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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.

APPELLANT'S OPENING BRIEF

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2. **Issue No. 2:**
Where Defendant, an electricity utility service, owned and operated residential supply equipment serving Plaintiffs’ home, and evidence showed that Plaintiffs’ home burned in a fire directly and solely ignited and caused by Defendant’s equipment and electricity, are Plaintiffs entitled to have their *res ipsa loquitur* claim of negligence submitted to the jury, because general experience and observation of mankind teaches that a home burned down by a utility’s

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A. ASSIGNMENT OF ERROR

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

Issues Pertaining to Assignment of Error

1. **Issue No. 1:** Was the failure of Defendant, an electricity utility service, to inspect and maintain its owned and operated residential supply equipment serving Plaintiffs' home over the forty years since installation a breach of the high duty of care required of the utility to protect a personal residence from fire caused by deterioration or failure of the equipment, such that Plaintiffs' negligence claims should have been submitted to the jury?

2. **Issue No. 2:** Where Defendant, an electricity utility service, owned and operated residential supply equipment serving Plaintiffs' home, and evidence showed that Plaintiffs' home burned in a fire directly and solely ignited and caused by Defendant's equipment and electricity, are Plaintiffs entitled to have their *res ipsa loquitor* claim of negligence submitted to the jury, because general

experience and observation of mankind teaches that a home burned down by a utility's residential power supply equipment is an injury that would not be expected without negligence, in light of the utility's high duty of care?

B. STATEMENT OF THE CASE

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

Defendant had installed the power pole and electricity supply equipment in 1973 when Plaintiffs located their home at the site, and Defendant had operated the supply equipment while Plaintiffs 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. Defendant's power pole and equipment were located about 7 to

eight feet from the corner of the wood shed 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, Plaintiffs watched the home burn, then left the scene to get to town to buy clothing. RP 43-44.

When Plaintiff returned to the scene within the next day, the wooden power pole was on the ground, with burned sections at the top and bottom, and the transformer and wire which had been attached to the pole were gone. RP 45. Two days after the fire, Plaintiff visited the Defendant's office and learned from Defendant's staff that a crew of Defendant's linemen had arrived at Plaintiffs property after Plaintiffs were gone and disconnected and removed the wire and the transformer and taken it from the scene. RP 48-49.

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 Defendant'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 Defendant's power pole and electrical supply equipment. RP 138-139.

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

C. SUMMARY OF ARGUMENT

Failure to inspect aging and deteriorating residential electric utility supply equipment is a breach of the high duty of care owed by an electricity utility to a homeowner.

Alternatively, ordinary application of the elements of *res ipsa loquitur* mandate that a jury may consider in determinate negligence as a basis of liability, where a utility's residential power supply equipment catches fire and burns a home, at least where the utility disturbs and removes the equipment without and before an investigation of the origin and cause of the fire.

D. ARGUMENT

Scope of Review of Directed Verdict

On review of a ruling on a motion for a directed verdict, the appellate court applies the same standard as the trial court." *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728 (2013).

"A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Id.* "Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true." *Joy v. Dep 't of Labor & Indus.*, 170 Wn.App. 614, 619, 285 P.3d

187 (2012). A directed verdict "can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest." *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting *State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968)).

Issue No. 1 –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).

It is worthy of note that only property loss by fire, not personal injury or death, were 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 existence of a duty is a question of law, while breach and proximate cause are generally questions of fact for the jury. *Hertog v. City of Seattle*, 138 Wash.2d 265, 275, 979 P.2d 400 (1999). Once it is determined that a legal duty exists, it is generally the jury's function to decide the foreseeable range of danger, thus limiting the scope of that duty. *Bernethy v. Walt Failor's, Inc.*, 97 Wash.2d 929, 933, 653 P.2d 280 (1982). In other words, given the existence of a duty, the scope of that duty under the particular circumstances of the case is for the jury. *Id.* However, breach and proximate cause may be determined as a matter of law where reasonable minds could not differ about them. *Hertog*, 138 Wash.2d at 275, 979 P.2d 400.” *Briggs v. Pacificorp*, 120 Wn.App. 319, 322-323, 85 P.3d 369 (Wash.App. Div. 3 2003)

“The seminal statement regarding an electrical supplier's duty of care expressed in *Scott v. Pacific Power & Light Co.*, supra at 649-51, 35 P.2d 749, has not been improved upon:

The care to be exercised by an electric company with respect to its wires is such as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise under the circumstances in order to prevent injury.

"While the measure of duty resting upon electric companies in order to exonerate them from liability for negligence is expressed by the courts in forms varying from reasonable or ordinary care and diligence, to a close approximation to the view that they are insurers, yet the generally accepted rule in such cases, as in determining liability for negligent injuries generally, is that such companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus; that is, such care as a reasonable man would use under the circumstances, and will be responsible for any conduct falling short of this standard. The degree of care which will satisfy this requirement varies, of course, with the danger which will be incurred by negligence, and must be commensurate with the danger involved, and, according to numerous decisions, where the wires maintained by a company are designed to carry a strong and powerful current of electricity, so that persons coming in contact with them are certain to be seriously injured, if not killed, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its plant, to prevent such injury." 9 R.C.L. 1199.

"Electric companies are ... bound to use reasonable care in the construction and maintenance of their lines and apparatus, that is, such care as a reasonable man would use under the circumstances, and will be responsible for any conduct falling short of this standard. It follows from this rule, that the amount of care necessary varies with the danger which is incurred by negligence, for a prudent and reasonable man increases his care with the increase of danger. If but little danger is incurred, as, for instance, when the wires carry only a harmless electric current, such, for instance, as the telegraph or telephone current, only ordinary care may be required. While if the wires carry a strong and dangerous current of electricity, so that negligence will be likely to result in serious accidents, and perhaps death, or if a harmless wire is in dangerous proximity to a high tension wire, a very high degree of care, indeed, the highest that human prudence is equal to, is necessary. This is particularly true of electric light and

electric railway wires, which carry a high tension current often of great danger. The rule is thus stated in a case in Massachusetts. 'The vigilance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged of according to the subject-matter, the danger and force of the material under the defendant's charge.' 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.

Issue No. 2 -- Res Ipsa Loquitur

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. Negligence resulting in injury from a defendant's source of electricity may be shown by circumstantial inferences under the rule of *res ipsa loquitur*. *Robison v. Cascade Hardwoods, Inc.*, 117 Wash. App. 552, 563, 72 P.3d 244, 250 (2003) citing *Morner v. Union Pac. R.R.*, 31 Wash.2d 282, 291–92, 196 P.2d 744 (1948).

“Whether *res ipsa loquitur* applies in a given context is a question of law. *Pacheco v. Ames*, 149 Wash.2d 431, 436, 69 P.3d 324 (2003). *Res ipsa loquitur* means " ' the thing speaks for itself.' " W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 243 (5th ed.1984). Generally, it " provides nothing more than a permissive inference" of negligence. *Zukowsky v. Brown*, 79 Wash.2d 586, 600, 488 P.2d 269 (1971). It is " ordinarily sparingly applied, ' in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.' " *Tinder v. Nordstrom, Inc.*, 84 Wash.App. 787, 792, 929 P.2d 1209 (1997) (quoting *Morner v. Union P. R.R. Co.*, 31 Wash.2d 282, 293, 196 P.2d 744 (1948)). 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)

In the recent opinion in *Brugh v Fun-Tastic Rides, Co.*

437 P.3d 751 (Washington. App. Div. 2 2019), the Court there illuminated the structure of the *res ipsa loquitur* doctrine. There, in a case where a child had suffered a head injury on an amusement ride and neither the mechanism of the injury nor the actions or inactions of negligence were explained at trial, the Court said,

“Res ipsa loquitur "provides an inference as to the defendant’s breach of duty." *Curtis v. Lein*, 169 Wn.2d 884, 892, 239 P.3d 1078 (2010). Whether res ipsa loquitur applies is a question of law. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003).

‘A plaintiff may rely on res ipsa loquitur’s inference of breach of duty if three elements are met: "(1) the accident or occurrence that caused the plaintiff’s injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency 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." *Curtis*, 169 Wn.2d at 891, 239 P.3d 1078. The parties dispute only the first element.

‘The first element is satisfied in any of three conditions:

"(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law ... ; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; [or] (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries." *Curtis*, 169 Wn.2d at 891, 239 P.3d 1078 (internal quotation marks omitted) (quoting *Pacheco*, 149 Wn.2d at 438-39, 69 P.3d 324).

"[T]he res ipsa loquitur doctrine allows the plaintiff to establish a prima facie case of negligence when he cannot prove a specific act of negligence Once the plaintiff establishes a prima facie case, the defendant must then offer an explanation, if he can." *Pacheco*, 149 Wn.2d at 441, 69 P.3d 324. Res ipsa loquitur is inapplicable only where the defendant’s evidence completely explains the plaintiff’s injury. *Pacheco*, 149 Wn.2d at 440, 69 P.3d 324. "Thus, the plaintiff may be entitled to rely on the ... doctrine even if the defendant’s testimony, if believed by the jury, would explain how the event causing injury to the plaintiff occurred." *Pacheco*, 149 Wn.2d at 440, 69 P.3d 324.

‘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 it can.

.....

‘In *Robison v. Cascade Hardwoods, Inc.*, 117 Wn.App. 552, 566-67, 72 P.3d 244 (2003), we similarly looked to the nature of the plaintiff’s injuries in applying *res ipsa loquitur*. There, a logging-truck driver suffered a severe electrical shock while operating the defendant’s trailer loader. *Robison*, 117 Wn.App. at 555, 566, 72 P.3d 244. The trial court granted summary judgment to the defendant on the ground that *res ipsa loquitur* did not apply. *Robison*, 117 Wn.App. at 561-62, 72 P.3d 244. We reversed, stating, “[G]eneral experience and observation [teaches] that, absent evidence of an act of God, individuals ordinarily do not suffer severe electrical shocks unless someone has been negligent.” *Robison*, 117 Wn.App. at 567, 72 P.3d 244 (footnote omitted).

‘Our decision turned on the nature of the shock. *See Robison*, 117 Wn.App. at 567, 72 P.3d 244. For example, general experience teaches that minor shocks, like those resulting from static electricity, do occur in the absence of negligence. But severe shocks are different. In the absence of negligence, they do not ordinarily occur while operating a trailer loader. *Robison*, 117 Wn.App. at 567, 72 P.3d 244. Thus, we looked to the nature of the plaintiff’s injuries and determined whether general experience teaches that those injuries ordinarily happen in the absence of negligence. *Robison*, 117 Wn.App. at 567, 72 P.3d 244.

‘Language from the Supreme Court further supports our conclusion. In *Zukowsky v. Brown*, 79 Wn.2d 586, 594-95, 488 P.2d 269 (1971), the court recognized that application of *res ipsa loquitur* depends on whether “the manner and circumstances of the damage or injury be of a kind that do not ordinarily happen in the absence of someone’s negligence.” In *Pacheco*, the court again recognized that the doctrine takes effect when “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.” 149 Wn.2d at 436, 69 P.3d 324.

‘Thus, *Zukowsky* and *Pacheco* further suggest that we may determine whether *res ipsa loquitur*’s first element is established by analyzing whether the general experience and observation of mankind teaches that the nature of plaintiff’s injury would not be expected without negligence.

‘Accordingly, we conclude that it is appropriate to examine the nature of an injury when analyzing the first element of *res ipsa loquitur*.’ *Brugh v Fun-Tastic Rides, Co.*, 437 P.3d 751 (Washington. App. Div. 2 2019)

In recitation of the oral ruling on Defendant’s Motion for Directed Verdict, the Trial Court relied on *Cambro v. Snook*, 43 Wn. 2d 609, 262 P.2d 767 (1953). RP 369 – 371. In *Cambro*, the Plaintiff had alleged that it buildings had been damaged by fires caused the negligent operation of an acetylene torch being used by Defendant’s employee. The only evidence linking Defendant’s activities to the ignition of the fire was the 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 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.

Cambro is inapposite to the facts and issues of the case at bar. As to ordinary negligence, the Defendant electric utility is subject to a “highest degree of care human prudence is equal to” in the operation of its equipment, which would include inspection and maintenance of deteriorating equipment that could cause electrical current to escape, and Plaintiff gave eye witness testimony that he saw the fire started outside the home on the ground next to Defendant’s power pole. That is a much higher duty than applies to the use of an acetylene torch.

Cambro is also inapposite as to the application of *res ipsa loquitur*, because the issue here is whether fire could have been started by Defendant’s properly maintained electrical equipment, not by the use and control of a flaming torch as the instrumentality. The distinction is apparent in *Keegan v. Snook*, *supra* where negligence was found in the burning of the plaintiff’s home by an electricity surge from the defendant utility’s downed power line. The issue is the control of electricity, not the control of fire. The *Keegan* analysis is the correct one for residential fire caused by utility electrical service, not the *Cambro* analysis of fires caused by the use of instruments of fire. Unlike *Cambro*, normal experience indicates that a fire should not have resulted from the failure of Defendant’s residential service equipment controlling and containing the electrical current, in the absence of any negligence upon the part of the

Defendant, in light of Defendant's highest duty of care as an electrical utility. Electricity is to be analyzed as it was in *Robison, supra*, where the spillage of electric current is shown to cause the damages, but the negligent actions or inactions of the Defendant are indeterminate, and subject to the common sense that residential utility equipment won't start a house fire if it is properly maintained.

E. CONCLUSION

The Plaintiffs are not asking for the extension or deviation of the common law of duties of negligence or the doctrine of *res ipsa loquitur*, nor for the application of strict liability. Rather, Plaintiff's contend that a reasonable juror determine that plaintiff's house would not have burned down but for some negligent action or inaction of the Defendant. The Trial Court erred in applying the ordinary duty to control fire rather than a utility's high duty to control electricity, and erred in disregarding the application of *res ipsa loquitur* where electrical utility service ignition of fire caused the damages. There was sufficient evidence presented that Defendant's residential electrical supply equipment failed, causing the fire that burned Plaintiffs' home. Negligence is evident from the failure to inspect and maintain deteriorating equipment, or, alternatively, normal experience indicates that a fire should not have resulted from the failure of

Defendant's residential service equipment controlling and containing the electrical current, in the absence of any negligence upon the part of the Defendant.

The Trial Court's Order Granting Defendant's Motion for Directed Verdict and dismissing Plaintiffs case was error and it should be reversed. The case should be remanded for trial.

August 6, 2019

Respectfully submitted,

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I arranged for a copy of the preceding Motion to Appellant's Brief and Certificate to be served on Respondents at the address below, by email to:

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