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Case No. 87679-7

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SUPREME COURT
OF THE STATE OF WASHINGTON

CATHERINE LAKEY, a single woman; GERTHA RICHARDS, a single woman; MICHAEL HESLOP, a single man; TROY FREEMAN and CAROLINA AYALA de FREEMAN, husband and wife; PATRICK McCLUSKY and MICHELLE McCLUSKY, husband and wife; SHAHNAZ BHUIYAN and ANN RAHMAN, husband and wife; STEVEN RYAN and NORA RYAN, husband and wife; KEVIN CORBETT and MARGARET CORBETT, husband and wife; KATHRYN McGIFFORD, a single woman; and JACQUELYN MILLER, a single woman,

Appellants,

v.

PUGET SOUND ENERGY INC., a Washington corporation; and
CITY OF KIRKLAND, a Washington municipal corporation,

Respondents.

**APPELLANTS' ANSWER TO THE *AMICUS CURIAE* BRIEF
OF PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY,
WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF
SNOHOMISH COUNTY, WASHINGTON; THE WASHINGTON
PUBLIC UTILITY DISTRICTS ASSOCIATION; AND THE CITY
OF SEATTLE BY AND THROUGH ITS CITY LIGHT
DEPARTMENT**

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 ORIGINAL

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I. OVERVIEW

The various utilities, Public Utility District No. 1 of Clark County, Washington; Public Utility District No. 1 of Snohomish County, Washington; the Washington Public Utility Districts Association; and the City of Seattle by and through its City Light Department (collectively “Utilities”), lodging an amicus brief make three arguments, in order:

1. The nuisance claim fails as a matter of law because there is no reasonable basis to fear electromagnetic fields (“EMF”) at the exposure levels on Appellants’ properties;
2. RCW 7.48.160 precludes a nuisance claim; and
3. Finding nuisance liability here would be burdensome.

Appellants will address the issues in this order. As with the amicus submitted by the Association of Washington Municipal Attorneys, the Utilities do not really add anything new to the discussion.

II. DISCUSSION

A. Issue 1 – Nuisance Claim Fails as a Matter of Law.

There has never been a dispute here that public concern about exposure to EMF impacted the value of Appellants’ properties after construction of the largest electrical substation ever constructed by Puget Sound Energy Inc. (“PSE”) in a residential neighborhood (the “Substation”). The issue here is whether PSE or the City of Kirkland has any liability for that impact. With respect to PSE, the issue, as framed in the Order of Certification, is “whether the trial court properly dismissed claims that electromagnetic fields emanating from a substation constituted a nuisance...”

There are two components to this: (1) what is the standard for nuisance liability under the circumstances here; and (2) what kind of proof needs to be made to meet that standard. In this regard, as Appellants understand the Utilities' Brief, the Utilities assert that an apprehension of injury from conduct on adjacent property would constitute a nuisance and be reasonable only if there is "definitive" evidence of a health risk. That standard has never been imposed in Washington.

The Utilities' conception of the applicable legal standard derives from *Bradley v. American Smelting & Refining Co.*, 635 F. Supp. 1154 (1986). *Bradley* nowhere states that *definitive* evidence of an injury or health risk is required to show a nuisance. What the case actually says is:

As a general matter, mental distress is compensable in nuisance only under limited circumstances. First, distress is compensable in nuisance if manifested by physical symptoms. Second, distress may be compensable if accompanied by an actual or threatened invasion of the plaintiff's person or security.

In the present case, plaintiffs' distress is not compensable under either of these standards. It is undisputed that plaintiffs have experienced no ill health or physical discomfort. It is also clear that there has been no invasion or threatened invasion of plaintiffs' security because, as the court has determined, the evidence indicates no health risk.

Id. at 1158. The basis for decision was not the lack of "definitive" evidence, but rather that no evidence whatsoever of a health risk.

Nevertheless, *Bradley* is not saying anything different from the what the Courts said in *Ferry v. City of Seattle*, 116 Wash. 648, 662-63, 203 P. 40 (1922), and *Everett v. Paschall*, 61 Wash. 47, 51-53, 111 P. 879 (1910) that before "emotional distress"/"apprehension" can be actionable as

a nuisance, there must be a reasonable basis for that apprehension. Indeed, the whole discussion by the Utilities of the standard focuses on the conclusion that the apprehension has to be reasonable to be actionable. Reasonableness is almost by definition an issue of fact.

It is particularly interesting that the Utilities rely heavily on Ferry, because the Ferry Court was explicit that a scientific basis for the apprehension was not the *sine qua non* of nuisance:

The court said, in the sanitarium case, supra, that, although the danger of communication of disease might be reduced to a negligible quantity and that such a sanitarium might be constructed with due regard to the safety of patients and the public, and that there might be no danger to persons living in the immediate vicinity, and that the sanitarium would be a great benefit to the general community, yet that it constituted a nuisance for the reason that there had grown into the law of nuisances an element not recognized at common law; that is, that *making uncomfortable the enjoyment of another's property is a nuisance*. It was there held that, though the fear of disease might be unfounded, imaginary, and fanciful, yet, *where there is a positive dread which science has not yet been able to eliminate, such dread, robbing as it did the home owner of the pleasure in and comfortable enjoyment of his home, would make the thing dreaded an actionable nuisance*, and the depreciation of the property consequent thereon would warrant a decree against its continuance; further, that *dread of disease and fear induced by the proximity of the sanitarium, if that in fact destroys the comfortable enjoyment of the property owners, is not unfounded and unreasonable when it is shared by the whole of the interested public, and property values become endangered*, and that:

...Nuisance is a question of degree, depending upon varying circumstances. There must be more than a tendency to injury; there must be something appreciable. The cases generally say tangible, actual, measurable, or

subsisting. But in all cases, in determining whether the injury charged comes within these general terms, resort should be had to sound common sense. * * * *The theories and dogmas of scientific men, though provable by scientific reference, cannot be held to be controlling unless shared by the people generally.*

Id. at 664-65. (*Emphasis added*).

Ferry, clearly stands for the proposition that conduct causing disquiet, discomfort or “emotional distress” in the words of the *Bradley* Court can constitute a nuisance. Taking *Ferry*, on its face, *Ferry* appears to be saying that any link between EMF and human disease must be affirmatively disproven before the “apprehension of injury” would be considered unreasonable. The *Ferry*, Court talks about “*a positive dread which science has not yet been able to eliminate...making uncomfortable the enjoyment of another’s property*” into a nuisance.

Even the United States Government is unwilling to endorse the position that a link between EMF and human disease has been disproven. The Environmental Protection Agency (“EPA”) makes available on-line a publication which states that a “*definitive cause-effect relationship*” between EMF and human disease cannot be confirmed *or refuted*. (*Hearing Ex. 16 at p. 1; emphasis in original*). In a publication currently available from the Centers for Disease Control (“CDC”), the CDC is equally clear that a link between EMF and human disease cannot be disproven:

Many studies report small increases in the rate of leukemia or brain cancer in groups of people living or working in high magnetic fields. Other studies have found no such increases. The most important data come from six recent studies of workers wearing EMF monitors to measure

magnetic fields. All but one study found significantly higher cancer rates for men with average workday exposures above 4 milligauss. However, the results of these studies disagree in important ways such as the type of cancer associated with EMF exposures. So scientists cannot be sure whether the increased risks are caused by EMFs or by other factors. A few preliminary studies have also associated workplace EMFs with breast cancer, and one study has reported a possible link between occupational EMF exposure and Alzheimer[']s disease.

(*Hearing Ex. 15 at p. 3*).¹ Incidentally, the field strengths in the Appellants' back yards regularly exceed 4 milligauss. The ultimate conclusion stated in the outdated 1999 report of the National Institute of Environmental Health Services/National Institute of Health ("NIEHS") was as follows: "The NIEHS concludes that *ELF-EMF exposure cannot be recognized at this time as entirely safe* because of weak scientific evidence that exposure may pose a leukemia hazard." (CP 76) (*Emphasis added*).

Indeed, reading *Ferry*, literally, scientific evidence may be immaterial if the apprehension is widely shared by the public. Appellants don't go that far. The real issue here is whether the evidence in the record that exposure to EMF presents a health risk is sufficient to warrant the conclusion by a finder of fact that EMF exposure from the Substation constitutes "an actual or threatened invasion of the plaintiff's person or security." Security in this case being used in the same sense discomfort

¹ The Utilities characterize these official publications available on-line from the CDC and EPA to which Appellants have cited as "internet rumors." You have to wonder how these people can maintain a straight face when they make this kind of statement.

was used in *Ferry*. If so, this was a case for a jury, not the Trial Court Judge.

The Utilities assert that Appellants “concede that no scientifically reliable causal relationship between EMF exposure and human disease has ever been demonstrated.” (*Utilities Brief at 1*). Appellants have made no such concession and, indeed, the assertion that no causal relationship has been shown between human disease and EMF simply flies in the face of the large body of epidemiological evidence on the subject already of record. The basis for Appellants’ contention that an apprehension of EMF is reasonable is the significant body of epidemiological evidence drawing a causal link between EMF and human disease.

There are 18 different epidemiological studies spanning decades in the record reporting a correlation between EMF exposure and human disease at exposure levels similar to the levels measured on Appellants’ properties. These studies are in and of themselves evidence of causation:

“When [*epidemiological*] *studies* are available and relevant, and particularly when they are numerous and span a significant period of time, they *assume a very important role in determinations of questions of causation.*” *Richardson v. Richardson-Merrell, Inc., supra.*² See also *Ref. Manual* at 335 n. 2 (“Epidemiologic studies have been well received by courts trying mass tort suits. Well-conducted studies are uniformly admitted.”)

In re Silicon Breast Implant Litigation, 318 F.Supp. 879 at 892-893 (C.D. Cal 2004); *Eakins v. Huber*, 154 Wn. App. 592, 225 P.3d 1041 (2010); *Intalco Aluminum*, 66 Wn. App. 644 at 661-662, 833 P.2d 390 (a

² *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 830 (D.C.Cir.1988), cert. denied, 493 U.S. 882, 110 S.Ct. 218, 107 L.Ed.2d 171 (1989).

cause-effect relationship can be proven by epidemiological studies). And, even PSE's expert on the causes of cancer ultimately had to admit that the epidemiological evidence should not be ignored. (4/26/11 a.m. T.P. at 45:1-9).

However there was other information in the record and the other question that this Court needs to take into consideration is what sources of information would give rise to a reasonable apprehension. In particular, can reasonable apprehension of injury be based on the recommendation of multiple governmental agencies that exposure be limited?

Virtually every governmental authority which has examined the EMF issue has recommended that people conduct themselves in a manner so as to limit exposure to EMF. The NIEHS Report from 1999 states: "NIEHS suggests that the power industry continue its *current* practice of siting power lines to reduce exposure..." (CP 123). The California Department of Health Services ("CDHS") report, for example, concludes:

[T]o put things in perspective, individual decisions about things *like buying a house* or choosing a jogging route should involve the consideration of certain risks, such as those from traffic, fire, flood, and crime, as well as the uncertain comparable risks from EMFs.

(CP 275; *emphasis added*). The EPA publication referenced above goes on to recommend that:

People concerned about possible health risks from power lines can reduce their exposure by:

Increasing the distance between you and the source –
The greater the distance between you and the power lines the more you reduce your exposure.

Limiting the time spent around the source – Limit the time you spend near power lines to reduce your exposure.

(Hearing Ex. 16 at p. 2; emphasis in original). Increasing the distance between you and a source would include not buying a house next to a giant substation. Is a member of the public acting unreasonably if that member elects not to purchase one of Appellants' homes because of the potential health risk from EMF when governmental agencies charged with protecting the public health have advised him to minimize exposure?

On the fundamental issue here – would the apprehension of exposure to EMF manifesting itself as a loss in market value of Appellants' homes be reasonable and, therefore, a nuisance – there is more than adequate evidence from which a finder of fact could draw the conclusion that the apprehension is reasonable even if the totality of the evidence is not definitive. This matter should be resolved by a jury.

B. Issue 2 – RCW 7.48.160 Precludes a Nuisance Claim.

This argument was made by PSE in a Motion to Dismiss early in the case in which PSE maintained that because the Washington Utilities and Transportation Commission (“WUTC”) requires PSE to operate transmission lines at 60 Hz, the transmission lines can never be a nuisance. The simple answer is that, while the WUTC may require transmission lines to be operated at 60 Hz, neither the WUTC nor any other governmental authority required or directed PSE to locate the Substation adjacent to Appellants' properties. The decision to site the Substation adjacent to Appellants' properties with reduced setbacks was an entirely discretionary decision on the part of PSE. So, while the operation of the Substation at

60 Hz may have been mandated by the WUTC, no “authority under a statute” mandated that the Substation be placed where it was placed.

It is undisputed that applicable land use regulations would have precluded the Substation from being constructed in its current location had PSE not sought variances, which variances actually increased Appellants’ exposure. The reduced setbacks are, in fact, a significant contributing factor in the exposure levels measured on Appellants’ properties because EMF attenuate rapidly with distance from the source. The reduced setback actually results in a material difference in the exposure levels. (4/27/11 *T.P. at 21:15-22:9, 26:20-27:9, 43:22-44:7*).

RCW 7.48.160 provides: “Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.” The contention that PSE is fully immunized under this statute is based on a misstatement of the scope of the statute. Even activities conducted under the express authority of a statute can still be a nuisance if conducted in a manner that unreasonably interferes with adjacent property owner’s rights:

The Court of Appeals would foreclose Grundy’s public nuisance claim because “[n]othing which is done or maintained under the express authority of a statute, can be deemed a nuisance.” RCW 7.48.160. But a lawful action may still be a nuisance:

When a nuisance actually exists, it is not excused by the fact that it arises from a business or erection which is of itself lawful; and, even though an act or a structure was lawful when made or erected, if for any reason it later becomes or causes a nuisance, the legitimate character of its origin does not justify its continuance as a nuisance.

66 C.J.S. *Nuisances* § 15, at 551-52 (1998) (footnote omitted). “[A] ‘fair test as to whether a business lawful in

itself, or a particular use of property, constitutes a nuisance, is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case’.” Powell v. Superior Portland Cement, 15 Wn.2d 14, 19, 129 P.2d 536 (1942) (quoting 46 C.J. *Nuisances* § 20 (1928)). “The fact a governmental authority tolerates a nuisance is not a defense if the nuisance injures adjoining property.” Tiegs v. Watts, 135 Wn.2d 1, 15, 954 P.2d 877 (1998).

Grundy, 155 Wn.2d at 6-7 F.N. 5, a case relied on by PSE. *See, also*, Bruskland v. Oak Theater, Inc., 42 Wn.2d 346 at 350-351, 254 P.2d 1035 (1953). So, activity otherwise protected under RCW 7.48.160 can still be a nuisance if it unreasonably interferes with the use and enjoyment of property by other property owners. Even if the location of the Substation falls within RCW 7.48.160, unless the intrusion on Appellants’ use and enjoyment of their properties could never be characterized as unreasonable by a finder of fact, PSE’s argument based on the statute must fail.

RCW 7.48.160 was adopted in 1875. WAC 480-100-368 provides:

Any electric utility supplying alternating current must design and maintain its distribution system for a standard operating frequency of sixty cycles per second under normal operating conditions.

Power generation standardized in the United States at 60 Hz in the 1890’s. The WAC appears to have its genesis in the early 1900’s. It is hardly likely that this State intended either enactment to insulate utilities from then-unknown risks from exposure to EMF.

It is the history of industrial development that very often technologies are introduced and end up in wide spread use before the public health impacts of the technology are known. When PCBs first went into

use in electrical transformers for the power industry in the late 1920's, no one knew that PCBs were potent carcinogens. The Asarco smelter, the subject of Bradley, operated for decades without any concern about public health risks. Indeed, the Bradley Court concluded there was no evidence that arsenic and lead from the Asarco plume were hazardous. What the Department of Ecology now says on its website³ about the Asarco plume and the same dirt the Bradley Court thought was safe is:

Arsenic and lead can harm your health. You can be exposed by accidentally ingesting or inhaling contaminated soil. Children are especially at risk because they put dirty hands and toys in their mouths, and because their small bodies are still growing and developing.

EMF were characterized as a possible carcinogen a decade ago. The first studies linking EMF to infantile leukemia date from the late 1970's.

In fact, Courts have been basing awards in eminent domain proceedings on a diminution in property value resulting from a fear of electromagnetic fields for decades. See, e.g., San Diego Gas & Electric Co. v. Daley, 205 Cal. App. 3d 1334, 253 Cal. Rptr. 144 (1988), which surveys the authority from various jurisdictions. So, it is not like PSE or any other utility would have no idea what impact a siting decision for a substation would have on adjacent properties or reasonably contend that it had no reason for understanding that the siting decision here might not inflict both disquiet and damage on Appellants.

³ http://www.ecy.wa.gov/programs/top/sites_brochure/tacoma_smelter/2011/ts-hp.htm. Thurston and King Counties have similar websites with similar information. More internet rumors?

As a corollary, the Utilities and PSE assert that the fact that no regulatory authority has set an exposure level even close to the exposure levels reported as resulting in increased incidence of disease is dispositive. PSE offers no rationale as to why actions by a regulatory body would be relevant to private decision making.

The issue here is not what constitutes prudent regulation in the public interest, but whether it is reasonable for private individuals to avoid exposure to EMF. As previously noted, Dr. Li has testified: “scientists are still trying to figure out exactly how smoking causes lung cancer.” (CP 421 at 4:14-15). But, over 40 years ago, in 1969, Congress adopted the Public Health Cigarette Smoking Act, Pub.L. now 15 U.S.C. §§ 1331-1340 which required the following warning to be placed on cigarette packages: “WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH.”

This warning does not quantify the risk, but suggests that a concerned citizen can minimize the health risk by avoiding smoking. This is not particularly different from the CDHS saying:

[T]o put things in perspective, individual decisions about things *like buying a house* or choosing a jogging route should involve the consideration of certain risks, such as those from traffic, fire, flood, and crime, as well as the uncertain comparable risks from EMFs.

(CP 275; *emphasis added*). It took Washington State until 2005 to adopt a statute regulating exposure to second-hand smoke. *See*, RCW 7.160.175. Would it have been unreasonable prior to 2005 for someone to have been apprehensive of exposure to cigarette smoke? The fact that EMF is not

regulated at the field strengths which the epidemiological data indicates are harmful is immaterial to whether an apprehension of injury is reasonable.

C. Issue 3 – Finding Nuisance Liability Here Would be Burdensome.

The Utilities' basic argument is that the electrical service infrastructure provided by both public and private utilities already exists and is highly beneficial to the public. In the absence of definitive evidence that EMF are harmful to human health, this Court should avoid imposing the additional costs associated with addressing public concern about EMF. Don't burden this industry unless and until the health impacts can be shown with absolute certainty. Much the same argument was made by both the tobacco and asbestos industries decades ago.

What the Utilities are really arguing is that the public benefit simply outweighs the loss to Appellants. But, isn't the purpose of Article I, § 16, of the State Constitution to ensure that private landowners are not supposed to have their property taken for a public benefit without compensation? While not necessarily germane to PSE's liability, aren't the Utilities essentially admitting that what happened here was an inverse condemnation?

Nevertheless, the burden associated with rectifying the condition causing the nuisance is not a recognized defense to a nuisance claim. Moreover, we are not talking about a substation built before there was any information available to the industry about health risks and EMF. There is no credible basis for the industry to assert that it was unaware of the burden

and loss that would be imposed on Appellants by a siting decision made in 2009, whether the public apprehension was reasonable or not. Again, Courts have been basing awards in eminent domain proceedings on the fear of transmission lines for decades. Just like the tobacco industry, that the electrical generation industry wants to be in a state of denial does not justify imposing these costs on Appellants.

III. CONCLUSION

Appellants believe this is a case where the characterizations of the record by either party could be safely ignored in answering the question of whether the fear of exposure to EMF is a nuisance. The record, from both sides, speaks very competently for itself and what that record says is that no one can tell you that exposure to EMF is safe. What the record says is that if you want to be safe, minimize the amount of time you spend exposed to EMF because that exposure otherwise could potentially result in one of a number of awful diseases.

In the final analysis, it can all be boiled down to one question – after reviewing all the data, both theirs and ours, would the members of this Court be entirely comfortable taking small children and living in any of the Appellants' homes? Even if the risk is not large, how many of you would be willing to expose your child to an increased risk of infantile leukemia if you did not have to? Bear in mind, Appellants don't have any choice in the matter but potential purchasers who are now not willing to buy Appellants' homes do. Because, unless the members of this Court would be comfortable doing that, living in these homes with their children, the Substation is a nuisance and Appellants are entitled to relief.

DATED this 5th day of October, 2012.

BRAIN LAW FIRM PLLC

By: 

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of October, 2012, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of October, 2012, at Tacoma, Washington.

