SUMMARY
July 13, 2023

2023COA64

No. 22CA0301, *Cuevas v Public Service* — Public Utilities — Public Utilities Commission — PUC — Tariff Sheet No. R87 of Electric Tariff; Industrial and Commercial Safety — High-Voltage Safety Act — Violation — Costs and Attorney Fees

As a matter of first impression in Colorado, a division of the court of appeals addresses the enforceability of a tariff purporting to grant an electrical utility immunity from personal injury claims brought by non-customers who are injured by an electrical line while working near the line. The division concludes the purported grant of immunity is unenforceable because it exceeds the purpose and function of a tariff and is in derogation of the utility company's heightened duty to protect the public from the dangers associated with electrical lines.

The division also addresses, as a matter of first impression, whether the indemnification provision of the High Voltage Safety Act

(HVSA) allows a utility company to recover its costs and attorney fees from a party who violates the HVSA's notice provision. The division concludes that the plain language of section 9-2.5-104(2), C.R.S. 2022, does not provide a basis for a cost or attorney fee award.

COLORADO COURT OF APPEALS **2023COA64**

Court of Appeals Nos. 22CA0301 & 22CA1108
City and County of Denver District Court No. 19CV34285
Honorable Stephanie L. Scoville, Judge

Francisco Cuevas,

Plaintiff-Appellant and Cross-Appellee,

v.

Public Service Company of Colorado, d/b/a Xcel Energy,

Defendant-Appellee and Cross-Appellant,

and

Outdoor Design Landscaping, LLC,

Third-Party Defendant-Appellant and Cross-Appellee.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART, ORDER REVERSED IN PART, ORDER AFFIRMED IN PART, VACATED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE SCHUTZ
Harris and Lipinsky, JJ., concur

Announced July 13, 2023

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¶ 1 This consolidated appeal arises from the personal injury action plaintiff, Francisco Cuevas, brought against defendant, Public Service Company of Colorado, d/b/a Xcel Energy (Xcel). Cuevas and the company for which he worked and was an owner, third-party defendant, Outdoor Design Landscaping, LLC (Outdoor Design), appeal the district court's grants of summary judgment in favor of Xcel pursuant to Tariff Sheet No. R87 (R87) of the Xcel Electric Tariff, Colo. PUC No. 7 (Tariff), and the High Voltage Safety Act (HVSA), §§ 9-2.5-101 to 106, C.R.S. 2022.

¶ 2 Cuevas and Outdoor Design also appeal the district court's order holding them jointly and severally liable for Xcel's costs pursuant to C.R.C.P. 54(d). Xcel, in turn, appeals the district court's denial of its motion for summary judgment against Cuevas under HVSA and its claim for attorney fees. We affirm in part, reverse in part, vacate in part, and remand with instructions.

I. Background

¶ 3 In November 2017, Peggy Anderson[1] hired Outdoor Design to decorate her spruce tree with Christmas lights. The tree had grown

[1] Anderson is not a party to this appeal.

within twenty-six inches of a high voltage overhead power line. Cuevas was hanging lights on the tree when he was electrically shocked, knocking him off his stepladder to the ground. The fall fractured Cuevas's spine and caused permanent paralysis.

¶ 4 Cuevas filed the underlying action against Xcel based on its alleged failure to maintain the vegetation near its power line, and against Anderson based upon her asserted failure to warn of the dangerous condition created by the proximity between the tree and the line. Xcel moved to dismiss the case pursuant to R87, arguing that it barred Cuevas's claims as a matter of law. Cuevas countered that R87 did not insulate Xcel from liability for his injuries.

¶ 5 R87 states, in relevant part:

> The Customer shall be responsible for any damage to or loss of Company's property located on Customer's premises, caused by or arising out of the acts, omissions or negligence of Customer or others. . . .
>
> The Customer shall be responsible for any injury to persons or damage to property occasioned or caused by the acts, omissions or negligence of the Customer or any of his agents, employees, or licensees, in installing, maintaining, operating, or using any of Customer's lines, wires, [or] equipment, . . .

> and for injury and damage caused by defects in the same.
>
> The Company shall not be held liable for injury to persons or damage to property caused by its lines or equipment when contacted or interfered with by ladders, pipes . . . ropes, aerial wires, attachments, trees . . . or other objects not the property of Company, which cross over, through, or are in close proximity to Company's lines and equipment, unless said lines and equipment are in a defective condition.

¶ 6 In denying the motion to dismiss, the district court reasoned that R87 relieved Xcel of liability for any injuries caused by the proximity of a tree to its lines, unless the subject line was in a defective condition. Because the court was "without sufficient information . . . as to whether the line was defective . . . and what caused [Cuevas] to be electrocuted," it denied the motion to dismiss.

¶ 7 Xcel then filed an answer and third-party complaint, joining Outdoor Design as a third-party defendant. Xcel argued that Outdoor Design's failure to notify Xcel in advance of the work violated HVSA.

¶ 8 Section 9-2.5-102(1), C.R.S. 2022, provides:

> Unless danger against contact with high voltage overhead lines has been effectively guarded against as provided by section 9-2.5-

> 103, a person or business entity shall not, individually or through an agent or employee, perform or require any other person to perform any function or activity upon any land, building, highway, or other premises if at any time during the performance of any function or activity it could reasonably be expected that the person performing the function or activity could move or be placed within ten feet of any high voltage overhead line or that any equipment, part of any tool, or material used by the person could be brought within ten feet of any high voltage overhead line during the performance of any function or activity.

Xcel also argued that Outdoor Design was obligated to reimburse Xcel for any liabilities resulting from Cuevas's injuries pursuant to HVSA's indemnification provision: "If a violation of this article results in physical or electrical contact with any high voltage overhead line, the person or business entity violating this article shall be liable to the owner or operator of the high voltage overhead line for damages . . . caused by the contact . . . ." § 9-2.5-104(2), C.R.S. 2022.

¶ 9 Xcel moved for summary judgment against Cuevas under both R87 and HVSA. Xcel also moved for summary judgment against Outdoor Design under HVSA. Outdoor Design filed a cross-motion for summary judgment against Xcel, contending the undisputed

facts demonstrated that no equipment, tool, or other materials it used came within ten feet of the power line at the time of the incident, and that there was no causal link between the alleged HVSA violation and Cuevas's injuries.

¶ 10 The district court granted Xcel's motion for summary judgment against Cuevas, concluding R87 barred his claim as a matter of law. The court rejected Xcel's argument that section 9-2.5-102(1) barred Cuevas's claim but granted summary judgment for Xcel against Outdoor Design based on section 9-2.5-104(2). Finally, the court denied Xcel's claim for an award of costs and attorney fees under HVSA but awarded Xcel its costs under C.R.C.P. 54(d). The aggrieved parties appeal these respective determinations.

II. Analysis

A. Timeliness of Cuevas's Notice of Appeal

¶ 11 Before reaching the merits of the parties' contentions, we must first address Xcel's argument that Cuevas's appeal was untimely. We conclude Cuevas's notice of appeal was timely filed.

¶ 12 After the court granted summary judgment for Xcel, Cuevas filed a timely motion to reconsider. At the time, there were still

unresolved claims. Then, on March 15, 2022, the court issued an order resolving the parties' remaining claims against Anderson. The parties agree that the summary judgment became final on that date. Cuevas contends that once the summary judgment became final, his motion for reconsideration became a de facto C.R.C.P. 59 motion to amend the judgment. We agree.

¶ 13 As Xcel argues, once the judgment became final, Cuevas could have filed a new motion, specifically denominated as a Rule 59 motion, raising the same issues he raised in the motion for reconsideration. But that was not necessary. As Cuevas notes, "[D]ivisions of this court have repeatedly held that '[a] motion to reconsider may be treated as a post-trial motion under C.R.C.P. 59.'" *Spiremedia Inc. v. Wozniak*, 2020 COA 10, ¶ 18 (quoting *Bailey v. Arigas-Intermountain, Inc.*, 250 P.3d 746, 752-53 (Colo. App. 2010)). Thus, motions to reconsider need not cite or reference C.R.C.P. 59 to be recognized as falling within its purview. *Spiremedia*, ¶ 18; *see also Church v. Am. Standard Ins. Co. of Wis.*, 742 P.2d 971, 972 (Colo. App. 1987) (the type of relief sought fixes a motion's actual nature).

¶ 14 Accordingly, we conclude that the time to file an appeal started to run from the date Cuevas's motion was deemed denied on March 15, 2022. Because Cuevas filed a notice of appeal within forty-nine days of that date, his appeal is timely.

B. The Tariff

¶ 15 We begin with Cuevas's argument that the district court erred by concluding his claim was barred by R87. Cuevas argues that the plain language of R87 merely memorializes the contractual rights and responsibilities shared between Xcel and its customers. Accordingly, Cuevas argues that R87 only impacts Xcel's customers, such as Anderson, and those who use or benefit from a customer's electric service pursuant to the Tariff. Thus, his argument continues, R87 does not preclude his negligence claim against Xcel.

1. Standard of Review

¶ 16 We review a grant of summary judgment de novo. *CadleRock Joint Venture LP v. Esperanza Architecture & Consulting, Inc.*, 2021 COA 119, ¶ 9. Summary judgment is only appropriate when the pleadings and supporting evidence show no genuine issue of material fact is in dispute. *Martini v. Smith*, 42 P.3d 629, 632 (Colo.

2002). The nonmoving party is "entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *Id.*

¶ 17 But even if "it is extremely doubtful that a genuine issue of fact exists," summary judgment is not appropriate. *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991) (quoting *Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 428, 494 P.2d 1287, 1290 (1972)). To avoid summary judgment, the evidence presented in opposition to the motion must sufficiently demonstrate that a reasonable jury could return a verdict for the nonmoving party. *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007). Thus, summary judgment is only appropriate when the evidence presents no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *Id.*

2. Tariff Interpretation

¶ 18 The Colorado Public Utilities Commission (PUC) possesses broad authority over public utilities. Under article XXV of the Colorado Constitution, the General Assembly has "the power to vest jurisdiction over public utilities' facilities, services, rates, and

charges with the [PUC]." *U S W. Commc'ns, Inc. v. City of Longmont*, 948 P.2d 509, 520 (Colo. 1997). A tariff created through the exercise of delegated legislative authority has the force and effect of state law. *Safehouse Progressive All. for Nonviolence, Inc. v. Qwest Corp.*, 174 P.3d 821, 826 (Colo. App. 2007).

¶ 19 Our interpretation of a tariff is governed by general principles of statutory construction. *Redfern v. U S W. Commc'ns, Inc.*, 38 P.3d 566, 568 (Colo. App. 2000). When interpreting a statute, our goal is to give effect to the intent of the General Assembly. *Cain v. People*, 2014 CO 49, ¶ 10. And there is a presumption that the General Assembly intends a just and reasonable result when it enacts a statute. *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998).

¶ 20 In determining legislative intent, we look to the statutory language itself and give words and phrases their ordinary and commonly accepted meaning. *Id.* When the language is clear and unambiguous, it may be presumed that the legislature meant what it clearly stated. *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001). And omissions from a statute are given the same effect as inclusions under the rule of interpretation *expressio unius est*

exclusio alterius, which means the inclusion of certain items implies the exclusion of others. *Id.*

¶ 21 Tariffs are designed to facilitate rate setting and the terms of service between a utility and its customers. They are also the means by which utilities record and publish their rates along with all policies relating to them. Colo. Const. art. XXV; *AviComm*, 955 P.2d at 1031. Divisions of this court have compared a utility tariff with "a menu in a restaurant or a price list in a store [because] [i]t gives each customer official notice what the charge will be if [they select] this or that product or service." *U S W. Commc'ns, Inc. v. City of Longmont*, 924 P.2d 1071, 1080 (Colo. App. 1995) (quoting Francis X. Welch, *Cases and Text on Public Utility Regulation* 519 (rev. ed. 1968)), *aff'd*, 948 P.2d 509 (Colo. 1997). Thus, tariffs have contractual roots and regulate a utility's provision of services to its customers. *Id.*

3. General Duty of Care Applicable to Providers of Electricity

¶ 22 Because of the inherently dangerous nature of supplying electricity, electrical utilities are held to the "highest degree of care which skill and foresight can attain consistent with the practical conduct of [their businesses] under the known methods and the

present state of the particular art." *Smith v. Home Light & Power Co.*, 734 P.2d 1051, 1058 (Colo. 1987) (quoting *Denver Consol. Elec. Co. v. Simpson*, 21 Colo. 371, 376-77, 41 P. 499, 501 (1895)). Electrical utilities that utilize power lines assume this heightened degree of care to protect the public from the dangers of electricity. *City of Fountain v. Gast*, 904 P.2d 478, 480 (Colo. 1995). An unreasonable risk of danger may arise when electrical utilities "are negligent in the design, construction or maintenance of power lines." *Smith*, 734 P.2d at 1058.

¶ 23 Despite this heightened standard of care, the district court held that R87's plain language eliminated any duty Xcel owed to Cuevas unless the line at issue was in a defective condition. In effect, the district court held that R87 granted Xcel immunity from any liability so long as its line was not defective.

¶ 24 The recognition of such broad immunity would be in clear derogation of the common law. Laws that purport to limit liability that is otherwise recognized at common law must be strictly construed. *See Cisneros v. Elder*, 2022 CO 13M, ¶ 25 (statutory grants of immunity to public entities in derogation of Colorado's common law are strictly construed as a matter of public policy); *see*

also Corsentino v. Cordova, 4 P.3d 1082, 1086 (Colo. 2000) (legislative grants of immunity must be strictly construed). Nevertheless, a tariff's provisions may supersede an inconsistent common law remedy between entities subject to the tariff. *Shoemaker v. Mountain States Tel. & Tel. Co.*, 38 Colo. App. 321, 323, 559 P.2d 721, 723 (1976); *see Beach v. Beach*, 74 P.3d 1, 4 (Colo. 2003) ("Although the General Assembly possesses the authority to abrogate common law remedies, statutes may not be interpreted to abrogate the common law absent a clear expression of intent.").

4. Analysis

¶ 25 The language at issue appears in R87's paragraph four:

> The Company shall not be held liable for injury to persons or damage to property caused by its lines or equipment when contacted or interfered with by ladders, pipes, . . . ropes, aerial wires, attachments, trees, . . . or other objects not the property of Company, which cross over, through, or are in close proximity to Company's lines and equipment, unless said lines and equipment are in a defective condition.

¶ 26 The district court concluded that R87 "disclaims *all* liability unless the Company's lines and equipment are in a defective

condition." In reaching this conclusion, the court acknowledged the disclaimer within R87 "does not . . . carry the considered policy determinations that typically accompany grants of immunity." Nevertheless, reading R87 to apply to any person, the court concluded Xcel had no liability to Cuevas:

> Tariff Sheet No. R87 distinguishes between "The Customer" and "persons" and uses those two terms in different ways. The language of the [T]ariff puts responsibility for any injury "to persons" on "the Customer" and limits the Company's liability for injury "to persons." The Court must assume that the language choice in the [T]ariff was a deliberate choice by the PUC and was intended to limit the utility's liability for more than just customers.

¶ 27 R87 lies within the lengthy Tariff, which includes schedules, rates, rules, and regulations. The General Assembly has established that the contents of an electrical utility's tariff shall include, among other things, information regarding the utility's meter testing equipment and facilities, collection fees or miscellaneous service charges, and rules, regulations, and policies covering the relations between the customer and the utility. Dep't of Regul. Agencies Rule 3108, 4 Code Colo. Regs. 723-3. Thus, R87

must be read in the context of other rules, regulations, and applicable policies located within the Tariff.

¶ 28 The "General Statement" located in R8 of the Tariff states that the rules and regulations "set forth the terms and conditions under which electric service is supplied." R10 reiterates the contractual roots of the Tariff, stating that "the use of electric service constitutes an agreement under which the user receives electric service and agrees to pay the Company."

¶ 29 The Tariff defines a "Customer" as "the *person* or entity that receives or is entitled to receive electric service under any rate schedule or Construction Services under this Electric Tariff." (Emphasis added.) "Company" is defined as "Public Service Company of Colorado doing business as Xcel Energy, Inc." Consistent with its lowercase appearance in the definition of a "Customer," the word "person" is not separately defined in the general definitions section of the Tariff or by the applicable regulations. *See* Dep't of Regul. Agencies Rule 3001, 4 Code Colo. Regs. 723-3. But, as the district court noted, the terms "person" and "Customer" are used separately and sometimes interchangeably throughout the Tariff.

¶ 30 On appeal, Cuevas argues that R87 serves to define the relative liability between Xcel and its customers but does not operate as a grant of immunity to Xcel with respect to claims brought by third parties injured because of the proximity of Xcel's lines to trees or other objects. Thus, Cuevas argues, we should interpret the fourth paragraph of R87 solely as an allocation of liability as between Xcel and Anderson for Cuevas's injuries.

¶ 31 Xcel, in contrast, argues that the use of the term "person" in the fourth paragraph of R87 reflects an intention to grant Xcel immunity from any claim of injury resulting from contact or interference with its lines by any person or object, unless the line was in a defective condition. Reading paragraph four of R87 with this breadth, Xcel argues that this language operates to bar Cuevas's claim against it as a matter of law.

¶ 32 Xcel cites no statute or case law that permits the PUC to grant an electrical utility immunity from claims brought by those persons in situations similar to Cuevas. In contrast, Cuevas cites authority from other jurisdictions concluding that a utility and regulatory body lack such authority. *See, e.g.*, *Tyus v. Indianapolis Power & Light Co.*, 134 N.E.3d 389, 406-08 (Ind. Ct. App. 2019). The

authority cited by Xcel enforces such liability disclaimers only with respect to customers of the utility, guests of the customer utilizing the customer's utility service, or those who agreed to work on the particular electrical line. *See, e.g., CenterPoint Energy Res. Corp. v. Ramirez*, 640 S.W.3d 205, 207, 210-21 (Tex. 2022) (liability limitation in tariff approved by state regulators barred claim by customer's houseguest who was injured through the explosion of a natural gas line in the customer's home that the houseguest had inadvertently opened); *Yorty v. PJM Interconnection, LLC*, 79 A.3d 655, 668 (Pa. Super. Ct. 2013) (contractor performing repairs on utility's electrical line). Cuevas did not have the same status as any of those plaintiffs.

¶ 33 Thus, even if the phrase "injury to persons" could mean injury to *any* person, we conclude that the General Assembly has not granted Xcel or the PUC the authority to abrogate the common law duty that electric companies owe to persons who are not customers or using a customer's electric service. Recall that our common law requires electrical utilities to utilize "the 'highest degree of care which skill and foresight can attain'" as to the design, construction, and maintenance of power lines. *Smith*, 734 P.2d at 1058 (quoting

Denver Consol. Elec. Co., 21 Colo. at 376-77, 41 P. at 501). Recall also the contractual roots of a tariff and its essential purpose to regulate the "rates, tolls, rentals, charges, and classifications . . . together with all rules, regulations, contracts, privileges, and facilities that in any manner affect or relate to rates, tolls, rentals, classifications, or service." *Carestream Health, Inc. v. Colo. Pub. Utils. Comm'n*, 2017 CO 75, ¶ 20 (quoting § 40-3-103, C.R.S. 2022).

¶ 34 Given the contractual foundation of tariffs, and the absence of an express authorization by the General Assembly, we conclude such immunity cannot be granted through a tariff. As the court reasoned in *Tyus*:

> The legislature conferred upon the [commission] the power to "formulate rules necessary or appropriate to carry out the provisions of [this] chapter." However, without additional specificity, we find no evidence that the legislature gave, or intended to give, the [commission] power to shield [the utility company] from liability for injuries caused by [the utility company's] negligence to noncustomers. "[A]ny doubt about the existence of [the commission's] authority must be resolved against a finding of authority."

134 N.E.3d at 406 (citations omitted). As in *Tyus*, the General Assembly has not granted the PUC the authority to abrogate

common law duties owed to noncustomers such as Cuevas, and we reject Xcel's efforts to create such authority by implication.

¶ 35 Finally, even if such authority were deemed to exist, we conclude that R87 does not contain a clear expression of intent to abrogate the common law heightened duty of care imposed on electrical utilities. *See Beach*, 74 P.3d at 4.[2]

¶ 36 For these reasons, we reverse the district court's entry of summary judgment in favor of Xcel and against Cuevas pursuant to R87.

C. The High Voltage Safety Act

¶ 37 Xcel moved for summary judgment against both Cuevas and Outdoor Design under section 9-2.5-102(1). The district court denied the motion as it related to Cuevas's claim but granted the

[2] We reach this conclusion notwithstanding Xcel's argument that Cuevas failed to preserve the question of whether R87 clearly and definitively expressed an intention to abrogate the common law duty imposed on electrical providers. We do not require "'talismanic language' to preserve particular arguments for appeal," but merely that the appealing party provided the trial court with "an adequate opportunity to make findings of fact and conclusions of law" on the issue. *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004). Here, we conclude the district court had that opportunity based on Cuevas's contentions in response to Xcel's summary judgment motion.

motion as it related to Xcel's third-party indemnity claim against Outdoor Design. Xcel appeals the district court's denial of its motion relative to Cuevas, and Outdoor Design appeals the judgment in favor of Xcel.

1. Standard of Review and Applicable Law

¶ 38 Like the analysis of a tariff, the interpretation of HVSA presents a question of law that we review de novo. The same rules of statutory construction set forth in the previous section control.

¶ 39 Recall that section 9-2.5-102(1) mandates as follows:

> [A] person or business entity shall not, individually or through an agent or employee, perform or require any other person to perform any function or activity . . . if at any time during the performance of any function or activity it could reasonably be expected that the person performing the function or activity [or the related equipment] could move or be placed within ten feet of any high voltage overhead line . . . during the performance of any function or activity.

¶ 40 The statute requires that the person or business entity performing such work must provide advance notice to the electrical utility. *Id.*; *Rodriquez v. Nurseries, Inc.*, 815 P.2d 1006, 1007 (Colo. App. 1991) (HVSA "imposes a duty upon contractors performing work within [ten] feet of an overhead high voltage line to notify the

utility company in advance and to arrange for effective guarding of the line against accidental contact."). The notification is a preliminary step in making mutual arrangements for safety. HVSA also mandates that no work shall be done until the utility "notifies such person that the clearance is completed." § 9-2.5-103(2)(b), C.R.S. 2022.

¶ 41 Importantly, as the district court noted, the notice provision of HVSA is not limited to those situations in which a person actually comes within ten feet of a high voltage line. Rather, HVSA compels those working around electrical lines to make arrangements whenever it "could reasonably be expected" that any person, equipment, or tool may come within that distance. § 9-2.5-102. Nor does HVSA contain a causation element regarding any contact or resulting injury. The language of HVSA clearly states that a violation "shall" result in a shift in liability. § 9-2.5-104(2). Thus, we agree with the district court that because "the shift in liability occurs regardless of whether the utility was negligent . . . [HVSA] does not require any analysis of causation."

2. Was Cuevas's Claim Barred by HVSA?

¶ 42 Xcel argues the plain language of section 9-2.5-102(1) bars Cuevas's claim because he did not contact Xcel before working on the tree and should have reasonably expected that his work would require him to come within ten feet of Xcel's line. Cuevas argues that the statute did not apply to him personally because it was Outdoor Design that was performing the work on the tree. We agree with Cuevas's reading of the statute.

¶ 43 HVSA specifically defines the phrase "person or business entity." The definition specifies that a "'[p]erson or business entity' means a party contracting to perform any function or activity upon any land, building, highway, or other premises." § 9-2.5-101(4). Thus, HVSA expressly limits the scope of the notification requirement to the party that contracts to perform the work that is anticipated to come within ten feet of the line. In this case, the undisputed facts establish that the contracting party was Outdoor Design, not Cuevas. Accordingly, we agree with the district court that Cuevas had no obligation to provide notice to Xcel, and the absence of such notice does not bar his claim.

¶ 44 Our conclusion is supported by a division of this court's holding in *Mladjan v. Public Service Co. of Colorado*, 797 P.2d 1299, 1301 (Colo. App. 1990). In *Mladjan*, a city employee was delivering dirt to a construction site when he was electrocuted because his dump truck contacted a high voltage line. *Id.* The division concluded that Mladjan was acting in his capacity as a city employee and therefore not as "a person or business entity" as defined in HVSA. *Id.* Thus, he did not violate HVSA because he was not the contracting party. *Id.*

¶ 45 The same analysis applies here. Like Mladjan, Cuevas was acting as an employee of the contracting party, Outdoor Design. Based on the plain language of HVSA and the persuasive reasoning in *Mladjan*, we decline Xcel's invitation to consider case law from other jurisdictions that may support a different result based on those jurisdictions' particular statutory schemes.

¶ 46 For these reasons, we affirm the district court's denial of Xcel's motion for summary judgment against Cuevas under HVSA.

3. Did Outdoor Design's Failure to Provide Notice Trigger HVSA's Indemnification Provision?

¶ 47 Outdoor Design contends that the district court erred by granting Xcel's third-party claim for indemnification because there remained disputed issues of material fact relative to the claim. Specifically, Outdoor Design argues that the district court disregarded the testimony of its employees stating they did not reasonably expect or intend to come within ten feet of the line. Instead, Outdoor Design argues, the district court improperly relied on Anderson's stated intent for the company to hang lights throughout the entire tree, and the fact that, on the day following Cuevas's accident, Outdoor Design completed the work by placing lights around the entire tree.

¶ 48 Outdoor Design argues that these facts do not support the district court's conclusion that Outdoor Design should have reasonably expected that workers or equipment could come within ten feet of the line, and neither does the undisputed fact that the line was approximately twenty-six inches from the tree. *See* § 9-2.5-102(1). We disagree.

¶ 49 Even drawing all inferences in Outdoor Design's favor, the undisputed evidence established that (1) Outdoor Design failed to provide any notice to Xcel before starting its work on the tree; (2) Cuevas was an employee of Outdoor Design and acting on its behalf; (3) the tree was within twenty-six inches of Xcel's line; (4) Anderson expected that Outdoor Design would provide lights for the entire tree, as it had done for at least four years prior to 2017; and (5) consistent with Anderson's expectations, Outdoor Design's employees, ladders, and extension tools were utilized to hang lights around the *entirety* of the tree the day after Cuevas's electrocution.

¶ 50 Based on these facts, the district court determined that Outdoor Design violated section 9-2.5-102(1), thus triggering the indemnification provisions of section 9-2.5-104:

> While the steps that [Xcel] would have taken are unknown, [Xcel] was deprived of the opportunity to take any protective measures when Outdoor Design failed to notify the utility that it would be working on the [s]pruce tree. As a result, [Xcel] is entitled to indemnification from Outdoor Design . . . for any liability incurred by [Xcel] due to the physical or electrical contact with the . . . line . . . .
>
> A violation of the Act occurs when work occurs without prior notice to the utility and the work "could reasonably be expected" within 10 feet

> of a . . . line . . . . As a result, for liability to shift to Outdoor Design, the Safety Act does not require any analysis of causation.

¶ 51 We discern no error in the district's court's analysis and conclusion on this issue. Given the undisputed facts, the court correctly concluded that Outdoor Design should have reasonably expected that the contemplated work would require its employees or their equipment to come within ten feet of the line.

¶ 52 We reach this conclusion notwithstanding the fact that one or more employees averred that they had no intention of coming within ten feet of the line. The statutory duty is not tied to the subjective intent of a particular employee, but rather, the reasonable expectations of the contracting party. § 9-2.5-102(1). As the district court correctly concluded, any contractor should have reasonably expected that the person placing lights on the entirety of the tree, or their equipment, may come within ten feet of Xcel's line. Thus, we affirm the entry of summary judgment in favor of Xcel on its claim for indemnification from Outdoor Design under section 9-2.5-104.

D. Did the District Court Err by Assessing Costs Against Cuevas and Outdoor Design?

¶ 53 Based on its entry of summary judgment against both Cuevas and Outdoor Design and their purportedly aligned litigation interests, the district court awarded costs against them, jointly and severally, and in favor of Xcel, under C.R.C.P. 54(d). Both Cuevas and Outdoor Design appeal this order.

¶ 54 Generally, trial courts have broad discretion to determine which party, if any, is the prevailing party and whether costs should be awarded. *Archer v. Farmer Bros. Co.*, 90 P.3d 228, 231 (Colo. 2004). But whether a statute mandates an award of costs or attorney fees is a question of law that we review de novo. *US Fax L. Ctr., Inc. v. Henry Schein, Inc.*, 205 P.3d 512, 515 (Colo. App. 2009) ("[W]e review de novo any statutory interpretation or legal conclusion that provides a basis for such a fee award.").

¶ 55 Rule 54(d) provides, in pertinent part, as follows: "Except when express provision therefor is made either in a statute of this state or in these rules, reasonable costs shall be allowed as of course to the prevailing party considering any relevant factors which may include the needs and complexity of the case and the amount in

controversy." Trial courts have wide discretion in determining the extent to which a prevailing party is entitled to recover its costs, and what costs are reasonable. *See Cherry Creek Sch. Dist. No. 5 v. Voelker*, 859 P.2d 805, 812-14 (Colo. 1993).

¶ 56 The district court's award of costs against Cuevas was based on the entry of summary judgment against him pursuant to R87 of the Tariff. Based on that order, the court concluded that Xcel was the prevailing party and was entitled to recover its costs against Cuevas. *See* C.R.C.P. 54(d); § 13-16-105, C.R.S., 2022 (permitting an award of costs to a prevailing defendant). But we have reversed the judgment against Cuevas, and thus the factual predicate for the district court's conclusion that Xcel prevailed against Cuevas no longer applies. As a division of this court explained in *Bainbridge, Inc. v. Douglas County Board of Commissioners*, 55 P.3d 271, 274 (Colo. App. 2002),

> [W]here a judgment has been successfully appealed, an award of costs previously entered on that judgment is no longer valid because, upon remand, that judgment no longer exists. The identity of the prevailing party is still unknown, and only after the stage of the proceedings where a prevailing party can be identified will a court's order awarding costs be valid.

Accordingly, we vacate the cost award against Cuevas.

¶ 57 Turning to the award of costs against Outdoor Design, the district court rejected Xcel's argument that it was entitled to a cost award under section 9-2.5-104(2), which provides that

> [i]f a violation of this article results in physical or electrical contact with any high voltage overhead line, the person or business entity violating this article shall be liable to the owner or operator of the high voltage overhead line for damages to the facilities caused by the contact and for the liability incurred by the owner or operator due to the contact.

Xcel argues the term "liability" includes costs. We conclude the district court properly rejected this argument.

¶ 58 The general rule in Colorado is that each party bears their costs and attorney fees unless otherwise provided by statute, rule, or contract. *See, e.g.*, *Bunnett v. Smallwood*, 793 P.2d 157, 160 (Colo. 1990) (in the absence of such legal authority to the contrary, attorney fees are not recoverable by the prevailing party).

¶ 59 Section 9-2.5-104 does not refer to the recovery of costs and attorney fees. Indeed, the legislative history of section 9-2.5-104(2) reflects the General Assembly's intention to exclude an award of costs from the indemnification provision. The section originally

specified that the indemnity obligation extended to "all damages and all costs and expenses, incurred." § 9-2.5-104(2), C.R.S. 2002. In 2003, the General Assembly amended the operative indemnification language so that it now applies only to "damages to the facilities caused by the contact and for the liability incurred . . . due to the contact." *See* Ch. 197, sec. 2, § 9-2.5-104(2), 2003 Colo. Sess. Laws 1413. In light of this legislative history, we conclude the district court correctly determined that HVSA does not authorize an award of costs against Outdoor Design.

¶ 60 The district court also concluded that Xcel was entitled to an award of costs under C.R.C.P. 54(d). In doing so, the court acknowledged that, under its summary judgment order, Xcel incurred no liability to Cuevas. But the court nevertheless concluded that an award of costs was appropriate because Xcel prevailed on "at least some of the issues" against Outdoor Design. We conclude this analysis cannot support the existing cost award against Outdoor Design.

¶ 61 The procedural posture of this case has changed significantly with our reversal of the summary judgment entered against Cuevas. At this stage, Cuevas's claim against Xcel remains viable. Thus, the

extent to which Xcel may, or may not, completely prevail on its indemnification claim against Outdoor Design is uncertain.

¶ 62 As the division reasoned in *Bainbridge*,

> "[A] judgment of reversal . . . leaves the parties in the same position as they were before the judgment of the lower court was rendered." Thus, when an underlying judgment is reversed, an award that is dependent on that judgment for its validity is also necessarily reversed and becomes a nullity.

55 P.3d at 273-74 (citation omitted). Similarly, the entire issue may be rendered moot if the parties resolve their claims through a negotiated settlement.

¶ 63 The determination of who is the prevailing party in a particular case is best left to the district court's discretion, to be determined at the time all claims involving the claiming party are resolved. Particularly because the district court ruled in favor of Xcel under HVSA, and the uncertainty regarding the future entry of any indemnification judgment, we conclude that it is necessary to vacate the cost award against Outdoor Design, with directions that the issue of costs be reserved until a final judgment, if any, is entered in this case.

E. Xcel's Claim for Attorney Fees

¶ 64 For similar reasons, we conclude the district court did not err by denying Xcel's request for an award of attorney fees. As previously noted, section 9-2.5-104(2) does not expressly authorize an award of attorney fees. And as with costs, the general rule in Colorado is that parties pay their respective costs and fees absent a rule, statute, or contract expressly directing otherwise. *Bunnett*, 793 P.2d at 160. Considering this general rule, the absence of statutory language authorizing an award of fees, and the legislative history restricting the indemnity obligation imposed by section 9-2.5-104(2) to "damages to the facilities caused by the contact and for the liability incurred . . . due to the contact," we conclude the district court properly denied Xcel's claim for attorney fees. *See Bunnett*, 793 P.2d at 160 ("Attorney fees and costs are not considered actual damages 'because they are not the legitimate consequences of the tort or breach of contract sued upon.'" (quoting *Taxpayers for the Animas–LaPlata Referendum v. Animas–LaPlata Water Conservancy Dist.*, 739 F.2d 1472, 1480 (10th Cir. 1984))).

III. Disposition

¶ 65 For the stated reasons, we reverse the district court's entry of summary judgment against Cuevas based on R87. We affirm the district court's denial of Xcel's motion for summary judgment against Cuevas under HVSA, but affirm its entry of summary judgment against Outdoor Design under HVSA. We also vacate the court's award of costs against Cuevas and Outdoor Design. Finally, we affirm the court's denial of Xcel's claim for attorney fees. We remand the case to the district court for further proceedings consistent with this opinion.

JUDGE HARRIS and JUDGE LIPINSKY concur.