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COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION III

No. 36602-2

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

Plaintiffs-Appellants,

v.

NESPELEM VALLEY ELECTRIC COOPERATIVE, INC.,

Defendant-Respondent.

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BRIEF OF RESPONDENT NESPELEM VALLEY ELECTRIC  
COOPERATIVE, INC.

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## **I. INTRODUCTION**

No one saw what caused the fire that burned the home and property of Edwin Wells and Ann Minor (“Plaintiffs”). A local law enforcement officer, investigating the fire five days after it occurred, determined that it was caused by electricity “leakage” occurring on a power pole owned and operated by Nespelem Valley Electric Cooperative (NVEC). Plaintiffs sued NVEC alleging that NVEC was negligent by failing to adequately maintain and inspect its equipment. At trial, however, Plaintiffs were unable to establish how NVEC breached its duty of care. In fact, the fire investigator who earlier concluded that NVEC’s equipment caused the fire testified that he could not say what, if anything, NVEC did wrong to cause the fire. Based on Plaintiffs’ failure to prove an essential element of their case, the trial court granted a directed verdict in favor of NVEC.

The trial court further ruled that Plaintiffs could not rely on the doctrine of *res ipsa loquitur* to create an inference that NVEC breached a duty of care. The trial court reasoned that Plaintiffs could not establish that NVEC’s negligence caused the fire, and that fire can occur even in the absence of negligence.

The trial court correctly directed verdict in favor of NVEC and properly declined to apply *res ipsa loquitur* to this case. This Court should affirm.

## **II. STATEMENT OF FACTS**

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. The case proceeded to a jury trial.

### **A. Edwin Wells**

At trial, Wells testified he moved into his home on Columbia River Road in 1973. Verbatim Report of Proceedings (VRP) at 7-9. When he had home constructed in 1973, NVEC installed electrical equipment, including a power pole, transformer, power line, and meter to provide electrical service to Wells’ residence. *Id.* at 9. Wells did not know whether NVEC had ever replaced any equipment servicing his residence since 1973. *Id.* He also did not know whether NVEC maintained or inspected the equipment, although he testified that, for some period of time, NVEC linemen would come out every month to read his meter, at which time he “presumed” that the linemen would do “some sort of visual inspection.” *Id.* at 11, 60.

On August 15, 2013, Wells was working on a project outside his home. VRP at 20. Around noon, Wells drove to get his mail, which he picked up from his mailbox down the road, and then drove back to his house. *Id.* When he walked into his house with the mail (a distance of about 50 feet from where he parked), he noticed nothing unusual. *Id.* at 27-28. About five minutes after walking into his house, Wells heard his smoke detector in a back room “chirp.” *Id.* at 28-29. Wells walked to the room with the chirping smoke detector. *Id.* at 29. He opened the door to the room and saw “little wisps of white . . . smoke.” *Id.* Cf. VRP at 101 (Det. Sloan testifying that Wells reported finding the room “full of smoke”). Based on his observation of smoke in the room, Wells “figured there must be fire outside somewhere or in the house itself.” *Id.* Wells left the room and told his wife, Minor, who was using a computer in the living room, “I think the house is on fire.” *Id.* at 28-29.

Wells stepped outside and saw flames, which were “occasionally licking against the roof.” *Id.* at 30.<sup>1</sup> He testified that the fire “was really going.” *Id.* Wells tried to put out the fire, which had ignited both the house and a wood shed, with a garden hose, but to no avail. *Id.* at 30-33. He then

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<sup>1</sup>Wells’ testimony about where he first saw the fire burning is ambiguous as he often referred to an illustrative exhibit. VRP at 30. No trial exhibits have been made a part of the record on appeal.

went back inside the house and “hollered” at Minor. *Id.* at 33. Minor was “still on the computer and [Wells] wasn’t sure whether she thought [he] was joking.” *Id.* The power, which had been on up to this point in time, went out. *Id.* Wells and Minor again tried to extinguish the fire with garden hoses, which was ineffective. *Id.* at 34. Wells and Minor abandoned their hoses and began grabbing possessions from the inside of the house. *Id.* Wells then called 911, and he was informed that the fire had already been reported. *Id.* at 38.

Fire fighters arrived soon after Wells called. *Id.* The firefighters did not attempt to extinguish the fire, but instead sought to contain it by digging a fire line. *Id.* at 40-41. As there was nothing they could do, Wells and Minor left the scene. *Id.* at 43. When they left, the fire was still burning and the firefighters still monitoring the situation. *Id.* at 43, 47. After the firefighters left the site on August 15, 2013, the fire rekindled and burned additional property. *Id.* at 46-47, 72, 107-08, 120.

The next afternoon, Wells returned to the site of the fire. *Id.* at 45. He observed that NVEC’s transformer pole was “down on the ground” and the “transformer was missing off of it”; the main power line was also “missing.” *Id.* Wells could not recall if the power pole was charred. *Id.* at 49.

On cross examination, Wells admitted that at no time on August 15, 2013 prior to the fire did he see any smoke coming from the transformer pole or hear any abnormal sound coming from the pole, including when he walked past the transformer pole minutes before he noticed the fire inside his home. VRP at 62-65. Wells clarified that when he first saw flames outside the house, they were mostly on the ground and on the wood shed. *Id.* at 69. Wells also admitted that when he first went outside after noticing smoke in his back room, he did not look at the transformer pole, and could not testify whether any portion of the transformer pole was on fire. *Id.*

**B. Detective Kreg Sloan**

Plaintiffs next called Detective Kreg Sloan, Okanagan County Sheriff's Office, who had investigated the cause and origin of the fire. VRP at 89-90. Detective Sloan testified that he was out of town when the fire occurred, and did not investigate the scene until August 20, 2013 (five days after the fire). VRP at 95-97. When he arrived at the fire scene, Detective Sloan observed burn marks on the downed transformer pole, but “[didn’t] know [whether it burned] . . . after the pole came down.” *Id.* at 119.

From the burn patterns on the power pole, Detective Sloan concluded that the fire started “at the top end of the pole . . . around [a

clevis] connection.” *Id.* at 137. Detective Sloan testified that this clevis connection was where the “distribution wire” attached to the pole and then ran into the transformer. *Id.* at 123. Detective Sloan concluded that a small fire started at the top of the power pole in the area around the clevis connection, which caused burning material to drop to the ground below. *Id.* at 133. According to Detective Sloan, the cause of the fire was “leakage current through that [clevis] connection to the wood,” i.e., electricity ignited the wood through a “crack or a spark.” *Id.* at 137. He reached this conclusion before he had left the scene of the fire on August 20, 2013. *Id.* at 136, 162.

On cross examination, Detective Sloan admitted:

- He was not a certified fire investigator. *Id.* at 144-45.
- When he investigated the fire scene, he did not know the configuration of the electrical distribution system servicing Plaintiffs’ residence, and did not know if the service consisted of both a phase wire and a neutral wire. *Id.* at 149-51.
- He did not know whether the clevis that he identified as the origin site of the fire was used for the connecting the phase [energized] wire or the neutral [non-energized] wire. *Id.* at 150-51. He did not know how far the clevis connection was from the top of the power pole because he did not measure it. *Id.* at 151.

- A neutral wire connection would not leak electrical current. *Id.* at 157.
- He did not know when the transformer pole was brought down manually or whether it fell on its own accord; he did not know if it was burned in the first or second fire at the site. *Id.* at 152; *see also id.* at 119.
- He generally is only assigned to investigate fires started by suspected criminal activity. *Id.* at 153; *see also id.* at 95.
- He never interviewed, or even tried to contact, three firefighters who deemed the fire “suspicious,” which was the reason his supervisor sent him to investigate the fire in the first place. *Id.* at 153-54.
- He never contacted NVEC to inquire about what its employees saw at the fire scene, and never inspected the transformer and wires that NVEC removed from the scene. *Id.* at 155-56.
- The fire scene was not secured after the fire occurred, and the scene would have been altered at least twice before Detective Sloan began his investigation. *Id.* at 154-55, 158. The scene was first altered when fire fighters “hailed back” flammable material from the initial fire. *Id.* at 120, 158. The scene was altered a second time when the fire “rekindled” after the fire fighters left the scene, burning additional material. *Id.* at 154-55, 158.

- If the transformer pole was on the ground before the fire rekindled, the area around the clevis connection could have been burned during the second fire. *Id.* at 160.

- In his report, he did not rule out other potential causes of the fire such as cigarettes and electrical wiring in Plaintiffs' house. *Id.* at 167-68. Wells also did not tell Detective Sloan that Wells had roughly 12 feral cats on the property; Detective Sloan acknowledged that animals climbing into the bushings of transformers can cause fires. *Id.* at 174.

- If there was electrical "leakage," there would have been some interruption in power. *Id.* at 170-71.

- Wells did not "indicate" to Detective Sloan that he (Wells) had been around the scene of the fire all day, passed the transformer pole multiple times, and, at no time, did he hear anything that sounded strange or see any smoke coming from the pole. *Id.* at 171. When asked, "Does that give you pause?" Detective Sloan responded, "It makes you think." *Id.* at 172.

- Detective Sloan did not know how long it would take for smoldering caused by electrical leakage to start a fire. *Id.* at 172.

- He has no training in above-ground utility hookups or rural utility standards for construction. *Id.* at 174-75.

- He could not opine whether NVEC constructed the pole incorrectly. *Id.* at 175. He could not say whether NVEC did anything wrong to cause the fire. *Id.*

**C. Cris Kirchner**

Cris Kirchner, Wells’ “ranch hand” who lived on Plaintiffs’ property nearby, was the next witness to testify. VRP at 74, 202-14. Kirchner arrived at the fire about 35 minutes after it started, and observed that “[e]verything was on fire . . . two trailer houses and a couple of sheds.” *Id.* at 204. Although most of the structures were pretty much burned to the ground, Kirchner saw that the transformer pole was still standing, but on fire. *Id.* at 205-06. Kirchner was at the scene of the fire for about three hours, the power pole was still standing when he left, which was between 5:00 and 6:00 p.m. *Id.* at 206-07. He returned to the scene at about 7:00 p.m. and observed that the fire was still smoldering. *Id.* at 208. He thought that the power pole was now on the ground, burned, with the transformer still attached. *Id.* When Kirchner inspected the scene the next day, he testified that the burn marks on the pole were the same as the day before but the transformer and the wires were gone. *Id.* at 214. He did notice that other things, including a vehicle, had caught fire overnight. *Id.*

**D. Daniel Simpson**

Plaintiffs next called NVEC general manager Daniel Simpson to testify. Although he was not employed at NVEC at the time of the fire, Simpson testified that he understood that, on the day after the fire, NVEC removed the transformer and power lines from the fallen power pole on the Wells' property because such equipment posed a hazard. VRP at 216-17, 222-23. NVEC kept the transformer in its shop. *Id.* at 223. To Simpson's knowledge, NVEC's followed "standard procedure" in responding to the fire. *Id.* at 224.

**E. Edward Hartbarger**

Plaintiffs' final witness for their liability case was NVEC line foreman Edward Hartbarger. On the day of the fire, Hartbarger was notified of the fire by the NVEC office. VRP at 227. He drove his NVEC vehicle to the site of the fire, which was burning when he arrived. *Id.* at 227-28. Other NVEC employees, who had already de-energized the line servicing the Wells' residence, were present at the fire scene. *Id.* at 228-29.

When he arrived, Hartbarger observed that the butt of NVEC's power pole was on fire, but the top of the pole was not damaged. *Id.* at 235. After about an hour, Hartbarger's supervisor told him to bring the pole down. *Id.* at 230. The NVEC linemen cut the de-energized power line

and the neutral wire from the “takeoff pole,” let the wires down, and then, from a position 20-30 feet away from the pole, used the lines to pull down the pole. *Id.* at 230-32, 242. When the pole hit the ground, oil from the transformer leaked out and caught fire. *Id.* at 233. Hartbarger did not remove the transformer or wire because it was too hot; he temporarily secured the wire and left the scene. *Id.* at 234-35. Hartbarger came back the next morning and took the transformer off the pole and removed the transformer and wires from the site. *Id.* at 235.

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. *Id.* at 236-37. The neutral wire was connected to an eye bolt on the power pole with a “J6” clevis connection. *Id.* at 238. Hartbarger testified that a “J6” clevis is not used for the phase wire connection. *Id.* at 246-47 (“The J6 is a neutral [line] installation.”).

**F. NVEC’s Motion to Directed Verdict**

Following Hartbarger’s testimony, marking the end of Plaintiffs’ liability case, NVEC orally moved for a directed verdict. VRP at 248-57. NVEC argued that Plaintiffs had failed to establish the existence of a duty, breach of any duty, proximate cause, or established the criteria necessary

to apply the *res ipsa loquitur* doctrine. *Id.* The Court concluded that Plaintiffs had established that NVEC owed Plaintiffs a duty of care, but found the other issues presented a “more difficult question.” *Id.* at 257-58. The Court preliminarily denied NVEC’s motion, but further ruled that the court would reconsider its ruling, and hear additional argument, on the Motion after Plaintiffs put on evidence concerning their damages. *Id.* at 261-62.

Plaintiffs proceeded to put on evidence of their damages by presenting the testimony of Maurice Joy, Wells, and Plaintiffs’ children, Jordan Wells and Philip Wells. *Id.* at 264-72, 303-54.

The following day, the Court orally granted NVEC’s Motion for directed verdict and dismissed the case. VRP at 359-72; CP at 14-16. The Court found the following facts significant:

- Detective Sloan testified that he could not testify to what NVEC did wrong to cause the fire. VRP at 363-64.
- Hartbarger testified that when he arrived at the scene of the fire, the top of the pole was not burned or on fire. *Id.* at 364.
- Plaintiffs presented no evidence of NVEC’s negligence and *res ipsa loquitur* did not apply because fires can occur absent negligence. *Id.* at 365-68.

### **III. COUNTERSTATEMENT OF ISSUES**

1. Whether the trial court correctly directed the verdict in favor of NVEC when Plaintiffs failed to put forward substantial evidence or any reasonable inference that NVEC breached a duty of care to cause Plaintiffs' damages?

2. Whether the trial court correctly concluded that *res ipsa loquitur* does not apply in this case when Plaintiffs could not (1) identify how NVEC was negligent in causing the fire, (2) overcome the fact that fires occur even in the absence of negligence, and (3) show that the alleged mechanism of injury was under NVEC's exclusive control?

### **IV. ARGUMENT**

#### **A. Standard of Review**

The Court of Appeals reviews an order granting a motion for directed verdict *de novo*, applying 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," i.e., "if the facts can reasonably support but one legal conclusion." *Id.* at 732, 734.

**B. The trial court properly directed the verdict in favor of NVEC because Plaintiffs failed to put forth substantial evidence or any reasonable inference that NVEC breached a duty of care.**

Plaintiffs argue that the trial court erred in directing the verdict in favor of NVEC because they presented evidence that NVEC had not inspected or maintained its “deteriorating” equipment, which had been servicing Plaintiffs’ property for approximately forty years old. App. Br. at 1, 5. Plaintiffs’ arguments fail to justify reversal of the verdict directed in favor of NVEC for several reasons.

First, Plaintiffs’ briefing on this issue is wholly deficient. Plaintiffs assign error to the dismissal of their action based on insufficient evidence of NVEC’s breach of a duty of care. App. Br. at 1, 5. The substance of Plaintiffs’ argument on this issue, however, addresses the standard of care applicable to electrical utilities. *See* App. Br. at 6-9 (*quoting Keegan v. Grant Cty. Pub. Util. Dist. No. 2*, 34 Wn. App. 274, 661 P.2d 146 (1983)). NVEC does not dispute that it owed the Wells a duty of care, and does not disagree with the standard set forth in *Keegan*. Plaintiffs’ Brief fails to address the complete lack of evidence concerning NVEC’s alleged *breach* of duty. Given Plaintiffs’ passing treatment of this issue and lack of reasoned argument, this Court need not consider this issue on appeal. *See Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996) (“Without argument or citation to authority, [the Court] will not consider the issue.”).

Second, Plaintiffs argue that NVEC failed to maintain or inspect its equipment on the Wells' property. But the evidence is actually to the contrary. Wells testified that his electrical service was installed in 1973, and that NVEC occasionally "[came] out [to his property] and change or check or install equipment on the ranch property." VRP at 9-10. He further testified that an NVEC lineman "came every month and read the meter physically until [digital] meters were put in." *Id.* at 11, 60. Wells "presume[d] that [the NVEC lineman] might have done some visual sort of inspection when they were [checking the meter]." *Id.* Thus, substantial evidence does not support that NVEC failed to maintain or inspect its equipment.

Finally, regardless of whether NVEC owed a heightened duty of care and how Plaintiffs characterize NVEC's efforts at maintaining and inspecting its equipment, Plaintiffs are not relieved of their burden to show that NVEC breached its duty. Failure to direct a verdict in favor of a defendant is error when the evidence, and legitimate inferences therefrom, are insufficient to prove that a fire was caused by defendant's negligence. *Cambro Co. v. Snook*, 43 Wn.2d 609, 262 P.2d 767 (1953). *Cambro* is analogous to this case and supports that the trial court properly directed verdict in favor of NVEC.

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, who did not hear about the fire until two days after it occurred, admitted "it was possible that persons other than [Snook's] workmen could have gained admittance to the premises." *Id.* 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 contact 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.

No witness testified about seeing the fire start; thus, Snook’s liability was, “of necessity, based upon circumstantial evidence.” *Id.* at 612. No witness at trial “testified that an acetylene torch was being used by any employee of appellant on the morning of the fire.” *Id.* at 613. Cambro also 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.*

At the close of Cambro’s evidence, Snook moved for a directed verdict, which the 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.*

The Washington Supreme Court reversed the judgment in favor of Cambro, and remanded with instructions to dismiss the action. After outlining the evidence presented at trial, the 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.

The Court rejected Snook's argument that the trial court's finding was supported by reasonable inferences. *Id.* at 615-16. The 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, the 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.

Like 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 Minor nor any other witness saw the fire start. Like Cambro's case, Plaintiffs' case was based entirely on circumstantial evidence. Detective

Sloan, inspecting the scene five days after the fire occurred, and after the scene had been disturbed by firefighting activity and a second fire, determined that the origin of the fire was a clevis connection on NVEC's power pole and the cause of the fire was "current leakage." *E.g.*, VRP at 137. But, like the fire inspector in *Cambro*, Detective Sloan ultimately testified that he was unable to conclude what, if anything, NVEC did wrong to cause the fire. VRP at 175; *Cambro*, 43 Wn.2d at 614. Simply observing char marks on the power pole did not establish that NVEC did something wrong to start the fire. *Cf. Cambro*, 43 Wn.2d at 612-13 (fact that acetylene hose was near site of fire origin did not mean that fire started through an employee's negligent use of the torch).

Also significant in this case is the fact that NVEC lineman Edward Hartbarger testified that the clevis connection identified by Detective Sloan as the origin site of the fire was actually where the neutral (non-energized) wire connected to the power pole. VRP at 236-38, 246-47. Plaintiffs could not refute this evidence. And Detective Sloan admitted that (1) he was not familiar with the configuration of the electrical distribution system servicing Plaintiffs' residence, *id.* at 149-51, and (2) did not know if the clevis connection served the phase or neutral line, *id.* at 150-51. Detective Sloan did admit, however, that a power pole

connection to the neutral line would not result in electrical “leakage,” *id.* at 157.

The only evidence of alleged negligence Plaintiffs can point to is that NVEC’s equipment was several decades old. Cambro made the same argument based on “evidence that the building was old and that in many places the wood was impregnated with [coconut] oil as a result of the previous processing operations.” *Id.* at 613. But the *Cambro* Court concluded that the age of the building was not enough to establish Snook’s negligence. *Id.* Likewise, in this case, the mere fact that NVEC’s power pole and some of its equipment was several decades’ old does not establish that NVEC breached a duty of care. Plaintiffs’ argument that the age and “deterioration” of NVEC’s equipment is especially thin because they had few issues with their electrical service over the course of 40 years, and, on the day of the fire, they did not lose power until sometime the fire was “really going.” VRP at 13-14, 30, 33.

Finally, in this case, like in *Cambro*, the trial court at the close of Plaintiffs’ evidence was left only with multiple conjectural theories about how the fire started. While Detective Sloan theorized that the fire started at the top of the power pole, he could not contradict the alternative theories proposed by NVEC, including that the fire was started by (1) “suspicious activity,” (2) an animal contacting the electrical

equipment, or (3) the fire starting by an electrical issue inside Plaintiffs' home. VRP at 153-54, 167-68, 174. As there was nothing more tangible to proceed upon than multiple conjectural theories, the trial court correctly directed the verdict in favor of NVEC.

Plaintiffs argue that, rather than *Cambro*, the case of *Keegan v. Grant Cty. Pub. Util. Dist. No. 2* provides the "correct [analysis in cases involving] residential fire caused by utility electrical service." App. Br. at 14. *Keegan* addresses the duty owed by electrical utilities, but does not address the propriety of a directed verdict when plaintiffs fail to establish that the utility breached its duty of care. *Keegan* does not provide an analysis that should be applied in this case.

In *Keegan*, property owners, the Keegans, sued their electrical utility when, soon after the utility's power line was broken near the Keegans' home, the home caught fire. 34 Wn. App. at 276. The evidence admitted at trial established that, during a strong wind, a tree was blown into the 7,620-volt line, breaking the line. *Id.* The line remained "hot" for about an hour, when a utility employee deenergized the line. Ten minutes after the line was deenergized, the Keegans' house "burst into flames." *Id.* The Keegans alleged, and over the course of a "lengthy trial" apparently proved, "that the utility was negligent in its installation and maintenance of the power line; that it failed to properly trim the trees around the lines;

and that safety devices were not properly installed to stop the flow of electricity in the event of a downed line.” *Id.* at 276-77. The Keegans theorized that the utility’s “lack of proper safety devices allowed the power to surge into the ground for [one] hour and that this power found its way to the Keegans’ underground metal water pipe, which carried it into the house, causing the fire.” *Id.* at 276. The jury entered a verdict in favor of the Keegans, which the trial court reduced based on the Keegans’ comparative fault. *Id.* at 277. The utility appealed, arguing that the trial court erred by, inter alia, instructing the jury of the utility’s standard of care and excluding the testimony of the utility’s expert appraiser. *Id.*

The Court of Appeals affirmed in part and reversed in part. The Court of Appeals found, in relevant part, that the trial court (1) did not err in instructing the jury on the utility’s “sliding scale” standard of care, but (2) did abuse its discretion in excluding the utility’s expert appraiser, who would have testified about the Keegans’ damages. *Id.* at 281, 283-84. Accordingly, the Court of Appeals affirmed the jury’s liability findings, but remanded for a new trial on damages. *Id.* at 285.

Unlike the Keegans, Plaintiffs in this case failed to present any evidence of what NVEC did wrong to start the fire. The Keegans alleged,

and were apparently able to prove<sup>2</sup>, specific acts of negligence on the part of their electrical utility, viz., the utility's failure to (1) maintain its power line, (2) perform vegetation management, and (3) install adequate safety devices. *Keegan*, 34 Wn. App. at 276. Plaintiffs in this case, on the other hand, alleged only that NVEC's equipment was old and not regularly maintained or inspected. But Plaintiffs did not submit evidence supporting these allegations, and did not establish what NVEC could and should have done differently to prevent the fire. *Keegan* addressed issues different than the issues presented in this case and does not compel the reversal of the trial court's directed verdict.

In sum, Plaintiffs put forth no evidence about how NVEC's equipment caused or contributed to the fire or how NVEC was negligent in providing electrical service to Plaintiffs. At the close of Plaintiffs' evidence, the trial court was left only with competing conjectural theories about how the fire started. Absent substantial evidence or any reasonable inferences that NVEC breached its duty of care, the trial court properly directed the verdict in favor of NVEC.

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<sup>2</sup>As the defendant utility in *Keegan* did not challenge on appeal the sufficiency of the evidence pertaining to the jury's finding of liability, the Court of Appeals' opinion does not summarize or describe in detail the evidence the Keegans put forth to establish the utility's liability.

- C. **The trial court correctly concluded that res ipsa loquitur does not apply to this case as Plaintiffs failed 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.**

Plaintiffs claim that the trial court erred by not letting them submit their negligence claim to the jury under a res ipsa loquitur theory. App. Br. at 9-15. Plaintiffs claim that they put forth evidence that the fire was ignited “directly and solely” by NVEC’s “equipment and electricity” and that “general experience and the observation of mankind” is that a fire will not be caused absent negligence. *Id.* The trial court correctly ruled that res ipsa loquitur does not apply to the facts of this case.

“As a general rule, a defendant’s negligence is not presumed, but must be affirmatively proved.” *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App. 374, 397, 305 P.3d 1108 (2013) (subsequent citations omitted). “Res ipsa loquitur provides an inference as to the defendant’s breach of duty.” *Brugh v. Fun-Tastic Rides Co.*, 8 Wn. App.2d 176, 180, 437 P.3d 751 (2019) (quotation marks and citation omitted). “Whether res ipsa loquitur applies is a question of law.” *Id.*

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." *Id.* "Res ipsa loquitur 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 Wn. App. 787, 792, 929 P.2d 1209 (1997) (internal quotation marks omitted).

"The rule of [res] ipsa loquitur is infrequently applied to cases involving fires." *Menth v. Breeze Corp.*, 73 A.2d 183, 186 (N.J. 1950).

The reasons are not difficult to perceive. The cause of a fire is generally unknown, fires commonly occur where due care has been exercised as well as where due care was wanting. Where a fire originates on a defendant's premises, that alone is not evidence that it was started by the defendant, nor that the fire was caused by any negligence on its part.

*Id.* (internal citations omitted). As further stated by one commentator,

Fires seem to be in a class by themselves. Basically, the cases hold that the 'experience' factor forbids use of the res ipsa inference merely because defendant's instrumentality catches fire. Plaintiff must prove that a 'negligent' fire arose from something which defendant controlled, and this requires evidence of the precise cause of the blaze.

Alan Loth, *Res Ipsa Loquitur in Iowa*, 18 DRAKE L. REV. 1, 7 (1968).

Washington cases similarly hold that *res ipsa loquitur* should not be applied in cases involving fires of undetermined cause.

In *Voorde Poorte v. Evans*, 66 Wn. App. 358, 359, 832 P.2d 105 (1992), Plaintiffs, Voorde Poortes, entered into a real estate contract to sell their land and mobile home to Defendants, the Evanses. Prior to closing, the mobile home located on the property burned down. *Id.* The county fire marshal concluded that “the fire probably started in the kitchen and most likely involved the electrical system,” but admitted “[h]e did not know the exact cause of the fire.” *Id.* at 360. “There was no evidence that the fire was caused by incendiaries, chemicals, lightning or smoking.” *Id.* Another fireman who helped extinguish the fire “believed the fire was caused by an electrical device that overheated or shorted out.” *Id.*

The Voorde Poortes filed suit against the Evanses alleging, *inter alia*, negligence. *Id.* at 360. The trial court granted summary judgment on the Voorde Poortes’ negligence claim and they appealed. *Id.* On appeal, the Voorde Poortes contended that “they were entitled to submit the case on the theory of *res ipsa loquitur*.” *Id.* at 364. The Court of Appeals disagreed with the Voorde Poortes, and affirmed the summary dismissal of the negligence claim. The Court of Appeals stated:

Before *res ipsa loquitur* is applicable, [plaintiffs] must establish the occurrence producing the injury is of a kind which

ordinarily does not occur in the absence of negligence . . .

[Plaintiffs] have not met this requirement. Normal experience indicates that a fire could result even in the absence of negligence.

*Id.* (citations omitted). *Accord 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.”).

Likewise, in *Cambro v. Snook*, discussed *supra*, the Washington Supreme 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 invoked the doctrine arguing that *res ipsa* 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.* The Court reasoned:

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).

In this case, the trial court correctly concluded that doctrine of res ipsa loquitur did not apply because Plaintiffs failed 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.

1. *Res ipsa loquitur does not apply in this case because Plaintiffs failed to show that the fire was an accident or occurrence that ordinarily does not happen in the absence of negligence.*

Plaintiffs failed to satisfy the first element of res ipsa loquitur, i.e., that the fire was "an accident or occurrence . . . which ordinarily does not happen in the absence of someone's negligence." *Jackass Mt. Ranch, Inc.*, 175 Wn. App. at 398. This element can be 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.

*Brugh*, 8 Wn. App.2d at 180 (formatting altered for clarity). Plaintiffs argue application of only the second condition. *See, e.g.*, App. Br. at 15-16 (“normal experience indicates that a fire should not have resulted from the failure of [NVEC’s] residential service equipment”).

Plaintiffs cannot meet this condition because “[n]ormal experience indicates that a fire could result even in the absence of negligence.” *Voorde Poorte*, 66 Wn. App. at 364; *see also Menth*, 73 A.2d at 186 (“[F]ires commonly occur where due care has been exercised as well as where due care was wanting.”). The only evidence Plaintiffs put forth at trial as to the cause of the fire was the testimony of Detective Sloan. But Detective Sloan could only theorize about how the fire started, and could not rule out the possibility that the fire was caused by animals, “suspicious activity,” an electrical issue within the Wells’ home, or some other cause. VRP at 153-54, 167-68, 174. Significantly, Detective Sloan admitted that he could not testify as to what, if anything, NVEC did wrong to cause the fire. VRP at 175. As demonstrated by similar admissions of the fire investigators in *Voorde Poorte* and *Cambro*, Detective Sloan’s admissions alone makes it so *res ipsa loquitur* is inapplicable. *See Loth, supra*, at 7 (stating that, for *res ipsa* to apply, “[p]laintiff must [put forth evidence of] the precise cause of the blaze.”).

*Robison v. Cascade Hardwoods, Inc.*, 117 Wn. App. 552, 72 P.3d 244 (2003), relied upon by Plaintiffs, is distinguishable and does not support the application of res ipsa to this case. In *Robison*, the plaintiff, Robison, a logging truck driver, experienced a severe electrical shock while operating a trailer loader owned by a lumber mill. *Id.* at 555-56. Robison sued the lumber mill. *Id.* at 561. In concluding that res ipsa applied to that case, the *Robison* Court observed that general experience teaches that minor shocks (such as from static electricity) may occur in the absence of negligence. *Id.* at 567. But the Court went on to observe that general experience and observation teaches that *severe* shocks do not ordinarily “unless someone has been negligent” (absent an act of God). *Id.* The Court also emphasized that Robison presented “uncontroverted evidence,” including the opinions of three medical experts, that he received a severe electrical shock and electrical burns. *Id.* at 566.

This case does not involve injuries caused by a severe electrical shock. Whereas severe shocks generally do not occur absent negligence, *Robison, supra*, general experience and observation teaches that fires can and do occur absent negligence, *Voorde Poorte, supra*. This is especially true when the cause and origin of the fire cannot be determined. In *Robison*, where the evidence of how the plaintiff was injured was essentially “uncontroverted,” it made sense to apply res ipsa to allow

Robison to infer that he must have been injured because of a breach of the lumber mill's duty of care, even if he could not establish what exactly the lumber mill did wrong. But, in this case, it does not make sense to allow Plaintiffs to infer that NVEC was negligent in causing the fire and Plaintiffs' damages. The fire that caused Plaintiffs' damage could have ignited a number of different ways, and Plaintiffs provided inaccurate evidence that NVEC's equipment played any role in the fire and no evidence of any wrongdoing on the part of NVEC.

In sum, the trial court correctly concluded that *res ipsa loquitur* did not apply to this case because Plaintiffs' damages were caused by something that could happen even in the absence of negligence.

2. *Res ipsa loquitur does not apply in this case because Plaintiffs failed to show that their damages were caused by an instrumentality within the exclusive control of NVEC.*

At trial, Plaintiffs could not prove that their injuries were caused by "an agency or instrumentality within the exclusive control of the defendant." *Jackass Mt. Ranch, Inc.*, 175 Wn. App. at 398; *see also* Loth, *supra*, at 7 ("Plaintiff must prove that a 'negligent' fire arose from something which defendant controlled."). At trial, it was established that NVEC provided Plaintiffs with electricity and owned, inspected, and maintained the transformer pole. VRP at 9, 11, 60. But Plaintiffs put forth no evidence, other than Detective Sloan's conjecture, that the fire was

caused by NVEC's equipment. And, even if some evidence did suggest that the fire was electrical in origin, NVEC did not have exclusive control over all of the components that could have caused or contributed to an electrical fire.

NVEC's control of the electrical distribution system was not so exclusive, for instance, that it could prevent a bird, cat, or wild animal from coming into contact with equipment that may have enflamed the animal. NVEC obviously cannot control the weather and natural forces that may contact or otherwise affect its equipment. NVEC also has no control over the electrical systems within Plaintiffs' home. *See Arkansas Power & Light Co. v. Butterworth*, 258 S.W.2d 36, 38 (Ark. 1953) (concluding *res ipsa loquitur* did not apply in a case where a mill caught fire allegedly because of an electrical surge, when the electrical utility had no control over the electrical system within the mill, and thus, the utility "did not have exclusive control of the instrumentality or thing from which the fire may have developed").

In support of their argument that NVEC maintained exclusive control of the instrumentality that caused the fire, Plaintiffs attempt to distinguish this case from *Cambro*. App. Br. at 14. Recall that in *Cambro*, the Washington Supreme Court concluded that *res ipsa loquitur* did not

apply to a case where the plaintiff could not establish how Snook's negligence set the landowner's building ablaze.

Plaintiffs first attempt to distinguish *Cambro* on the grounds that NVEC owed a "much higher duty of care" than the equipment-remover (Snook) in *Cambro*. App. Br. at 14. Again, Plaintiffs confuse the element of duty owed with breach of duty. The type or level of duty owed is not a consideration for whether *res ipsa* applies to a particular case. *Cf. Jackass Mt. Ranch*, 175 Wn. App. at 397.

Plaintiffs next argue that the alleged "instrumentality" in *Cambro* ("a flaming torch") is different from the alleged instrumentality of the Wells' fire ("[im]properly maintained electrical equipment"), and, Plaintiffs argue, "the issue is control of electricity, not the control of fire." App. Br. at 14. This case is not distinguishable from *Cambro* based on the "instrumentality" that allegedly caused the fire. In *Cambro*, the Court observed that using a flaming torch around wood presented a risk of fire even when due care was used in operating the torch. 43 Wn.2d at 617. Similarly, operating electrical distribution equipment in a rural setting presents a risk of fire even when due care is used. Electricity is a volatile force. And when operating in the natural environment, a tree or animal coming into contact with the power lines, or a major windstorm or weather

event, has the capacity to start a fire even when the utility has taken all reasonable steps to safely deliver the electricity.

In sum, this is not the “peculiar and exceptional” case where the court should apply *res ipsa loquitur*. *Tinder*, 84 Wn. App. at 792. The doctrine’s application is not essential in this case, and Plaintiffs failed to meet the first two elements required for the doctrine to apply. The trial court correctly ruled that Plaintiffs could not rely on *res ipsa loquitur* to avoid their affirmative duty to prove each element of their negligence claim.

#### V. CONCLUSION

For the foregoing reasons, this court should affirm the trial court’s order granting directed verdict to NVEC.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of October, 2019.

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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 7<sup>th</sup> day of October, 2019, at Spokane, Washington.

/s/ Scott C. Cifrese  
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**PAINE HAMBLEN LLP**

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