

In The
United States Court of Appeals
For The Fourth Circuit

WALLACE GRAHAM; DOROTHY GRAHAM,

Plaintiffs – Appellants,

v.

PROGRESS ENERGY, INCORPORATED,

Defendant – Appellee,

and

**BASSETT FURNITURE INDUSTRIES, INCORPORATED;
FLEETWOOD HOMES OF GEORGIA, INCORPORATED;
PHILLIPS INCORPORATED,**

Defendants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT FLORENCE**

BRIEF OF APPELLANTS

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**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**
Richmond, VA

No. 08-1906

Graham v. Progress Energy, Inc.

**DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER
ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION**

Pursuant to FRAP 26.1 and Local Rule 26.1

Wallace Graham, et al., who is appellant, makes the following disclosure:

- 1) Is the party a publicly held corporation or other publicly held entity?
() Yes (XX) No

- 2) Is the party a parent, subsidiary, or affiliate of, or a trade organization representing, a publicly held corporation, or other publicly held entity (see Local Rule 26.1(b))?
() Yes (XX) No

If the answer is YES, state the name of the entity and its relationship to the party.
(N/A)

- 3) Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation (see Local Rule 26.1(b))?
()Yes (XX) No

If the answer is YES, state the name of the entity and the nature of its financial interest.
(N/A)

/s/ Robert P. Foster
Signature

February 6, 2009
Date

TABLE OF CONTENTS

	Page
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION.....	1
II. STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	2
III. STATEMENT OF THE CASE	3
IV. STATEMENT OF FACTS.....	5
V. SUMMARY OF THE ARGUMENT.....	7
VI. ARGUMENT.....	8
STANDARD OF REVIEW.....	8
A. Standard for granting summary judgment	8
B. Defendant Progress owed a duty of care to Plaintiffs to comply with mandatory regulations and procedures in the termination of their electrical service for non-payment. Defendant Progress failed to comply with those mandates, and as a result, the Plaintiffs were wrongfully deprived of the right to electrical service and unnecessarily exposed to heightened risks of harm.....	9

C.	Defendant Progress affirms that it foresaw the risks associated with the misuse of candles, and for this reason, the causal chain is maintained because the law does not require that the specific and precise manner of the intervening act be foreseeable, but only that the injuries are foreseeable consequences of the risks created	13
VII.	CONCLUSION	39
VIII.	REQUEST FOR ORAL ARGUMENT.....	40
ADDENDUM		
CERTIFICATE OF COMPLIANCE		
CERTIFICATE OF FILING AND SERVICE		

TABLE OF CITATIONS

	Page(s)
CASES	
<u>Aguirre v. Adams,</u> 15 Kan. App. 2d 470, 809 P.2d 8 (1991)	34
<u>Ballou v. Sigma Nu Gen. Fraternity,</u> 291 S.C. 140, 352 S.E.2d 488 (S.C. Ct. App. 1986)	16
<u>Bennett M. Lifter, Inc. v. Varnado,</u> 480 So.2d 1336 (Fla. Dist. Ct. App. 1985).....	34
<u>Benton v. Pellum,</u> 232 S.C. 26, 100 S.E.2d 534 (1957).....	14
<u>Bessinger v. DeLoach,</u> 230 S.C. 1, 94 S.E.2d 3 (S.C. 1956).....	29
<u>Brown v. National Oil Co., et al.,</u> 233 S.C. 345, 105 S.E.2d 81 (1958).....	15, 26
<u>Crolley v. Hutchins,</u> 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989)	16
<u>Daniel v. Days Inn of America, Inc.,</u> 292 S.C. 291, 356 S.E.2d 129 (S.C. App. 1987).....	15, 21, 32, 33
<u>De Pass v. Broad River Power Co.,</u> 173 S.C. 387, 176 S.E. 325 (1934).....	10
<u>Dyer v. Moss,</u> 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985)	9
<u>Enis v. Ba-Call Bldg. Corp.,</u> 639 F.2d 359 (7th Cir. 1980).....	34

<u>Erie R.R. Co. v. Thompkins,</u> 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)	8
<u>Faris vs. Potomac Electric Power Company,</u> 753 F. Supp. 388 (D.D.C. 1991)	<i>passim</i>
<u>Felty v. Graves-Humphreys Co.,</u> 818 F.2d 1126 (4th Cir. 1987).....	8
<u>Goode v. St. Stephens United Methodist Church,</u> 329 S.C. 433, 494 S.E.2d 827 (1997).....	13
<u>Graham v. Whitaker,</u> 282 S.C. 393, 321 S.E.2d 40 (S.C. 1984).....	29
<u>Higgins v. E.I. DuPont De Nemours & Co.,</u> 863 F.2d 1162 (4th Cir. 1988).....	8
<u>Hill v. York County Sheriff's Dep't,</u> 313 S.C. 303, 437 S.E.2d 716 (Ct. App 1993).....	16
<u>Horne v. Beason,</u> 285 S.C. 518, 331 S.E.2d 342 (1985).....	9, 16
<u>Hughes v. Children's Clinic, P.A.,</u> 269 S.C. 389, 237 S.E.2d 753 (1977).....	<i>passim</i>
<u>Juisti v. Hyatt Hotel Corp. of Maryland,</u> 94 F.3d 169 (4th Cir. 1996).....	8
<u>Koester v. Carolina Rental Ctr., Inc.,</u> 313 S.C. 490, 443 S.E.2d 392 (1994).....	16
<u>Martinez v. Lazaroff,</u> 48 N.Y.2d 819, 424 N.Y.S.2d 126, 399 N.E.2d 1148 (1979).....	34
<u>Mathews v. Porter,</u> 239 S.C. 620, 124 S.E.2d 321 (S.C. 1962).....	14

<u>Moreno v. Balmoral Racing Club, Inc.,</u> 217 Ill. App. 3d 365, 160 Ill. Dec. 303, 577 N.E.2d 179 (1991)	34
<u>Oliver v. South Carolina Dept. of Highways and Pub. Transp.,</u> 309 S.C. 313, 422 S.E.2d 128 (S.C. 1992).....	19
<u>Padgett v. Colonial Wholesale Distributing Co.,</u> 232 S.C. 593, 103 S.E.2d 265 (1958).....	14
<u>Rawl v. United States,</u> 778 F.2d 1009 (4th Cir. 1985).....	8
<u>Rickborn v. Liberty Life Ins. Co.,</u> 321 S.C. 291, 468 S.E.2d 292 (1996).....	9
<u>Riggs v. Akers Motor Lines,</u> 233 N.C. 160, 63 S.E.2d 197 (1951)	14
<u>Small Pioneer Machinery, Inc.,</u> 316 S.C. 479, 450 S.E.2d 609 (1994).....	29
<u>Southeast Bank N.A. v. J.A.M.A. Mobile Home Parks, Ltd. Partnership,</u> 490 So.2d 1057 (Fla. Ct. App. 1986)	21, 34
<u>St. Paul Fire & Marine Ins. Co. v. Jacobson,</u> 48 F.3d 778 (4th Cir. 1995)	8
<u>Talkington v. Atria ReclamelucifersFabrieken BV,</u> 152 F.3d 254 (4th Cir. 1998).....	15, 16, 28, 29
<u>Tobias v. Carolina Power & Light Co.,</u> 190 S.C. 181, 2 S.E.2d 686 (S.C. 1939).....	27
<u>Vinson v. Hartley,</u> 324 S.C. 389, 477 S.E.2d 715 (1996).....	9

Young v. Tidecraft,
270 S.C. 453, 242 S.E.2d 671 (1978)..... 14, 16

Woody v. South Carolina Power Co.,
202 S.C. 73, 24 S.E.2d 121 (S.C. 1943)..... 15

STATUTES

28 U.S.C. § 1291..... 1

28 U.S.C. § 1332..... 1

S.C. Code § 58-27-1510 10

S.C. Code § 58-27-2520(A)..... 10, 11

S.C. Code § 58-27-2520(B)..... 10, 11, 13

S.C. Code § 103-352..... 11, 13

RULE

4th Cir. L.R. 32.1 35

OTHER AUTHORITIES

15 Am. Jur., Damages..... 29

38 Am. Jur., Negligence 15

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This Court has Subject Matter jurisdiction in this diversity of citizenship action, the amount claimed being in excess of \$75,000, as required by 28 U.S.C. Section 1332. Plaintiffs are residents of South Carolina and the Defendant Progress Energy, Inc. is a resident of North Carolina.

This Court has Appellate Jurisdiction pursuant to 28 U.S.C. Section 1291, which grants the Federal Court of Appeal jurisdiction over all final decisions of the district courts of the United States. Summary Judgment has been granted to the Defendant by the district court. This is a final decision within the meaning of 28 U.S.C. Section 1291.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the District Court err in determining as a matter of law that the Plaintiffs failed to prove their injuries were proximately caused by the negligence of the Defendant in improperly terminating Plaintiffs' electricity?

Did the District Court err in concluding as a matter of law that the Plaintiffs' failure to extinguish the candle, which started the fire was an unforeseeable act which broke the causal chain?

III. STATEMENT OF THE CASE

This is a negligence action brought by a husband and wife against their electrical utility service provider. The Plaintiffs allege the Defendant owed a duty to Plaintiffs to comply with mandatory procedures and regulations in terminating their electrical service for non-payment. The Plaintiffs further allege that the Defendant failed to comply with these obligations and terminated service. Lastly, Plaintiffs further argue that the negligence of the Defendant was a proximate cause of the catastrophic fire that took place, despite the Plaintiffs' act in leaving a lighted candle unattended.

Defendant Progress filed a motion for summary judgment contending the Plaintiffs could not establish a genuine issue of material fact as to whether or not the Defendant's negligent acts were the proximate cause of Plaintiffs' injuries.

The United States District Court for the District of South Carolina held that the chain of causation leading to Plaintiffs' injuries could not, as a matter of law, satisfy the required element of proximate cause. In so holding, the District Court never addressed the evidence submitted by Plaintiffs in support of their argument that the misuse of candles was foreseeable in the context of a wrongful termination of electrical service. Additionally,

Defendant Progress never produced substantive evidence in support of its argument. Rather, the primary focus of the Defendant's argument as well as the District Court's holding, was in a distinguishable District of Columbia case finding in favor of the defendant on the issue of proximate cause.

This is an appeal of the decision of the District Court, granting Defendant's motion for summary judgment on the issue of proximate causation. The District Court failed to apply the South Carolina law on proximate causation. Accordingly, this Court should reverse the District Court order granting summary judgment.

IV. STATEMENT OF FACTS

In late April of 2005, Defendant Progress Energy, Inc. (hereinafter “Defendant Progress”) terminated the Plaintiffs electrical service for non-payment of a \$660 outstanding balance. (J.A. 40, 47). The act of terminating a customer’s electrical service is highly regulated with specific procedures in place that must be followed before a termination can be deemed legal and proper. (J.A. 40). Defendant Progress undertook additional internal obligations with regards to the termination of a customer’s service. (J.A. 214I). The Defendant admitted that it had failed to perform various procedures delineated by both the South Carolina legislature and the Defendant. (J.A. 305; 214O-214P).

Five days prior to the termination, Plaintiffs made a partial payment of the outstanding balance. (J.A. 214N). Had the Defendant complied with the mandatory procedures in offering a six (6) month deferred payment plan, the Plaintiffs would have been able to use that money for the initial payment under the plan and still have \$30 left over. (J.A. 214N). Instead of doing that, Defendant Progress decided the payment was insufficient and terminated the service anyway.

Due to the negligence of Defendant Progress, which deprived the Plaintiffs of their right to electrical service, the Plaintiffs were forced to

resort to candles for their lighting needs that evening, until they could address the issue with Defendant Progress the next day. On the evening following the termination, the subject candle was placed in a sconce on the wall, was inadvertently left unattended, and fell on a sofa which resulted in a catastrophic fire which caused the Plaintiffs' injuries. (J.A. 62-63).

At the time of the termination and subsequent fire, Defendant Progress was aware of the risks inherent in the use of candles, particularly the misuse of candles and posted same on its web site. (J.A. 215, 217, 218, 225, 230).

V. SUMMARY OF ARGUMENT

The injuries suffered by the Plaintiffs were reasonably foreseeable. The chain of events leading to their injuries was a natural and logically foreseeable consequence of the negligence of Defendant Progress in wrongfully terminating Plaintiffs' electrical service. Defendant Progress foresaw the risks of harm attendant to the misuse of candles in the event of a termination or power outage. Therefore, any intervening events relating to the misuse of candles derive from the Defendant's negligence, and do not supersede the Defendant's negligent acts, and the chain of events remains intact. Thus, summary judgment on the issue of proximate causation was inappropriate.

VI. ARGUMENT

STANDARD OF REVIEW

Summary judgments are reviewed *de novo* on appeal. Higgins v. E.I. DuPont De Nemours & Co., 863 F.2d 1162, 1166-67 (4th Cir. 1988); Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1127-28 (4th Cir. 1987). The appropriate standard of review employed in the Fourth Circuit for questions of whether a District Court correctly granted summary judgment on the issue of proximate cause is plenary. Juisti v. Hyatt (citing Rawl v. United States, 778 F.2d 1009, 1014 (4th Cir. 1985)).

A. Standard for granting summary judgment

This case is before this court pursuant to diversity jurisdiction, and thus South Carolina law governs. See Erie R.R. Co. v. Thompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). If the law is not entirely clear, the court must rule as it appears the state court would rule. See St. Paul Fire & Marine Ins. Co. v. Jacobson, 48 F.3d 778, 783 (4th Cir. 1995). In trying to determine how the highest state court would interpret the law, the court “should not create or expand that State’s public policy.” *Id.*

On a motion for summary judgment, the inferences to be drawn from the underlying facts in the record must be viewed in the light most favorable to the party opposing the motion, and summary judgment should be granted

only when it is perfectly clear no issue of fact is involved. Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). The evidence supporting the movant is closely scrutinized, while that of the opponent is treated indulgently. *Id.*

B. Defendant Progress owed a duty of care to Plaintiffs to comply with mandatory regulations and procedures in the termination of their electrical service for non-payment. Defendant Progress failed to comply with those mandates, and as a result, the Plaintiffs were wrongfully deprived of the right to electrical service and unnecessarily exposed to heightened risks of harm.

To make out a negligence claim in South Carolina, a plaintiff must prove three elements: “(1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty.” Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292, 298 (1996). “A breach of duty exists when it is *foreseeable* that one’s conduct may likely injure the person to whom the duty is owed.” Horne v. Beason, 285 S.C. 518, 331 S.E.2d 342, 344 (1985) (emphasis added); *see also* Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715, 720 (1996).

The issues of duty and breach are briefly summarized here because they are relevant to the ultimate issue of proximate causation, and to the ruling below.

The provision of electric utility service to all citizens is an important public policy of this State. S.C. Code § 58-27-1510 (“Every electrical utility shall furnish adequate, efficient and reasonable service”). The business of providing electric service is not a mere privilege of private property, but rather invokes vital public interests. As our Supreme Court has observed,

It is true that a public service utility company, in the exercise of the franchises granted it, has certain rights and privileges not enjoyed by private enterprises. But it must be remembered that, as such utility, it is required to properly serve the public, and this duty or obligation it can neither neglect nor avoid. . . . [It] must serve all who comply with its reasonable rules and regulations. And, as . . . indicated in all the decisions, it will not be permitted, should it be so minded, to exploit the public it serves . . .

De Pass v. Broad River Power Co., 173 S.C. 387, 176 S.E. 325, 333 (1934).

Therefore, the termination of electric utility service for non-payment is not taken lightly and is highly regulated. *See* S.C. Code § 58-27-2520(A) (electrical utilities to establish written procedures governing the termination of electrical service); S.C. Code § 58-27-2520(B) (procedures to include, *inter alia*, notice to customer of impending termination and time available for making payment arrangements, installment payment arrangement plan for residential customers, notification of local social service agencies to

assist customers unable to pay their bills). *See also* S.C. Code of Regs. § 103-352. Procedures for Termination of Service (requiring, *inter alia*, pre-termination notice and information about deferred payment plans and other devices to avoid termination).

In addition to these regulations, Defendant Progress undertook its own internal policies and procedures, as mandated by S.C. Code § 58-27-2520(A).¹ The evidence in this case shows that Defendant Progress complied with **none** of these obligations in the process of terminating the Plaintiffs' service.

Ellen Fagan is the Manager of the Customer Accounting Operations for Progress Energy Carolinas. (J.A. 214F-214H). Fagan testified that the Defendant was legally required to offer various options, one of which was the six (6) month deferred payment plan required by S.C. Code § 58-27-2520(B) and S.C. Code of Regs. § 103-352. (J.A. 214J-214K).

Significantly, five days before the date of termination, the Plaintiffs actually paid a portion of the outstanding amount owed. Had this prior

¹ Progress Energy Carolinas, Inc. Residential Delinquent Account Disconnection Procedures-South Carolina (J.A. 214A); Progress Energy Business Policies-Payment Extension Plans (J.A. 214B); Progress Energy Business Policies-Collections (J.A. 214C)

payment been made pursuant to the six (6) month payment plan that concededly was to be offered, the payment would have exceeded the requisite amount by \$30.00. (J.A. 214J-214K; 214N).

Despite the affirmation of Progress' obligations, Defendant Progress chose to ignore those obligations, accept the Plaintiffs' money, and proceed with the termination the Plaintiffs' service.

Ms. Fagan further testified that it was company policy at the time of this incident to abide by Section 5.0 of Defendant Progress' internal policies and procedures requiring the documentation of attempts to contact the customer. (J.A. 214I; 214E). There was no evidence of any attempt to contact the Plaintiffs by any employee of the Defendant. (J.A. 214O-214Q).

Section 5.1 of Defendant Progress' internal policies and procedures requires an employee or agent of the Defendant to make a final attempt to contact the customer by personally going to the residence. (J.A. 214E). The Defendant Progress failed to abide by this policy as there was simply no record of any such attempt. (J.A. 214Q-214R)

In light of the above referenced evidence, it is clear the Defendant Progress owed a duty to Plaintiffs which it breached. The Defendant

deprived the Plaintiffs of their rights to adequate notice and a fair opportunity for a deferred payment plan in direct contravention of S.C. Code § 58-27-2520(B) and S.C. Code of Regs. § 103-352. Plaintiffs have offered sufficient evidence indicating that had Defendant offered these rights, the Plaintiffs' prior partial payment would have been sufficient to keep the service activated pursuant to a payment plan, and they would not have had to resort to the use of candles for light. The District Court assumed as much in its opinion.

Therefore, sufficient evidence exists warranting a reasonable inference that the Defendant, indeed, breached its duty of care to Plaintiffs.

C. Defendant Progress affirms that it foresaw the risks associated with the misuse of candles, and for this reason, the causal chain is maintained because the law does not require that the specific and precise manner of the intervening act be foreseeable, but only that the injuries are foreseeable consequences of the risks created.

In a negligence action, a plaintiff must demonstrate that the defendant's breach of duty was the proximate cause of the plaintiff's damage. See Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827, 834 (1997).

Proof of proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence. Legal cause is proved by

establishing foreseeability. Young v. Tidecraft, 270 S.C. 453, 242 S.E.2d 671 (1978); The standard by which foreseeability is determined is that of looking to the natural and probable consequences of the act complained of. *Id.* at 671.

Negligence, to render a person liable, need not be the sole cause of an injury; it is sufficient to show that it is **a** concurring proximate cause. Mathews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (S.C. 1962) (citing Benton v. Pellum, 232 S.C. 26, 100 S.E.2d 534 and Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 103 S.E.2d 265).

Evidence of an independent negligent act is directed to the question of proximate cause. To exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged. The superseding act must so intervene as to exclude the negligence of the defendant as one of the proximate causes of the injury. Mathews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (S.C. 1962) (citing, Riggs v. Akers Motor Lines, 233 N.C. 160, 63 S.E.2d 197).

The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently

arising. Woody v. South Carolina Power Co., 202 S.C. 73, 24 S.E.2d 121 (S.C. 1943).

“(I)t is unessential that the precise manner in which the injuries might have occurred, or where sustained, be foreseeable, or foreseen. It is sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range. . . . It [is], therefore, a jury question [...]” (citation omitted). Hughes v. Children’s Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753, 757 (1977); Daniel v. Days Inn of America, Inc., 292 S.C. 291, 356 S.E.2d 129 (S.C. App. 1987).

When an injury occurs through the concurrent negligence of two persons, and it would not have happened in the absence of the negligence of either person, the negligence of each of the wrongdoers will be deemed a proximate cause of the injury, although they may have acted independently of one another; and both are answerable, jointly or severally, to the same extent as though the injury were caused by his negligence alone, without reference to which one was guilty of the last act of negligence. Brown v. National Oil Co., et al., 233 S.C. 345, 105 S.E.2d 81 (citing 38 Am. Jur., Negligence, Section 64); Talkington v. Atria ReclamelucifersFabrieken BV,

152 F.3d 254 (4th Cir. 1998) (The liability is not defeated by the mere fact that the negligence of one preceded that of another in point of time).

Proximate cause, including the issue of foreseeability, is generally a question of fact to be decided by the jury. *See id.* In fact, “[o]nly in rare or exceptional cases may the question of proximate cause be decided as a matter of law.” Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 352 S.E.2d 488, 493 (S.C. Ct. App. 1986). It may also be proven by direct or circumstantial evidence. Young v. Tidecraft, 270 S.C. 453, 242 S.E.2d 671 (1978). The issue of foreseeability of an intervening act should be submitted to the jury² unless no reasonable juror could find foreseeability based on the facts involved.³

Defendant Progress essentially argues, and the District Court held, that although it may have been foreseeable that a termination of service would cause Plaintiffs to use candles for light during the power outage, it was unforeseeable that the Plaintiffs would leave a lighted candle unattended. (J.A. 53; 318). This argument fails because Plaintiffs have presented sufficient evidence from which a reasonable jury could conclude

² See, e.g., Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 443 S.E.2d 392 (1994); Horne v. Beason, 285 S.C. 518, 331 S.E.2d 342 (1985); Hill v. York County Sheriff’s Dep’t, 313 S.C. 303, 437 S.E.2d 716 (Ct. App. 1993).

³ Horne v. Beason, 285 S.C. 518, 331 S.E.2d 342 (1985); Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989).

that the inadvertent, unattended use of candles in ‘out-of-power’ situations is foreseeable. Furthermore, this argument fails because the Plaintiffs are required only to present evidence lending to a reasonable inference that the Defendant foresaw or should have foreseen that wrongfully terminating a customer’s service would increase the already existing risk of harm from the misuse of candles, and not the precise manner in which they could reasonably be misused.

Accordingly, the “foreseeable event” should be confined to the mishandling of candles, and not the precise manner in which they are mishandled. Hughes, supra. Leaving candles unattended is a reasonable and known manner of misuse.⁴ Furthermore, the mishandling of candles is well within the ‘generalized gamut of greater than ordinary dangers of injury’ resulting from a wrongful termination. Hughes, supra.;

If anything, human experience has shown our society that the very event at issue in this case is quite common and certainly not unforeseeable⁵.

⁴ Unattended candles caused 34% of the 15,000 to 18,000 reported home candle fires from 1999-2001. See NFPA Study (J.A. 152).

⁵ When searching under “unattended candle home fire,” the following number of hits are provided under various popular internet search engines:

Google.com:	31,100
MSN.com:	173,000
Yahoo.com:	868,000

In the public domain on Progress's own web site, there is both advice to have candles handy during power outages, as well as warning and instruction as to the careful use of candles to avoid fires. This warning is given because Defendant Progress, like everyone else, foresees the consequences of unsafe use of candles in starting fires. Defendant Progress' web site provides, in part:

- Exhibit K. Hurricane Safety.
www.progressenergy.com/aboutenergy/stormcentral/stormtips/post-stormsafety/hurricanesafety/. It is mentioned that one should "make sure you have the following items: portable radio with fresh batteries, flashlight, **candles** or lamps, matches . . ." (emphasis added) (J.A. 215).
- Exhibit L. Hurricane Kit Checklist.
www.progressenergy.com/aboutenergy/stormcentral/stormtips/hurricanechecklist/. It listed General Items: . . . Mosquito repellent; portable radios; **candles** and lanterns . . ." (emphasis added) (J.A. 217).
- Exhibit M. Post Storm Safety.
www.progress-energy.com/aboutenergy/stormcentral/stormtips/post-stormsafety/. It advises that "**if you must use candles, remember that open windows and gusty winds can knock them over or blow flammable materials into them, so be careful about where you place them.**" (emphasis added). (J.A. 218).
- Exhibit N. Storm Information.
www.progress-energy.com/aboutenergy/stormcentral/Stormbook_eng.pdf. Hurricane Safety Messages, Page 5, indicates you should "Check supplies and make sure you have the following items: portable radio with fresh batteries, flashlight, **candles** or lamps . . ." (emphasis added) (J.A. 225).

Exhibit O. Carolina Life.

www.progress-energy.com/custservice/carres/communicate/CarLife0806.pdf. Eye On The Storm, Page 4 suggests to “(1) Check supplies such as: portable radio with fresh batteries, flashlight, **candles** or lamps . . .” (emphasis added) (J.A. 230).

The evidence from the Defendant’s web pages alone substantiates the fact that the risk associated with the mishandling of candles was foreseeable, and that Defendant Progress knew it well. See, Oliver v. South Carolina Dept. of Highways and Pub. Transp., 309 S.C. 313, 422 S.E.2d 128, 131 (S.C. 1992) (noting that the defendant’s own witnesses acknowledged the risk which resulted in injury, in finding that a jury issue existed as to proximate cause and upholding the jury’s finding).

The above referenced admonitions by Progress regarding the use of candles in out-of-power situations begs the question of how it could have contemplated only one or two specific ways in which the misuse of a candle could start fires, yet not the scenario where candles are inadvertently left unattended. What if the candle blew over because the weather was windy and the Plaintiffs had an open window they forgot to close? With the rationale of the District Court’s ruling, would Defendant Progress be liable for this particular misuse it admonishes against on its web page, to the exclusion of all other misuses, including leaving candles unattended? This result would defy common sense. Clearly, because South Carolina law does

not require foreseeability of the precise manner of how the harm may manifest itself as a result of a negligent act of the defendant, Hughes, supra., the particular type of misuse should have no bearing on the question of whether or not the danger of candle misuse is within the generalized gamut of greater than ordinary dangers of injury created by a wrongful termination. *Id.* It is reasonable to infer that this is precisely the reason that the courts have broadened the approach to exclude consideration of the exact manner in which the injury is sustained. It would be a constant grappling of the mind in every case involving an intervening act, with a party methodically pointing out every conceivable detail of every event that could possibly have resulted in the injuries, in arguing against foreseeability.

Therefore, whether or not the Defendant actually conceived of the Plaintiffs' particular misuse of the candle or not, is irrelevant to the inquiry. The law would not require the Defendant to have foreseen the actual event of failing to extinguish a candle, but only that the mishandling of candles, which includes leaving them unattended, was a foreseeable risk born from the Defendant's negligent acts. The above referenced web site publications alone establish the requisite foreseeability of the risks of harm from the misuse of candles, which, in this case, was directly what Defendant Progress warned against when it terminated power.

Far from being unforeseeable, accidental injury and even death from the mishandling of candles is always a definite possibility when power is terminated, and hardly an unheard of event. See, e.g., Southeast Bank N.A. v. J.A.M.A. Mobile Home Parks, Ltd. Partnership, 490 So.2d 1057, 1058 (Fla. Ct. App. 1986) (complaint, alleging that trailer park owner was under a duty to repair defects in electrical wiring before tenant took possession of mobile home, that tenants were required to use candles at night for purposes of illumination due to such termination of electrical service, and that two minor children were burned to death in a fire started by the use of candles, sufficiently alleged causation to state cause of action for negligence against the trailer park owner).

South Carolina Courts have considered statistical evidence on the issue of foreseeability and notice. Daniel v. Days Inn of America, Inc., 292 S.C. 291, 356 S.E.2d 129 (S.C. App. 1987) (crime statistics in a hotel assault case offered to show notice and foreseeability). Plaintiffs also presented to the District Court empirical evidence from a 2004 “Home Candle Fires” study performed by the Fire Analysis and Research Division of the National Fire Protection Agency (NFPA) (J.A. 151-195).⁶ The date of this study

⁶ This highly respected organization focuses on public fire safety issues, and its ‘fire-loss’ data is relied upon by governmental agencies and code officials who pass fire safety laws.

(2004), was well before the date of wrongful termination (2005), and was readily available to the Defendant at the time of its negligence.

(www.nfpa.org.)

This study offers, among others, the following relevant statistics:

- that in the year 2001 (the latest year for which data was available) candles in U.S. homes caused an estimated 18,000 reported fires, 190 civilian deaths, 1,450 civilian injuries and \$256 million in estimated direct property damage (these were the highest numbers since 1980, the first year of the study period);
- since 1995, every year has been a new high, and that the 18,000 reported in 2001 is more than three times the 5,000 reported in 1990;
- that between 1999 and 2001, one- third (34%) of all home candle fires occurred after candles were left **unattended**, abandoned, or inadequately controlled (emphasis added);
- that a special study of news clips and fire service reports about identified fatal home candle fires in 1997 and 1998 revealed that candles used for light in the absence of electrical power caused about one of every three of the studied fatal home candle fires;
- that about one in four (24%) of the fatal home candle fires occurred in homes in which the power had been shut off; and, that 7% of the fatal fires occurred during temporary power outages.

(emphasis added) (J.A. 152).

The most important statistics, highly relevant to the issue of foreseeability, are that there are more than 18,000 annually, that more than

one-third (1/3) of house fires attributed to candle use were the result of unattended candles, and one third (1/3) of the fatalities were from misuse of candles when the power was shut off.

Many other similar comparisons may be made, but the foregoing is sufficient to indicate what may be taken to be common knowledge, that in the situation of a termination of electrical services, humans will mishandle other sources of light and heat. The statistics discussed above clearly establish that the misuse of candles can, and **will**, lead to catastrophic fires, injuries and loss of life, irregardless of the particular manner of misuse. This powerful evidence, in and of itself, establishes the requisite foreseeability, which is properly reserved for the jury. Despite the Plaintiffs' contentions raising this study in their brief and oral argument (J.A. 59, 324), the District Court never addressed this evidence, either from the bench or in its two orders. (J.A. 231-310; 315-318; 352-353).

The District Court heavily relied on Faris vs. Potomac Electric Power Company, 753 F. Supp. 388 (D.D.C. 1991) in support of the Defendant's argument that the Plaintiffs' act was neither foreseeable nor dependent on the Defendant's acts in terminating service.

In Faris, the court held that the defendant power company that terminated the plaintiff customer's electric service was not liable for a fire

when a candle, being used by the plaintiff four days after termination, fell onto a rug after the plaintiff had fallen asleep. The Faris opinion states:

“Although the defendant’s decision to disconnect electric services to the plaintiff’s apartment may have motivated her to light the candles in the first place, the plaintiff’s actions were an intervening cause of the subsequent fire.”

Faris at 391.

The plaintiff in Faris, appearing *pro se*, apparently argued that the defendant was responsible because she believed that she was being overcharged by the defendant, which led her to believe she did not have to pay the outstanding balance. The court found no wrongful conduct of the power company, but rather than stopping there, went on to decide the case on proximate cause. The district court was presented with no evidence or genuine legal basis by the plaintiff from which to gage the foreseeability of her intervening act, nor any evidence reasonably suggesting that the plaintiff would have otherwise acted, had the defendant utility acted differently. As a consequence, the court found that her act was **independent** from that of the defendant, and as such, broke the causal chain exposing the defendant to liability. In so holding the district court stated, “We have defined proximate cause many times in our prior opinions to mean that negligence is not actionable unless it, without the intervention of any independent factor, causes the harm complained of.” Faris at 390.

One distinction of Faris is that contributory negligence of misusing the candle amounting to as little as one percent (1%), would have barred recovery anyway, justifying the court in foreclosing the claim by summary judgment. On the contrary, as argued by the Plaintiffs here in their brief, under our comparative negligence analysis, the Grahams' conduct should have been an issue for the jury to address in its deliberations.

Significantly different than in Faris, the Plaintiffs in this case have offered admissions by the Defendant that the risk of misuse of candles was foreseeable, as well as empirical data from a well respected fire safety organization, on the high frequency and manner of home fires caused by candles, which includes the specific act of leaving candles unattended.

The District Court, like the Faris court, stated that even if the defendant had breached a duty, the plaintiff would have failed on proximate cause where the act of leaving a candle unattended was unforeseeable. (J.A. 318). With the facts and evidence, or lack thereof, before the Faris court, this may have been a correct conclusion there. However, the District Court's adoption of that conclusion in this case was an incorrect application of the law where the proof of foreseeability submitted by Plaintiffs, in conjunction with the facts of this case, should yield a different conclusion.

In Faris, the plaintiff's intervening acts were **independent** from the acts of the utility company because the plaintiff put herself in that position four days later, when she could not make do, despite having adequate notice and an opportunity for a deferred payment plan. Therefore, the plaintiff would have been in the same position even if she was deprived of proper notice and the opportunity for a plan. Here, though, the Plaintiffs actually had the ability to avoid putting themselves in that situation, and yet, the Defendant, through its negligence, put the Plaintiffs in a foreseeably dangerous situation. Had the Defendant acted properly and accepted the Plaintiffs' prior payment pursuant to a deferred payment plan, it would have negated the need for the use of candles for lighting, (the parties agree that is the only reason they were used), as well as any possible mishandling of them, which the Defendant was already aware of.

Unlike Faris, there exists here uncontroverted evidence that the inadvertence in failing to extinguish the candle on the night directly following the wrongful termination, was directly influenced by, and **dependent** upon, the wrongful actions of the Defendant. In short, had the defendant acted properly, this tragic event would not have happened. That cannot be said to be true under the facts in Faris. For this reason, the issue of proximate cause should have been presented to a jury. See Brown, supra.

In the case of Tobias v. Carolina Power & Light Co., 190 S.C. 181, 2 S.E.2d 686 (S.C. 1939), a pedestrian on the highway was struck by a passing motorist and thrown against exposed guy wires of an electric light pole installed and maintained by the power company in the center of the highway. The South Carolina Supreme Court held that if the power company was negligent in installing and maintaining the pole, it could not escape liability on the theory that the negligence of the motorist was an efficient intervening cause. The opinion states the following:

‘While the general rule is that, if, subsequently to an original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the former must be considered as too remote, still, if the **character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all the consequences resulting from the intervening act.** (citations omitted)’

Tobias at 687-688. (emphasis added)

It is far from unreasonable to state that the act of leaving a candle unattended could not be characterized as ‘mishandling’ or a ‘misuse’ of the candle. Accordingly, the probable and natural consequences of mishandling fire could reasonably be anticipated and/or foreseen as a product of a wrongful termination.

In Talkington v. Atria Reclamelucifers Fabrieken BV, 152 F.3d 254 (4th Cir. 1998), this Court was presented with an appeal from a District Court of South Carolina case where the plaintiffs sued the manufacturer of a lighter under strict liability and negligence claims. The facts state that an infant child ignited a sofa with a lighter that lacked child-resistant safety features, and was produced by the defendant manufacturer. Among other issues, those of intervening and superseding causes were addressed. The defendant argued that even if it had been negligent, the intervening acts of the infant child's parents in not supervising the infant child broke the causal chain, even though it was foreseeable that infants would play with lighters lacking safety features. The issue was appropriately sent to the jury for its determination, and the lower court instructed the jury as follows:

If the intervening cause was foreseeable, then the defendants are not relieved from liability. If the intervening cause was not foreseeable, then the chain of causation has been broken and the defendants are relieved from liability for any wrong, which they may have had. Where, however, the concurrent negligence of two or more persons combines to produce injury or loss to a third party, the negligence of the one provides no excuse or defense for the negligence of the other. The liability is not defeated by the mere fact that the negligence of one preceded that of another in point of time.

Talkington, 152 F.3d at 267.

Interpreting South Carolina law, this Court determined the above quoted jury instruction as, "an accurate and adequate instruction on

superseding, intervening causes” (*Id.* at 267, citing Small Pioneer Machinery, Inc. 316 S.C. 479, 450 S.E.2d 609, 616 (1994).

The issue was properly submitted to the jury where it found that the defendant was at least 1% at fault, and that the parents intervening acts were foreseeable. Talkington, 152 F.3d at 267.

Our state has also held that medical malpractice committed by a physician on a plaintiff injured by the fault of a third party is foreseeable, and does not break the causal chain. Bessinger v. DeLoach, 230 S.C. 1, 94 S.E.2d 3 (S.C. 1956); Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (S.C. 1984); see also, 15 Am. Jur. 437, 438, 495, Damages, secs. 38, 84, 85.

In Hughes v. Children’s Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977), the South Carolina Supreme Court correctly addressed the issue of intervening causes as they relate to proximate cause. In that case, the defendant clinic had placed a large mirror on a wall six (6) inches from the floor. The mirror was a typical fun-house mirror used for the purpose of entertaining the children while waiting for treatment. While waiting in line, a child fainted and fell back against the mirror with his head and the glass shattered resulting in permanent and serious injury to the child.

The court relied on expert testimony stating that the mirror had “absolutely no safety factor in it,” on the fact that the defendant took no

precautions to warn the children patients or their parents that the mirror could break, and on the fact that the defendant never examined or inquired as to whether the mirror was susceptible to breakage as they could have done. Accordingly, the court held that the placement of a convex mirror in the office of the defendant clinic constituted a foreseeable risk of harm to the child plaintiff. In so holding, the opinion states:

“Moreover, it has been stated that . . .

(I)t is unessential that the precise manner in which the injuries might have occurred, or where sustained, be foreseeable,**757 or foreseen. It is sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range. . . . It was, therefore, a jury question whether the defendant had provided reasonably safe premises, and a reasonably safe installation upon the premises, for the use of *398 the child invitee, . . . (citation omitted) (emphasis supplied)

It was certainly foreseeable that the mirror, if shattered or broken by one of the children-patients, could cause severe injury to the child. The evidence shows that the mirror was unsafe and created an unreasonable risk of harm to the defendant’s patients, including the plaintiff. The jury was justified in concluding under the particular facts and circumstances of this case, that the mirror was an inherently dangerous condition on the defendant’s premises.”

Hughes at 756-757.

Furthermore, with respect to intervening causes, the court held that the child's act in fainting and falling into the mirror was not the sole proximate cause of his injuries, and thus the chain of events was not broken. The court correctly applied South Carolina law and held:

Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided. Gunnels v. Roach, 243 S.C. 248, 133 S.E.2d 757 (1963).

When we speak of proximate cause, we are not referring to the "sole cause". In order to establish actionable negligence, the plaintiff is required only to prove that the negligence on the part of the defendant was at least one of the proximate, concurring causes of his injury. It is generally for the jury to say whether the defendant's negligence was a concurring, proximate cause of the plaintiff's injuries. Grooms v. Minute-Maid, 4 Cir., 267 F.2d 541 (1959).

The presence of the mirror on the premises was not merely a condition involved in the plaintiff's receiving his injuries, as contended by the defendant. The plaintiff's particular injuries would not have resulted except for the maintenance of the mirror on the premises. If the defendant had not breached its duty of reasonable care which it owed to the plaintiff by properly inspecting and taking adequate safeguards to prevent injury resulting from forceful contact with the mirror, the plaintiff would not have been injured as he was. The evidence, therefore, was sufficient to permit the jury to find that the mirror constituted a proximate cause of the plaintiff's injuries.

Hughes at 757 (emphasis added).

The Hughes analysis and rationale applied to this case would yield a far different conclusion than that reached by the District Court here. As in Hughes, there was a negligent act on the part of the defendant that imposed a foreseeable risk of harm to the Plaintiffs. The absence of power and light was not merely a condition involved in the Plaintiffs' injuries, as was unsuccessfully argued by the Hughes defendant. The Plaintiffs' injuries would not have resulted had the Defendant complied with its duties and applied Plaintiffs' partial payment to a deferred payment plan and kept service activated. The evidence is sufficient for a jury's determination on the issue of whether or not the Defendant's negligence constituted a proximate cause of the Plaintiffs' injuries.

In Daniel v. Days Inn of America, Inc., 292 S.C. 291, 356 S.E.2d 129 (S.C. App. 1987), the South Carolina Court of Appeals addressed the issue of intervening causes in the context of a hotel assault case. The plaintiff offered statistical evidence suggesting that the defendant hotel knew or should have known of the risk of harm from assaults occurring on its premises. The defendant hotel argued that it was unforeseeable that one of its guests would assault another guest. The court held:

“Here, it is evident that the hotel perceived some threat of physical harm to its guests by reason of the fact that it required its night auditor to walk the hotel's premises once or twice each night and the fact that it had requested the sheriff's department

to patrol the hotel's parking area. It is not illogical to infer that in view of the two armed robberies and many break-ins, the hotel could have foreseen that its guests may be physically attacked on its premises by third parties. The hotel's contention that it could not have foreseen that one of its guests would also attack another guest is at least a fact question that should not be decided at the summary judgment stage."

Daniel, 356 S.E.2d 129 at 18-19.

Like in Daniel, the Plaintiffs in this case have established that Defendant Progress perceived some threat of physical harm to the Plaintiffs, by reason of the fact that it warned of such threat on its web pages in the public domain. Furthermore, the 2004 NFPA study clearly establishes home candle fires occur frequently and that the numbers are reaching new highs every year. It is logical to infer that in view of the above referenced evidence, the Defendant could have foreseen that its customers may be harmed through the misuse of candles. Like in Daniel, Defendant Progress' contention that it could not have foreseen the precise manner in which this risk manifested itself, is at the very least, a question of fact for the jury that should not have been decided at the summary judgment stage.

Lastly, there are a number of courts across the nation that have addressed the issue of proximate causation in a termination of utility service context where the central question was whether or not an intervening event

was the sole cause or a concurring cause of the injuries sustained.⁷ The factual scenarios of these cases are basically the same where, due to a termination of service, the customer attempts to compensate for the loss and injury results. The mere existence of court opinions involving “power termination candle fires”, is itself evidence of foreseeability of their occurrences.

Significantly, Plaintiffs are aware of at least one court that has addressed this very issue under identical facts and concluded differently than the District Court. The Plaintiffs bring the Court’s attention to the 2000

⁷ See (See, e.g., Enis v. Ba-Call Bldg. Corp., (7th Cir. 1980) 639 F.2d 359 [causation is jury question where tenant boiled hot water on stove to compensate for lack of heat and water spilled on child]; Bennett M. Lifter, Inc. v. Varnado, (Fla. Dist. Ct. App. 1985) 480 So.2d 1336 [proximate cause is jury question where child collides with grandmother transporting hot water to the bathroom]; Southeast Bank v. J.A.M.A. Mobile Home Parks, (Fla. Dist. Ct. App. 1986) 490 So.2d 1057 [causation sufficiently alleged where trailer park owner’s negligence caused termination of electric service, leading to tenant’s use of candles which started fire in which children were killed] *contra*, Aguirre v. Adams, (1991) 15 Kan. App. 2d 470, 809 P.2d 8 [landlord not liable for failure to provide hot water because no causation as matter of law where mother’s negligent supervision of child resulted in burn by hot water in bathtub]; Moreno v. Balmoral Racing Club, Inc., (1991) 217 Ill. App. 3d 365, 160 Ill. Dec. 303, 577 N.E.2d 179 [operating charcoal grill indoors to compensate for landlord’s failure to provide heat not reasonably foreseeable and breaks causal link]; Faris v. Potomac Elec. Power Co., (D.D.C.1991) 753 F. Supp. 388 [plaintiff’s act in falling asleep with candles lit is intervening cause which supersedes power company’s responsibility after properly noticed termination of power]; Martinez v. Lazaroff, (1979) 48 N.Y.2d 819, 424 N.Y.S.2d 126, 399 N.E.2d 1148 [father’s act of transporting pot of boiling water from stove to bathroom which spilled on child was intervening act that cut off liability of landlord].)

California Court of Appeals unpublished opinion of Kuns v. City of Ukiah, 94 Cal.Rptr.2d 359, 00 Cal. Daily Op. Serv. 2750, 2000 Daily Journal D.A.R. 3675 (Cal. App. 1 Dist. Apr 07, 2000) (NO. A087470), review denied and ordered not to be officially published (Jul 19, 2000).⁸ (See Addendum).

Even though this opinion lacks the force of law, Plaintiffs find it a detailed and thorough analysis of the relevant considerations in addressing the issues at hand and respectfully refer the Court to its strikingly similar facts as well as the rationale underlying the holding.

Identical to this case, the defendant utility wrongfully terminated the plaintiffs' service by not providing adequate notice nor an opportunity for a deferred payment plan. There was sufficient evidence presented to establish a reasonable inference that had the defendant acted properly, the plaintiffs would have been able to keep the service activated. Also identical to the case at hand, the plaintiffs resorted to candles as their source of light. The plaintiffs went to bed leaving the candles lighted and one of them fell starting a catastrophic fire killing three children younger than 10 years old.

⁸Although this is not an opinion of this Court, Plaintiffs have referred to FRAP and Local Rule 32.1 and cite this case in order to establish the law of the case and for its precedential value in relation to the material issues involved in this case, and that there is no published opinion that would serve as well. Therefore, Plaintiffs submit to the Court that it has met the Rules' requirements in citing it.

Among other evidence, the plaintiffs offered strong empirical evidence of the numbers and frequency of unattended candle fires, as did the Plaintiffs in this case. The lower court held that as a matter of law, the act of leaving the candles unattended was unforeseeable.

In reversing, the lower courts holding, the appellate court stated:

“The failure to give the statutorily required notice and the termination of the power were not the physical causes of the fire. But the law does not look to Newton’s laws of motion to explain cause and effect, but to its own definition of “substantial factor” in determining legal cause. The question is whether the premature cutting off of the power is a legally causative factor. As explained below, whether the defendant’s conduct or the later intervening actions of [plaintiffs] constituted sole or joint substantial factors in causing the damages is the type of question about which reasonable men and women can differ—a dispute of contested factual issues properly allocated to and resolved by the fact-finding capabilities of a jury (citation omitted). Whether the intervention of a later cause is an interconnected risk of the [defendant’s] conduct so that responsibility should not be terminated, or is such that ordinary human experience should anticipate it, is the type of traditional proximate cause normally determined by the hindsight of jurors. (See generally Prosser & Keeton, Torts (5th ed. 1984) ch. 7, §§ 41-45, pp. 263-321.)

(See Addendum).

In effect, the trial court in this case accepted the [defendant’s] argument that [plaintiff’s] action in leaving a burning candle unattended was a superseding cause which relieved the [defendant] of liability as a matter of law. However, the evidence produced in opposition to the summary judgment motion showed that it was very likely that cutting off the power without giving the resident the statutory 24-hour personal or 48-hour mailed notice, would, and did, result in the unprepared

resident being unable to pay the amount in arrears and thereby prevent disconnection. The evidence produced in connection with the summary judgment motion indicated that the [defendant] would have accepted [plaintiff's] payment of the past due amounts if he had offered it prior to disconnection of the power. [Plaintiff's] testimony indicated that she would have produced payment if she had known the disconnection was imminent. The lack of proper notice resulted in the abrupt disconnection, which triggered a foreseeable attempt to compensate for loss of the electricity. The court erred in finding as a matter of law that leaving a candle unattended was a superseding cause of the harm. [citations omitted]. To reach a "Palsgrafian" result in the context of the disputed facts in this case would improperly withdraw causation from the jury [...]"

(See Addendum).

"The question of whether the acts of [plaintiff] were foreseeable is for the jury unless the undisputed facts allow only one conclusion. [citation omitted]. In summary, a jury should determine to what extent, if any, the insufficient notice and the act of shutting off the power on December 26 deprived the [plaintiffs] of three days within which to pay their bill, led to the use of candles, and caused their damages; whether the [plaintiffs] could have paid the arrearage between December 26 and December 29 or would the same result have occurred on the 29th; or whether the actions of [plaintiffs] were foreseeable or superseding acts relieving other negligent persons of responsibility. The facts surrounding causation of this tragic fire are disputed, and subject to differing inferences. It was error to grant summary judgment on the issue of causation."

(See Addendum).

At the very least, this opinion, though not authoritative, establishes the credibility of the rationale underlying the Plaintiffs' arguments, and that reasonable minds can certainly reach different opinions when the courts

themselves have differing conclusions. This rationale, taken with the evidence of record, puts the relevant facts in sufficient dispute, so as to keep its final determination a jury matter.

VII. CONCLUSION

Plaintiffs have presented sufficient evidence, both direct and circumstantial, to rebut the District Court and Defendant's conclusion that unattended candles in a powerless situation is unforeseeable. Plaintiffs have established that the District Court and Defendant have interpreted the law to require that the specific manner of harm be foreseeable, when the law requires only that some harm is foreseeable as a consequence of the heightened risks born on the Plaintiffs by the Defendant's wrongful termination of power. Also, that the Plaintiffs use of candles is not independent, but derives directly from the Defendant's wrongful termination.

For the above stated reasons, the Appellants respectfully request that this Court reverse the District Court's order granting Defendant Progress summary judgment on the issue of proximate causation, and remand for a jury trial.

VIII. REQUEST FOR ORAL ARGUMENT

Appellants respectfully request that oral argument be heard in this matter because they believe it will significantly aid the Court in deciding the issues raised in this appeal.

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ADDENDUM

7 of 33 DOCUMENTS

CHRISTINE LYNETTE KUNS et al., Plaintiffs and Appellants, v. CITY OF UKIAH, Defendant and Respondent. BILLY MACK CLARK et al., Plaintiffs and Appellants, v. CITY OF UKIAH, Defendant and Respondent.

A087470

**COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT,
DIVISION ONE**

79 Cal. App. 4th 899; 94 Cal. Rptr. 2d 359; 2000 Cal. App. LEXIS 263; 2000 Cal. Daily Op. Service 2750; 2000 Daily Journal DAR 3675

April 7, 2000, Filed

NOTICE: [***1] NOT CITABLE - ORDERED NOT PUBLISHED

SUBSEQUENT HISTORY: As Modified on Denial of Rehearing May 4, 2000, Reported at: *2000 Cal. App. LEXIS 362*.

Review Denied July 19, 2000 and the Reporter of Decisions directed not to publish this opn. in the Official Reports (*Cal. Const., art. VI, § 14; rule 976, Cal. Rules of Ct.*), Reported at: *2000 Cal. LEXIS 5603*.

PRIOR HISTORY: Mendocino County Superior Court. Super. Ct. No. 75347. Super. Ct. No. 75547. Honorable Vincent Lechowick, Judge.

DISPOSITION: The judgment is reversed and the matter is remanded for further proceedings. Appellants are entitled to costs on appeal.

COUNSEL: Johnson & DeMarchi, Thomas F. Johnson, Linda S. Mitlyng, William B. Phillips (Attorneys for Appellants/Plaintiffs - Christine Kuns et al., Billy Mack Clark et al.)

Shapiro, Galvin & Shapiro, Piasta & Moran, Joseph A. Piasta II, Adrienne M. Moran, Dana Beernink Simonds (Attorneys for Respondent/Defendant - City of Ukiah).

JUDGES: Marchiano, J. We concur: Strankman, P.J., Swager, J.

OPINION BY: MARCHIANO

OPINION

[*903] [**362] This is an appeal from a summary judgment in favor of the City of Ukiah (the City) in a consolidated action arising out of a fatal [*904] residence fire which occurred after the City's utility company shut off the power to the residence of Christine and Emitte Kuns. We find that triable issues of material fact exist as to causation of the fire and reverse the judgment.

BACKGROUND

On December 26, 1995, the City of Ukiah's utilities department [***2] disconnected the power to the home that Christine Kuns shared with her husband, Emitte Kuns and six young children. Four of the children died of smoke inhalation in a fire that broke out that night, apparently started by a **candle** left **unattended** in a macrame plant hanger in the living room. On December 5, 1996, Billy Mack Clark, father of Ashley Clark age 8, who survived the fire, and Brandon, age 4, Aaron, age 5 and Amy Clark, age 7, who did not survive the fire, filed a complaint for wrongful death and negligence against the City and the County of Mendocino.¹ The complaint was subsequently amended to add a cause of action for negligent infliction of emotional distress.² Christine Kuns filed a complaint against the City, subsequently amended to allege wrongful death, negligence and negligent infliction of emotional distress.³ The complaints were consolidated pursuant to stipulation of the parties on July 16, 1997.

1 The fourth child who died was Casey Kuns, age 1, one of the two children of Emitte and Christine Kuns.

79 Cal. App. 4th 899, *; 94 Cal. Rptr. 2d 359, **;
2000 Cal. App. LEXIS 263, ***; 2000 Cal. Daily Op. Service 2750

2 The cause of action against the county for negligent infliction of emotional distress was voluntarily dismissed on June 17, 1997.

[**3]

3 Plaintiffs in Christine's action included Ashley Clark, age 8 and Deanna Kuns, age 2 months at the time of the fire. Emitte is not a party in either action.

On August 13, 1998, the City filed a motion for summary judgment in the consolidated case. In addition to various arguments regarding claims against other departments of the City which are not before us, the City's motion was based on the contention that *Public Utilities Code sections 10010* and *10010.1* did not create a duty of care owed to appellants and that appellants could not establish that any act or omission of the City proximately caused the fire.

The following facts were submitted to the court for purposes of the motion for summary judgment. The City billed Christine and Emitte Kuns \$ 177.68 for utilities on October 27, 1995. They failed to make any payment on the October bill, and the utility records showed that a delinquency notice was sent on December 4, 1995. Christine denied ever receiving the December 4 notice and the City did not retain a copy of the notice. [**4] Erin Tarkhanian, the City's customer service representative stated that the December 4 notice stated a "pay by" date and warned that if payment was not made, a 48-hour [*905] notice would issue and penalties would be assessed. The form of notice produced by the City did not mention disconnection of service. ⁴

4 City records showed the notice had been sent, but Christine Kuns claimed she never saw the notice, and the utility did not have a copy of the form of notice sent. Customer service representative Erin Tarkhanian stated that a computer notation indicated that a notice was sent on December 4. There was some confusion as to which form of notice was sent and the content of the notice. A form of notice was attached to one of the declarations submitted in support of the summary judgment motion. The City has not produced a form that references disconnection on the December 4 notice.

[**363] Another notice was sent on December 14, 1995, which stated: "current charges: \$ 200.01, past due charges \$ 177.68, late [**5] fee \$ 5.00, total due \$ 382.69, pay by 12/21/95." ⁵ The notice was headed "final notice" and provided that the account was past due and unless payment in full was made by the "pay by" date, the power would be disconnected. ⁶ Christine received this notice. She believed that there was an amount due, but expected she would receive a 48-hour

notice prior to any disconnection. Utility records showed that Christine had been behind in payments to respondent on many occasions, but had contacted the City and eventually paid.

5 December 21 was seven days after the December 14 mailing of the notice. Prior to the 1985 amendments, *Public Utilities Code section 10010* required only a seven-day notice of termination for nonpayment of a delinquent account. (See Historical and Statutory Notes, 58 West's Ann. Pub. Util. Code (1984 ed.) foll. § *10010*, p. 186.) At the relevant times in this case, *section 10010* provided for a 10-day notice of termination plus 5 days for mailing. Fifteen days after the December 14 notice would have been December 29.

6 Until August of 1995, the City used a notice titled: "Final/48-hour Notice." After August, the 48-hour wording was deleted. The notice did not contain any information about the procedure for requesting an extension or amortization.

[**6] On this occasion, the City made no attempt to give either a 24 or a 48-hour notice of disconnection. Christine was home at all times because of her new baby, and did not receive any additional notice. The statutory period required by *section 10010.1* would have allowed the City, with proper notice, to disconnect the power 15 days from the date of the notice, on December 29. Christine stated that if she had received a 48 or 24-hour notice she would have found a way to pay the bill before the 29th. In addition, Emitte had enough cash on the 26th to cover the past due portion of the bill.

On December 26, 1995, the day after Christmas, the City disconnected the utilities. Christine, Emitte, and Christine's stepfather, Mr. Whitcombe, called the City that day to attempt to get the power reconnected. Christine Kuns had \$ 200 on deposit with the City's utilities department. Whitcombe requested that the City turn the power on that day, and promised to pay in [*906] seven days. Emitte offered \$ 250 or \$ 300 cash, which would have covered the past due amount, but was told that he had to pay the entire amount, including disconnect fees, before the power would be turned on. The City did not offer to [**7] apply the deposit toward payment of the account.

City personnel stated that if Emitte had spoken with the City prior to the power being disconnected, the City would have accepted his payment, which would have covered the past due amounts. Private and state funded assistance programs were no longer available because the power had already been turned off. Emitte and Christine were not offered information about or offered an opportunity to amortize the past due payment at this

79 Cal. App. 4th 899, *; 94 Cal. Rptr. 2d 359, **;
2000 Cal. App. LEXIS 263, ***; 2000 Cal. Daily Op. Service 2750

time.⁷ [**364] They were told that they would have to pay the entire past due amount, current amounts due, disconnect and reconnect fees, before the power would be turned on. The total due was \$ 417.69.

7 *Section 10010.1, subdivision (d)(5)* requires every notice of termination to include information regarding "the procedure by which the customer may request amortization of the unpaid charges." *Section 10010, subdivision (e)* provides that any customer who obtains the certification of a physician that termination of service will be life threatening and the customer is financially unable to pay ". . . shall, upon request, be permitted to amortize, over a period not to exceed 12 months, the unpaid balance of any bill asserted to be beyond the means of the customer" Deposition testimony indicated that Emitte suffered from attention-deficit disorder, obsessive-compulsive disorder, Tourette's syndrome and fetal alcohol syndrome. Neither Christine nor Emitte had ever told the City about the existence of their disabilities.

[***8] Unable to negotiate a reconnection of the power with the City, Christine and Emitte borrowed **candles** from their neighbor to light the house that night. Christine put one **candle** in a jar in the living room and one on a dish in the kitchen. Emitte put the third **candle** in the soil of a plant hanging in a macrame plant hanger above the couch. After Christine and the six children went to bed, Emitte left the house. He left the **candle** in the potted plant in the plant hanger **unattended**. That **candle** apparently ignited a fast burning fire which, combined with the foam-cushioned couch, Christmas tree and gift wrappings, quickly produced high temperatures, large quantities of smoke, heat and toxic gases.

Christine, who took phenobarbital for her epilepsy, did not awaken until Ashley came into her bedroom and tugged on her arm saying that her throat hurt. Christine saw an orange glow in the hallway and panicked. She ran down the hallway, past the bedrooms where the other children were sleeping, and saw the couch in the living room in flames. She could smell smoke, but did not see any smoke in the house. She ran to the neighbor's house for help, then returned and grabbed two of her children. [***9] The other four children died in the fire.

[*907] The court granted the City's motion for summary judgment. Judgment was entered on April 21, 1999, and Christine Kuns and Billy Mack Clark appealed.⁸

8 The trial court dismissed the action as to the City's fire, police and ambulance departments. No

issue is raised on appeal as to this portion of the judgment.

DISCUSSION

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Code Civ. Proc.*, § 437c, *subd. (c)*.) A defendant moving for summary judgment must show "that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (*Code Civ. Proc.*, § 437c, *subd. (o)(2)*.) "The burden [then] shifts to the plaintiff . . . to show that [***10] a triable issue of one or more material facts exists as to the that cause of action or a defense thereto." (*Code Civ. Proc.*, § 437c, *subd. (o)(2)*.) The sole function of the trial court is to find issues, not to resolve them. (*Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1511, 285 Cal. Rptr. 385*.) The trial court's ruling on a summary judgment motion is subject to de novo review. (*Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal. 4th 666, 674-675, 863 P.2d 207*.)

Oral argument on the motion for summary judgment in this case as well as the court's written statement of decision, focused on the existence of a duty on the part of the City as well as proximate cause. However, the order granting summary judgment mentioned duty only in a footnote in which the court stated that it rejected the City's argument that *Public Utilities Code sections 10010* and *10010.1* do not create a duty of care.

The court's judgment was based, not on the issue of duty, but on its determination that appellants could not establish causation as a matter of law. Specifically, [***11] the court stated: "Spoiled refrigerated food is damage which can be easily and directly linked to a loss of electrical power." In contrast, the court found: "Destructive fires result from negligent use of open flames and such devices regardless of whether or not the electrical power to a residence is connected or even exists." In addition, the court relied on the doctrine of judicial estoppel to support its decision. This determination was based on statements [**365] made by Christine and Billy Mack Clark in child custody proceedings to the effect that Emitte's actions caused the fire. [*908] Because both of the court's conclusions are erroneous, we reverse the judgment.⁹

9 Appellants argue that the trial court erred by not specifically adjudicating the issue of duty. As respondent points out, to the extent this issue was addressed, the court's comment was favorable to appellants. Respondent has not cross-appealed or

79 Cal. App. 4th 899, *; 94 Cal. Rptr. 2d 359, **;
2000 Cal. App. LEXIS 263, ***; 2000 Cal. Daily Op. Service 2750

urged us to review the subject of duty. We conclude that the question of duty is not currently before us and express no view on that issue.

[***12] The failure to give the statutorily required notice and the termination of the power were not the physical causes of the fire. But the law does not look to Newton's laws of motion to explain cause and effect, but to its own definition of "substantial factor" in determining legal cause. The question is whether the premature cutting off of the power is a legally causative factor. As explained below, whether the City's conduct or the later intervening actions of Emitte Kuns or others constituted sole or joint substantial factors in causing the damages is the type of question about which reasonable men and women can differ -- a dispute of contested factual issues properly allocated to and resolved by the fact-finding capability of a jury. (*Braman v. State of California* (1994) 28 Cal. App. 4th 344, 355-356.) Whether the intervention of a later cause is an interconnected risk of the City's conduct so that responsibility should not be terminated, or is such that ordinary human experience should anticipate it, is the type of traditional proximate cause normally determined by the hindsight of jurors. (See generally Prosser & Keeton, *Torts* (5th ed. 1984) ch. 7, §§ 41-45, pp. [***13] 263-321.)

Whether the City's Acts Were a Substantial Factor in Causing Appellants' Injury is a Jury Question

The City correctly frames the issue: would the fire have occurred even if the City complied with the notice requirements and did not disconnect the electricity until December 29? We disagree with the City's analysis of the issue. Specifically, the City argues that the harm indisputably would have occurred even if the disconnection had been properly noticed because Christine and Emitte Kuns could not have paid on December 29, and would have used candles regardless of when the power was disconnected.

This issue, in light of the evidence produced to date, is a factual question for the jury. The City failed to produce undisputed evidence that Christine Kuns would not have paid the past due amounts if she had received a 48 or 24-hour notice of disconnection.¹⁰ There was no evidence that Kuns could not have raised the money if she had been given proper notice and allowed [*909] the statutory time in which to avoid disconnection and the need to use candles for light in the darkness of their residence. In addition, appellants presented evidence that the family would not [***14] have been using [**366] candles if the electricity had not been abruptly terminated.

10 *Public Utilities Code section 10010* provides that a municipally owned electric utility may not "terminate residential service for nonpayment of a delinquent account unless the public utility first gives notice of the delinquency and impending termination, as provided in *Section 10010.1*" (*Pub. Util. Code, § 10010*.) *Section 10010.1* contains specific and detailed provisions, which prohibit termination of electric service for nonpayment unless the utility gives notice of the proposed termination 10 days prior to the termination. The notice may not be mailed earlier than 19 days from the date of mailing of the bill. The 10-day period does not begin to run until 5 days after the notice is mailed, effectively giving 15 days after the notice to pay the past due amount. (*§ 10010.1, subd. (a)*.) Furthermore, the statute requires the utility to "make a reasonable attempt to contact an adult person residing at the premises of the customer by telephone or personal contact, at least 24 hours prior to any termination" (*§ 10010.1, subd. (b)*.) If personal contact cannot be accomplished, "the public utility shall give, by mail, in person, or by posting in a conspicuous location at the premises, a notice of termination of service, at least 48 hours prior to termination." (*§ 10010.1, subd. (b)*.)

[***15]

The determination of causation rests on a jury's common sense analysis of the facts based on ordinary experience guided by applicable legal principles. The appellant's burden of proof to establish causation is explained in the Restatement Second of Torts: "It is enough that [plaintiff] introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists." (*Rest.2d Torts, § 433B, com. b, p. 443*.)

The City's conduct may be said to be a cause of appellants' harm if the acts of the City were a substantial factor in bringing about the harm. (*Mitchell v. Gonzales* (1991) 54 Cal. 3d 1041, 1049, 819 P.2d 872; *Rest.2d Torts § 431*.) Causation is generally a question of fact for the jury. (*Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal. 3d 508, 520, 150 Cal. Rptr. 1, 585 P.2d 851.) [***16] ""Legal cause' exists if the actor's conduct is a 'substantial factor' in bringing about the harm and

79 Cal. App. 4th 899, *; 94 Cal. Rptr. 2d 359, **;
2000 Cal. App. LEXIS 263, ***; 2000 Cal. Daily Op. Service 2750

there is no rule of law relieving the actor from liability. [Citations.] . . . The question of causation is one of fact; it becomes a question of law only where reasonable people do not dispute the absence of causation. [Citation.] It is also a question of fact when the issue is whether the defendant's negligence was a substantial factor in causing injuries inflicted during a criminal attack by a third party. [Citation.] The defendant has the burden of establishing there was not "room for a reasonable difference of opinion" on the issue of causation. [Citation.]" (*Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal. App. 4th 1225, 1235.) "The standard is high for [*910] finding as a matter of law that the material facts show a lack of causality . . ." (*Constance B. v. State of California* (1986) 178 Cal. App. 3d 200, 207, 223 Cal. Rptr. 645.) Whether an act is the cause of an injury is a question of law only when "the facts are uncontroverted and only one deduction or inference may reasonably be drawn therefrom." (*Sanders v. Atchison, Topeka & Santa Fe Ry. Co.* (1977) 65 Cal. App. 3d 630, 649, 135 Cal. Rptr. 555.) [***17]

The City relies on *Tovar v. Southern Cal. Edison Co.* (1988) 201 Cal. App. 3d 606, 247 Cal. Rptr. 281 and *Capolungo v. Bondi* (1986) 179 Cal. App. 3d 346, 224 Cal. Rptr. 326 to argue that causation is absent in this case. Those cases are not similar to the facts at issue. *Tovar* involved a suit by the residents of a motel against a utility and the owners of the motel. The applicable statute required 10 days notice of intent to terminate utility services when the master account was in arrears. On November 14, the utility left a notice that services would be terminated on November 18 due to arrearages in the master customer's account. (*Tovar v. Southern Cal. Edison Co.*, *supra*, 201 Cal. App. 3d at p. 611.) However, the utility actually terminated service on November 15, pursuant to the direction of the landlord. (*Id.* at p. 610.) The tenants claimed that the termination notice did not comply with the statutory notice requirements applicable when the account is in arrearages. The court concluded that regardless of the acts of the utility, the cause of the termination was the order by the landlord, not the improper notice based [***18] on arrearages in the master account. (*Id.* at p. 610.) Unlike this case, *Tovar* is a case where the act of the landlord caused the plaintiff's harm independently of any action by the power company. The landlord in *Tovar* solely and directly caused the termination of service.

[**367] In *Capolungo*, the plaintiff was injured when she swerved her bicycle around defendant's parked car and was hit by a passing motorist. Plaintiff argued that defendant was negligent per se because he had parked in a yellow zone for longer than the 24-minute limit. (*Capolungo v. Bondi*, *supra*, 179 Cal. App. 3d at p. 349.) The court found that regardless of whether

defendant's car had been parked for more or less than 24 minutes, plaintiff would have swerved around it and been injured. The element of legal causation was missing because the accident would have happened even if the car had been parked for the legal time limit. (*Id.* at p. 355.) Like *Tovar*, *Capolungo* is a case in which the independent act of a third party, which was unrelated to the original actor's negligence, caused the plaintiff's harm.

In *Tovar* and *Capolungo*, the facts demonstrated [***19] that the plaintiffs would have been injured by an independent cause even if the proper notice had been given and the parking time limit had been observed. Here, in contrast, [*911] the City ignores the specific and unusual facts that appellants produced in opposition to the summary judgment motion. In particular, appellants produced evidence that with proper notice, Christine would have paid the delinquent bill and the resort to alternative sources of light would have been unnecessary. Appellants' argument in this case is that the cause that injured them was directly dependent on and related to the improper notice itself.

The City argues that appellants never proved that Christine could have paid the bill in full even if the City had given the 24 or 48-hour notice and waited the appropriate three additional days to disconnect the power. However, it is not appellants' burden to affirmatively prove every element of the case in order to resist a summary judgment. In Christine's initial contract with the utility, she noted she was receiving Aid to Families with Dependent Children (AFDC), which provided some notice to the City of her financial circumstances. The City's records showed many times [***20] that Christine had requested and received extensions of time, and had finally paid the amounts due. The undisputed evidence indicates that Christine and Emitte Kuns were habitually late in paying their utility bills, but had managed to avoid disconnection by paying at the last minute.

Christine testified that if she'd been given a 48-hour notice in December of 1995, she would have again found a way to pay the bill to avoid disconnection of the utilities. When she received the December 14 notice, she believed she had to pay by the stated date or she would get a 48-hour notice of disconnection. In the past, when she received the 48 or 24-hour notice, she testified that she would call "everybody and their mama" to get the money. Bill Clark had helped with money in the past, as had her mother and an energy program. Patricia Archibald, supervisor of the City's utility department stated that Emitte called her on December 26 after the power was shut off, said "Come on, I've got little kids here," and offered to bring in \$ 250, which was more than the delinquent amount from October, if the power

79 Cal. App. 4th 899, *; 94 Cal. Rptr. 2d 359, **;
2000 Cal. App. LEXIS 263, ***; 2000 Cal. Daily Op. Service 2750

could be reconnected.¹¹ Archibald refused. Archibald and Tarkhanian admitted, however, [***21] that if Emitte had offered to pay the delinquency before the power was physically shut off, alternatives would have been available and the City would have worked out payment arrangements. The power should not have been shut off at that time because the statutory 15 days before termination had not elapsed. In fact, Christine and Emitte were trying to make arrangements to pay the delinquency at a time when the power should have been on.

11 Archibald had not begun working for the City until December 18, just before the fire. She had received no instruction on the legal procedures for terminating electric services.

Contrary to the City's position, appellants offered evidence that they would have paid at least the overdue portion of the bill, and possibly the [*912] entire bill if they [**368] had been properly noticed and given the statutory time limit in which to pay. In order to prove that its action was not a substantial factor in causing the harm, it was the City's burden on summary judgment to produce undisputed [***22] evidence that Christine and Emitte could not have paid with proper notice. The City has not directed us to evidence in the record on appeal where Christine Kuns or anyone intervening on the family's behalf stated that they could not have paid the bill by the correct termination date of December 29 if allowed the proper time to do so.¹² The electric power should have been on during three days in which appellants could have sought assistance to pay the bill. In fact, Patricia Archibald stated that the fact that the power had already been turned off made assistance from H.E.A.P. (Home Energy Assistance Program) or R.E.A.C.H. (Residential Energy Assistance Challenge) inaccessible to the Kuns family.¹³

12 The City's separate statement of undisputed facts in support of its motion for summary judgment did not even assert the fact that appellants would have been unable to pay if the power had remained connected for the appropriate time period. Undisputed statement number 32 in the City's statement merely represents that Emitte Kuns stated that he had \$ 250 or \$ 300 to apply to the account, "at no time before the fire did he bring that money in to the utility department."

[***23]

13 Tarkhanian described the R.E.A.C.H. program, funded by the Salvation Army, as a financial assistance program the City referred utility customers to for help in paying overdue utility bills. The H.E.A.P. program was a similar

state funded financial assistance program for low income families.

In support of its argument that the use of candles was inevitable, the City notes the declaration of appellants' fire expert, stating that it is common knowledge that people use candles when the electricity is off. Frank Holbrook, appellants' fire expert, also stated that Christmas holidays are a dangerous time for fires due to extremely flammable Christmas trees and wrappings being present in homes. Other evidence submitted to the trial court indicated that use of candles and resulting fires are common occurrences when the power is off. Appellants also submitted a table of statistics showing 429 residential fires caused by candles in 1993, and similar numbers for the previous 19 years. The City's Fire Deputy Chief, Roe Sandelin, testified at his deposition that he had seen five or ten fires start [***24] from candles burning. He also stated that he had seen fires that occurred after the electricity had been turned off in a residence.

The City argues that these facts prove the fire would have happened regardless of when or how the power was disconnected. However, the facts also support the inference that the use of candles in this case was a foreseeable, direct and potentially dangerous response to the City's lack of [*913] proper notice and abrupt termination of the electricity. The City's argument on this point assumes that disconnection of the power was inevitable, which is a disputed fact at this stage of the proceedings.

The trial court erred when it concluded that causation was negated by the facts that "candles are used year round" and that open flames at Christmas can cause fires even if the electricity is connected. These general factual statements resolve no issue in this case. There is no evidence that appellants routinely used candles prior to the disconnection. To the contrary, the undisputed evidence submitted by appellants was that they had to borrow three candles from the neighbor after the power had been disconnected. The City failed to provide undisputed evidence to support [***25] its argument that the fire in this case would have happened even if the City had complied with the notice provisions of the Public Utilities Code.

The evidence presented at this stage of the case leaves room for a reasonable difference [***369] of opinion. Whether the action of the City in this case was a substantial factor in causing the harm to appellants remains a question of fact to be resolved by the appropriate fact finder at trial, not by summary judgment.

An Intervening Cause Does Not Negate Liability

79 Cal. App. 4th 899, *; 94 Cal. Rptr. 2d 359, **;
2000 Cal. App. LEXIS 263, ***; 2000 Cal. Daily Op. Service 2750

Although the main focus of the City's argument is the substantial factor issue, the reliance on the intervening cause cases of *Tovar* and *Capolungo* indicates that the fundamental issue in this appeal is the effect of the actions of Emitte Kuns on the City's liability. The City argued in the trial court that Emitte's acts of leaving a burning **candle unattended** and removing the battery from the smoke alarm preclude any liability on the part of the City. Appellants concede that this is a case in which more than one action contributed to the harm, but argue that Emitte's actions do not relieve the City of liability as a matter of law.

The law in California is that foreseeable [***26] intervening acts do not immunize the initial actor from liability. (*Richardson v. Ham* (1955) 44 Cal. 2d 772, 777, 285 P.2d 269; *Mosley v. Arden Farms Co.* (1945) 26 Cal. 2d 213, 218, 157 P.2d 372.)¹⁴ "Causation in the law of negligence is not determined by a linear projection from a 'but for' premise. [*914] Instead, it is expressed in terms of 'foreseeability' and is limited by the policy that cause must be 'proximate.' The problem is complex, and has bedeviled many. [Citations.]" (*Brewer v. Teano* (1995) 40 Cal. App. 4th 1024, 1030.) As the court in *Brewer* noted, the Restatement Second of Torts sets out the rules for evaluating the issue of whether the acts of another party intervene in the chain of causation in such a manner as to prevent the original actor from being liable for harm to another.¹⁵ (40 Cal. App. 4th at p. 1031.)

14 Courts in other states have reached conflicting results in cases involving injuries sustained as a result of a plaintiff's attempt to compensate for a landlord's wrongful termination of hot water or heat. (Annot., Landlord and Tenant: Violation of Statute or Ordinance Requiring Landlord to Furnish Specified Facilities or Services as Ground of Liability for Injury Resulting from Tenant's Attempt to Deal with Deficiency (1988) 63 A.L.R.4th 883.) The results turn on differing state laws and the particular court's view of whether an injury was foreseeable or the result of a superseding independent act. (See, e.g., *Enis v. Ba-Call Bldg. Corp.* (7th Cir. 1980) 639 F.2d 359 [causation is jury question where tenant boiled hot water on stove to compensate for lack of heat and water spilled on child]; *Bennett M. Lifter, Inc. v. Varnado* (Fla. Dist. Ct. App. 1985) 480 So. 2d 1336 [proximate cause is jury question where child collides with grandmother transporting hot water to the bathroom]; *Southeast Bank v. J.A.M.A. Mobile Home Parks* (Fla. Dist. Ct. App. 1986) 490 So. 2d 1057 [causation sufficiently alleged where trailer park owner's negligence caused

termination of electric service, leading to tenant's use of candles which started fire in which children were killed] *contra*, *Aguirre v. Adams* (Kan. Ct. App. 1991) 15 Kan. App. 2d 470, 809 P.2d 8 [landlord not liable for failure to provide hot water because no causation as matter of law where mother's negligent supervision of child resulted in burn by hot water in bathtub]; *Moreno v. Balmoral Racing Club, Inc.* (Ill. Ct. App. 1991) 217 Ill. App. 3d 365, 577 N.E.2d 179, 160 Ill. Dec. 303 [operating charcoal grill indoors to compensate for landlord's failure to provide heat not reasonably foreseeable and breaks causal link]; *Faris v. Potomac Elec. Power Co.* (D.D.C. 1991) 753 F. Supp. 388 [plaintiff's act in falling asleep with candles lit is intervening cause which supersedes power company's responsibility after properly noticed termination of power]; *Martinez v. Lazaroff* (N.Y. Ct. App. 1979) 48 N.Y.2d 819, 399 N.E.2d 1148, 424 N.Y.S.2d 126 [father's act of transporting pot of boiling water from stove to bathroom which spilled on child was intervening act that cut off liability of landlord].)

[***27]

15 The factors listed in the Restatement include: whether the intervention brings about harm different in kind from that which would have resulted from the actor's negligence; whether the intervention is an extraordinary event; if the intervening force operates independently of the situation created by the actor's negligence; whether the intervention is caused by a third party; whether the third party's act is wrongful; and the relative degree of culpability of the third party. (*Rest.2d Torts* § 442, subds. (a)-(f).)

"An intervening force is one which actively operates in producing harm [**370] to another after the actor's negligent act or omission has been committed." (*Rest.2d Torts*, § 441, subd. (1).) "Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause." (*Rest.2d Torts*, § 442A.)

As stated by Witkin: "Where, subsequent to the defendant's negligent act, an independent intervening force actively operates to produce [***28] the injury, the chain of causation may be broken. It is usually said that if the risk of injury might have been reasonably foreseen, the defendant is liable, but that if the independent intervening act is highly unusual or extraordinary, not reasonably likely to happen and hence not foreseeable, it is a superseding cause, and the

79 Cal. App. 4th 899, *; 94 Cal. Rptr. 2d 359, **;
2000 Cal. App. LEXIS 263, ***; 2000 Cal. Daily Op. Service 2750

defendant is not liable." (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts § 975, p. 366.)

[*915] Negligence alone does not make a third party's intervention a superseding cause. (*Rest.2d Torts*, § 447.) If the intervening act ". . . is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent" a third party's negligent act does not supersede the liability of the initial actor. (*Rest.2d Torts*, § 447, *subd. (c)*.) Even intervening criminal conduct may not be a superceding cause, thereby breaking the chain of causation.¹⁶ ". . . It is settled, however, that 'If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or *criminal* [***29] does not prevent the actor from being liable for harm caused thereby.' [Citations.]" (*Richardson v. Ham*, *supra*, 44 Cal. 2d at p. 777 [citing *Rest.2d Torts*, § 449].) (Italics added.)

16 Although the City hinted that Emitte might have intentionally caused the fire, the evidence was sharply disputed on this point. The only undisputed fact regarding Emitte's action was that he left a **candle unattended**.

In effect, the trial court in this case accepted the City's argument that Emitte's action in leaving a burning **candle unattended** was a superseding cause which relieved the City of liability as a matter of law. However, the evidence produced in opposition to the summary judgment motion showed that it was very likely that cutting off the power without giving the resident the statutory 24-hour personal or 48-hour mailed notice, would, and did, result in the unprepared resident being unable to pay the amount in arrears and thereby prevent disconnection. The evidence produced in connection [***30] with the summary judgment motion indicated that the City would have accepted Emitte's payment of the past due amounts if he had offered it prior to disconnection of the power. Christine's testimony indicated that she would have produced payment if she had known the disconnection was imminent. The lack of proper notice resulted in the abrupt disconnection, which triggered a foreseeable attempt to compensate for loss of the electricity. The court erred in finding as a matter of law that leaving a **candle unattended** was a superseding cause of the harm. (See, e.g., *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal. 3d 49, 58-59, 192 Cal. Rptr. 857, 665 P.2d 947.) To reach a "Palsgrafian" result in the context of the disputed facts in this case would improperly withdraw causation from the jury guided by *BAJI No. 3.79*.¹⁷

17 *BAJI No. 3.79*, entitled "When Third Party's Intervening Negligence Is Not A Superseding Cause," provides:

"If you find that defendant [City of Ukiah] was negligent and that such negligence was a substantial factor in bringing about an injury to the plaintiff but that the immediate cause of the injury was the negligent conduct of [Emitte Kuns], the defendant [City of Ukiah] is not relieved of liability for such injury if:

1. At the time of such conduct defendant [City of Ukiah] realized or reasonably should have realized that [Emitte Kuns] might so act; [or the risk of harm suffered was reasonably foreseeable]; or

2. A reasonable person knowing the situation existing at the time of the conduct of [Emitte Kuns] would not have regarded it as highly extraordinary that [Emitte Kuns] had so acted; or

3. The conduct of [Emitte Kuns] was not extraordinarily negligent and was a normal consequence of the situation created by defendant [City of Ukiah]. [Extraordinary means unforeseeable, unpredictable, and statistically extremely improbable.]" (*BAJI No. 3.79* (8th ed. 1994).)

[***31] [**371] The City also contended that an additional superseding cause of the deaths of the children was the fact that the smoke detector was not working. The [*916] City asserted in support of its motion that Emitte had removed the battery from the smoke detector. The City hinted at possible criminal activity on Emitte's part. Christine testified that the battery might have been dead, as she heard it "chirp" about a week before the fire, but could not remember if anyone replaced it. Emitte was not sure if the battery had been taken out the last time the oven smoked or not. He did not know whether the smoke detector worked on the night of the fire. The evidence on this point was equivocal. However, even if it is accepted that Emitte removed the battery at some time in the past, there was evidence that the smoke detector was connected to the electric system of the house as well as having a battery. This possibility implicates the City's action in abruptly terminating the power as well as any act of Emitte in rendering the smoke detector inoperable.

In addition, Ashley in fact managed to arouse her mother while the fire was still confined to the couch in the living room. Christine arose and went [***32] down the hall and saw only the couch in flames. She was awake and active before the fire progressed to the bedroom area of the house, which makes the lack of a smoke detector a less important causal factor at this stage

79 Cal. App. 4th 899, *; 94 Cal. Rptr. 2d 359, **;
2000 Cal. App. LEXIS 263, ***; 2000 Cal. Daily Op. Service 2750

of the case. In any event, the facts regarding the smoke detector do not establish a superseding cause for purposes of summary judgment.

The question of whether the acts of Emitte Kuns were foreseeable is for the jury unless the undisputed facts allow only one conclusion. (*Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal. App. 4th 1830, 1849.) In summary, a jury should determine to what extent, if any, the insufficient notice and the act of shutting off the power on December 26 deprived the Kuns of three days within which to pay their bill, led to the use of candles, and caused their damages; whether the Kuns could have paid the arrearage between December 26 and December 29 or would the same result have occurred on the 29th; or whether the actions of Emitte Kuns and others were foreseeable or superceding acts relieving other negligent persons of [*917] responsibility. The facts surrounding causation of this tragic fire are disputed, and subject to differing [***33] inferences.¹⁸ It was error to grant summary judgment on the issue of causation.

18 The City also argues that public policies against reducing an intentional tortfeasor's liability and finding liability when the connection between the act and the harm is too tenuous, as well as the policy against rewarding defaulting utility customers compel a finding that it not be responsible for the fire. The City ignores the fact, demonstrated by *Public Utilities Code sections 10010 and 10010.1*, that there is a public policy against abrupt and improper termination of utilities which competes with the policies identified by the City. If the City's action is a substantial factor in the devastating fire at issue, public policy does not shield it from liability. (See, e.g., *Pub. Util. Code, § 2106* [utility is liable for all injury caused by act or omission required by law].)

Judicial Estoppel is Not Applicable

[***34] The court stated an additional reason in support of its order granting summary judgment. This alternative reason was based on the court's determination that several statements made in other actions judicially estopped appellants from claiming that the City was responsible for the fire.

[**372] Referring to Christine Kuns' application for a restraining order against Emitte in February of 1997, the court noted the following statement in Christine's supporting declaration.

"On December 26, 1995, my six kids and I went to sleep for the night. We had a candle burning in the living room for light. We left Emitte on the couch just below the burning candle. He left my house, got stoned and

went to a casino leaving the candle burning which started the fire. Me and two of my children escaped. Four died."

Referring to the declaration of Christine's mother, Carol Whitcombe, submitted by Billy Mack Clark in his action requesting custody of Ashley, the court quoted as follows:

"I know for a fact the following is true: Emitte Kuns has an extreme gambling problem, and would deliberately get into fights with Christy in order to leave the house to go gambling at the local casino.

"On December 26 in the [***35] morning hours I received a call from my daughter Christy who stated to me that Emitte had, for the second time, tried to suffocate her and told her that he would be the one to take her life.

"On December 27, 1997, Emitte Kuns told me that prior to the fire he had removed the batteries from the smoke detectors in the home because 'they went off when they were cooking.'"

The doctrine of judicial estoppel "applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously [*918] asserted.' . . ." (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal. App. 4th 345, 350.) "Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one." (*Ibid.*, [internal quotation marks and citations omitted].) The doctrine applies when the same party takes inconsistent positions in a judicial or quasi-judicial proceeding. The party must be successful in asserting the first position, in that the tribunal accepts the position as true. (*Id. at p. 351.*)

International Engine Parts, Inc. v. Feddersen & Co., *supra*, 64 Cal. App. 4th 345, [***36] relied on by the trial court, presents a clear example of judicial estoppel. In that case, the prior proceeding was a bankruptcy case, which imposes a duty to disclose to creditors all property rights of the debtor. The possibility of any nonbankruptcy litigation is one of the items subject to mandatory disclosure. In the bankruptcy action, appellants successfully argued that their former chief financial officer was responsible for the company's accounting problems. (*Id. at p. 348.*) Although the evidence was clear that the debtor had knowledge of a potential action against the defendant accounting firm for accounting malpractice, the debtor intentionally did not disclose this action in the bankruptcy case. (*Id. at pp. 348, 351-352.*) After the debtor obtained the relief sought from the bankruptcy court, including the rejection of an executory contract with the chief financial officer, it

79 Cal. App. 4th 899, *; 94 Cal. Rptr. 2d 359, **;
2000 Cal. App. LEXIS 263, ***; 2000 Cal. Daily Op. Service 2750

commenced an action for damages for accounting malpractice against the defendant. (*Id. at p. 349.*) The court correctly applied judicial estoppel to prevent the debtor from taking the inconsistent position that the accounting firm was responsible for [***37] the plaintiff's accounting problems. "The purpose [of judicial estoppel] is to protect the integrity of the judicial process and not the parties of the lawsuit." (*Id. at p. 350.*)

In this case, the positions taken in the child custody and restraining order cases do not directly contradict any position taken in this action against the City. The second amended complaint admits that Emitte used the candle to provide light in response to the City's improper [***37] disconnection of the electricity and that the candle "inadvertently" set the fire. There is nothing inconsistent between this position and the statement that Emitte left the candle burning when he left the house that night. There is no equitable reason to invoke judicial estoppel.
19

19 The doctrine of judicial estoppel applies only when: ". . ."(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.]" (*International Engine Parts, Inc. v. Feddersen & Co., supra, 64 Cal. App. 4th at p. 351.*)

[***38] The declaration of Carol Whitcombe in Billy Mack Clark's custody case regarding a threat and taking the battery out of the smoke detector is not [*919] inconsistent with any position taken in this case. As noted previously, the issue of the batteries in the smoke detector has little importance in the resolution of the legal issue in the case in its present posture. Lack of electricity was also at fault for its malfunction, if it is eventually proved that it did not function. Further, since Ashley actually roused Christine Kuns before the fire spread to the back of the house, the fact finder could determine that the smoke detector was not a contributing factor. In addition to the lack of inconsistency in the statements referred to by the trial court, there is no evidence that any court accepted the statements as true in

rendering a decision. The doctrine of judicial estoppel is not applicable in this case.

Evidentiary Issues

Appellants argue that the trial court erred in admitting various deposition transcripts during the hearing on the summary judgment motion. Appellants particularly identify the deposition of Marcia Stroud Clark, appellant Billy Mack Clark's wife. This deposition [***39] involved factual statements that were disputed by Billy Mack Clark. Furthermore, it does not appear that the court relied upon the statements in ruling on the summary judgment motion. The court allowed counsel to lodge the deposition with the court during argument, but apparently did not rely on it. It is not clear that any of the questioned depositions were either admitted as evidence or considered by the court.

Appellants also object to the court's refusal to rule separately on each objection to the City's evidence. The court stated that it agreed with the City's analysis of the evidentiary issues and overruled appellants' objections. Appellants do not specify which objections were wrongfully overruled, nor do they state any legal reasoning which would support the sustaining of any of the objections. In addition, the court offered appellants two opportunities to file specific objections to its rulings, and appellants failed to make their objections clear at those times. We conclude that appellants failed to preserve the issue for appeal. In addition, the evidence referred to by appellants apparently had no bearing on the decision granting summary judgment.

DISPOSITION

It was [***40] error to grant summary judgment on the issue of causation. Based solely on the undisputed evidence submitted in support of the motion, [*920] appellants have raised triable issues of material fact regarding causation. The judgment is reversed and the matter is remanded for further proceedings. Appellants are entitled to costs on appeal.

The petition for rehearing is denied.

Marchiano, J.

We concur:

Strankman, P.J.

Swager, J.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: February 6, 2009

/s/ Robert P. Foster
Attorney for Appellants

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of February, 2009, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 6th day of February, 2009, I caused the required bound copies of the Brief of Appellants and Joint Appendix to be hand filed with the Clerk of the Court, 1100 East Main Street, Richmond, Virginia 23219 and a copy of the Joint Appendix to be served, via UPS Ground Transportation, upon counsel for the Appellee, at the above address.

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