FILED
SUPREME COURT
STATE OF WASHINGTON
8/11/2020 11:25 AM
BY SUSAN L. CARLSON
CLERK

Washington Supreme Court No. 98877-3

Washington State Court of Appeals, Div. III No. 36602-2

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

Respondents,

v.

NESPELEM VALLEY ELECTRIC COOPERATIVE, INC.,

Petitioner.

PETITION FOR REVIEW

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I. <u>IDENTITY OF PETITIONER</u>

Nespelem Valley Electric Cooperative, Inc. ("NVEC").

II. <u>COURT OF APPEALS DECISION</u>

NVEC seeks review of *Wells v. Nespelem Valley Electric Cooperative, Inc.*, No. 36602-2-III, (Slip Op. May 5, 2020)**Error! Bookmark not defined.**, a published opinion, which reversed the trial court's directed verdict in favor of NVEC. App. at 1-11 (hereinafter, "Court of Appeals' Opinion"). NVEC timely filed a Motion for Reconsideration, which the Court of Appeals denied on July 14, 2020. App. at 12.

III. <u>ISSUES PRESENTED FOR REVIEW</u>

1. A decision of this Court, *Cambro Co. v. Snook*, holds that a trial court must direct a verdict in favor of a defendant when a plaintiff, who has been damaged by a fire, fails to establish that defendant's negligence started the fire. Plaintiffs in this case did not present any evidence at trial that NVEC was negligent in causing the fire that damaged them. The trial court directed the verdict in favor of NVEC. The Court of Appeals reversed. By reversing the directed verdict, does the Court of Appeals' Opinion conflict with a decision of this Court?

2. A decision of this Court, *Cambro Co. v. Snook*, holds that res ipsa loquitur does not apply in cases involving property damage caused

by fire because fires can occur even in the absence of negligence. The trial court ruled that res ipsa loquitur did not apply to this case. The Court of Appeals reversed. By concluding that Plaintiffs produced a "viable" case for application of res ipsa loquitur, does the Court of Appeals' Opinion conflict with a decision of this Court?

3. Electrical utility liability for fires is a pressing social and political issue. There is a high demand for electricity, but global warming has created hotter and drier conditions throughout the American west, which makes the environment more conducive to fires. The Court of Appeals' Opinion, which makes res ipsa loquitur apply to cases involving fires allegedly caused by electric utilities, shifts the burden to utilities to rebut a presumption of negligence. Does the Court of Appeals' Opinion, which expands electrical utility liability under the theory of res ipsa loquitur, involve a substantial question of public interest?

IV. STATEMENT OF THE CASE

A. Plaintiffs' evidence presented at trial.

On August 15, 2013, a fire burned the home and property of Edwin Wells and Ann Minor. Wells and Minor, individually and on behalf of the George Wells Family Trust (collectively, hereinafter, "Plaintiffs"), sued their electrical utility, NVEC, alleging that NVEC's negligence caused the

fire and resulting damage. NVEC denied that it was negligent. The case proceeded to a jury trial.

Plaintiffs called five witnesses in their liability case in chief: (1) Edwin Wells, (2) Detective Kreg Sloan, a detective with the Okanagan County Sheriff's Office who investigated the scene of the fire, (3) Kris Kirchner, Wells' ranch hand, (4) NVEC general manager Daniel Simpson, and (5) NVEC linemen Ed Hartbarger. Plaintiffs' witnesses did not establish, or even allow the jury to infer, that NVEC breached a duty of care to proximately cause the fire.

Wells testified that a fire started near his woodshed in the proximity of NVEC's power pole. On the day of the fire, Wells did not observe fire, sparks, or smoke emanating from NVEC's equipment, and never heard any sounds coming from the equipment. Wells also testified that there was no interruption of his power on the day of the fire. Wells testified that he did not know what inspections or maintenance NVEC performed on its equipment prior to the fire, except that NVEC had replaced its meter several years before the fire. Wells' ranch hand, Kris Kirchner, testified that he arrived at the fire about 35 minutes after it started and did not know what caused the fire.

As Plaintiffs had no lay testimony connecting NVEC to the cause of the fire, Plaintiffs relied on the "expert" opinion of Detective Kreg

Sloan. Sloan testified about his investigation of the fire, from which Sloan concluded that the fire started from "current leakage" at a clevis connection on the pole where the "distribution" wire attached before entering the transformer. On cross examination, however, Sloan admitted that:

- He did not know whether the clevis that he identified as the origin site of the fire was used for connecting the energized phase wire or the non-energized neutral wire.
- He did not know how far the clevis connection was from the top of the power pole because he did not measure it.
- A neutral wire connection would not leak electrical current.
- If there was electrical "leakage," there would have been some interruption in power.

Finally, Det. Sloan admitted that he could not say what, if anything, NVEC did wrong to cause the fire:

> Q: So, you don't have an opinion that Nespelem Valley Electric had constructed the pole incorrectly?
>
> A: I'm not going to make an opinion on that.
>
> Q: Okay. In fact, you can't say as you sit here today that Nespelem Valley Electric did anything wrong, correct?
>
> A: I'm not here to testify to that.

VRP at 175:9-14.

Plaintiffs' final two liability witnesses were NVEC employees: GM Simpson and lineman Hartbarger. Simpson testified that NVEC had followed its standard procedures in responding to the fire and preserving evidence. Hartbarger testified that he responded to the Plaintiffs' property as the fire was burning. He observed that the butt of NVEC's power pole was on fire, but the top of the pole was not damaged. Hartbarger further testified as to the configuration of the electrical distribution system to the Wells' property. He testified that the power pole in question had a phase wire connecting to the transformer, as well as a (non-energized) neutral wire connected to the pole two to four feet below the phase wire. Hartbarger testified that the clevis connection identified by Det. Sloan as the cause of the fire was a connection used for the neutral wire, not the phase wire.

B. Trial court grants NVEC's motion for directed verdict.

After the close of Plaintiffs' liability case, NVEC moved for a directed verdict, which the trial court took under advisement. The trial court allowed Plaintiffs to put on evidence of their damages. After the completion of Plaintiffs' case in chief, the trial court granted NVEC's Motion for directed verdict and dismissed the case. The trial court found

that Plaintiffs had failed to put forth any evidence that NVEC breached a duty of care to proximately cause the fire, and that it was inappropriate to allow the jury to infer negligence under a theory of res ipsa loquitur because fires can occur absent negligence. In granting NVEC's motion for directed verdict, the trial court stated that principles of stare decisis made the court "duty bound" to follow *Cambro Co. v. Snook*, 43 Wn.2d 609, 262 P.2d 767 (1953). VRP at 371:16-29.

C. Court of Appeals reverses trial court.

In a published decision, the Court of Appeals reversed the trial court's grant of a directed verdict. Disagreeing with the trial court, which had sat through the presentation of evidence, the Court of Appeals found that Plaintiffs submitted evidence at trial "sufficient to support a claim of breach." App. at 6. Specifically, the Court of Appeals found that a jury could infer that NVEC "fail[ed] to maintain the electrical pole and related service equipment in good working order." *Id.*

After finding that Plaintiffs put forth sufficient evidence to establish a prima facie case of negligence, the Court of Appeals went further to conclude that Plaintiffs "produced a viable case of res ipsa loquitur." App. at 7. The Court of Appeals articulated a creative new test for determining whether res ipsa loquitur applies to a case involving fire:

> The circumstance at issue was not simply a fire, but a fire originating with an electrical utility's power supply equipment. The *general* fact that fires often happen without any negligence does not address the Plaintiffs' *specific* claim that a fire attributed to electrical service is not something that normally occurs outside of negligence. It is the specific claim that governs application of res ipsa loquitur, not the more abstract occurrence.

App. at 8 (emphasis in original).

The Court of Appeals' Opinion did not discuss, try to distinguish, or even cite to *Cambro Co. v. Snook* (despite the trial court's reliance on the case, VRP at 369-71, and treatment in both parties' briefing on appeal, App. Br. at 13-14; Resp. Br. at 15-21).

V. ARGUMENT

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or . . . (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

A. The Court of Appeals' reversal of the verdict directed in favor of NVEC conflicts with *Cambro Co. v. Snook*.

Cambro stands for the proposition that, in a case involving property damage caused by fire, the trial court must direct a verdict in favor of the defendant when plaintiff fails to prove the cause of the fire by

a preponderance of the evidence, and instead presents only a "conjectural" theory about what might have happened.

In *Cambro*, Plaintiff, Cambro, purchased a building that had formerly been used to make soap and process coconut oil. 43 Wn.2d at 610. Cambro wanted to use the building as a warehouse, so it contracted with defendant, Snook, to remove the soap-making/oil-processing equipment (including steel vats) from the premises. *Id.* Snook's employees used acetylene torches to remove the equipment. *Id* On a day when Snook was removing equipment, a fire started in the building causing damage. *Id.* at 611. Cambro sued Snook and the case proceeded to a bench trial. *Id.*

At trial, a corporate representative of Cambro admitted "it was possible that persons other than [Snook's] workmen could have gained admittance to the premises." *Id**Error! Bookmark not defined.***. at 612.

Next, a fire inspector from the city testified that he arrived at the fire about 20 minutes after it occurred and concluded, based on "past experiences," that the "fire started from cutting operations," and further noted that an "acetylene hose was in that area and burned." *Id.* at 612-13. Under cross examination, however, the fire inspector admitted (1) he "had not seen any torch in use and that the fire could have started by some other means," and (2) "he could not determine whether the flame from the

damaged torch which he found on the floor had come in contract with the wood and could not be sure whether the torch had been operated in a careless manner by whoever was using it." *Id.* at 613. When the fire inspector was asked, "Did you find any evidence of any carelessness or unreasonable conduct?" he responded, "None other than what actually is practiced generally on that type of work." *Id.* at 614.

At the close of Cambro's evidence, Snook moved for a directed verdict, which the trial court denied. *Id.* at 611. The trial court entered judgment in favor of Cambro, finding, inter alia, that one of Snook's employees "in the operation of the [acetylene] torch, was negligent and careless in that he did allow the flames therefrom to come in contact with portions of the building upon which he was working causing the same to catch fire and damaging the building." *Id.* Snook appealed this finding. *Id.*

This Court reversed the judgment in favor of Cambro and remanded with instructions to dismiss the action. This Court observed that no witness testified about seeing the fire start; thus, Snook's liability was, "of necessity, based upon circumstantial evidence." *Id.* at 612; *see also id.* at 613 (observing that no witness at trial "testified that an acetylene torch was being used by any employee of appellant on the morning of the fire"). This Court also noted that Cambro failed to put forth "any evidence that a

torch was being operated by anyone in such a negligent manner that the flame from it was carelessly allowed to come in contact with any wooden part of the building." *Id.* This Court concluded:

> Even assuming that the evidence . . . was sufficient to support the portion of the finding that the fire was caused by an acetylene torch, [Cambro] failed to prove by a preponderance of the evidence that the torch was operated by one of [Snook's] employees in a negligent or careless manner. Negligence cannot be assumed merely because the evidence shows that a fire occurred, or an accident happened . . . It must be established by evidence or by a legitimate inference from the established facts.

Id. at 614.

This Court rejected Snook's argument that the trial court's finding was supported by reasonable inferences. *Id.* at 615-16. This Court concluded from the record before it that there was "nothing tangible to proceed upon" except the "two conjectural theories" proposed by the parties. *Id.* at 616-17. At bottom, this Court decided that the case "involve[d] [Cambro's] failure to prove by either direct or circumstantial evidence that the fire could not reasonably have occurred without negligence on the part of one of [Snook's] employees." *Id.* at 617.

Cambro applies to this case on all fours and it is telling that the Court of Appeals did not discuss this case, or even cite to it, in reaching a result divergent from *Cambro*. Like the plaintiff in *Cambro*, Plaintiffs in this case failed to put forth evidence that NVEC breached a duty of care

that caused the fire. Neither Wells nor any other witness saw the fire start. Like Cambro's case, Plaintiffs' case was based entirely on circumstantial evidence. Det. Sloan was the only witness who, as an "expert," could opine about the cause of the fire. But, like the fire inspector in *Cambro*, Detective Sloan ultimately testified that he could not conclude what, if anything, NVEC did wrong to cause the fire. *Cf. Cambro*, 43 Wn.2d at 614 (fire inspector admitting that he did not have any evidence of someone acting careless or unreasonable). Just as Cambro's case failed because Cambro could not prove that one of Snook's employees operated an acetylene torch in a negligent or careless manner, in this case, Plaintiffs' case failed because they could not prove that NVEC was negligent or careless in providing electrical service to Plaintiffs. *See id.* at 614 ("Negligence cannot be assumed merely because the evidence shows that a fire occurred, or an accident happened.").

Further, Plaintiffs' inconsistent evidence concerning the cause of the fire makes this case even more susceptible to a directed verdict than Cambro's case. This is because Plaintiffs' own evidence, *viz.* testimony of Hartbarger, established that the connection Det. Sloan identified as the source of the fire was actually a neutral wire connection, a fact Det. Sloan did not dispute. And Det. Sloan conceded that "current leakage" would not occur on a non-energized neutral connection. Thus, at the close of

Plaintiffs' evidence, the jury was left only with a conjectural and inconsistent theory about how the fire started.[1]

In sum, the Court of Appeals' reversal of the verdict directed in favor of NVEC conflicts with *Cambro*. Under *Cambro*, it would have been error for the trial court to deny NVEC's motion for directed verdict. This Court should accept review pursuant to RAP 13.4(b)(1) because the Court of Appeals disregarded and departed from this Court's precedent.

B. The Court of Appeals' ruling that Plaintiffs produced a "viable" case of res ipsa loquitur conflicts with *Cambro v. Snook.*

In *Cambro*, this Court rejected Cambro's argument that res ipsa loquitur provided a way for Cambro to avoid a directed verdict. 43 Wn.2d at 617. Cambro argued that res ipsa loquitur applied to establish Snook's negligence "even if the proof was not sufficient to establish a specific act of negligence on the part of [Snook's] employee." *Id.* This Court disagreed, reasoning:

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[1] Although NVEC did not put on its defense case, Det. Sloan admitted on cross examination that he could not eliminate other causes of the fire such as (1) "suspicious activity," (2) an animal contacting the electrical equipment, or (3) an electrical issue inside Plaintiffs' home. VRP at 153-54, 167-68, 174. Thus, like in *Cambro*, the jury was faced with multiple conjectural theories about how the fire started. *See Cambro*, 43 Wn.2d at 612 (Cambro representative admitting that it was possible that an unauthorized individual could have accessed the building and started the fire).

> Before [res ipsa] will be applicable in any specific case the circumstances must be such that normal experience indicates that the injury would not have happened in the absence of negligence on the part of the defendant. 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. Therefore, the doctrine of *res ipsa loquitur* is not applicable.

Id. (citations omitted). *Accord Voorde Poorte v. Evans*, 66 Wn. App. 358, 364, 832 P.2d 105 (1992) ("Normal experience indicates that a fire could result even in the absence of negligence."); *Milwaukee Land Co. v. Basin Produce Corp.*, 396 F. Supp. 528, 530, 532 (E.D. Wash. 1975) ("Under the present state of the record res ipsa loquitur would not be applicable because there is no evidence in the record that the accident [("a fire of unknown origin")] was of the type that normally does not occur in the absence of negligence.").

In this case, the Court of Appeals rejected *Cambro*'s clear rule that res ipsa loquitur does not apply to fire cases. The Court of Appeals ignored the well-established rule that res ipsa only applies to cases "where the general experience and observation of mankind teaches that the result would not be expected without negligence." *Brugh v. Fun-Tastic Rides Co.*, 8 Wn. App.2d 176, 180, 437 P.3d 751, *review granted in part*, 194 Wn.2d 1001, 451 P.3d 339 (2019). Instead, the Court of Appeals engaged

in analytical gymnastics to specially apply res ipsa to cases involving fires allegedly caused by electrical utility equipment:

> The circumstance at issue was not simply a fire, but a fire originating with an electrical utility's power supply equipment. The *general* fact that fires often happen without any negligence does not address the Plaintiffs' *specific* claim that a fire attributed to electrical service is not something that normally occurs outside of negligence. It is the specific claim that governs application of res ipsa loquitur, not the more abstract occurrence.

App. at 8 (emphasis in original).[2]

In so holding, the Court of Appeals ignored *Cambro* (and other Washington cases, including *Voorde Poorte*), and failed to appreciate that res ipsa loquitur is only applied "sparingly" and in "peculiar and exceptional" cases when "the demands of justice make its application essential." *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792, 929 P.2d 1209 (1997). Instead, the Court of Appeals expanded the doctrine to an entirely new and common category of cases, i.e., cases involving fire

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[2] Undersigned counsel could find no Washington case law that, in analyzing res ipsa loquitur, distinguishes between a "general" circumstance and a "specific" theory alleged by a plaintiff, or case law suggesting that the "specific" theory alleged by plaintiff controls over the "more abstract occurrence." *Cf.* App. at 8. Such a distinction was certainly not drawn by this Court in *Cambro*. Under the Court of Appeals' new analysis, res ipsa loquitur would apply in *Cambro* because the "specific" act alleged, i.e., operation of acetylene torch, a commonly used welding tool, would not burn down a building when used properly.

damage. The Court of Appeals' ruling is analytically unsound and has widespread implications to electrical utilities and other entities who own or control a mechanism capable of causing fire through electricity, mechanical operation, chemical reaction, or otherwise.

In sum, the Court of Appeals' ruling that Plaintiffs produced a "viable" theory of res ipsa loquitur conflicts with *Cambro*. This Court should accept review pursuant to RAP 13.4(b)(1) because the Court of Appeals disregarded and departed from this Court's precedent.

C. 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.

This Court may accept review of a Court of Appeals' decision if the decision involves a question of "substantial public interest." RAP 13.4(b)(4). An issue is of substantial public interest if it "immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 803, 83 P.3d 419 (2004)**Error! Bookmark not defined.**.

The Court of Appeals' ruling on the application of res ipsa loquitur expands the liability of electrical utilities by excusing plaintiffs from proving an electrical utility's negligence in cases of fire. Regardless of

whether anyone saw what started the fire, regardless of whether there are other possible causes, regardless of whether plaintiffs can show that the utility did something wrong, the utility will face a presumption of negligence if its equipment is anywhere near the area where the fire started. This shifts the burden to electrical utilities to rebut res ipsa's presumption of negligence. *See Curtis v. Lein*, 169 Wn.2d 884, 892, 239 P.3d 1078 (2010) (observing that the result of applying res ipsa is "to shift the burden to the defendant to prove, through evidence sufficient to rebut the inference arising from application of res ipsa loquitur, that [e.g.,] the faulty condition . . . was undiscoverable."). Under the Court of Appeals' Opinion, electrical utilities now have the burden to prove their innocence, contrary to the general rule that plaintiffs bear the burden of proof and persuasion. *See Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App. 374, 397, 305 P.3d 1108 (2013) ("As a general rule, a defendant's negligence is not presumed, but must be affirmatively proved [by the one asserting it].").

The issue of electrical utility liability for fires is a pressing social and political issue that impacts a significant segment of the population, i.e., all citizens who rely on electrical power. The demand for electricity (preferably cheap, or at least affordable, electricity) has never been higher; electricity is essential for nearly every trapping of modern life. Global

warming[3] means hotter, longer, drier summers, especially in the American west. The demand for electricity coupled with environmental changes makes the provision of electricity (a volatile, natural force harnessed for human consumption) an increasingly risky proposition given the tinder box conditions that exist in many rural environments.

This issue has recently reached the forefront of public debate in California. In California, plaintiffs damaged by fire may bring claims against private utilities under a theory of "inverse condemnation," which makes utilities strictly liable for damages caused by their equipment. *E.g.*, *Barham et al. v. S. Cal. Edison Co.*, 88 Cal. Rptr. 2d 424 (Cal. Ct. App 1999). Applying a strict liability standard, however, has become untenable given modern climate realities. For instance, massive California wildfires (allegedly caused by utilities) in recent years forced Pacific Gas & Electric (PG&E) (California's largest electrical utility with some 5.4 million electricity customers), into bankruptcy. Steven Weissman, *Turning Off the Lights in California*, N.Y. Times, Oct. 14, 2019, *available at*

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[3] This Court has recognized the existence of global warming caused by human activity. *See Ass'n of Washington Bus. v. Washington State Dep't of Ecology*, 195 Wn.2d 1, 5, 455 P.3d 1126 (2020) ("The issue is not whether man-made climate change is real—it is.").

https://www.nytimes.com/2019/10/14/opinion/pg-and-e-shutdown.html (last visited May 13, 2020).

The implications of utility bankruptcies include (1) increasing the cost of electric service to ratepayers (PG&E expects customer rates to double), (2) preventing utilities from obtaining financing to, inter alia, improve their infrastructure, (3) making utilities uninsurable, (4) making it impossible to fund renewable energy projects and meet climate-related goals, and (5) impairing the ability of the victims of wildfire to recover damages for wildfire-related losses. *See id.*; Shelley Ross Saxer, *Paying for Disasters*, 68 U. Kan. L. Rev. 413, 445 (2020). Since 2018, California has tried (to varying degrees of success) to pass legislation that strikes a balance between the needs of utilities and their customers, to reduce risk of fires, and to spread the cost of fire-related damages. *See* Saxer, *supra*, at 443-44; *see also* A.B. 1054, 2019 Leg., Reg. Sess. (Cal. 2019).

The Court of Appeals' Opinion changes Washington law and policy by exposing electrical utilities to increased liability, and, in doing so, intrudes into social and political issues that will impact every consumer of electricity in this state. With the Court of Appeals' Opinion, Washington utilities with equipment in the vicinity of a fire (the cause of which cannot be explained) are now presumed negligent, similar to California utilities under a theory of inverse condemnation. If the Court of

Appeals' Opinion does not create a strict liability standard in principle, it creates a strict liability standard in fact by shifting the burden of proof and persuasion to utilities to rebut the presumption of negligence. *Curtis*, *supra*.

Rural utilities and their consumers will be disproportionately affected by the Court of Appeals' expansion of utility liability. Shrubs, grasses, and trees present in the rural environment provide abundant fuel for fires. Further, it is not economical to supply electricity to customers living far apart in rural settings; doing so requires significant amounts of power lines and related equipment, often serviced by a handful of employees. In the rural setting, there are relatively few customers to spread the cost of this infrastructure. In fact, the only way electricity can be provided in rural areas is through preferential treatment by the federal government pursuant to the Rural Electrification Act of 1936, 7 U.S.C. § 901 et seq. ("REA"). *See*, *e.g.*, *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 659–60, 911 P.2d 1301 (1996) (observing that the "basic purpose of the [REA] was to extend electric service to those rural areas of the country without central station service by providing government loans at low interest rates."). With the Court of

Appeals' expansion of utility liability, NVEC[4] (and others like it) will be put in the same situation as PG&E in California. But when NVEC runs out of money, are its 1,500 customers going to be able to bail it out? The Court of Appeals' Opinion creates a real possibly that utilities will, in the near future, be unable to operate in rural areas of Washington state. Such a significant change to the liability of utilities in this state should come from the legislature after thorough study and debate, not from a Court of Appeals' decision considering facts presented in this one lawsuit and making a legally questionable holding that puts the onus on utilities to prove their innocence.

In sum, the Court of Appeals' dubious expansion of the doctrine of res ipsa loquitur has far reaching social and political consequences that raises a substantial question of public interest. This Court should grant review pursuant to RAP 13.4(b)(4).

VI. CONCLUSION

NVEC respectfully requests that this Court grant NVEC's Petition for Review.

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[4] Petitioner NVEC is the smallest electrical co-op in Washington state. http://www.nvec.org/about/ (last visited May 13, 2020). NVEC has just over 1,500 customers/members (almost half of which are members of the Colville Confederated Tribes) and 405 miles of power line, which is less than four meters per mile. *Id.*

RESPECTFULLY SUBMITTED this 11th day of August, 2020.

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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 Washington Courts online Portal and by email.

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Dated this 11th day of August, 2020, at Spokane, Washington.

/s/ *Scott C. Cifrese*
Scott C. Cifrese

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Wells v. Nespelem Valley Electric Cooperative

Appendix to NVEC's Petition for Review

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FILED
MAY 5, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

EDWIN WELLS; ANN MINOR; and GEORGE WELLS FAMILY TRUST,	)	No. 36602-2-III
Appellants,	)	
v.	)	PUBLISHED OPINION
NESPELEM VALLEY ELECTRIC COOPERATIVE, INC., a Washington corporation,	)	
Respondent.	)	

PENNELL, C.J. — An electrical fire traced to equipment owned by Nespelem Valley Electric Cooperative, Inc. (NVEC) destroyed the rural home and other property of Edwin Wells, Ann Minor, and the George Wells Family Trust (collectively the Plaintiffs). According to the Plaintiffs, NVEC's electrical pole and equipment were old and cracked, making them susceptible to electrical leakage and combustion. The Plaintiffs 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. We reverse. 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. The matter is remanded for trial.

BACKGROUND

The fire at the Plaintiffs' property began around noon on a clear day in late summer. Both Edwin Wells and Ann Minor were home at the time. Mr. Wells first noticed something amiss when a smoke detector began to chirp and wisps of smoke were observed in his home's back bedroom. Mr. Wells stepped outside and saw flames coming from a woodshed on his property. The woodshed was located approximately eight feet from an electrical pole.

The electrical pole belonged to NVEC. It had been installed in the early 1970s, around the time Mr. Wells moved to the property. NVEC supplied all electrical equipment associated with the pole, including a transformer, power line, and meter.[1] Over the decades, Mr. Wells observed NVEC employees arrive "every month and read the meter." Report of Proceedings (Jan. 15, 2019) at 11. However, apart from replacing the meter, Mr. Wells never observed NVEC update any of its equipment.

Mr. Wells tried to extinguish the fire himself, but was unsuccessful. Firefighters arrived on the scene and Mr. Wells and Ms. Minor left thereafter for evaluation of Ms. Minor for possible smoke inhalation. Efforts to save the home were unsuccessful. While Mr. Wells and Ms. Minor were away, representatives from NVEC arrived to disconnect

[1] The meter was installed on a separate pole located closer to the home.

the power and take down the electrical pole. After a transformer on the pole cooled down, NVEC removed the transformer and wires from the property, pursuant to standard protocol. Other components of the electrical service were left on site.

Several days after the fire, Okanogan County Sheriff's Detective Kreg Sloan conducted an investigation at the Plaintiffs' property. Detective Sloan ruled out several possible causes of the fire. The weather had been stable; thus, the fire could not have been started by lightning. There was no evidence of unauthorized persons or accelerants; thus, eliminating the possibility of arson. And there was no indication the fire could have been started by a domestic or wild animal. Rather than any of the foregoing, Detective Sloan attributed the cause of the fire to the electrical service associated with NVEC's power pole.

Detective Sloan identified the source of the fire based on burn patterns left on the electrical pole. The pole's most severe charring was located on the top and bottom. The middle showed less damage. According to Detective Sloan, this indicated the fire started at the top of the pole, in the location of the service lines. Then burning embers dropped to the earth, causing a conflagration on the ground below.

In addition to describing where the fire started, Detective Sloan opined as to how the fire started. Detective Sloan found a ceramic insulator attached to the top of the power pole. The insulator was old and cracked. Detective Sloan posited that electricity from the

power line leaked through the insulator to the power pole. Because the wooden pole was also old and cracked, it was ripe for combustion. On the day of the fire, sustained electrical leakage caused smoldering on the wooden pole and then a fire. Once the pole was on fire, flames spread to the rest of the property.[2]

Armed with the information from Detective Sloan's investigation, the Plaintiffs filed suit against NVEC, alleging liability for the fire on grounds of general negligence. The Plaintiffs theorized NVEC breached its duty of care by failing to maintain its power line and equipment. They also claimed relief under a theory of res ipsa loquitur.

The case proceeded to trial. At the close of the Plaintiffs' case, the trial court granted NVEC's motion for a directed verdict. According to the trial court, the Plaintiffs failed to demonstrate NVEC had done anything wrong. Thus, there was insufficient evidence to support liability under a general negligence theory. The trial court also rejected the Plaintiffs' argument for res ipsa loquitur. The court reasoned that fires

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[2] NVEC disputed Detective Sloan's analysis. According to NVEC, the insulator cracked when the power pole was pulled to the ground. In addition, NVEC proffered the insulator identified by Detective Sloan serviced a neutral line, not an active line (known as a phase wire); thus, it could not have contributed to electrical leakage. Given the applicable standard of review, we credit Detective Sloan's testimony, not the theories proffered by NVEC. *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 848, 348 P.3d 389 (2015).

can have many causes, several of which are not attributable to negligence. Given this circumstance, the trial court ruled the res ipsa loquitur standard was unmet.

The Plaintiffs appeal.

ANALYSIS

Standard of review

A trial court's entry of a directed verdict is reviewed de novo. *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 848, 348 P.3d 369 (2015). All facts are construed in the light most favorable to the nonmoving party. *Id.* A directed verdict will be affirmed only if there is no legally sufficient evidentiary basis for a contrary result. *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728 (2013).

General negligence

A claim of general negligence has four elements: (1) duty, (2) breach, (3) damages, and (4) proximate cause. *Brugh v. Fun-Tastic Rides Co.*, 8 Wn. App. 2d 176, 180, 437 P.3d 751, *review granted in part*, 194 Wn.2d 1001, 451 P.3d 339 (2019). The first element is a question of law, the remaining three involve questions of fact. *Briggs v. Pacificorp*, 120 Wn. App. 319, 322, 85 P.3d 369 (2003).

NVEC does not dispute it owed a duty to the Plaintiffs. Indeed, because of electricity's potential dangers, NVEC, as a supplier of high voltage electricity, owed the

Plaintiffs "the highest degree of care." *Estates of Celiz & Sanchez v. Pub. Util. Dist. No. 1 of Douglas County*, 30 Wn. App. 682, 685, 638 P.2d 588 (1981). Rather than duty, NVEC's dispute focuses on the factual issue of whether the Plaintiffs presented evidence of breach.

Although perhaps thin, the evidence presented at trial was sufficient to support a claim of breach. Testimony from Mr. Wells and Detective Sloan indicates NVEC failed to maintain the power pole and insulator on the Plaintiffs' property. According to Mr. Wells's testimony, the pole and related equipment were approximately 40 years old. Detective Sloan testified the pole and the insulator were both cracked, making them susceptible to electrical leakage and combustion. Representatives from NVEC regularly visited the Plaintiffs' property to read, and at some point replace, the meter. By failing to maintain the electrical pole and related service equipment in good working order, the facts alleged by the Plaintiffs indicate NVEC breached its duty to maintain its electrical systems with "'*the utmost care and prudence*.'" *Keegan v. Grant County Pub. Util. Dist. No. 2*, 34 Wn. App. 274, 279, 661 P.2d 146 (1983) (quoting *Scott v. Pacific Power & Light Co.*, 178 Wash. 647, 650, 35 P.2d 749 (1934)).

Viewing the evidence in a light most favorable to the Plaintiffs, a jury relying on testimony from Mr. Wells and Detective Sloan could find NVEC's failure to maintain its power pole and equipment was negligent conduct that led to the fire on the Plaintiffs'

property. The evidence presented at trial was therefore sufficient to overcome NVEC's motion for directed verdict. The trial court's decision to the contrary must be reversed.

Res ipsa loquitur

In addition to presenting sufficient evidence of general negligence, the Plaintiffs also produced a viable case of res ipsa loquitur. Res ipsa loquitur is a Latin phrase, roughly meaning "'the thing speaks for itself.'" BLACK'S LAW DICTIONARY 1566 (11th ed. 2019). Res ipsa loquitur is not an independent legal claim; it is instead a tool of circumstantial evidence that allows a plaintiff to proceed with a negligence claim when a defendant's specific act of negligence is unclear. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). Whether res ipsa loquitur can be applied to a set of facts is a legal issue. *Curtis v. Lein*, 169 Wn.2d 884, 889, 239 P.3d 1078 (2010). The doctrine may be used when:

> (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality . . . that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence.

Id. at 891.

In granting NVEC's motion for directed verdict, the trial court focused on res ipsa loquitur's first element. The court noted that fires are often attributed to causes having

nothing to do with negligence. As such, the trial court reasoned res ipsa loquitur did not apply in this context.

The trial judge's assessment of the type of occurrence at the heart of the Plaintiffs' res ipsa loquitur claim was too broad. Application of res ipsa loquitur is fact-specific and focuses on the "manner and circumstances" of a plaintiff's damage or injury. *Zukowsky v. Brown*, 79 Wn.2d 586, 594-95, 488 P.2d 269 (1971). Here, the circumstance at issue was not simply a fire, but a fire originating with an electrical utility's power supply equipment. The *general* fact that fires often happen without any negligence does not address the Plaintiffs' *specific* claim that a fire attributed to electrical service is not something that normally occurs outside of negligence. It is the specific claim that governs application of res ipsa loquitur, not the more abstract occurrence. *See Brugh*, 8 Wn. App. 2d at 185 (looking to plaintiff's specific claim of injury resulting from rollercoaster, rather than general claim of injury during rollercoaster).

The common law has long favored the Plaintiffs' position that res ipsa loquitur permits an inference of negligence for fires attributed to an electrical utility's equipment. *See Collins v. Virginia Power & Elec. Co.*, 204 N.C. 320, 168 S.E. 500, 504 (1933) ("'It is generally held that in cases of injuries sustained from electric appliances on private property the doctrine of res ipsa loquitur applies where it is shown that all the appliances for generating and delivering the electric current are under the control of the

person or company furnishing the same.'") (quoting *Lynch v. Carolina Tel. & Tel. Co.*, 204 N.C. 252, 167 S.E. 847, 850 (1933)); *accord Snow v. Duke Power Co.*, 297 N.C. 591, 256 S.E.2d 227, 233 (1979) (Res ipsa loquitur applies where circumstantial evidence shows the source of the fire was electrical and the defendant "had the exclusive control and management of the electrical current."); *Peterson v. Minnesota Power & Light Co.*, 207 Minn. 387, 391-92, 291 N.W. 705 (1940).

The common law approach is persuasive here. Under Washington law, when a "utility's operation exposes the public to serious accidents or death, the utility is held to the highest degree of care human prudence is equal to." *Keegan*, 34 Wn. App. at 279. The public reasonably expects utilities to deliver electricity in a safe manner, capable of withstanding normal tests of time and exposure to the elements. *See Scott*, 178 Wash. at 656-57 (Utility is expected to account for normal, foreseeable interactions with power lines.). While an unusual weather event or other interference may defeat an inference of negligence under the doctrine of res ipsa loquitur, the mere possibility of a defense does not mean a plaintiff has failed to make out a prima facie case for the jury. *See Pacheco*, 149 Wn.2d at 440-41 (A "plaintiff is not required to 'eliminate with certainty all other possible causes or inferences' in order for res ipsa loquitur to apply.") (quoting *Douglas v. Bussabarger*, 73 Wn.2d 476, 486, 438 P.2d 829(1968)). Instead, the claims and defenses must be resolved by a trier of fact.

NVEC claims res ipsa loquitur's second element is unmet because the power pole on the Plaintiffs' property was not in its exclusive control. Similar to its claim against res ipsa's first element, NVEC points out the power pole was subject to the elements and other natural forces. According to NVEC, a bird, cat, or wild animal could come into contact with its equipment and cause a disruption or fire.

NVEC's view of res ipsa loquitur is too rigid. The issue of exclusive control serves to narrow the defendant as the source of a plaintiff's injuries, as opposed to some other party. *Zukowsky*, 79 Wn.2d at 595. Generally, an electrical company will be held responsible for fires originating from its equipment, even if the equipment is placed on private property. *Collins*, 168 S.E. at 503-04. Presumptive responsibility is defeated only when the evidence shows a third party has interfered with a power company's equipment. *See, e.g.*, *Hippe v. Duluth Brewing & Malting Co.*, 240 Minn. 100, 105-06, 59 N.W.2d 665 (1953) (Res ipsa loquitur inapplicable when evidence was that plaintiff's son had exerted control over the power company's transformer.); *Arkansas Power & Light Co. v. Butterworth*, 222 Ark. 67, 70-71, 258 S.W. 36 (1953) (Res ipsa loquitur inapplicable because only a portion of the instrumentality that started the fire was under the defendant's control.).

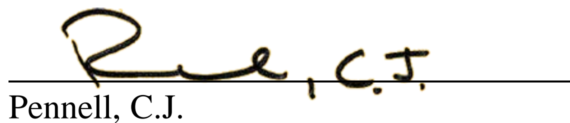
Here, there was no evidence presented at trial of any outside interference with NVEC's power equipment. Detective Sloan testified he did not observe any indication of

tampering by either people or animals. No other witness indicated anything to the contrary. Because the wires, insulator, and other devices on the Plaintiffs' property "were all furnished and installed, inspected, etc." by NVEC, the utility is deemed in exclusive control of its equipment for purposes of res ipsa loquitur. *Collins*, 168 S.E. at 504.

NVEC does not dispute res ipsa's third element. There was no evidence the Plaintiffs contributed to the fire that destroyed their residence and other property. Accordingly, the Plaintiffs have established a prima facie case for all three components of res ipsa loquitur. As a result, a trier of fact must decide the final merits of the Plaintiffs' claims.

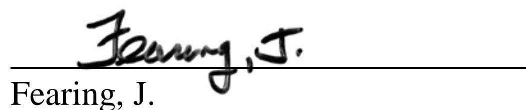
CONCLUSION

The order granting NVEC's motion for directed verdict is reversed. This matter is remanded for trial.

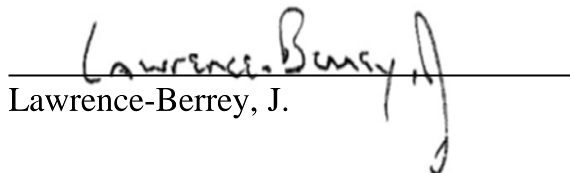


Pennell, C.J.

WE CONCUR:



Fearing, J.



Lawrence-Berrey, J.

FILED
JULY 14, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

EDWIN WELLS; ANN MINOR; and GEORGE WELLS FAMILY TRUST,	)	No. 36602-2-III
Appellants,	)	ORDER DENYING MOTION FOR RECONSIDERATION
v.	)	
NESPELEM VALLEY ELECTRIC COOPERATIVE, INC., a Washington corporation,	)	
Respondent.	)	

THE COURT has considered respondent Nespelem Valley Electric Cooperative, Inc.'s motion for reconsideration of our May 5, 2020, opinion; and the record and file herein.

IT IS ORDERED that the respondent's motion for reconsideration is denied.

PANEL: Judges Pennell, Fearing and Lawrence-Berrey

FOR THE COURT:

REBECCA L. PENNELL
Chief Judge

PAINE HAMBLEN LLP

August 11, 2020 - 11:25 AM

Filing Petition for Review

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