9/18/01

SUPREME COURT OF LOUISIANA

No. 2001-CC-0175

CLECO Corporation

versus

Leonard Johnson and Legion Indemnity Company

On Writ of Certiorari to the Court of Appeal, First Circuit,
Parish of St. Tammany

VICTORY, J., dissenting.

I dissent from the majority opinion because Cleco is prohibited from recovery in this case under the concepts announced in ***PPG Industries, Inc. v. Bean Dredging***, 447 So. 2d 1058 (La. 1984). Admittedly, this is a difficult area of the law. But this Court made a "policy decision" in ***PPG Industries*** almost 20 years ago not to allow damages similar to the damages in this case using the "ease of association" test "because the list of possible victims and the extent of the economic damages might be expanded indefinitely." 447 So. 2d at 1062. In my view, having established the law in 1984, the Court should refrain from expanding recovery of damages in this area and leave such "policy decision[s]" to the Legislature.

Part of the majority's error is in characterizing the damages to Cleco's customers' equipment as "direct physical damage," which it uses to distinguish this case from the prohibition of recovery set out in ***PPG Industries***, as follows:

> Unlike the plaintiff in ***Bean Dredging***, Cleco is not attempting to recover from any [sic] economic damages it sustained as a result of damage to a third party's property. By contrast, it is seeking to recover amounts it expended as a result of damage to its own property, the pole, which led to damages to the customers' property. There is no "indeterminite class" in this case. Cleco alleges that is compensated one hundred eighty-seven customers for the direct physical damage to the customers' equipment as a result of the power surge caused by defendants' actions. A trier of

> fact may find that there is an ease of association between a person who damages an electrical pole, causing a power surge and the damage to electrical equipment in the homes and businesses supplied with power by the damaged electrical pole. Defendants' action were not an *indirect* cause of damage to the equipment; rather, defendants' action was the *direct* cause. (Emphasis added.)

Slip Op. at 6, 7.

However, the only party to suffer "direct physical damage" to its property was Cleco. The equipment the defendants damaged was Cleco's electric pole, and there is no doubt that Cleco is entitled to recover for the direct physical damage to its equipment caused by defendants. Cleco is clearly a primary victim of the allegedly negligent act of the defendants.

When this property damage caused a power surge, which in turn damaged the Cleco's customers' electrical equipment, Cleco's customers became secondary victims of the defendants' allegedly negligent act. There is no doubt that "but for" the defendants' act, Cleco's customers' property damage would not have occurred, but that does not entitle them to recover. What if Cleco had a customer who bought electricity from Cleco, and who in turn supplied it to others? As a result of the accident, Cleco's customer's equipment was damaged and in turn, his customer's equipment was also damaged. Would this tertiary victim also be allowed to recover? "But for" the defendants' act in hitting the power line, its damages would also not have occurred. However, our law does not allow all victims to recover for all injuries, just as all damages are not recoverable. As we stated in ***PPG Industries***, "the rule of law which prohibits negligent damage to property does not necessarily require that a party who negligently causes injury to property must be held legally responsible to *all* persons for *all* damages flowing in a "but for" sequence from the negligent conduct." ***Id.*** at 1061.

The problem with expanding recovery in this area is clearly illustrated by the

majority's citing the case of ***Istre v. Fidelity Fire & Casualty Ins. Co.***, 628 So. 2d 1229 (La. App. 3 Cir. 1993), *writ denied*, 643 So. 2d 852 (La. 1984), and quoting from it, apparently with approval. In ***Istre***, a construction company damaged some utility lines which caused a power outage. As a result of the power outage, a distant traffic light ceased to function and an automobile accident occurred. ***Istre*** went much further than the instant case, allowing the victim of the traffic accident to recover from the construction company personal injury and unspecified special damages, not merely property damages. In addition, ***Istre*** used very broad language in allowing such recovery, such as the "predictability of widespread effect and delays in restoring power." It is one thing to expand recovery to a situation where a Cleco customer's electrical equipment that is physically connected to Cleco's lines or poles is damaged by a surge caused by the defendant's vehicle hitting a pole; it is quite another to seemingly approve of recovery for personal injuries and other unspecified "special damages" when there is no such physical connection between the plaintiff and his or her property and the affected damaged electric line, and the plaintiff is not a primary or secondary victim, but a tertiary victim.[1] In my view, the damages in both this case and ***Istre*** fall into the type not recoverable under ***PPG Industries***, and the Court should not be indicating approval of a case that goes far beyond the instant case.

Finally, the majority errs on the subrogation issue. Cleco's petition merely alleges that "it has paid in its own name the damages . . . to its customers and has been subrogated to their rights against defendants herein." This is a legal conclusion, not

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[1]In ***Istre***, the contractor damaged the utility line which caused the traffic light to go out. The power outage did not injure the traffic accident victim, the outage damaged the light, which was owned by the City of Lafayette. The City would be in the same position as Cleco's customers are in this case--both are secondary victims who suffered physical damage to their property. One more step removed was the injured driver of the vehicle, who, because the traffic light went out, suffered personal injuries in a traffic accident. Further indirect damages could go on indefinitely, which is why this Court drew the line in ***PPG Industries***, prohibiting recovery for indirect economic losses.

an allegation of fact, and is not admitted as true for the purposes of an exception of no cause of action. Cleco has not alleged it obtained a conventional subrogation, and has no legal subrogation because, under the facts alleged, it was not liable for its customers' property damage because it was not negligent. La. C.C. art. 1829[2]. Thus, because Cleco was not liable with defendants for the damage to Cleco's customers' property, absent a conventional subrogation, it has no cause of action against defendants even if its customers do.

[2]Civil Code Article 1829 defines legal subrogation, as applicable to this case, as follows: "Subrogation takes place by operation of law: . . . (3) In favor of an obligor who pays a debt he owes with others or for others and who has recourse against those others as a result of the payment." La. C.C. art. 1829. As this Court has stated, "Article 1829(3) is an exception to the general rule that subrogation does not take place when a third person pays the debt of another." ***Martin v. Louisiana Farm Bureau***, 638 So. 2d 1067, 1068 (La. 1994). "Due to the exceptional nature of subrogation by operation of law, the right is strictly construed." ***Id.*** Thus, "[t]he initial inquiry under article 1829(3) is whether [Cleco] is bound 'with . . . or for others.'" ***Id.***