel a tingle beginning at his fingers and going up his arm. (5RT2482-2483; see 5RT2546-2547 [Wilson's father felt nothing at the showerhead, even while standing in water].)

When she realized that the tingling sensation was electrical current, Wilson was upset and angry, and she and Stelle decided to call an electrician. (4RT1821-1822; 5RT2482.) On April 20, Wilson's father and his electrician came to the house and took a number of voltage readings (without a resistor). (5RT2484, 2504, 2533.) The electrician confirmed voltage on the master showerheads, even when they turned down the power to the house; Wilson's father told Wilson that it was probably coming from outside the house and that they should call Edison. (4RT1823; 5RT2533-2534.) Wilson stopped using the master shower. (4RT1836.)

Loud and Norwalk testified that because the shower remodel replaced an elevated tub that had nonconductive piping with a shower that had a metal drain embedded in concrete in the ground, it created a previously nonexistent contact point with the earth that allowed current to

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[5] Fisher lived with Wilson until early 2009; they divorced in April 2010. Stelle lived with Wilson from September 2009 to September 2011. (4RT1867; 5RT2480-2481, 2509.)

flow if someone contacted the shower head and drain at the same time. (ART34-37, 96, 101; 6RT2798; 4AA1011.) Wilson and Stelle confirmed that they never felt current before the remodel and that they never felt it anywhere but at the new shower fixtures. (4RT1884-1885; 5RT2503.) Loud's inspection revealed plastic drain pipes on all water fixtures in the house except for the remodeled ones. (ART37-38, 101; AA1106-1114.)

3. Wilson's interactions with Edison.

Edison's initial response. Wilson and Stelle contacted Edison on Tuesday, April 20. (4RT1823.) Two technicians came out that Friday. (5RT2486, 2488.) One took measurements in various parts of the house and found voltage on the master showerhead. (5RT2487.) He gave no explanation for the voltage, but told Stelle that "there had been a history of problems with this particular property" and that they would take readings and test the house to see if anything could be immediately fixed. (5RT2487-2488.) The other technician came later and took readings on the back showers and gas pipe header in front of the property. (5RT2488.)

The next week Norwalk and another Edison representative took voltage readings, measuring 2.2 volts on the master shower with a resistor and 2.4 volts without, and 0.5 volts on the gas meter with a resistor and 1.7 volts without. (6RT2750-2751.)

Norwalk discussed the situation with Stelle. (5RT2489.) As Stelle understood the explanation, the Topaz substation was creating a voltage

potential across the property, but it was within Edison's standards and they didn't have plans to do anything about it. (5RT2489-2490.)

Wilson's understanding (from Stelle, who handled most of the communications with Edison) was that there was a long-standing problem of stray electricity on the property that Edison had never been able to resolve and that Norwalk had a long-standing history with the problem. (4RT1824.) Wilson also testified that Edison representative Araya Gebeyehu told her that Edison had studied and tested the property but had been unable to fix it. (4RT1825-1826.)

Stelle asked Norwalk to come back to explain things to Wilson in person, and they set up a meeting for May 6, 2011, when Wilson could attend. (5RT2490; 6RT2752.)

The May 6, 2011 meeting. Wilson and Stelle met with Norwalk, Gebeyehu, and Edison claims representative Bill Stone at the property on May 6, 2011, joined by Wilson's father and his electrician. (4RT1824, 1826; 5RT2490; 6RT2752-2753.) The Edison representatives did a walkthrough to try to explain the voltage and how it was affecting the house; Norwalk showed Wilson the monitoring data and explained that load levels varied consistently throughout the day, trending higher in the evening. (6RT2758-2759; 5RT2490-2491; 3RT1576-1577; 4RT1826.) He explained that the monitor had not recorded anything from December 2010 to April 2011 because the battery ran out or the memory card was full. (3RT1577; 6RT2758-2759.) However, the voltage values recorded before and after the stoppage were almost exactly the same. (6RT2759.)

Norwalk brought his voltmeter and took measurements around the house with a resistor, explaining to Wilson that using a resistor tested the actual amount of current that would be experienced by a body. (4RT1828; 6RT2753-2756.) They performed the same measurements as before, and again measured approximately 2.2 volts on the master shower with a resistor and 2.4 volts without the resistor. (6RT2753.) Wilson's father and his electrician verified Edison's measurements with their own voltmeter. (5RT2534-2535.)

The meeting ended without resolution. Wilson told the Edison representatives that she wanted the stray voltage completely eliminated. (4RT1829.) She also testified that when she described symptoms in her hands (see § E, *post*), Stone "yelled at me and said, 'It's just your nerves.'" (4RT1827.) Edison asked her to put her requests for more documentation in writing, which she did on May 8, 2011. (4RT1831-1835; 4AA1009-1010.) Norwalk testified that the meeting ended when Wilson became upset that Edison could not do things within the substation to eliminate the voltage. (6RT2760.)

Wilson feels current on her new outdoor shower. At the same time as the bathroom remodel, Wilson also installed an outdoor shower. (ART35.) Around June 2011, Wilson felt electricity on the outdoor shower fixture. (4RT1847.) In early July 2011, Stelle took measurements on the outdoor shower with a voltmeter and also felt a tingling sensation or charge. (5RT2485.)

Edison explains to Wilson how to mitigate the touch potential. It is undisputed that at some point Edison offered to mitigate the touch potential on Wilson's fixtures by installing plastic insulators on her pipes (4RT1830-1831; 6RT3050), but the parties dispute the circumstances and timing.

Wilson testified that Norwalk initially advised her to "modify [her] home to make it less conductive" but did not offer to do any work. (3RT1576-1577; 4RT1826; see 5RT2493 [Stelle testifies that Edison recommended bonding the shower to the drain].) She said that Edison did not make any offer to install plastic insulators until October 2011, a month after she moved out of the house, and that she refused because she believed plastic piping was "substandard" and would just be a "bandaid." (4RT1893-1894; see §D.2., *ante* [there was already plastic piping throughout the house].) She testified that she never would have accepted the offer, because "[t]he only thing that would be acceptable to me is to completely eliminate the stray voltage on my property." (4RT1903.)

Norwalk testified that Edison representatives explained the options of bonding and insulators at the May 6 meeting and told Wilson that Edison would reimburse the cost if she preferred to have her contractor do the work. (6RT2759.) Norwalk testified that Wilson refused the May 6 offer because she didn't want to subject her family to more construction dust after their recent remodel. (6RT2759-2760.) Edison claims investigations manager Frederick McCollum testified that he spoke with Wilson by phone on May 12, 2011 and again explained Edison's offer to pay for plastic

inserts on the pipes, but that Wilson found the offer unacceptable and said that she wanted Edison to buy the house. (6RT3050-3051.)

Wilson moves out. Wilson testified that at some point she hired a building biologist who told her she needed to get out of the house. (3RT1580; 4RT1898, 1901-1902.) She moved out in September 2011 (3RT1580), although she owned the property until January 2013 (2RT623).

D. Wilson's Symptoms.

Wilson testified that after she felt current she "was throwing up all the time" and felt extremely weak, with shaky hands and numbness, tingling, and pains in her hands and feet. (3RT1581-1582.) Her father observed that her hands flushed red and felt warm to the touch, and her coworker John Stasinos observed episodes of redness and temperature changes in her hands and feet. (5RT2523, 2539-2940.) Stelle noted that Wilson "was also starting to get abdominal issues" and that "her health started to just kind [of] go haywire." (5RT2495.) Wilson described the whole experience as "devastating"; she developed social anxieties and embarrassment about her hands and feet; she felt "tremendous guilt" about having her children in the house, worrying about their safety and her own every day they remained there. (3RT1581; 4RT1836, 1849.) Stelle, Fisher, Stasinos, and Wilson's father all observed her distress and concern. (5RT2497-2498, 2510-2511, 2524-2525, 2540.)

Wilson admitted that many of the symptoms that she said appeared only after she felt current—nausea, vomiting, uterine pain, and

headaches—went away after she had a hysterectomy in January 2012. (4RT1885.) She gave conflicting testimony about whether her fatigue also cleared up at that time. (4RT1886.)

Wilson visited Dr. George Rederich about her hands and feet in May 2011. (4RT1838.) He did not testify, but Wilson testified that he could not definitely say what was causing her symptoms. (4RT1839.) She testified that "he did very simple tests on just touch where they prick you with a needle, or touch you with a soft feather" and that he told her that she had severed her nerve endings but that they would regenerate over time. (3RT1581-1582; 4RT1837-1838.) When her symptoms worsened, he prescribed pain medication, and she testified that he told her she "might be developing" "secondary erythromelalgia," which he described as a rare disease with "no cure" and with which he had limited experience.[6] (4RT1838-1839, 1887-1888.)

Dr. Rederich referred Wilson to Dr. Said Beydoun, a specialist neurologist at USC, whom she saw three times. (4RT1839, 1889; 6RT3005-3006.) He concluded that Wilson did *not* have secondary erythromelalgia or any severed or damaged nerves. (6RT3014-3016.)

Dr. Beydoun's testing included nerve conduction studies, which involved stimulating Wilson's nerves with 20 to 40 or 50 milliamps of

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[6] Edison's erythromelalgia expert, Dr. Stephen Waxman, described erythromelalgia as "a very rare disorder characterized by burning pain in the distal extremities, the distal arms and legs. It's triggered by warmth. It's relieved by cooling. It's accompanied by profound reddening of the limbs and that's a general outline." (6RT3032-3033.) "Secondary" erythromelalgia is triggered by another disease or condition. (6RT3033.)

current for about two minutes. (6RT3008-3010; 4AA1094-1095.) This was many times greater than Wilson experienced at her house, but Dr. Beydoun testified that he had never seen any patient injured by testing with amperage at those levels (6RT3017), and Wilson did not testify that she found the experience harmful or even unpleasant. The results were normal—Wilson had no large or medium-fiber nerve damage. (6RT3008-3010; 4AA1094-1095.) He also performed a skin biopsy that showed no evidence of any small fiber nerve damage. (4RT1889-1891; 6RT3010-3012; 4AA1092-1093.) Every other test Dr. Beydoun performed was also normal. (6RT3012-3016.)

Dr. Beydoun did not know the reason for the redness and pain Wilson was experiencing. (6RT3016.) He agreed that Wilson's symptoms were valid, that they might have a psychological basis (6RT3020-3021), and that it was possible, although not probable, that she could have primary erythromelalgia, which he described as an inherited condition (6RT3016, 3022-3023).

Edison's expert, Dr. Stephen Waxman, a leading erythromelalgia specialist, testified that Wilson's test results were "absolutely normal" and that they did not indicate any neurological disorder or any recognized disorder associated with secondary erythromelalgia. (6RT3031-3032, 3036.) Dr. Waxman was aware of no evidence that intermittent exposure to low-voltage electricity, or anxiety or emotional distress, could trigger primary or secondary erythromelalgia or cause nerve damage. (6RT3033-3035.) He explained that tens of milliamps of electrical current, up to

100 and 120 milliamps, are regularly used in medical testing and physical therapy (6RT3036), and he cautioned that the temporal relationship between Wilson's symptoms and her contact with low-voltage electricity did not necessarily imply a causal relationship (6RT3033-3035).
Dr. Waxman believed that Wilson had no reasonable basis to be concerned about developing any condition from her contact with low-voltage current. (6RT3036-3037.)

E. Trial Court Proceedings.

Wilson's operative First Amended Complaint (1AA19-44) went to trial on IIED, negligence, and nuisance.

Edison moved in limine to exclude Bennett's opinion as to whether Edison was in violation of industry standards; whether 0.5 milliamps is the maximum allowable level of stray voltage under applicable industry standards; and whether stray voltage could cause ignition risk on gas lines. (1AA53-92; 2RT603-605, 906-913.) The trial court denied the motion on all three issues. (2RT913.)

The trial court denied Edison's request for this jury instruction on the reasonable medical probability standard: "In a personal injury action, causation must be proven within a reasonable medical probability based upon competent expert testimony. A possible cause only becomes probable when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of the defendant's action." (3AA885; ART55-57.)

After an eight-day trial, the jury deliberated for three days. (1AA107-108, 117-126.) It sent back one question on the second day of deliberations, requesting "witness testimony from Ms. Wilson being questioned by Mr. Johnson regarding her symptoms and dates of symptoms, Dr.'s visits, etc." (1AA117; 7RT3601.)

The jury found Edison liable on all three claims. For IIED and negligence, it awarded $375,000 for past noneconomic damages and $175,000 for future noneconomic damages. (7RT3901-3904; 1AA121.) For nuisance, it awarded $500,000 for past noneconomic damages. (7RT3904-3905, 3914-3922; 1AA123.)

The jury also found Edison liable for punitive damages, and in a separate punitive damages phase awarded $3 million. (7RT3905-3906, 3952; 1AA125.)

The jury poll revealed divisions on almost every issue, including 9-3 splits on whether Edison committed outrageous conduct, on whether its conduct was a substantial factor in causing severe emotional distress, and on both liability for and the amount of punitive damages. (7RT3906-3914, 3922-3926, 3953-3954.)

F. Judgment And Appeal; Statement of Appealability.

The court entered judgment on April 10, 2013 (1AA127-138) and Wilson served notice of entry on April 18 (1AA139). Edison timely filed motions for judgment notwithstanding the verdict and new trial on May 3 and May 13 (1AA155-177; 4AA888-909); the trial court denied both by minute order on June 10 (4AA976).

Edison filed a timely notice of appeal on June 14, 2013. (4AA977-980; Cal. Rules of Court, rules 8.104(a)(1)(B), 8.108(b)(1), 8.108(d)(1).) Edison filed a precautionary second notice of appeal on July 15, 2013 because of the trial court's second denial of Edison's post-trial motions on June 21, 2013. (4AA981-982, 995-1001.)

The judgment is appealable under Code of Civil Procedure section 904.1, subdivision (a).

ARGUMENT

I. WILSON'S CLAIMS ARE BARRED BY THE PUC'S EXCLUSIVE JURISDICTION OVER THE DESIGN, SITING, OPERATION, AND SAFETY OF EDISON'S ELECTRICAL DISTRIBUTION SYSTEM.

A. *Covalt*'s Three-Prong Test For Determining When The PUC Has Exclusive Jurisdiction That Precludes A Superior Court Action.

The PUC regulates all public utilities, including electric power companies. (Cal. Const., art. XII; Pub. Util. Code, §§ 216, subd. (a), 701.) Public Utility Code section 1759, subdivision (a) excludes courts from regulating utilities:

> No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.[7]

Although the Public Utilities Code creates an exception to the PUC's exclusive jurisdiction by authorizing superior court actions for damages caused by a public utility's "unlawful" act (§ 2106), our Supreme Court has held that this "sole private remedy" is available only in "'those situations in

[7] Further undesignated statutory citations are to the Public Utilities Code.

which an award of damages would not hinder or frustrate the commission's declared supervisory and regulatory policies.'" (*Covalt, supra*, 13 Cal.4th at pp. 916, 918 & fn. 20, quoting *Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1, 4.)

Covalt explains how to determine whether a case falls within this limited exception. The *Covalt* plaintiffs sought damages based on alleged "high and unreasonably dangerous levels" of electric and magnetic fields (EMF) around power lines adjacent to their homes. (*Covalt, supra*, 13 Cal.4th at p. 911.) The Court articulated a three-prong test to determine whether this claim fell within the PUC's exclusive jurisdiction: (1) whether the PUC had the authority to adopt a regulatory policy on the subject matter of the litigation and on what steps, if any, the utilities should take to minimize the claimed risks; (2) whether the PUC had actually exercised that authority; and (3) whether a superior court action would hinder or interfere with the PUC's exercise of that authority. (*Id.* at pp. 923, 926, 935.)

The Court further explicated *Covalt*'s three-prong test in *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256 (*Hartwell*). The decision barred lawsuits claiming that public utility water companies had provided unsafe drinking water, where the PUC had "established uniform standards of water quality service for regulated utilities, including specific requirements for the source of water, operation of the water supply system, and water testing requirements." (*Id.* at pp. 267-268, 272, 274.) Applying *Covalt*, the Court held that (1) the PUC had the clear authority to establish

water quality rules for regulated water utilities "that protect[] the public health and safety," to investigate safety complaints, "and to take the appropriate actions, if any, to ensure water safety"; (2) the PUC had exercised its authority, adopting the federal Department of Health Services (DHS) regulations and standards as the minimum requirements; and (3) a superior court award of damages "on the theory that the public utilities provided unhealthy water, even if the water met DHS and PUC standards," would undermine the PUC's jurisdiction. (*Id.* pp. 271-276.)

The Court explained that while section 2106 may, in some cases, allow a superior court to hear a claim that a public utility has violated PUC regulations, the court does not otherwise have jurisdiction to consider the design or construction of a utility's system or the safety of its operations; only the PUC does. (*Id.* at p. 275.) It was for the PUC to determine, and it had determined, "what constitutes adequate compliance with applicable water quality standards, whether any increased water treatment is justified in light of its impact on ratepayers, and what marginal increases in safety may be gained" by amending its regulations. (*Id.* at p. 272.) The PUC's adoption of the DHS standards hence provided a "safe harbor for public utilities if they comply with [those] standards." (*Id.* at p. 276.) Accordingly, the Court held that without an allegation that the public utilities had violated PUC regulations, the plaintiffs' water-quality claims would interfere with "a 'broad and continuing supervisory or regulatory program' of the PUC." (*Id.* at pp. 272, 276.)

Application of these principles here is reviewed de novo. (*Tearlach Resources Limited v. Western States International, Inc.* (2013) 219 Cal.App.4th 773, 780 ["Questions of subject matter jurisdiction are questions of law, which are reviewed de novo"].)

B. Wilson's Claim Satisfies All Three *Covalt* Prongs For Exclusive PUC Jurisdiction.

1. The first prong: The PUC has broad and comprehensive jurisdiction to regulate the design, siting, operation, and safety of electrical distribution systems.

Statutory and case law. The California Constitution empowers the PUC to regulate all public utilities, including power companies, and gives the state Legislature plenary power "to confer additional authority and jurisdiction upon the commission." (Cal. Const., art. XII, § 5.) The Legislature has exercised that power through statutes that give the PUC "comprehensive jurisdiction over questions of public health and safety arising from utility operations." (*Covalt, supra*, 13 Cal.4th at p. 924.) "The commission's authority has been liberally construed, and includes not only administrative but also legislative and judicial powers." (*Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal.App.4th 225, 235 (*Sarale*), citation and internal quotation marks omitted, quoting *Covalt, supra*, 13 Cal.4th at p. 915.)

In overseeing public utilities, the PUC is responsible for ensuring enforcement of the Constitution and statutes affecting public utilities (§ 2101), including the requirement that utilities furnish such service and facilities "as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public" (§ 451). Public utilities are required to "obey and comply with every order, decision, direction, or rule made or prescribed by the commission." (§ 702.) The PUC "may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (§ 701.) Its responsibilities include promulgating "rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility" (§ 761), and it has the power to "[a]scertain and fix just and reasonable standards, classifications, regulations, practices, measurements, or service to be furnished, imposed, observed, and followed by all electrical, gas, water, and heat corporations" (§ 770, subd. (a)).

In addition, the PUC has "broad authority to determine whether the service or equipment of any public utility poses any danger to the health or safety of the public, and if so, to prescribe corrective measures and order them into effect." (*Covalt, supra*, 13 Cal.4th at pp. 923-924.) It is charged with investigating all incidents of injury or property damage connected with a public utility's maintenance or operations. (§ 315.) It must certify the "public convenience and necessity" of any utility line or facility before

construction (§ 1001), and it "exercises jurisdiction over the safety and adequacy of electric powerlines" (*P.U.C. v. Energy Resources Conservation & Development Com.* (1984) 150 Cal.App.3d 437, 452, citing § 8001 et seq.). The PUC's oversight thus covers virtually any complaint of inadequacy in a utility's design, siting, operation, or safety.

If the PUC "finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient," it must "determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed." (§ 761; see also § 762 [PUC is responsible for determining whether "additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities," and issuing orders directing any appropriate response].) The PUC "may prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances" and "may establish uniform or other standards of construction and equipment." (§ 768.)

The Legislature has also established the PUC as the forum for determining whether a utility's activities violate any PUC regulations or are otherwise unlawful. Section 1702 authorizes any person to file a complaint with the PUC "setting forth any act or thing done or omitted to be done by any public utility . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission." (See *Sarale, supra*, 189 Cal.App.4th at p. 247 (conc. opn. of Scotland, P.J.) [while the PUC does not have authority to award damages, if the PUC finds its regulation has been violated, "the aggrieved (party) could file an action in the superior court to obtain damages"]; *Ford v. Pacific Gas and Elec. Co.* (1997) 60 Cal.App.4th 696, 707 [no superior court jurisdiction to determine tort claim for cancer caused by exposure to EMF; court notes that in section 1702, "(t)he Legislature has also provided a statutory scheme to resolve disputes before the PUC, including a formal complaint procedure"]; *Schell v. Southern California Edison Co.* (1988) 204 Cal.App.3d 1039, 1047 [plaintiff mobilehome park owner claimed he was entitled to a different rate schedule than Edison was providing him; court held that his superior court claims for damages, injunctive and other relief would "not be ripe" until the PUC "made a final determination" whether the regulation at issue applied to him].) Further, if a person believes that a PUC regulation is inadequate, section 1708.5 allows the person to petition the PUC "to adopt, amend or repeal" it.

The PUC's view. "Although the scope of the PUC's jurisdiction is ultimately a legal question subject to independent review, in deciding this

issue we necessarily take into account the PUC's interpretation," which though not controlling "is one of 'among several tools available to the court' in determining the meaning and legal effect of a statute." (*PG & E Corp. v. P.U.C.* (2004) 118 Cal.App.4th 1174, 1195.)

The PUC's descriptions of the scope of its authority over electric utilities are broad and unambiguous: "This Commission has comprehensive jurisdiction over questions of public health and safety arising from utility operations." (*Order Instituting Rulemaking To Revise Com. Gen. Order Nos. 95 & 128* (Oct. 2, 2001) Ruling No.01-10-001 [2001 Cal.P.U.C. LEXIS 941,*4]; see *Order Instituting Rulemaking to Implement Com. Regs. Re Safety of Electric Utility Substations* (Oct. 25, 2012) Dec. No. 12-10-029 [2012 Cal.P.U.C. LEXIS 470, *1, *15] (*Electric Utility Substations*) ["The publicly owned electric utilities in California are subject to the Commission's jurisdiction for safety matters"]; *Safety and Enforcement* <http://www.cpuc.ca.gov/PUC/safety/> [PUC official website, stating that the PUC Safety and Enforcement Division works to "ensure that regulated services are delivered in a safe, reliable manner" and has safety oversight in a number of industries, including electric infrastructure].)

Because "construction, design, and operation of public utility facilities are of statewide concern," the PUC has emphasized its jurisdiction over the location and construction of electric distribution facilities, under which "'[s]uch matters as the location of lines, their electrical and structural adequacy, their safety, and their meeting of the needs of the public within

this state are clearly, by law, subject to the jurisdiction of this Commission.'" (*Re Rules, Procs. & Pracs. Applicable to Transmission Lines Not Exceeding 200 Kilovolts* (1994) 55 Cal.P.U.C.2d 87 [1994 Cal.P.U.C. LEXIS 453, *12-15], quoting *Duncan v. PG&E* (1965) 61 P.U.R. 3d 388, 394.)

The PUC has further stated that "[e]lectric substations and all their connected component parts fall within the Commission jurisdiction"; that the PUC has the authority to regulate "safety rules and inspection practices for electric substations"; and that the Public Utilities Code "empower[s] the Commission to review the reasonableness of existing or proposed facility sitings and to make orders consistent with its determinations." (*Electric Utility Substations, supra*, 2012 Cal.P.U.C. LEXIS 470 at p. *15; *Southern California Edison Co.* (1972) 74 Cal.P.U.C. 265 [1972 Cal.P.U.C. LEXIS 170, *4].) With regard to substation design and construction, the PUC has explained that it "retains jurisdiction to respond to complaints from local agencies *or others* for ultimate resolution of any conflicts regarding substation siting, design, or other potential project impacts. Such overriding jurisdiction is necessary *to ensure that decisions made on the basis of strictly local concerns do not impede or impair* the placement of facilities necessary for the rational development of a statewide public utility system." (*Re Rules, Procs. & Pracs. Applicable to Transmission Lines Not Exceeding 200 Kilovolts, supra*, 1994 Cal.P.U.C. LEXIS 453 at p. *28, emphasis added.)

2. The second prong: The PUC has exercised its authority to regulate the design, siting, operation, and safety of electrical distribution systems.

Regulation in general. Pursuant to the "extensive jurisdiction of the CPUC over transmission systems" (*P.U.C. v. Energy Resources Conservation & Development Com., supra*, 150 Cal.App.3d at p. 452), the PUC's regulations include detailed design, construction, operating, and safety specifications for every possible aspect of electric distribution systems (e.g., G.O. 95 [construction of overhead systems]; G.O. 128 [construction of underground systems]; G.O. 165 [inspection requirements]; G.O. 131-D [planning and construction of electric generation, transmission and distribution facilities]; G.O.174 [substations]; 6RT3066). The PUC has explained that its "general orders promote safety, not only to the public utility involved and its employees, but also to the public in general. There can be little doubt that a uniform statewide policy of safety regulation is in the general public interest. Such matters are not solely matters of local interest and concern. The Commission, being a constitutional body exercising statewide jurisdiction, is the logical agency of the State to exercise authority of this nature." (G.O. 128, at p. vi.)

Accordingly, in G.O. 95 the PUC has exercised its "broad authority over the design and siting of electric powerlines" by setting forth "over 440 pages [now nearly 600 pages] of highly detailed specifications for the design, construction, operation, and maintenance of overhead electric lines." (*Covalt, supra*, 13 Cal.4th at pp. 924-925.) The "stated purpose" of

G.O. 95 "is to prescribe uniform requirements for overhead electric line construction in order to 'insure adequate service and secure safety' to those who work on such lines and to 'the public in general.'" (*Id.* at p. 925, quoting G.O. 95, Rule 11; see also *Order Instituting Rulemaking To Revise Com. Gen. Order Nos. 95 & 128, supra*, 2001 Cal. PUC LEXIS 941 at p. *4 [G.O. 95's rules "concern the safety of the general public, electric utilities' customers and their employees"].)

G.O. 95's rules are designed to embody "the requirements which are most important from the standpoint of safety and service." (G.O. 95, Rule 13.) Accordingly, G.O. 95 not only prescribes grounding requirements, as discussed below, but also provides specifications for "such matters as the number, spacing, material, strength, and shielding of conductor wires, and their minimum clearances from buildings, streets, and railroads" and "regulates poles and towers, guy wires, insulators, transformers, voltage regulators, warning signs, and numerous other components of powerline design and construction," all in exhaustive detail. (*Covalt, supra*, 13 Cal.4th at p. 925; see, e.g., G.O. 95, Rule 35 [vegetation management around electric wires], Rules 37-39 [minimum clearances]; Rules 40-49 [strength and materials of electric supply equipment]; Rule 22.8 [details of protective coating for wires]).

And G.O. 174 imposes regulations governing substations like Topaz, which "shall be designed, constructed and maintained for their intended use, regard being given to the conditions under which they are to be

operated, to promote the safety of workers and the public and enable adequacy of service." (G.O. 174, Rule 12.)

Regulation of grounding. The regulations explicitly address grounding. (See G.O. 95, Rules 21.4, 33.3, 58.2.) They mandate that grounding be "effective[]" (6RT2726; G.O. 95, Rule 33.3(A)), meaning that ground connections must be "of sufficiently low impedance" that dangerous voltages cannot build up (G.O. 95, Rule 21.4). They include detailed minimum requirements for ground conductors, down to their material, diameter, and length and the depth they must be driven into the earth. (*Ibid.*)

For common neutral systems like the one at Topaz, G.O. 95, Rule 21.4(B) provides that Rule 59.4's grounding provisions apply. Among other things, these specify the maximum resistance of the common neutral grid and specify the material and size of conductors and grounding rods. (G.O. 95, Rule 59.4(A), (B)(1).)

The breadth and extreme detail of the PUC's rules make clear that the PUC has exercised its jurisdiction to regulate all aspects of the design, construction, operation, and safety of Edison's system, specifically including grounding.

3. The third prong: The jury award obstructs, interferes with, and displaces the PUC's regulatory scheme.

These facts are undisputed:

- As Wilson's expert Bennett testified, Wilson's perception of electricity on fixtures in the home was "due to a phenomenon that we call stray voltage, in that, because the way the system exists, electrical current from the distribution system returns not only through the wires but through ground, and it will always do that." (4RT2170.)
- "It will always do that" because the system is grounded. (*Ibid.*)
- The system is grounded because that is what the PUC requires. (G.O. 95, Rules 21.4(A)(2), 58.2(A), 59.4; 6RT2726 [Norwalk]; ART24 [Loud]; see 4RT2154 [Bennett: grounding is for "lighting [*sic*; lightning] protection and other reasons for safety consideration"]; 4AA916 [Wilson JNOV opposition: "It is true that '(g)rounding is required by the PUC . . . '"].)
- One therefore cannot both comply with PUC grounding regulations and completely eliminate stray voltage.

But according to Wilson, the existence of *any* stray voltage at 904 Knob Hill is unacceptable, even in the absence of any defect with Edison's system. (4RT2169 [Bennett: It's "not right" that stray voltage exists at the property]; 5RT2439-2442, 2473 [Bennett found no defect with

Edison's system or with Edison's efforts to mitigate stray voltage].) Wilson told the jury that the mitigation of touch potential by bonding or plastic insulators would just be a "bandaid," and that she would only be satisfied if Edison "completely eliminated" the stray voltage. (4RT1829, 1893, 1903.)

The tension between the undisputed facts and Wilson's claim dramatically shows why there is no jurisdiction here.

A court action against a public utility is barred "[a] not only when an award of damages would directly contravene a specific order or decision of the commission, i.e., when it would 'reverse, correct, or annul' that order or decision, but also [b] when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy." (*Covalt, supra*, 13 Cal.4th at p. 918.) Here, the jury award does both:

- It contravenes the PUC's grounding regulations by imposing liability on Edison for stray voltage that results from Edison's compliance with those regulations.
- It interferes with the broad and continuing regulatory policy of the PUC over electric utility safety, among other things by effectively finding that Edision was *required* to do something—"completely eliminate[]" stray voltage—that the PUC *does not* require.

The case is just like *Covalt*, where the evidence showed that "'[t]here are electric and magnetic fields wherever there is electric power'" and that "'[k]eeping fields out of the home would mean keeping *any* electricity from coming into or being used in the home.'" (*Covalt, supra*, 13 Cal.4th at p. 910, emphasis in original.) Because there is stray voltage wherever there is grounding, keeping stray voltage off customers' property "would mean keeping *any* electricity from coming into or being used in the home." (*Ibid.*; cf. 5RT2425 [Bennett testifies that stray voltage would be eliminated if Edison shut off the electrical distribution system].)

Compounding the conflict between the jury's verdict and the PUC's requirements is the absence of *any* evidence that *anything* about Topaz violates *any* PUC regulation governing grounding or any other design or construction requirement.[8] This runs directly afoul of *Hartwell, supra*, 27 Cal.4th 256. Like the *Hartwell* plaintiffs who complained of unsafe drinking water despite the fact that the water met PUC standards, Wilson claims that Edison's operations and service are unsafe, despite the fact that they meet PUC standards. As in *Hartwell*, this amounts to a claim that the PUC's standards are inadequate—which means that the claim falls squarely within the PUC's jurisdiction.

The court reached a similar result in *Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209. The City of Vernon blocked

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[8] The sole PUC regulation that Wilson contends Edison violated is G.O. 95, Rule 31.1. (5RT2473-2474.) But as we show below (§ I.C., *post*), this claim requires a rule interpretation that only the PUC has the power to make, and is also unsupportable on its merits.

construction of a proposed underground gas pipeline because of what it considered design "deficiencies," including the pipeline's depth and proximity to other underground lines. (*Id.* at p. 216.) The Court of Appeal held that regulation of pipeline safety was squarely within the PUC's exclusive jurisdiction, because "under the Constitution a city may not regulate matters over which the PUC has been granted regulatory power, the Legislature has granted regulatory power to the PUC over the safety of gas pipelines, and the PUC in fact has promulgated rules on this subject." (*Id.* at pp. 216-217.) Because the PUC had established minimum depths and distances from other underground equipment for gas pipelines, the City had no jurisdiction "to regulate the design or construction of the proposed pipeline under the guise of ensuring the pipeline's safety." (*Id.* at p. 217.) The Court explained that "[t]he goal of statewide uniformity in this area would be defeated if a municipality such as Vernon could enlarge upon the standards promulgated by the PUC in its General Order," and that "[i]f Vernon believes the PUC's standards are inadequate, it should direct its concerns to that entity." (*Ibid.*)

The judgment here presents the same threat to uniformity in electrical utility safety rules and regulations. It would mean that a jury could effectively set new safety standards in connection with the grounding or other operational aspects of a regulated utility's electrical distribution systems. As one court observed in a comparable situation, where the PUC regulated clearance around power lines and the plaintiffs claimed that an electric utility had trimmed too much from their trees, allowing plaintiffs to

seek "individualized judicial determinations of what might be 'necessary' or 'proper' vegetation would cause a regulatory nightmare for the commission." (*Sarale*, *supra*, 189 Cal.App.4th at p. 242.)

Covalt, *Hartwell*, *Vernon* and *Sarale* control this case. Under the rule these cases articulate—that courts and juries cannot substitute their own standards or judgment in areas that the PUC clearly occupies—there is no way a court or jury can properly decide Wilson's claim. The design, construction, operation, and safety of Edison's electrical distribution system—including what steps, if any, Edison was required to take to address stray voltage—are within the PUC's exclusive jurisdiction. The judgment must be reversed with directions to dismiss the action.

C. To The Extent Wilson Claims That Edison Violated G.O. 95, Rule 31.1 Because The Topaz Distribution System Was Not "Safe," Her Claim Falls Within The PUC's Exclusive Jurisdiction And In Any Case Is Unsupported.

As noted earlier (fn. 2, *ante*), Wilson's expert Bennett claimed that Edison violated G.O. 95, Rule 31.1 (Rule 31.1). The claim fails.

Rule 31.1 requires that for all overhead electrical lines, "[e]lectrical supply and communication systems shall be designed, constructed, and maintained for their intended use, regard being given to the conditions under which they are to be operated, to enable the furnishing of safe, proper, and adequate service." Although Wilson's expert Bennett could not

identify a single violation of any of the PUC's technical requirements, he nevertheless testified that Edison had violated Rule 31.1 because, he said, Edison did not "furnish[] safe and proper service." (5RT2473.)

Whether this is what Rule 31.1 means is itself an issue within the PUC's exclusive jurisdiction. But even if it were not, Bennett's opinion was unsupported by substantial evidence.

1. Whether Edison has violated Rule 31.1 is for the PUC to decide, because it has exclusive jurisdiction to interpret its own rules.

Although, as *Hartwell* states, superior courts can in some circumstances entertain suits that claim a violation of PUC regulations, this power is very limited: It extends at most only to claimed violations of *unambiguous* regulations. *Hartwell* gave the example of *Vila v. Tahoe Southside Water Utility* (1965) 233 Cal.App.2d 469 (*Vila*), in which the court allowed a claim for damages for a water utility's failure to provide service "as required by unambiguous tariff approved by the PUC." (*Hartwell, supra*, 27 Cal.4th at p. 275; see also *PG & E Corp. v. P.U.C., supra*, 118 Cal.App.4th at p. 1222 [in discussing situations in which a court may have jurisdiction to review a PUC regulation, rule or order, court states "(s)ignficantly, the court in *Vila* emphasized repeatedly that the PUC order at issue was 'unambiguous'"].) Wilson cannot meet this threshold requirement.

What is "safe" service" under Rule 31.1? Does "safe" mean "no risk of harm"—which, according to the undisputed evidence, was the situation here? Or, as Wilson and her expert Bennett claim, does it mean something beyond that—such as the complete elimination of all stray voltage, regardless of whether there is any risk of harm? Or does it mean something else entirely?

One thing is clear: No court can answer these questions. Only the PUC can. This is not like an exercise in statutory interpretation, where courts attempt to divine the Legislature's intent. Quite the opposite: Part of the PUC's exclusive jurisdiction is the exclusive power to interpret its own rules and to make case-specific decisions on particular issues.

The Court of Appeal applied this principle in *City of Anaheim v. Pacific Bell Telephone Co.* (2004) 119 Cal.App.4th 838 (*City of Anaheim*). The case involved the interpretation of Pacific Bell's Rule 32 tariff concerning responsibility for the cost of moving overhead telephone lines underground.[9] (*Id.* at p. 841.) Anaheim sued Pacific Bell to recover the cost under Rule 32; Pacific Bell successfully demurred on the ground that the dispute fell within the PUC's exclusive jurisdiction; the Court of Appeal affirmed. (*Id.* at p. 842.)

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[9] Tariffs are functionally equivalent to PUC rules, and that is how the courts treat them. (See *Dollar-A-Day Rent-A-Car Systems, Inc. v. Pacific Tel. & Tel. Co.* (1972) 26 Cal.App.3d 454, 457 ["A public utility's tariffs filed with the PUC have the force and effect of law"]; §§ 489-491.) The question under Rule 32 was if the "underground district" Anaheim had created qualified under the rule, which would require Pacific Bell to pay the cost of relocation. (*City of Anaheim, supra*, 119 Cal. App.4th at p. 845.)

Finding all three *Covalt* prongs satisfied, the court framed the third prong in terms of rule interpretation and application: "[W]hich body is authorized to decide whether plaintiff's district satisfies the rule 32 criteria?" (*Id.* at p. 845.) In concluding that "it is the PUC" (*ibid.*), the court focused on whether "'plaintiff's attempt to obtain relief under section 2106 may have the *effect* of interfering with the commission's regulation of utilities'" (*ibid.*, emphasis in original). Central to the court's holding that there would be interference was its view that the dispute had to do with *the interpretation and application* of Rule 32: The court distinguished the situation in which "there [was] no dispute that a utility was required to pay for relocation of overhead facilities and it failed to do so," so that "the superior court would have jurisdiction to rule on a complaint for payment." (*Id.* at p. 846, citing *Vila*, *supra*, 233 Cal.App.2d at p. 479 [utility's obligation to make water connection "was clear under an unambiguous provision in its own rules"].) In contrast, because Pacific Bell's obligation to pay for the underground lines was disputed under Rule 32, the PUC had exclusive jurisdiction to interpret the rule. (See also *Schell v. Southern California Edison Co.*, *supra*, 204 Cal.App.3d at p. 1046 [in dispute regarding whether rate schedule applied to the plaintiff, "for the superior court to undertake to determine this issue would be a usurpation of the PUC's authority"; distinguishing *Vila* because the utility's obligation there was unambiguous].)

Wilson cannot claim that Edison failed to comply with an unambiguous rule: Her claim depends entirely on how one interprets the

rule. Because the rule has state-wide application, its interpretation is necessarily "a matter of statewide concern over which the PUC has jurisdiction." (*City of Anaheim*, *supra*, 119 Cal.App.4th at p. 846.)

Sarale, *supra*, 189 Cal.App.4th 225 confirms the PUC's position that its exclusive jurisdiction extends to interpreting and applying its rules, and as noted above (p. 37-39, *ante*), the PUC's views are entitled to deference. The PUC regulation at issue in *Sarale*, Rule 35 of G.O. 95, specified minimum distances for a utility's trimming around power lines. (*Id.* at pp. 238-239.) The plaintiffs sought damages against PG&E for trimming their trees beyond Rule 35's minimum clearance. (*Id.* at p. 242.) In an amicus curiae brief, the PUC stated that "'whether the degree of trimming exceeded or violated any applicable Commission-approved rules' is 'an issue subject to the Commission's exclusive jurisdiction.'" (*Id.* at p. 247 (conc. opn. of Scotland, P.J.); see *ibid.* [observing that "only the Commission can determine whether the trimming in question was within the spirit and intent of its own rules"].) Consistent with the PUC's statements, *Sarale* held that "[t]he question of whether trimming must exceed the minimum standards on any particular section of an overhead powerline is a factual issue that is within the exclusive jurisdiction of the commission to decide." (*Id.* at p. 243, citing *Covalt*.)

Whether Edison operated in a "safe" manner under Rule 31.1 is exactly like the question in *Sarale* of whether the utility's tree-trimming was reasonable and the question in *City of Anaheim* of whether a particular

underground conversion came within a tariff. The PUC, and *only* the PUC, has the power to make these determinations.

2. The recent decision in *Mata v. Pacific Gas and Electric Company* does not affect this case.

The First District's very recent decision in *Mata v. Pacific Gas and Electric Company* (Cal.App., Feb. 28, 2014, No. A138568) 2014 WL 794338 addresses an exclusive jurisdiction/rule violation claim, but in a different context. We discuss it because it is the most recent explication of *Covalt*'s three-prong test, but it has no application here.

Mata arose from the death of a worker who was electrocuted while trimming a tree near a PG&E power line. (*Id.* at p. *1.) Unlike in *Sarale*, where the plaintiffs claimed that PG&E should *not* have exceeded the PUC's minimum vegetation clearance standards, the *Mata* plaintiffs claimed that PG&E *failed* to exceed minimum clearance standards when it was reasonably necessary for safety. (*Ibid.*) Applying *Covalt*'s three-prong test, the Court of Appeal rejected PG&E's argument the PUC had exclusive jurisdiction over the plaintiffs' claims.

The court reasoned that *Covalt*'s second and third prongs were not satisfied: (a) While the PUC had exercised its authority to regulate the minimum tree-trimming required, it had declined to exercise its authority to determine the extent to which trees around power lines should be trimmed beyond the minimum (second prong) (*id.* at pp. *3-4, *6), and (b) permitting courts to impose liability for a utility's failure to exercise due

care in making that determination would not hinder or interfere with the exercise of the PUC's authority (third prong) (*id.* at p. *5). The court distinguished *Sarale* on the basis that allowing the claim in that case—which was that PG&E *could not* permissibly trim trees beyond Rule 35's minimum clearances—"would have effectively countermanded the authorization that the PUC granted the utility to make that determination and to extend clearance beyond the minimum when necessary to ensure service reliability or public safety." (*Ibid.*)

Mata does not govern this case, for multiple reasons:

1. *Mata* found an absence of PUC regulation governing the issue at hand—the extent to which a utility should trim trees beyond the minimum. Here, Wilson's claims directly implicate the PUC's explicit regulation of the design, siting, operation, and safety of electrical distribution systems.

2. Unlike the absence in *Mata* of a PUC regulation explicitly governing tree-trimming beyond the minimum, here the judgment imposes liability for stray voltage that unavoidably results from Edison's *compliance* with the PUC's grounding regulations.

3. The *Mata* court did not appear to believe it was interpreting any PUC regulations. Here, in contrast, Wilson's claim requires an examination of the effect of the PUC's comprehensive regulations governing electrical distribution systems and an interpretation of Rule 31.1. As shown above, interpretation is itself a matter over which the PUC has exclusive jurisdiction. As in *Sarale*, the issue of whether Edison violated

Rule 31.1 "is a factual issue that is within the exclusive jurisdiction of the commission to decide." (*Sarale*, *supra*, 189 Cal.App.4th at p. 243.)

4. In stating that a finding of PUC exclusive jurisdiction "would deny [plaintiffs] any means of recovery" (2014 WL 794338 at p. *6), *Mata* did not consider section 1702, which allows a plaintiff to pursue a claim of violation with the PUC that, if successful, then allows a superior court damages action. (See *Sarale*, *supra*, 189 Cal.App.4th at p. 247 (conc. opn. of Scotland, P.J.) Indeed, the issue was not even before the court in *Mata* because the parties did not raise it in their briefs. (See *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 1277 ["'Reference to briefs is a permissible method of ascertaining what issues were before a court (citation)'"].)

5. In any case, *Mata* is wrongly decided, for several reasons.

First, it is questionable whether *Mata* can be reconciled with *Hartwell*, *supra*, 27 Cal.4th 256. Apart from the fact that the PUC rules in both decisions appear on their face to create safe-harbor minimum standards, *Mata* misconstrues the *Covalt* test: It treats *Covalt* as addressing the specific alleged misconduct at issue, whereas both *Covalt* and *Hartwell* require the court to consider the regulated subject matter at issue.

Second, *Mata* is also irreconcilable with a central principle underlying application of the exclusive jurisdiction doctrine to claims arising from the design, construction, siting and safety of overhead power

lines—uniformity. "Section 1759 safeguards the commission's ability to implement statewide safety protocols from being undermined by an unworkable patchwork of conflicting determinations regarding what constitutes necessary or proper management of power lines." (*Sarale*, *supra*, 189 Cal.App.4th at p. 231.) Indeed, uniformity is the raison d'être for G.O. 95. (*Covalt*, *supra*, 13 Cal. 4th at p. 925 [G.O. 95's "stated purpose is to prescribe uniform requirements for overhead electric line construction in order to insure adequate service and secure safety' to those who work on such lines and to 'the public in general,'" emphasis added].)

Third, although *Mata* tacitly acknowledges that it is in tension with *Sarale* (*Mata*, *supra*, 2014 WL 794338 at p. *5 [noting *Sarale*'s "strong dissent" and observing that "(i)t is unnecessary to take sides"]), it fails even to address, much less reconcile its holding with, *Sarale*'s concern that "[a]llowing owners of land containing overhead power lines to seek individualized judicial determinations of what might be 'necessary' or 'proper' vegetation would cause a regulatory nightmare for the commission that section 1759 was intended to prevent" (*Sarale*, *supra*, 189 Cal.App.4th at p. 242). If individualized determinations for landowners would create a "nightmare," a fortiori there cannot be case-by-case determinations for individual personal injury plaintiffs.

Fourth, although the court doesn't seem to recognize that it did so, *Mata* actually *does* interpret Rule 35. But, as we have shown, the PUC has the exclusive power to interpret its own regulations.

In short, *Mata* is inapposite here, and because it was also wrongly decided, this Court should decline to apply it in any case. (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1489, fn. 10 [intermediate court of appeal decisions not binding on other courts of appeal].)

3. Even if a court could permissibly interpret a PUC rule, no substantial evidence supports Bennett's "opinion" regarding Rule 31.1's meaning.

Bennett provided no factual or scientific basis for his bald claim that Edison violated Rule 31.1. On the contrary, he admitted that he found no defect with Edison's system or with Edison's efforts to mitigate stray voltage. (5RT2439-2442, 2473.) The entire basis of his opinion was that because stray voltage existed at Wilson's property, something was "not right" and that "at my house, I'd measure zero volts." (4RT2161, 2169, 2171, 2437-2438.) Because his testimony provided no reasons beyond these conclusory statements, his opinion "cannot rise to the dignity of substantial evidence." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136; see *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524 ["an expert opinion is worth no more than the reasons upon which it rests"].) Put another way, given the absence of any evidence as to what the PUC meant by Rule 31.1, Bennett's opinion about its meaning was utter speculation, in violation of the settled rule that "the expert's opinion may not be based on assumptions of fact without evidentiary support, or on speculative or conjectural factors." (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th

747, 770, internal quotation marks, brackets and citations omitted [noting also that "[a]n expert opinion has no value if its basis is unsound"].)

II. NO SUBSTANTIAL EVIDENCE SUPPORTS ANY OF WILSON'S CLAIMS.

A. Negligence: Wilson Failed To Establish Any Breach Of Duty.

A negligence claim requires evidence that Edison breached a duty of care to Wilson, that Wilson suffered harm, and that Edison's negligence was a substantial factor in causing the harm. (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 835, p. 52.) Wilson's claim founders on the absence of a breach of any relevant duty.

Wilson tried to establish a duty of care through her expert Bennett (5RT2410-2426, 2441-2442), but his testimony was insufficient. Although he testified that Edison had allowed "dangerous" voltage to be present, he admitted that he did not know what would constitute a dangerous level and that he could not identify anything wrong with the system's design. (5RT2441-2442.) He retreated to pure ipse dixit: Edison was liable "[b]ecause the voltage still exists at the property. And *that's not right.*" (4RT2169, emphasis added.) As just shown, Bennett's testimony does not constitute substantial evidence of anything. But even if it did, it does not remotely establish an intelligible standard of care by which a jury could properly assess Edison's conduct.

Beyond this failure of proof, the undisputed fact is that from 2005 until Wilson's 2011 remodel, *no one felt electricity at the property*. Whether the reason was the 2005 common neutral, the use of plastic drain pipes throughout the house, or something else, *there was no touch potential*. So whatever duty Edison might have owed before 2011 had been fully discharged.

Things changed when Wilson did her remodel, creating a ground connection that resulted in touch potential. This is the only circumstance in the case that could have given rise to any duty *toward Wilson*, and if such a duty did arise, its limits are clear: Since stray voltage cannot be eliminated, *at most* Edison had to help Wilson find a way to eliminate the touch potential that her remodel had created. Wilson's own testimony established that Edison did just that. It offered suggestions about how to lower conductivity at the house, and at some point it offered to install insulators. Wilson didn't like what she heard, and she felt she didn't hear it quickly enough. And of course what she really wanted was the impossible-to-achieve total elimination of stray voltage. But none of this establishes a breach of any duty.

This is particularly true given that Bennett himself not only failed to identify a single defect in Edison's system but also failed to identify any way in which Edison could have discharged the duty he claimed Edison owed, short of shutting off all current to the house. What the *evidence* shows, however, is clear: Edison's mitigation suggestions would have eliminated touch potential—but Wilson rejected them. So once again,

Wilson's case boils down to the claim that the presence of *any* level of stray voltage at the property, perceptible or not, was wrongful. But in the absence of an identifiable breach of some identifiable duty of care, her unattainable preference for 100% elimination of stray voltage cannot support a negligence claim.

B. Nuisance: Because Edison's Conduct Is Expressly Authorized By Law And There Is No Evidence Of Non-Compliance, It Cannot Support A Nuisance Claim.

As shown above, the undisputed evidence establishes that (a) the current Wilson experienced is a natural and inevitable byproduct of grounding, and (b) the system's grounding is both required by and fully compliant with PUC regulations. These facts negate Wilson's nuisance claim as a matter of law, because "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." (Civ. Code, § 3482.)

For example, in *Farmers Ins. Exchange v. State of California* (1985) 175 Cal.App.3d 494, the plaintiffs sought damages under nuisance and other theories for automobile paint corrosion caused by pesticide spraying for medfly eradication. They argued that the governor's authorization for the state to respond to the medfly infestation under the Emergency Services Act "did not 'expressly authorize' the state to damage automobile paint finishes." (*Id.* at p. 503.) Citing Civil Code section 3482, the Court of Appeal rejected the argument: "This misses the point. The authorizing statute need not predict the precise nature of the damages. It need only

authorize the governmental action." (*Ibid.*) Here, similarly, the PUC need not have "expressly authorized" stray voltage to exist on properties around a utility's electrical distribution infrastructure, and it need not have "expressly authorized" that homeowners might experience stray current. It need only—as it did—impose the design, siting, operation, and safety requirements for Edison's electrical distribution system, including grounding, with which Edison complied.

C. IIED: There Is No Substantial Evidence Of Extreme and Outrageous Conduct Directed Toward Wilson.

1. The legal standard: extreme and outrageous conduct directed toward the plaintiff.

Intentional infliction of emotional distress (IIED) requires conduct "'so extreme as to exceed all bounds of that usually tolerated in a civilized community'" that is "'intended to inflict injury or engaged in with the realization that injury will result.'" (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) In addition, IIED claims are limited to "'conduct *directed at the plaintiff*,'" or that "'occur[s] in the presence of a plaintiff *of whom the defendant is aware*.'" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001-1002 (*Potter*), emphasis in original.)

2. There is no substantial evidence that Edison engaged in any extreme or outrageous conduct before Wilson moved in.

In 1998, Edison fixed a ground connection that appeared to be the source of current in the house. No evidence suggests that Edison had any reason to believe it had not fully eliminated touch potential, especially since there were no reports of current for the next six years.

When current re-surfaced in 2004, Edison implemented the common neutral. Again, no evidence suggests that Edison had any reason to believe it had not eliminated touch potential. Six years passed again before there was another complaint about feeling current, including Wilson's first four years living in the house.

This conduct was not wrongful by any measure, and certainly not so extreme and outrageous as to support an IIED claim by someone who didn't even own the property at the time. The most one could say is that Edison was mistaken about the sufficiency of its mitigation efforts, but there is no basis in the record for concluding that such a mistake involved even ordinary negligence. After all, Wilson's expert Bennett opined that "[a]ll the things [Edison] did over the decades that they have owned this house have all been—appear to be appropriate measures to take to address this voltage issue." (4RT2168.)

At trial, Wilson's counsel never stopped talking about Drebushenko's and Raidy's emails questioning whether the property should

be inhabited. (Eg., 3RT1548, 1555-1557, 1559, 1563; 4RT1809, 1829, 1835, 2109, 2116-2117, 2121, 2129, 2135, 2140-2141, 2143; 5RT2516; 6RT2851-2852; ART124-125, 127; 7RT3322-3325, 3336, 3348, 3397, 3941-3942.) But both employees were quite clear that their views depended on whether Edison could solve the problem. (4AA1002 [Drebushenko: "If we cant (*sic*) sell and we need it as a buffer and *we cant (sic) fix the problem*, perhaps we should think about demolishing the structure," emphasis added]; 4AA1005 [Raidy: "*If we can't solve the problem*, we should not allow the property to be inhabited," emphasis added].) To all appearances—especially given six years with no problems—Edison *did* solve the problem in 1998, and when the problem resurfaced six years later, Edison appeared to have solved it again.

3. There is no substantial evidence that Edison engaged in any extreme or outrageous conduct after Wilson moved in.

When voltage appeared on Wilson's gas meter in 2008, Edison took voltage measurements, investigated the voltage source, and instituted ongoing voltage monitoring. Edison engaged in extensive discussions with the Gas Company on how best to mitigate stray voltage on gas lines throughout the neighborhood, and it ultimately paid a substantial amount for retrofitting the Gas Company's lines. (Statement Of The Case (SOTC) §D.2., *ante*.) There is no evidence of any risk of physical harm from the current detected at Wilson's gas meter, and no one ever reported feeling current at the meter. (4RT1879; 6RT2747.)

As for what happened when Wilson reported she had felt current, with one exception Edison's response was utterly routine and objectively proper. Technicians showed up at the house a few days after the call, took some measurements, explained to Stelle that there was no danger, and agreed to return when Wilson could be there. (SOTC §D.4.) They returned, took further measurements that Wilson's father verified with his own voltmeter, correctly explained that lowering conductivity in the house would help mitigate the situation, and suggested some ways to do it. (*Ibid.*; see also 4RT2171-2172 [Bennett agrees that plastic piping "would go a long way toward elimination of specific spots where you know you might have a touch problem"].)

The exception was that, according to Wilson, when she described the symptoms in her hands, an Edison claims representative yelled "It's just your nerves." (4RT1827.) If this did happen, the representative was rude. But "[l]iability for intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (*Hughes v. Pair* (2009) 46 Cal. 4th 1035, 1051, internal quotation marks omitted.)

* * *

That Wilson may have been distressed, or even very distressed, does not establish that Edison was guilty of extreme and outrageous conduct. As a matter of law, it wasn't. The judgment must be reversed with directions.

III. THE MILLION-DOLLAR AWARD FOR NONECONOMIC DAMAGES IS EXCESSIVE GIVEN THE ABSENCE OF SUBSTANTIAL EVIDENCE OF ANY PHYSICAL INJURY.

Even assuming some basis for liability, the million-dollar award for noneconomic damages is wildly excessive. It amounts to over $4,100 for every day Wilson lived at the property after the remodel plus $175,000 for *future* emotional distress, even though by the time of trial she had not lived at the property for well over a year.

As we now show, the obvious reason is that the jury believed, as Wilson urged it to, that the current caused Wilson to suffer physical harm. There was no substantial evidence to support this claim. Instructional error almost certainly contributed to this extreme result: The trial court erroneously refused Edison's jury instruction requiring proof of the cause of Wilson's symptoms to a reasonable medical probability.

A. Standard of Review.

Ordinarily, a damages award is reviewed for substantial evidence, with deference to the trial court's consideration of the question. Reversal is available only where "'the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.'" (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1213.) "If the award appears excessive as a matter of law, however, the reviewing court has a duty to act in order to correct the injustice." (*Ibid.*)

This case involves two additional considerations:

First, the question is not just whether the compensatory award is excessive relative to the emotional distress Wilson claimed, but also whether there is any substantial evidence of a key component of that claimed emotional distress: The physical injury Wilson claimed that the current caused her to suffer. If there is no substantial evidence of causation, the entire award becomes suspect, regardless of whether it would "shock the conscience" had there been such evidence.

Second, the impact of instructional error is reviewed in the usual way; whether the trial court erred in refusing to give an instruction is a question of law, reviewed de novo. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 4666, 475.) Prejudice—whether it is reasonably probable that the compensatory award would have been lower absent the error—is determined from a review of the record as a whole. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570-571 (*Soule*).)

B. Wilson's Damages Claim Centered On Her Panoply Of Physical Symptoms.

Wilson testified that after her first exposure to electricity she began "throwing up all the time," feeling weak and fatigued, and experiencing shaky hands and numbness, tingling, and pains in her hands and feet. (3RT1581-1582.) Her father and her coworker John Stasinos described seeing episodes of redness and warmth in her hands and feet. (5RT2523,

2539-2940.) Stelle described Wilson's "abdominal issues" and "haywire" health. (5RT2495.) Although Wilson conceded that many of her physical symptoms disappeared after she had a hysterectomy in January 2012 (including nausea, vomiting, uterine pain, and headaches) (4RT1885), she told the jury that Dr. Rederich concluded she had nerve damage in her hands and feet and that he referred her to a specialist because she "might be developing" secondary erythromelalgia, which Dr. Rederich told her was a rare condition with "no cure" (4RT1838-1839, 1887-1888).

That the jury took Wilson's physical symptoms into account is plain. During deliberations, it asked for a read-back of her direct testimony "regarding her symptoms and dates of symptoms, Dr.'s visits, etc." (1AA117; 7RT3601.) But Wilson's various physical symptoms could not have been relevant to damages unless they were somehow caused by her few-seconds-a-day contact with perception-level electrical current, or perhaps if she had claimed—she didn't—that the current caused emotional distress, which in turn caused the physical symptoms. As we now demonstrate, there is no substantial evidence of either. The award is therefore excessive and must be reversed.

C. There Is No Substantial Evidence That Wilson's Minimal Contact With Perception-Level Electrical Current Contributed In Any Way To Her Physical Ailments.

1. There is no substantial evidence that perception-level electrical current could have caused any of Wilson's physical symptoms. The undisputed evidence is contrary.

"'The law is well settled that in a personal injury action causation must be *proven within a reasonable medical probability based upon competent expert testimony*. Mere possibility alone is insufficient to establish a prima facie case.'" (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1384, 1387-1388, emphasis in original.) Wilson did not carry this burden. And because she did not, the jury's patent reliance on unproven causation means the verdict cannot stand.

Wilson had plenty of reasons to be distressed that had nothing to do with Edison: She suffered from an extraordinary array of physical and emotional problems before and after she first felt tingling on her shower fixtures.[10] Although many of her physical complaints disappeared after

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[10] These included hot flashes during and after her pregnancy in 2008 (4RT1862-1864); hot flashes, nausea and vomiting, and fatigue in 2009 (4AA1136; 4RT1874-1875); red, tender bumps appearing on her hands in 2009 (4RT1871-1873); rosacea (4RT1864-1865; 4AA1144); and anxiety and/or depression in May 2008 (4RT1865-1866; 4AA1144), July 2009 (4AA1136; 4RT1874-1875), March and April 2010 (4AA1142; 4RT1876), and July 2010 (4AA1138; 4RT1876-1879). Her medical records also indicated a history of insomnia, ulcers, irritable bowel syndrome, GERD, and fainting. (4AA1136, 1140, 1142; 4RT1858-1860.) She attended

a hysterectomy (4RT1885), Wilson maintained that she initially "got really sick when I first started to get exposed to the electricity" (3RT1581) and that she suffered ongoing episodes of pain, tingling, and hot flushing in her hands and feet that only began after her exposure to current (see 4RT1838, 1843-1844, 1849; 5RT2523, 2539-2940). But she presented no competent expert testimony—much less the required evidence of a reasonable medical probability—that the current she experienced could cause the symptoms she felt in her hands and feet, or any other kind of injury.

It is undisputed that Wilson experienced only perception-level electrical current on her master shower, not even what most people would consider a "startle" much less a shock. (5RT2415, 2432, 2436.) Her nonmedical electrical engineering expert Bennett testified that Wilson's description of a "tingling sensation" corresponded to between 0.7 and 1.2 milliamps according to the Dalziel chart. (5RT2432, 2469-2470.) Perception is possible at even lower levels, but even 0.7 to 1.2 milliamps is at the low end of the broad IEC/UL range in which there are usually "no harmful electrical physiological effects." (5RT2415; 4AA1105; see SOTC, § B.5.) Bennett testified that he had never seen any documented case of injury from perception-level current and that he was unaware of any

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relationship counseling with Fisher in late 2008 and with Stelle in 2010. (4RT1867-1868,1879.) She also underwent a number of surgeries: breast augmentation and stomach muscle surgeries in 2008 (4RT1868) and a tubal ligation in mid-2010 (4RT1877; 4AA1138). She had a hard time with the tubal ligation decision and was generally feeling overwhelmed and anxious around that time. (4RT1873-1879.)

physiological injury that could occur from contact with current under 6 milliamps. (5RT2452-2453.)

Wilson did not actually purport to present any evidence of causation: She did not attribute a causation diagnosis either to Dr. Rederich or to Dr. Beydoun, and nothing in evidence from either doctor's files draws any such conclusion.[11] She just offered the hearsay statement that Dr. Rederich told her she had nerve damage and that she "might be developing" secondary erythromelalgia, for which he referred her to Dr. Beydoun. (4RT1838-1839.) But even if one could somehow read into this testimony an opinion by Dr. Rederich connecting the current and Wilson's symptoms, it would not constitute substantial evidence of causation. There are two distinct reasons:

First, Wilson did not establish that Dr. Rederich had any specialized knowledge about the effects of exposure to electrical current or any experience in diagnosing individuals exposed to current. He therefore could not render a qualified expert opinion. (See *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487 [because allergist's

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[11] Wilson's counsel asked Wilson only about Dr. Rederich's diagnosis of her symptoms, not his view of their cause. (3RT1581:13-15 [Direct: "Q. And did Dr. Rederich give you a diagnosis? A. He told me that I had severed the nerve endings in my hands and the soles of my feet"]; 4RT1837:10-14 [Direct: "Q. And did he tell you that you had been injured? A. Yes. Q. What did he tell you your injury was? A. That I had severed my nerve endings"]; but see 4RT1887:22-25 [Cross: "Q. Dr. Rederich, in fact, was the only one who diagnosed you with any illness or illness due to physical contact with electricity; is that correct? A. Correct"].)

declaration did not establish specialized knowledge of the respiratory effects or diagnosis of exposure to methane, it lacked foundation and failed to rebut defense expert testimony regarding effects of methane]; Evid. Code, § 720, subd. (a) [expert qualification requires "special knowledge, skill, experience, training, or education" on the subject to which the testimony relates].)

Second, according to Wilson, Dr. Rederich could not definitively say what was causing her symptoms: He said only that she "might be developing" secondary erythromelalgia. (4RT1838-1839.) At most, then, his opinion was of a mere possibility, not the required medical probability. "The fact that a determination of causation is difficult to establish cannot, however, provide a plaintiff with an excuse to dispense with the introduction of some reasonably reliable evidence proving this essential element of his case." (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 403.)

In contrast, unrefuted expert testimony established that low-level current *could not* have caused Wilson's symptoms. Dr. Beydoun—Wilson's own treating neurologist and a specialist in nerve disorders—found that Wilson was not suffering from any kind of nerve damage. (4RT1889-1891; 6RT3008-3016; 4AA1092-1095.) Edison's expert, Dr. Waxman, testified that he knew of no physiological mechanism by which intermittent contact with low-voltage electricity could cause small fiber nerve damage or erythromelalgia. (6RT3034.) Given the total absence of evidence supporting Wilson's causation theory, there was no

reasonable basis for the jury to disbelieve the opinions of these highly-qualified physicians. And even if the jury could properly have disbelieved them, that disbelief would not have allowed the jury to infer causation: Mere disbelief of a witness's testimony does not constitute affirmative evidence of the contrary proposition. (*Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1229.)

2. Wilson did not claim, and in any case there is no substantial evidence, that whatever emotional distress she suffered could have caused her physical symptoms.

The only other basis on which Wilson's physical symptoms could be relevant to her damages would be if she had claimed that the current caused them indirectly—that is, the current caused emotional distress, which in turn caused physical symptoms. She never urged such a theory. And even if she had, the second part—causation of physical symptoms by distress—would also require expert testimony, and there was none. Dr. Beydoun stated there could "potentially" be a psychological basis for her physical symptoms and that he had read a doctor's report attributing Wilson's symptoms to psychological causes (6RT3020-3021), but this hearsay statement and Dr. Beydoun's general opinion that it is possible for stress to be connected to physical symptoms fall far short of an opinion of a reasonable medical probability.

D. Absent Any Connection To Wilson's Physical Symptoms, Wilson's Emotional Distress Is Insufficient To Justify A Million-Dollar Award.

There is, then, no basis on which the jury could properly have considered physical injury as a cause or component of Wilson's claimed distress. With physical injury out of the picture, the million-dollar award is plainly excessive.

1. Wilson's fear of harm cannot support the emotional distress awards because there was no substantial evidence that her fear was reasonable.

Wilson testified to anxiety and fear for her family's safety because of the presence of stray voltage at the property. (3RT1581; 4RT1836, 1849.) Since there is no substantial evidence that Wilson or anyone else in her family experienced *actual* harm that could serve as a basis for an emotional distress award, the only possible fear-based foundation for the award would be a fear of *future* harm—a belief that that injury from the current would surface at some future time. Indeed, there could be no other basis for the award of damages for *future* emotional distress.

But Wilson disclaimed any fear of future harm (see ART56-63), and in any case there can be no recovery for future harm in the absence of either medical probability (*Potter*, *supra*, 6 Cal.4th at p. 1004) or some "detrimental change to the body" (*Macy's California, Inc. v. Superior Court* (1995) 41 Cal.App.4th 744, 757 [recovery for emotional distress

triggered by physical injury is available only where the plaintiff shows "detrimental change to the body"; a needle stick from a hypodermic found in pocket of coat sold by store was insufficient].) Wilson showed neither.

Besides, the evidence uniformly negated the possibility that exposure to low-level current could threaten any kind of injury, including not just expert testimony but also the fact that Wilson herself experienced substantially greater current—because that is what physicians administer when they test nerves—with no ill effects as far as the record reveals. An *unreasonable* fear cannot justify *any* damages. As our Supreme Court held in *Potter*, *supra*, 6 Cal.4th 965, considering a claim based on fear of cancer from toxins, "it must nevertheless be established that the plaintiff's fear of cancer is reasonable, that is, that the fear is based upon medically or scientifically corroborated knowledge that the defendant's conduct has significantly increased the plaintiff's risk of cancer and that the plaintiff's actual risk of the threatened cancer is significant." (*Id.* at p. 1004.)

2. A million dollars for feeling a tingle is plainly excessive.

Since Wilson's fear of harm, even if genuine, was unreasonable, that leaves only the immediate distress of feeling perception-level current, and perhaps the anticipation of continuing to feel it—the unpleasantness of the sensation itself. It couldn't have amounted to much. Wilson didn't even realize she was experiencing current for the first month and a half, and it is undisputed that the most she felt was a tingle. While that might be

distressing, it cannot justify damages of $4,100 per day. And it cannot justify *any* award of future damages.

E. It Is Highly Likely That The Trial Court's Erroneous Refusal To Instruct The Jury On The Medical Probability Standard Contributed To The Verdict's Excessiveness.

Given Wilson's failure to offer substantial evidence of a causal link between her exposure to current and her symptoms, how could the jury have awarded so much?

The likely explanation is that the jury *did* find a causal link, based on Wilson's testimony that the symptoms—or some of her many symptoms, anyway—arose after her exposure to current. While that might seem like a reasonable inference to a layperson, as a matter of law it cannot support the verdict. Assuming a "cause and effect relationship based upon such a temporal sequence is a classic example of the logical fallacy of post hoc, ergo propter hoc (literally, 'after this, therefore because of this'). With respect to causation, '[m]ore than *post hoc, ergo propter hoc* must be demonstrated.'" (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 393-394, citations omitted [considering whether allegedly libelous emails caused the plaintiff to lose business].)

Edison sought to avoid this problem by requesting a jury instruction on the requirement of proof to a reasonable medical probability. (3AA885; ART55-57.) But the trial court refused the instruction. (ART57.)

The error is plain. The instruction was a correct statement of law, and it was certainly appropriate in light of Wilson's effort to focus the jury on her physical symptoms. (*Soule*, *supra*, 8 Cal.4th at p. 572 ["A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence"].)

Prejudice is equally plain, because "'it is *reasonably probable* [Edison] would have received a more favorable result in the absence of the error.'" (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1087-1088, emphasis in original.)

"In assessing prejudice from an erroneous instruction, we consider, insofar as relevant, '(1) the degree of conflict in the evidence on critical issues; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect; (3) whether the jury requested a rereading of the erroneous instruction or of related evidence; (4) the closeness of the jury's verdict; and (5) the effect of other instructions in remedying the error.'" (*Soule*, *supra*, 8 Cal.4th at pp. 571, citations omitted.) Here, all factors point toward prejudice:

The evidence. Because of the wide variety of Wilson's physical and mental afflictions (see fn. 10, *ante*), the cause of her symptoms was far from clear. The jury had to sort through this to figure out what role, if any, electrical current played. The only testimony about Wilson's symptoms and their timing came from laypersons—Wilson, her father, Fisher, Stelle, and her coworker. The jury presumably accepted these witnesses' accounts

of what they observed, ignorant of the fact that their observations were not competent evidence of the *cause* of Wilson's symptoms. The jury had no way to know that, even if it disbelieved Edison's experts, *Wilson's own evidence* failed to meet the required standard, and that it could not permissibly infer "[a] cause and effect relationship based upon such a temporal sequence." (*Franklin v. Dynamic Details, Inc.*, *supra*, 116 Cal.App.4th at pp. 393-394.)

Respondent's argument. Wilson's counsel specifically asked the jury to find causation, and indeed invited a post hoc, ergo propter hoc determination. He argued that "a really critical fact on that issue is that there is no evidence of her suffering any of these symptoms at all until she was exposed to the electricity" (7RT3342), and he repeatedly referred to her supposed—though actually non-existent—diagnosis of nerve damage (e.g., 7RT3328 [Wilson "found out (she had) been diagnosed with nerve damage from exposure to electricity"]; 3338-3339 [Wilson was "told that she had nerve damage," "told that she had suffered nerve damage"]).

Jury request for rereading evidence. The jury asked to hear Wilson's testimony "regarding her symptoms *and dates of symptoms*, doctor's visits, et cetera." (7RT3601, emphasis added.) It would be hard to find a clearer indication not only that the symptoms mattered to the jury, but also that the jury was relying on the temporal relationship between current and symptoms.

Closeness of the verdict. The jury split on every question. Although the split was 11-1 on compensatory damages, the split was 10-2 and even 9-3 on other questions.

It is not just probable but almost certain that the jury included Wilson's physical symptoms in its analysis of damages, something it could not properly have done had it received the instruction Edison requested. This prejudicial error requires a new trial.

IV. PUNITIVE DAMAGES WERE UNJUSTIFIED AND IN ANY CASE EXCESSIVE.

A. Without Liability For IIED Or Nuisance, There Can Be No Punitive Damages.

The trial court ruled, and the special verdict established, that the jury could award punitive damages only on Wilson's nuisance and IIED claims. (ART110-114; 1AA115:1-5, 134:1-5.) Since, as we have shown, there is no basis for those claims, there is likewise no basis for punitive damages.

B. There Is No Substantial Evidence That An Edison Managing Agent Authorized Or Ratified Any Alleged Malicious, Oppressive Or Fraudulent Conduct.

Punitive damages against a corporate defendant require clear and convincing evidence (a) of its agent's oppression, fraud, or malice in committing a tort against the plaintiff, and (b) that the misconduct was authorized or knowingly ratified by a director, officer or managing agent of the corporation. (Civ. Code, § 3294.)

No Edison witnesses were even arguably managing agents—employees "who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566-567.) Wilson relied on two chief sources of support for claiming that an Edison managing agent authorized or knowingly ratified Wilson's exposure to a known, probable danger: testimony by the Gas Company's William Perry that Edison's mitigation discussions with the Gas Company went "all the way up to the vice-presidential level" (4RT1923, 1941), and Drebushenko's testimony that one or two recipients of her 1997 emails were managers who "should have some impact" on corporate policy (4RT2123-2124; see 6RT2849 [Kraushaar testifies that neither recipient had independent authority and judgment on decisions ultimately determining Edison's corporate policy].)

This evidence doesn't clearly and convincingly—or, really, at all—establish *who* within Edison might have authorized or ratified anything. But the bigger problem is *what*: What would the speculated managing agents have learned? As to Perry's testimony, the managing agent would have learned that Edison was cooperating with the Gas Company in mitigation efforts that, as far as the evidence shows, proved successful. As to Drebushenko, the managing agent would have learned that there was a problem that should be solved if the property was going to be inhabited, and that the problem *was* solved for at least the next five years.

This isn't enough for punitive damages. It's not even close.

C. Even If The Evidence Supports Some Punitive Damages, $3 Million Exceeds Constitutional Limits.

1. Principles governing review of punitive damages awards.

Review of a punitive damages award for constitutional excessiveness is de novo. (*Simon v. San Paolo U.S. Holding Co. Inc.* (2005) 35 Cal.4th 1159, 1172 (*Simon*).)

The constitutionality of punitive damages is determined in light of (a) the degree of reprehensibility of the defendant's misconduct, (b) the proportionality of the punitive damages award to the actual damages suffered, and (c) comparable civil penalties. (*State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418 (*Campbell*).)

Reprehensibility is the most important factor. (*Id.* at p. 419.) The cases make clear that reprehensibility is not measured against good conduct or even tortious conduct. It is measured against *other conduct that deserves punitive damages*. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 717 (*Roby*); *Simon*, *supra*, 35 Cal.4th at p. 1181 [evaluating reprehensibility in terms of "the universe of cases warranting punitive damages"]; *Adams v. Murakami* (1991) 54 Cal.3d 105, 110-112 & fn. 2 [reprehensibility must be measured "in light of the types of misconduct that will support punitive damages"].) So the question is not whether the defendant's conduct is reprehensible *at all*—for purposes of this analysis, reprehensibility is a given.

Our Supreme Court has concluded that a one-to-one ratio is the constitutional limit where reprehensibility is low and compensatory damages are substantial and largely made up of noneconomic emotional distress damages. (*Roby, supra*, 47 Cal.4th at p. 719; see also *Campbell, supra*, 538 U.S. at p. 425 ["(W)hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."].) The reason that due process favors a small ratio between punitive damages and a substantial compensatory award for emotional distress is that "'the latter may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent.'" (*Roby, supra*, 47 Cal.4th at p. 718, citing *Simon, supra*, 35 Cal.4th at p. 1189; see also *Campbell, supra*, 538 U.S. at p. 426 [lower ratio appropriate where plaintiffs awarded "substantial" compensatory damages of $1 million for emotional distress, which duplicated punitive damages elements].)

In comparison, where the conduct is deemed "highly reprehensible" and noneconomic damages represent a smaller portion of compensatory damages, courts have upheld ratios of up to 2.4 to 1. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1312-1314, citing cases [asbestos].)

2. The punitive damages award exceeds constitutional limits.

Because the entire compensatory award is noneconomic and reprehensibility is relatively low, the punitive-compensatory ratio should not exceed 1:1.

The relevant factors in a reprehensibility analysis include whether physical harm was caused (there is no substantial evidence that it happened here); whether the tortious conduct evinced reckless disregard of the health or safety of others (Bennett testified that Edison's responses to stray voltage were appropriate); whether it involved repeated actions or was an isolated incident (Edison responded whenever there were problems, and it appeared to have eliminated touch potential for most of the 12 years that preceded Wilson's experience); and whether the harm was the result of "intentional malice, trickery, or deceit, or mere accident" (the worst that can be said about Edison is that it was mistaken in believing that it had eliminated touch potential at the property in 2005). (*Campbell, supra*, 538 U.S.at p. 419; *Roby, supra*, 47 Cal.4th at p. 713.)

Courts must also consider whether the case has impermissibly been used "as a platform to expose, and punish, the perceived deficiencies of [defendant]'s operations" or policies, "rather than for the conduct directed toward the [plaintiff]." (*Campbell, supra*, 538 U.S. at pp. 419-420, 428 [counsel told jury the case "transcends the Campbell file" and that it would hopefully "requir(e) State Farm to stand accountable for what it's doing across the country].) As in *Campbell*, where plaintiffs framed the case as

a chance to rebuke State Farm for its broader activities, Wilson's counsel told the jury that "this case is about the duties and responsibilities of a utility company who is putting electricity into all of our homes," that Wilson stood for "anyone who is going to be a potential victim of Edison and their carelessness," and that if the jury found the requirements for punitive damages, Edison would pay attention. (7RT3393, 3396, 3398.) This condemnation of perceived deficiencies in Edison's broader policies and actions violates *Campbell*'s direction that a defendant "should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business" or for harm to hypothetical plaintiffs. (*Campbell, supra*, 538 U.S. at p. 423.)

If the Court does find some basis for punitive damages, the size of the noneconomic damages and the relatively low degree of reprehensibility dictate a one-to-one ratio. The Court should so order.

D. Even If The Punitive Award Were Otherwise Proper, The Excessiveness Of The Compensatory Award Requires Reconsideration Of The Punitive Award.

"[P]unitive damages must be proportional to recoverable compensatory damages." (*Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1190.) The jury presumptively followed the court's instruction to consider the relationship between punitive and compensatory damages. (7RT3939.) Accordingly, if the Court reverses the compensatory award as excessive, the punitive award becomes "suspect" and must be reconsidered. This can happen through a retrial of punitives

(*Auerbach v. Great Western Bank, supra*, 74 Cal.App.4th at p. 1190; see also *Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 680-81) or a remittitur by this Court (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1259).

CONCLUSION

The judgment fails on multiple levels. The Court should reverse with directions to dismiss the case. Even if the Court finds that the trial court has jurisdiction, multiple components of the judgment should be stricken or at least remanded for a new trial.

Dated: March 17, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the attached **APPELLANT'S OPENING BRIEF** was produced using 13-point Times New Roman type style and contains **18,823 words** not including the tables of contents and authorities, caption page, or this Certification page, as counted by the word processing program used to generate it.

Dated: March 17, 2014

Robin Meadow

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On March 17, 2014, I served the foregoing document described as: **APPELLANT'S OPENING BRIEF** on the parties in this action by serving:

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Executed on March 17, 2014, at Los Angeles, California.

(X) (State): I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Charice L. Lawrie