

FILED
Court of Appeals
Division III
State of Washington
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No. 36602-2

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants,

v.

NESPELEM VALLEY ELECTRIC COOPERATIVE, INC., a
Washington Corporation,

Respondent.

APPELLANTS' REPLY BRIEF

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A. GENERAL REPLY AS TO THE ASSIGNMENT OF ERROR

The sole assignment of error is that the trial court erred in entering the Order Granting Defendant's Motion for Directed Verdict of January 23, 2019 and dismissing Plaintiffs' case.

Where a directed verdict (or, more correctly designated, a judgment as a matter of law) is granted as against a negligence claim, the Appellants, to prevail on appeal, need only show that there was some substantial evidence, or an inference of negligence in a context of *res ipsa loquitur*, on which the jury could have found that there was a breach of duty by conduct or neglect, causing damage to a plaintiff. In this case, Plaintiffs presented evidence that Defendant's utility power supply equipment started a fire due to long term electrical current leakage that had caused visible damage to the pole that could have been seen by inspection of the equipment. Plaintiff's claim that such evidence is sufficient to present a jury question of neglect of duty to inspect and maintain. Secondly, Plaintiffs claim that those circumstances are appropriate for the jury to consider whether to make an inference of negligence under the doctrine of *res ipsa loquitur*. Plaintiffs claims should have been submitted to the jury.

B. ARGUMENT

1. Reply as to Issue No. 1:

The Defendant asserts that, “The trial court properly directed the verdict in favor of NVEC because Plaintiffs failed to put forth substantial evidence or reasonable inference that NVEC breached a duty of care.” Resp Br. at 14.

As set forth in the opening brief, Appellants presented evidence that while under a high duty of care as to its residential power supply equipment, there was no on-going inspection and maintenance of the 40 year old equipment, that Defendant had made only passing looks at the pole by a meter reader, that a long term small electrical current leakage (which ultimately caused the fire) had made itself visually evident before the fire by corroding and hollowing out a visually apparent depression in the wood around a large eye bolt through the wood power pole, RP 128-139, EX 3 p339, 354, App. Br. at 3-4. The high duty of care includes the duty to inspect and maintain, and it is a jury question, in this case, whether the meter reader’s glances were sufficient inspections of equipment that could burn a house down if current is leaking into a pole over a long period of time.

The seminal case as to the duty of an electrical utility in Washington is *Keegan v. Grant Cty. Pub. Util. Dist. No. 2*, 34 Wash. App. 274, 279, 661 P.2d 146, 149–50 (1983).

Defendant apparently recognizes that *Keegan* is controlling authority as to the legal duty of an electrical utility (“.. the highest degree of care human prudence is equal to.” *Keegan* at 279), but argues that there was no evidence of breach of that duty, (Resp. Br. at 14).

The *Keegan* Court said,

“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* at 279.

While duty is a question of law, Defendant’s duty in this setting is not disputed. Breach of duty and causation are questions of fact. In this case the only evidence of the Defendant’s fulfillment of the high duty of care as to inspection and maintenance was that perhaps the monthly electrical meter readers might have looked at the power pole equipment in passing. It is a question of fact whether that was enough to satisfy the duty.

Defendant argues that that Plaintiffs' case, and Appellants' opening brief fails to present substantial evidence of negligent *actions*. However, such evidence of affirmative acts is not essential to prove a breach of duty by *neglecting* to properly inspect and maintain your potentially hazardous equipment, and proof of particular actions is not ever essential to the *res ipsa loquitur* inference of negligence available from the facts of this case. Failure to act, specifically failure to adequately inspect and maintain the equipment is the claimed breach of duty, and adequacy of inspection and maintenance, as a factual question of breach and causation, is a question for a jury, where the duty exists, on the direct evidence that there was only inconsequential cursory inspection, or by the allowance, pursuant to the doctrine of *res ipsa loquitur*, that a reasonable person could infer that their utility's power pole won't burn their house down unless the utility had been negligent in inspection and maintenance.

2. Reply as to Issue No. 2:

As to the applicability of the inference supplied by *res ipsa loquitur*, Defendant asserts that, "The trial court correctly concluded that *res ipsa loquitur* does not apply to this case as Plaintiffs fail to establish (1) the fire that caused Plaintiffs' damage would not ordinarily happen in the absence of negligence, and (2) the instrumentality that caused Plaintiffs' damage was in the exclusive control of the defendant. Resp. Br. at 24.

Defendant apparently concurs with Plaintiff's authority as to when the context of the resulting damage allow the inference of negligence by res ipsa loquitur, even citing the recent case of *Brugh v Fun-Tastic Rides, Co.*, 8 Wn. 2d 176, 437 P.3d 751 (2019).

Defendant first argues that the fire that burned Plaintiff's house might have ordinarily started without Defendant's negligence. The case law says that this first element of res ipsa loquitur is satisfied "when the general experience and observation of mankind teaches that the result would not be expected without negligence." *Curtis v. Lein*, 169 Wn. 2d 884, 891, 239 P. 3d 1078 (2010).

As discussed in the Appellant's opening brief, the reliance of the Defendant and the trial court on case authority involving instrumentalities of fire is misplaced. This is an electricity case like *Keegan, supra*, and *Robison v. Cascade Hardwoods, Inc.*, 117 Wash. App. 552, 563, 72 P.3d 244, 250 (2003). Plaintiffs contend, simply, that where there is evidence that a utility's residential power pole caught fire and burned a home, and that the jury could determine that the leakage of electrical current started the fire, that the general experience and observation of mankind teaches that the result would not be expected without negligence on the part of the utility. People don't expect their power pole equipment to burn their house down if the utility is adequately exercising its high duty of care.

In *Brugh*, on a motion for summary judgment, there was no evidence presented of any actions or neglect by the defendant that could explain the mechanism of a serious head injury incurred on an amusement ride. The Court in *Brugh* said, “The parties dispute whether *res ipsa loquitur*’s first element may be satisfied by showing that the resulting injury would not be expected without negligence. We conclude that it can.” *Brugh* at 754. Plaintiffs contend that homeowners justifiably think the same thing about their electricity supply from a utility.

Defendant next argues that the power pole and equipment were not in the “exclusive control” of the Defendant when the pole started the fire. Defendant admits that, “At trial, it was established that NVEC provided Plaintiffs with electricity and owned, inspected, and maintained the transformer pole.” Resp Br. at 31. Defendant came to plaintiff’s property in the next days after the fire and removed the transformer and wire, seemingly exercising their control. The exposure of the power pole to climbing animals or weather or acts of God does not mean the equipment was not owned and controlled by the Defendant, any more than the loader in *Robison* or the amusement ride in *Brugh* were exposed to those same kinds of forces. There was direct factual and expert testimony that the Defendant’s equipment caused the fire, and no evidence at all that

anything else but the power pole controlled by the Defendant caused the fire.

C. CONCLUSION

It is a question of fact for the jury as to whether the particular actions *or inactions* of a defendant electric utility constitute a breach of the high duty of care, or that a defendant's hazardous instrumentality should not cause damage or injury unless there were negligent actions or inactions. There is no reading of *Keegan*, as to the high duty of care as to electricity, *Robison*, as to the application of res ipsa loquitur to instrumentalities of electricity, and *Brugh*, as to consideration of damage done in the general human experience of negligence, that would support the directed verdict in this case as against the Plaintiffs' evidence that some failure of a utility's power supply equipment caused their house to burn. The grant of the directed verdict was error by the Trial Court. The judgment should be reversed, and the case returned for trial.

November 4, 2019

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 4th day of November, 2019, at Spokane, Washington.

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