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Court of Appeal Cause No. Div. III No. 36602-2

Supreme Court No. 98877-3

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

EDWIN WELLS, ANN MINOR, and GEORGE WELLS FAMILY
TRUST,
Respondents,

v.

NESPELEM VALLEY ELECTRIC COOPERATIVE, INC.,
Petitioner

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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A. Respondents’ Answer to Petitioner’s
Argument that the Court of Appeals’ reversal of the
verdict directed in favor of NVEC conflicts with
Cambro Co. v. Snook are that:

1) Unlike *Cambro Co. v. Snook*, where no
evidence of causation or negligence was presented,
Plaintiffs produced evidence of Defendant’s breach of
its “highest duty of care” to adequately inspect and
maintain its electrical equipment, such that an
undiscovered leakage of electrical current started a fire
destroying Plaintiff’s home 6

2) Where the Court of Appeals acknowledged
substantial evidence of causation and negligence, this
issue is not reviewable for substantial evidence on
Petition for Review under RAP 13(b) and is not made
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B. Respondents' Answer to Petitioner's Argument that the Court of Appeals' ruling that Plaintiffs produced a "viable" case of res ipsa loquitur conflicts with *Cambro v. Snook* is that *Cambro v. Snook* was reviewing the duties as to an instrumentality of fire without evidence of causation, whereas this case involves utility electrical equipment with evidence that electricity started the fire 11

C. Respondents' Answer to Petitioner's Argument that the Court of Appeals' ruling that Plaintiffs made out a viable case of res ipsa loquitur is an issue of substantial public interest in that it expands the liability of electrical utilities, which affects all citizens within this state that rely on electricity, especially in rural areas, are that:

1) Defendant did not argue at trial nor on appeal that ordinary application of res ipsa loquitur to electrical equipment of electrical utilities "expands the liability of electrical utilities", which have never had special immunity from res ipsa loquitur. 13

2) The fact that the Petitioner is an electrical utility is irrelevant to the case, unless Petitioner is asking for some expansion of law as to electrical utilities which was never argued before now. 14

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I. Identity of Answering Respondents

EDWIN WELLS, ANN MINOR, and
GEORGE WELLS FAMILY TRUST, (“Wells”)

II. Court of Appeals Decision

Well v. Nespelem Valley Electric Cooperative, Inc.
Div. III No. 36602-2 (Slip Op. May 5, 2020)

III. Issues Presented for Review

Petitioner Nespelem Valley Electric Cooperative, Inc. (“NVEC”) qualifies the issues with the statement that, “Plaintiffs in this case did not present any evidence at trial that NVEC was negligent in causing the fire that damaged them.” Pet. For Rev. at 1. That is not a correct predicate of the issues of the Petition. Petitioner made that argument to the trial court, but the Court of Appeals reviewed the record and held that Wells presented such substantial evidence.

Wells sued NVEC under theories of general negligence and res ipsa loquitur. The case went to trial. Before a jury could render judgment, the trial judge issued a directed verdict in favor of NVEC.

On appeal, the Court of Appeals reversed the trial court's dismissal, holding in part, "Because the Plaintiffs presented evidence linking the fire not only to NVEC's equipment, but also to the utility's neglected maintenance, the case should have been resolved by a jury." (at Slip Op. p 1).

This case, where there was substantial evidence in the record of causation and negligence cannot be "in conflict with a decision of the Supreme Court," (RAP 13.4(b)) where there was no evidence of causation and negligence.

IV. Respondents' Supplemental Statement of the Case

Wells brought a complaint for negligence against NVEC, an electricity utility cooperative, alleging that NVEC's power supply equipment, installed on Wells' property to serve their rural home, caught fire due to faulty or failed equipment, which fire spread to Wells' home, completely burning the home and its contents. CP 2.

NVEC had installed the power pole and electricity supply equipment in 1973 when Wells located their home at the site, and NVEC had operated the supply equipment while Wells occupied the home since then until the fire in August of 2013. RP 9.

Plaintiff Edwin Wells testified that during an August afternoon in 2013, smoke detectors began chirping at one end of his house while he and his wife were inside. Upon opening a door to a bedroom, he saw light smoke wafting in the far corner of the room. RP 28-29. Upon exiting the home to the back yard to investigate the source of the smoke, he observed flames spreading along a woodshed to the corner and eaves of the home. RP 30. NVEC's power pole and equipment were located about seven to eight feet from the corner of the woodshed where Plaintiff saw the flames. RP 28. He went back inside the home, told his wife, the Plaintiff Ann Minor, that the house was on fire and to get out. RP 31. They went outside and tried to put the fire out with garden hoses, to no avail. RP 32. They went back into the home, picked up a few important items. RP 35-36. They went outside, called in the fire on a cell phone RP 38. By the time firefighters arrived the house was filled with flames and the roof had collapsed. RP 39. With the firefighters, Wells watched the home burn, then left the scene to get to town to buy clothing. RP 43-44.

The Sheriff's fire investigator, Detective Kreg Sloan was out of town when the call came in, and arrived at the scene arrived at the

scene a few days later with the purpose of determining the source and cause of the fire, a part of his duties as a Sheriff's Detective for fire investigations. RP 95-96. The transformer and wire had already been removed from the scene by NVEC's line crew by the time he arrived for the investigation. RP 110, EX 3 p007.

At trial Detective Sloan testified that from his investigation, the only source and cause of the fire was an ignition of the power pole by the accumulated effects of slow leakage of electricity from a cracked insulator, RP 128-129, over a long period of time that had slowly hollowed out a depression in the wood around a large eye bolt to which the cracked insulator and electric wire was attached. RP 129-137, EX 3 p339, 354. He testified that the pole was old and deteriorated at the top, RP 126-127 and that apparently small sparks of ignited wood fell to the base of the pole from the area of the transformer and wire connections where the fire started. RP 133 He testified that he found no evidence of any origin or cause of the fire other than NVEC's power pole and electrical supply equipment. RP 138-139.

After Wells rested their case in chief, NVEC moved for directed verdict and dismissal of Wells' case on the grounds that there had been insufficient evidence of negligence and causation on the part of NVEC. The Trial Court granted that motion and dismissed Wells' case.

On appeal, the Court of Appeals reviewed the record for substantial evidence to support an inference of negligence and causation, and found such evidence in the record. The Court of Appeals reversed the dismissal and remanded the case for trial.

V. Answer to Argument Why Review Should Be Accepted

At trial, Wells presented two theories of negligence:

1) common law breach of the high duty of care imposed on electric utilities, which would impose sufficient inspection and maintenance that hazardous deterioration of equipment is detected and addressed, and

2) inference of negligence from *res ipsa loquitur*, in that normal experience indicates that a house fire should not have resulted from the failure of NVEC's adjacent residential service equipment to

control and contain the electrical current, in the absence of any negligence upon the part of the NVEC.

The Court of Appeals held that “Because the Plaintiffs presented evidence linking the fire not only to NVEC's equipment, but also to the utility's neglected maintenance, the case should have been resolved by a jury.” (at Slip Op. p 1).

Petitioner contends that the Court of Appeals decision is in conflict with a holding of *Cambro v. Snook*, 43 Wn.2d 609, 262 P. 2d 767 (1953).

1) Unlike *Cambro Co. v. Snook*, where no evidence of causation or negligence was presented, Wells produced evidence of connecting causation and NVEC’s breach of its “highest duty of care” owed by an electric utility to adequately inspect and maintain its electrical equipment, such that an undiscovered leakage of electrical current started a fire destroying Wells’ home.

As to the application of *res ipsa loquitur*, that the case at bar is about a utility’s control of residential electrical equipment and the attendant higher duty of care, where there is evidence of singular causation, rather than the general control of fire. *Cambro v. Snook* is

inapposite, and not conflicting, because in *Cambro* there was no evidence in the trial record of causation of the defendant in controlling fire, only conjecture that the defendant's torch might have started the fire, since it was in the building that caught fire.

And so this case does not conflict with *Cambro v Snook*, because in this case there is direct evidence, not just conjecture between alternate theories, that NVEC's electrical equipment failed due to long deterioration, which could have been remediated with inspection and repair, plus corroborating circumstantial evidence to support that inference by a jury, and expert testimony of a fire investigator finding no evidence of other causes. This presentation of direct, expert, and circumstantial evidence of the electrical origin and cause of the fire distinguishes this case from *Cambro v Snook*, which was not about electrical utilities, or even about electricity, or even about physical evidence and observation of the start of the fire as to causation and negligence.

2) Where the Court of Appeals acknowledged substantial evidence of causation and negligence, this issue is not reviewable for substantial evidence on Petition for Review under RAP 13.4(b) and is

not made reviewable by Petitioner's contention that it conflicts with a case where there was no substantial evidence of causation and negligence.

Issue No. 1 –Common Law Negligence with High Duty of Care

In general terms, to establish negligence a plaintiff must prove breach of a duty of care which results in an injury proximately caused by the breach. *Hansen v. Friend*, 118 Wash.2d 476, 479, 824 P.2d 483 (1992). In the case of the actions or inactions of an electrical supply utility, the standard of care varies according to the danger posed by the utility's activity. If the danger is minimal, the utility is held to conventional negligence concepts. But when the danger and the likelihood of injury is increased, the standard of care rises. When the utility's operation exposes the public to serious accidents or death, the utility is held to, "a very high degree of care, indeed, the highest that human prudence is equal to...". *Keegan v. Grant Cty. Pub. Util. Dist. No. 2*, 34 Wash. App. 274, 279, 661 P.2d 146, 149–50 (1983).

In *Keegan*, the Court said,

“The Keegans claimed the PUD was negligent in its installation and maintenance of the power line; that it failed to properly trim the Poplar trees; and that safety devices were not properly installed to stop the flow of electricity in the event of a downed line. They theorized the PUD's failure to perform its duty of properly trimming the trees caused the trees to blow into the power lines, breaking one and causing it to fall to the ground. They also contended the lack of proper safety devices allowed the power to surge into the ground for 1 hour and that this power found its way to the Keegans' underground metal water pipe, which carried it into the house, causing the fire.” (at 276)

It is worth noting that only property loss by fire, not personal injury or death, was at issue in *Keegan*, yet the Court approved the following jury instruction:

“The Defendant was bound to use reasonable care in the construction and maintenance of its lines and apparatus; that is, such care as a reasonable man would use under the circumstances and the Defendant is responsible for any conduct falling short of that standard. What is reasonable care varies with the danger that is incurred by negligence, for a reasonable man increases his care with the increase of danger. If the wires of the Defendant carried a strong and dangerous current of electricity so that negligence on the part of the Defendant would be likely to result in serious accidents or harm, then the Defendant owed the Plaintiffs the highest degree of care, the utmost care and prudence, consistent with the practical operation of the

Defendant's electrical distribution facilities, to avoid accident or injury.” *Keegan* at 151.

' The question of whether or not reasonable care has been used is in all cases for the jury, except where the court, on undisputed facts, can say that no reasonable man would have acted in the manner complained of, or that a reasonable man must have acted in the manner complained of. Between these limits the whole question is for the jury.” *Keegan* 278-279.

In the case at bar, the Court of Appeals relied on *Keegan*, where there was evidence of the causation of the fire by electricity supplied by a utility, along with a lack of performance of reasonable maintenance of their equipment, to make a jury case of negligence. That is the same factual case Wells presented in the case at bar.

Unlike *Cambro Co. v. Snook*, where no evidence of causation was presented, Wells produced evidence of NVEC’s breach of its “highest duty of care” to adequately inspect and maintain its electrical equipment, such that an undiscovered leakage of electrical current started a fire destroying Plaintiff’s home.

The fact that leakage of electrical current from deteriorated equipment in control of an electric utility caused the fire does not

relegate Well's negligence case to some lower duty or immunity of electrical utilities as to resulting fire damage.

Issue No. 2 -- Res Ipsa Loquitur

The case at bar is an ordinary application of res ipsa loquitur to electrical equipment causing injury to a plaintiff.

Cambro v. Snook reviewed the duties as to an instrumentality of fire without evidence of causation, whereas this case involves utility electrical equipment with evidence that electricity from the deteriorated equipment started the fire.

Res ipsa loquitur is a rule of evidence that allows an inference of negligence from circumstantial evidence to prove a defendant's breach of duty where (1) the plaintiff is not in a position to explain the mechanism of injury, and (2) the defendant has control over the instrumentality and is in a superior position to control and to explain the cause of the injury.

“The doctrine of res ipsa loquitur spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained,

and the injury is of a type that would not ordinarily result if the defendant were not negligent. In such cases the jury is permitted to infer negligence. The doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person. Pacheco, 149 Wash.2d at 436, 69 P.3d 324 (citations omitted).” *Curtis v. Lein*, 169 Wn.2d 884, 889-890, 239 P.3d 1078 (Wash. 2010)

There is no conflict between the case at bar and *Cambro* on those principals.

In *Cambro*, the plaintiff had alleged that his building had been damaged by fires caused by the negligent operation of an acetylene torch being used by defendant’s employee. The only evidence linking that defendant’s activities to the ignition of the fire was the attenuated circumstantial evidence that the defendant’s employee was operating an acetylene torch in the building before the fire. The *Cambro* court held that without evidence of negligent operation of the torch, there could be not liability for ordinary common law negligence, and that res ipsa loquitur was not applicable because, “The use of a torch near a wooden surface creates a danger of fire even when adequate precautions are taken. Normal experience indicates that a fire could

have resulted even in the absence of any negligence upon the part of the operator.” *Cambro* at 617.

The plaintiffs in *Cambro* were contended that *res ipsa loquitur* provided both an inference of causation, without other proof, if the defendant was handling fire in the area of the damage, and of negligence for the escape and spread of the fire being handled. That is not a conflicting holding with the case at bar, where causation is connected and *res ipsa loquitur* is regularly applied to electrical equipment, because people don’t expect to be injured by current from electrical equipment unless the operator of the equipment is negligent.

Issue No. 3 Substantial public interest

1) NVEC did not argue at trial nor on appeal that ordinary application of *res ipsa loquitur* to the electrical equipment of electrical utilities “expands the liability of electrical utilities”, which have never had special immunity from *res ipsa loquitur* just because they are utilities. The courts have applied common law *res ipsa loquitur* to electrical equipment in Washington and other states, as noted by the Court of Appeals, without “expanding the liability of electrical

utilities.” Petitioner cites no case protecting an electrical utility from common law application of *res ipsa loquitur*.

2) The fact that the Petitioner is an electrical utility is irrelevant to the case, unless Petitioner is asking for some expansion of law as to electrical utilities which was never argued to the trial court nor to the Court of Appeals.

F. CONCLUSION

Is the Petitioner boldly contending that an electrical utility can never be held liable for negligence in inspection and maintenance, when its equipment starts a fire, because of the costs of those liabilities on the industry paying damages? Considering the “highest duty of care” imposed upon an electric utility, and the potential catastrophic damages due to electrical equipment failure, it seems that inspection, maintenance, and the doctrine of *res ipsa* are especially applicable to residential power supply equipment.

Where there is evidence of causation of fire by the failure of deteriorated electrical equipment, questions of fact for the jury as to whether the particular actions *or inactions* of a NVEC substantiate a

common law breach of the high duty of care. Ordinary human experience acknowledges that a utility's residential electrical equipment should not set fire to the residence unless there were negligent actions or inactions. Thus, the grant of the directed verdict was error by the Trial Court. The Court of Appeals recognized that error. This case stands on substantial evidence of singular causation of a house fire by deterioration of the electric utility's residential supply equipment, where other no other alternate causes are presented. Review should be denied.

September 10, 2020

Respectfully submitted,

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was filed and served, on this day, electronically through the Court of Appeals' online Portal.

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Dated this 10th day of September, 2020, at Tonasket,
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