

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA**

HON. DANIEL E FLYNN

Dept. 2 / js

CRF21-0006622

**THE PEOPLE OF THE
STATE OF CALIFORNIA,
Plaintiff,**

vs.

**PACIFIC GAS AND ELECTRIC
COMPANY (PG&E),
Defendant.**

NATURE OF PROCEEDINGS:

TENTATIVE RULING OF DEFENSE MOTION [PENAL CODE 995]

BACKGROUND

On September 27, 2020, the Zogg Fire ignited in Shasta County following a gray pine tree failing and falling onto power lines controlled Pacific Gas and Electric. (PG&E) This gray pine, one which will be referenced throughout this ruling as the 'offending tree' had certain defects, discovered only after it fell, that should have caused the tree to be removed. Weather conditions on that September day were quite favorable to ignition and rapid spread of a fire. The consequences of the fire were devastating.

The District Attorney of Shasta County filed a criminal complaint against PG&E with multiple allegations, many of which were dismissed for a failure of evidence after a 7-day preliminary hearing commencing January 18, 2023. Following the hearing, PG&E was held to answer on 4 counts of involuntary manslaughter, 4 counts of recklessly causing a fire, each alleging a different resulting damage as defined in Penal Code sections 452 (a) through (d). PG&E filed a motion pursuant to Penal Code section 995. The matter being fully briefed by both parties, the Court heard arguments on April 3, 2023 and took the matter under submission. On Friday, April 7^h, the Court held an informal conference with the parties in order to arrange for the receipt of photographs of the area of the ignition of the Zogg Fire admitted during the preliminary hearing to be submitted. Those exhibits were received Monday, April 10, 2023.

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DISCUSSION

The testimony is replete with evidence of inspection redundancies. In 2018, fire crews from the Carr fire marked trees that may pose a threat within what has been referred to as the 'Carr Fire Footprint.' That area included the relevant area here, Zogg Mine Road. PG&E employees and supervisors of those employees, whose job it was to manage vegetation hazards, later followed up on the fire crew's preliminary work. These employees would not only inspect fire crew identified trees, but also others they believed may pose a hazard to power lines. Inspections were also carried out by contractors [CNUC] whose job was to walk the power lines, identify potentially hazardous trees, and have them marked for removal. Once marked, employees such as Kelly Fredrickson, a supervisor in the work verification program, would arrange for and confirm that trees marked for mitigation of risk were properly addressed. The redundancies per annual routine inspection were not only followed after the 2018 Carr fire but were followed at least three more times prior to the ignition of the Zogg fire excluding Cal. Fire crew work. Significant inspections from an evidence standpoint were as follows:

1. 2018: Following Carr Fire, Larry Lacunza. Lacunza followed 'pre-inspectors' who performed preliminary work to check their work and identify other trees. He did mark 25 additional trees including two gray pines.
2. October 2018: Steven Morefield. Did not testify he identified the offending tree or marked that tree.
3. April 2019: John Muegge combined with CEMA patrol. [That is more than one person inspected the area independently.]
4. March/April 2020: John Muegge.

Testimony was also introduced that following the Post Carr Fire 2018 inspection, and at other times, trees were mitigated (trimmed or removed entirely), and processes were in place to confirm the work was being accomplished [Generally: see the testimony of Kelly Fredrickson]. There was testimony that other workers identified what they believed to be deficiencies in the inspection processes being employed. It stands to reason that in this high fire risk environment, prudent management would include a consistent review of the way business is being done. None of those witnesses, however, contradicted the standard of care which will be discussed below.

All relevant witnesses, that is experts and actual inspectors and related personnel, testified that the ISA (International Society of Arboriculture) Manual; Utility Tree Assessment, Best Management Practices, (hereafter 'ISA Manual'), attached to the moving papers as Exhibit 9 and Defense Exhibit T at the preliminary hearing, was the working standard for identification of hazardous trees in the power/utility industry. [The People's expert witness Mr. McNeil and People's witnesses/inspectors Lacunza, Moreland, Loomis and Fischer all recognized this Best Management Practices Manual as the industry standard.] All inspectors testified to following the standards consistent with this manual.

Regarding the applicable standard of care, the ISA Manual requires electric utilities to conduct tree risk assessments at escalating levels. Level I, that is the first step, is an industry recognized and demonstrably effective method for inspecting trees that grow near powerlines, and it is the primary method used when assessing risks in large populations of trees [Preliminary Hearing Exhibit T: ISA Manual pages 13 and 14]. The ISA Manual goes on to define a Level 2 assessment as a detailed, ground-based visual inspection of an individual tree and its surrounding site. Level 2 is also referred to as a '360-degree assessment' [Preliminary Hearing Exhibit T: ISA Manual page 18]. Finally, the Level 2 assessment is warranted only after the Level I assessment identifies an abnormal appearance of a tree [Preliminary Hearing Exhibit T: ISA Manual page 15]. The ISA Manual explains the use, target, benefits, and limitations of the Level I inspection and assumes a properly trained inspector is conducting the assessment. The People have provided no evidence that any other standard of care is recognized in this area of expertise while arguing that a greater standard exists and should have been followed.

No witness testified that the ISA Manual standard was not followed in any inspection between the Carr fire and Zogg fires. All inspectors who testified did state that, had the defects of the offending tree, identified after the tree fell, been identified before the tree fell, they would have marked the tree for removal. No evidence was presented that any defect of the tree except the lean of the tree, would have been seen based upon a Level I inspection; that is those other defects were hidden from the inspector performing a Level I inspection.

It is undisputed that the offending tree posed a risk of failure, and due to the lean of the tree, should the tree fail, would likely fall onto existing power lines. This risk, however, has all been gleaned after the tree fell and the causal chain of events leading in short order to the Zogg fire's ignition by electrical arc of the power lines. Indeed, all inspectors and the expert arborist, McNeil, testified consistently that had the tree's defect on the uphill side, together with other factors obvious after the Zogg fire, been known prior to the tree falling, that would have resulted in the tree's marking for removal and would have been eradicated.

The issue is not how the People have identified it to be in their opposition. As stated in the People's Opposition:

In its motion, defendant takes great lengths to detail the actions it took in the Zogg Mine Road area in the time leading up to the Zogg Fire. However, it is undisputed that, despite its own responsibility and the obvious nature of the risk, it was the action not taken by the defendant (removal of the subject tree) that caused the fire. [emphasis in opposition.]

The defense analysis is the correct one, and the People have missed the issue. As will be discussed below, the recklessness and criminal negligence analysis does require focus on PG&E's efforts to identify hazardous trees, not on the failure to eliminate the risk of this specific tree in hindsight. Stated another way, had the tree been identified and marked for removal at any

of the 4 plus opportunities to do so prior to the ignition of the Zogg fire, the failure to have it removed would clearly be reckless and or criminally negligent for purposes of this P.C. 995 analysis. Defects of this nature in the case of a known hazardous tree would have been an obvious risk. (Simply, the fact that the tree fell does not itself equate to gross negligence or recklessness without more.) This tree was not a known risk prior to the Zogg fire, and there is no evidence to support the People's claim in their opposition that it was.

The People assert that:

During his post-Carr Fire inspection, Mr. Lacunza marked 25 trees for removal on Zogg Mine Road (RT 432-1:23 – 432-2:1). It is likely that one of the trees he marked was the subject tree. However, for unknown reasons, the tree was not removed. [Opposition pg. 9:18-20]

Mr. Lacunza's testimony as cited was as follows:

Q: I'm sorry. I'll take that back from you Mr. Lacunza. Do you recall making the declaration now?

A: Yes.

Q: Do you recall stating that as part of your work in the Carr fire footprint, you were provided a map and that you started working in that area?

A: Yes.

Q: And you were provided that location by a PG&E employee?

A: I couldn't tell you if it was an employee or a contractor.

Q: Do you recall what your LAN ID was at that time?

A: Yes, LEL-9.

Q: And what is a LAN ID for the purposes of a Collector app?

A: To determine who I was.

Q: Meaning, when you entered data using that number and letters, they would know who was entering the data?

A: Yes.

Q: Do you recall using the Collector in August of 2018 to mark approximately 25 trees on Zogg Mine Road?

A: Yes.

Q: Do you remember looking at any documents as part of your preparation of the declaration I just showed you?

A: Looking at any documents?

Q: Yes.

A: No, I don't recall

Exhibit 4 [Exhibit 41 at the preliminary hearing] provided with the moving papers is a declaration by Mr. Lacunza which was referenced in the above quoted testimony. This declaration was referred to in both his direct and cross examination. That declaration confirms

the testimony in that it provides no support for the proposition that the offending tree was marked. In fact the declaration makes clear Lacunza had no idea whether it was one of the two gray pines he inspected, marked, and logged into the system.

Counsel has provided admitted photographs of the fallen tree in question together with more expansive photographs of the surrounding landscape (People's Preliminary Hearing Exhibits 1 through 11, 19, 21, 22 and 31 and Defense Preliminary Hearing Exhibits QQ and YY). Dozens of gray pine trees, many of which have noticeable leans, are depicted within a short distance from the fallen tree in question. The location in question is one of a large population of trees.

The Court reviews the facts of the preliminary hearing in favorable light of a holding order under 995 analysis, as well as reasonable inferences to drawn from those facts. With this deferential review in mind, it is not a reasonable inference from Lacunza's testimony or Preliminary Hearing Exhibit 41 that the offending tree was marked for removal. That assertion by the people is speculation.

It is, therefore, not a question of whether PG&E was reckless or criminally negligent in failing to *remove* the tree. The question is whether PG&E was reckless or criminally negligent in failing to identify the particular tree that fell. For that analysis, the case of People v. Budish 131 Cal.App.3d 1043 is helpful. In Budish, the defendant had been living in the countryside without means of heating water within a trailer provided by his employer. Defendant had to use an outdoor campfire to heat water for coffee, and did so the morning of the fire. Once extinguished, the strong Santa Anna winds came up and, as the allegations go, stirred up the embers of that campfire and resulted in a much larger fire complex. That fire caused significant destruction, and the defendant was charged with recklessly setting fire.

The following discussion from Budish is important to the inquiry in this PG&E case. The charging statute, Penal Code section 452, provides: "A person is guilty of unlawfully causing a fire when he *recklessly* sets fire to or burns or causes to be burned, any structure, forest land or property." (Emphasis added.)

Penal Code section 450 defines reckless as follows: "(f) 'Recklessly' means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

The foregoing definition follows that of Model Penal Code section 2.02, which defines "recklessly" as follows: "A person acts *recklessly* with respect to a material element of an offense when he *consciously disregards* a substantial and unjustifiable risk that the material element exists or will result from his conduct.

The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its *disregard* involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

That section also defines *negligently* as follows: "A person acts *negligently* and with respect to a material element of an offense *when he should be aware* of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's *failure to perceive it*, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." (Emphasis added.) (See Model Penal Code section 2.02 (Final Draft) May 4, 1962, p. 26)

The distinction drawn by the Model Code between reckless conduct and negligent conduct lies in conscious disregard of the risk by the reckless actor and failure to perceive the risk by the negligent actor. In the case at bench, there is simply no evidence that the defendant was aware of the risk of widespread conflagration and that he consciously disregarded that risk. Deprived by his employer of an operating and safe stove in his living quarters, the defendant simply used the only available means, a primitive fire ring, to obtain hot water, the most minimum of creature comforts. [Budish at 1047-1048.]

The evidence from the preliminary hearing does establish, either directly or from reasonable inferences to be drawn from the facts, that the Zogg Mine Road in the area of the origin of the Zogg fire was a area of high fire risk. That risk was, in part, due to the presence of power lines as well as the vegetation in the area. Also, that the tree ultimately failing and falling on the powerline was tall enough to have reached a power line if the tree were to fall. That offending tree also had a 23 degree lean in the direction of the power lines, making it most likely the tree would fall on the lines if it failed. All the other facts about this tree, based upon the evidence, were not known specifically to anyone until after it fell. Defects identified after the fact, not known prior to the failure of the tree, are not relevant to the determination as to whether the standard of care was appropriately observed prior to the failure.

Also important is a significant volume of testimony from witnesses who were employed, either by PG&E, or contractors, whose specific jobs were to inspect the area of origin of the fire to identify and mark for further inspection or eradication trees that posed a danger. These witnesses were trained to perform this work, many with years of experience. Four or more inspections of the area of origin were conducted by these inspectors who identified and marked trees. These marked trees were ultimately removed or mitigated according to the testimony.

The question is whether the facts observable prior to the tree failure were sufficient to compel a Level 2 'walk around' inspection of the tree and/or whether a failure of a Level I inspection to identify the tree at all, fell below the standard of care to the degree of 'recklessness' and 'gross criminal negligence. Such level two inspection, it can be reasonably inferred, would have identified this tree for eradication. The fact that the tree actually fell, and the resultant fire

caused such significant and tragic damage, is not something that enters into the analysis. "In determining whether defendant was guilty of violating a *penal* statute we must strictly construe the statute uninfluenced by the extent of the harm which resulted. (*Somers v. Superior Court*, 32 Cal.App.3d 961, 969, 108 Cal.Rptr. 630.)" [*Budish* at 1048.]

Turning first to the issue of recklessness required in counts 5-8, Recklessly Causing a Fire as defined in Penal Code section 452(a), (b), (c) and (d). [It is unnecessary to distinguish between these crimes in that the recklessness requirement is the same.] The risk here is not, as the People seem to be arguing, that the Zogg Mine Road area is high fire risk location, it is whether PG&E was aware of the risk this specific tree posed to the powerlines and thus of potential fire or whether PG&E was reckless in the failure to specifically identify this specific tree by failure of their exercise of the applicable duty of care.

'Recklessly' means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. [See *Budish* above.]

Because PG&E was not actually aware of the danger the offending tree posed, it was not possible for PG&E to have disregarded that known risk. Having failed to provide any evidence that PG&E failed to exercise the recognized standard of care, it likewise is this court's conclusion that PG&E was not reckless in failing to identify the offending tree as a danger. Even considering the nature and purpose of the actor's conduct and the circumstances known to him, it has not been shown by the evidence that PG&E's conduct involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

Turning to the requirement that in failing to perceive the threat the offending tree posed the power lines, it is likewise the case the people have failed to provide sufficient evidence to sustain the holding order on Counts 1 through 4, Voluntary Manslaughter.

A person acts *negligently* and with respect to a material element of an offense *when he should be aware* of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's *failure to perceive it*, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. [See *Budish* above.]

The People have failed to identify a standard of care other than that established in the IMA Manual and have failed to establish that any of the various inspectors failed to abide by that standard. The People's argument here relies almost exclusively on facts learned about the tree after the fact and the fire resulting from the power lines being dropped due to the fall of the tree. Assuming for the sake of argument that there had been some deviation from the standard of care, it remains that any evidence supporting this hypothetical deviation does not raise to the level of a gross deviation as to make the conduct criminal.

The defense's primary point is that it is the People's burden to show that PG&E failed to exercise their duty under the appropriate standard of care. Other than not identifying the specific tree that fell, the People have presented no evidence that PG&E's multiple inspections of the Zogg Mine Road area fell below the standard of care. The testimony does not establish, either directly or by way of any reasonable inference to be derived from the evidence, that the lean and direction alone was enough to trigger a Level 2 inspection. In brief, the People's case does not meet the statutory standard for reckless conduct, and consequently, gross negligence.

Counts 9 and 10

Count 9 alleges a misdemeanor violation of 13001 of the Health and Safety Code, a misdemeanor. That section states:

Every person is guilty of a misdemeanor who, through careless or negligent action, throws or places any lighted cigarette, cigar, ashes, or other flaming or glowing substance, or any substance or thing which may cause a fire, in any place where it may directly or indirectly start a fire, or who uses or operates a welding torch, tar pot or any other device which may cause a fire, who does not clear the inflammable material surrounding the operation or take such other reasonable precautions necessary to insure against the starting and spreading of fire.

This crime, as a product of statutory construction, does not appear to apply to the set of facts presented at the preliminary hearing. First, "action" is a key word of the statute. Negligence can be a matter of an act or of omission. If the legislature had wished to make criminal a failure to act, that is 'omission,' the statute would have so stated. The People's theory is a failure to act. Second, the statute identifies things that are in and of themselves incendiary with no need for some intervening act to make them so. Items such as cigarettes, flaming substances, and welding torches are known to be primary incendiary objects. A power line is not in itself such a thing. The statute does not require that a fire actually result from the action required to commit this crime, likely, because of the inherent incendiary nature of the objects identified in the language.

Thus, one has committed a violation under H&S 13001 once a person has carelessly thrown a lit cigarette to the ground or failed to prepare the surrounding area of a tar pot because they have done something causing an immediate danger. Not so when PG&E put up a utility pole and electrical line.

Count 10 alleges a violation of the Business and Profession code section 4421. That section states:

A person shall not set fire or cause fire to be set to a forest, brush, or other flammable material that is on land that is not the person's own and, or under the person's legal control, without the permission of the owner, lessee, or owner's agent or lessee of the land.

The evil sought to be avoided in this section is setting fire to property that does not belong the person setting it when the person setting that fire has failed to get permission from the offended landowner. In the Court's oral tentative at the time of the hearing of this motion, the undersigned stated that the fire set would have to have been one intended. In reconsideration, that does not appear to be a requirement in that the statute also includes the alternative, 'A person shall not cause fire to be set.'


The statute does not require recklessness or a gross deviation from an appropriate standard of care, or even a negligent act or omission, only that some action or inaction caused a fire to be set. While the court has not found this fire reached the level of a Penal Code section 452, there are reasonable inferences to be drawn from the facts presented to support the elements of this charge.

TENTATIVE RULING

The Penal Code section 995 is GRANTED as to Counts 1 through 9. The motion is DENIED as to Count 10.

This matter is set **Monday, May 8, 2023 at 9:30 a.m. in Department 2** for Settlement Conference. Counsel is invited to submit additional points and authorities on issues discussed within the Tentative Ruling. The Court will not consider any new arguments unless the interest of justice may so require. The Court will hear additional oral arguments on any points raised in supplemental pleading submitted pursuant to this Tentative. The Court shall make a final ruling on May 8, 2023. prior to the Settlement Conference.

Dated: April 13, 2023



DANIEL E FLYNN
Judge of the Superior Court

CERTIFICATE OF MAILING
State of California, County of Shasta

I, the undersigned, certify under penalty of perjury under the laws of the State of California that I am a deputy clerk of the above-entitled court and not a party to the within action; that I mailed a true and correct copy of the above to each person listed below, by depositing same in the United States Post Office in Redding, California, enclosed in sealed envelopes with postage prepaid.

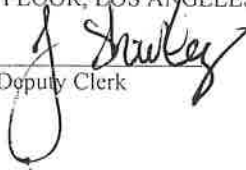
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Dated: April 14, 2023


Deputy Clerk