DEC 21 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DONALD ECKHOFF,	)	Filed December 21, 1978
Appellee,	)	
vs.	)	591
		2-61029
NORTHWESTERN BELL TELEPHONE COMPANY,	)	
Appellant.	)	

Appeal from Hardin District Court - Russell J. Hill, Judge.

Defendant appeals jury verdict awarding damages to plaintiff for injuries sustained in a fall from defendant's telephone pole alleging error in instructions. Reversed and remanded for new trial.

John Whitesell, of Whitesell Law Firm, Iowa Falls, and William F. McFarlin & Richard A. Karre, Des Moines, for Appellant.

John L. Butler, of Lundy, Butler, Wilson & Hall, Eldora, for Appellee.

Heard by Oxberger, C.J., Snell and Carter, JJ. Donielson, J., takes no part.

PER CURIAM

Defendant Northwestern Bell Telephone Company appeals a jury verdict in favor of plaintiff Donald Eckoff in an action for damages which plaintiff suffered when a telephone pole owned by defendant and which plaintiff was on, broke causing him to fall to the ground.

On the day of the accident, defendant's employees were in the process of wrecking out a long distance telephone line from Eldora to Gifford. As they were cutting the toll line, the employees noticed that a drop line which provided service to the Marvin Baker farmstead was broken. One of defendant's employees informed the Bakers and then went to a nearby hatchery and asked the people at the hatchery to call the General Telephone Company Office at Eldora and inform them that the service to the Baker farmstead was out. General Telephone was the company providing telephone service to the Baker farmstead.

General dispatched one of its employees, plaintiff herein, to repair the service. When Eckhoff arrived at the Baker residence he noticed that the break was between the point where the telephone line was attached to a power pole on the east side of the highway and a telephone pole owned by Northwestern Bell which served as a point of attachment for the dropline which ran from the power pole to the Bell pole. From the Northwestern Bell pole, the dropline went to the Baker farmhouse.

Before climbing the Northwestern pole, Eckhoff put on his climbers, visualized the pole, attempted to shake it to test the pole's soundness, threw his scare strap around it and then proceeded to climb. When he reached a point about twenty feet up, the pole broke and plaintiff fell sustaining the injuries complained of in this action. The jury returned a verdict in favor of Eckhoff in the amount of $104,613.10. On appeal, defendant cites error in instructions, evidence and the trial court's failure to grant its motions for directed verdict based upon contributory negligence as a matter of law and for new trial and judgment notwithstanding the verdict.

Defendant argues the trial court erred in finding as a matter of law an implied agreement between plaintiff's employer, General Telephone Company, and

defendant, and based thereon, instructing the jury as to the duties owed plaintiff by defendant and at the same time failing to instruct as to plaintiff's own duty of care for his own safety. The evidence is uncontroverted that the telephone pole which broke was owned by defendant. On the pole was a piece of flat sheeting with a notation "G-e-n T-e-l, JOINT AND FOREIGN" and above that was the number "4-2".

Testimony showed that it was common practice for one utility to have agreements with another utility for the joint use of its poles. Witnesses also testified that the meaning of the phrase "JOINT AND FOREIGN" indicated the pole was of foreign ownership, i.e. not owned by General, and that there was an agreement for joint use of the pole. However, there was no evidence of an actual agreement between General and defendant offered by any witness. Hedrick, a construction manager for defendant, testified that he was unaware of any such agreement, although it was common and that it would be necessary to check the Des Moines office where such agreements were likely kept, to see if one existed.

Instruction 14 set forth a general duty owed by defendant to employees of other companies jointly using its poles. The instruction states the law requires defendant to furnish a pole such as to provide a reasonably safe place within which to work, which varies in proportion to the dangers known to be involved in the work and increases and decreases as to dangers known or reasonably apprehended to exist. The part of Instruction 14 which defendant most vigorously resists stated that in the absence of circumstances that caution a reasonably prudent person in like position to the contrary, the employees of a company jointly using the pole may assume that the defendant has exercised ordinary care in furnishing a reasonably safe place within which to work, and the employees may rely and act on that assumption.

Instruction 15 stated that pursuant to an agreement, General Telephone was a joint user of the pole. Therefore, the court instructed the defendant had a duty to use due care toward General's employees. It went on to say that by agreeing to the attachment of General's wire to its pole, defendant assumed an obligation to use reasonable diligence to keep the pole in such a condition that it could be used with

safety. Further, defendant assumed an obligation to either provide plaintiff with a sound pole or to know the condition of its poles, make inspections to discover possible defects and to then warn rightful users of the poles of such defects.

The burden of proving the existence of an agreement is on the one who will benefit from its establishment. See 17A C.J.S. Contracts § 579 (1963); A & R Concrete and Construction Co. v. Backlow, 251 Iowa 1067, 103 N.W.2d 89 (1960). The rule applies to implied as well as express contracts. 17A C.J.S. Contracts, § 579(b). Therefore, it was plaintiff's burden to show the existence of an agreement between defendant and General Telephone and any breach thereof. Carmichael v. Stone, 243 Iowa 904, 54 N.W.2d 454 (1952).

In the instant case, Instructions 14 and 15 removed from the jury's consideration the issue of whether there was an agreement between defendant and General Telephone for joint use of the pole and what terms of such an agreement established obligations toward plaintiff. The resolution of these questions should have been made by the jury as bearing on the duties that arose therefrom and on which plaintiff predicates liability. See Donahoe v. Gagen, 217 Iowa 88, 250 N.W. 892 (1933); People's State Savings Bank v. Cross, 197 Iowa 750, 198 N.W. 70 (1924). Therefore, it was error to instruct that an agreement existed as a matter of law.

The question of whether prejudice resulted from this error remains. Plaintiff contends the trial court's findings that as a matter of law an agreement existed between the parties for joint use of the pole was surplusage and unnecessary. Eckoff argues that the duty defined by the instructions existed apart from an agreement for joint use and thus defendant suffered no prejudice by the findings as a matter of law. Plaintiff seeks to come within the ambit of Rosenau v. City of Estherville, 199 N.W.2d 125 (Iowa 1972).

In Rosenau, the court adopted the criteria for testing a landowner's liability to trespassing children laid down in Restatement (2nd) of Torts, § 339, p. 197, captioned "Artificial Conditions Highly Dangerous to Trespassing Children." Applying that standard, the court held that Instruction 15 which designated plaintiff an invitee could not have been prejudicial since his status as an invitee, licensee or trespasser was not controlling. Since the instructions taken together set out the

essential elements of the Restatement criteria, the jury could have found liability thereunder.

In the case at bar, the instructions set out the duty of care owed by defendant to plaintiff based on joint use of the pole pursuant to an agreement between defendant and plaintiff's employer, General Telephone. Instruction 15 stated:

> In this connection, you are instructed that the Northwestern Bell Telephone Company, by agreeing to an attachment of the General Telephone Company wire to its pole, assumed an obligation to use reasonable diligence to keep the pole in such condition that it could be used with safety in the customary manner. This duty of ordinary care includes an obligation under the facts and circumstances of this case, to provide the plaintiff Donald Eckoff with a sound pole, or an obligation to know the condition of its pole, make inspections of its pole so as to discover possible defects, and warn rightful users of the pole of said defects.

Nowhere in the instructions does the court set out the duty of care that would be owed by defendant in the absence of an agreement. Nor do the instructions establish the criteria for testing defendant's responsibilities toward plaintiff such as the Restatement predicates and as was found to be met in Rosenau. The court in Rosenau determined that the standard of care owed by the city to plaintiff was breached even though he was not an invitee and entitled to the protection afforded an invitee under the law. Under the facts of the case at bar, we cannot say as a matter of law the jury should have found, in the absence of an agreement, that Eckoff's status was such that the standard of care owed by defendant was that contained in the instructions. That standard of care was not instructed upon by the court so that a jury could determine if defendant had failed to provide it to Eckoff. Prejudice occurred to defendant from the error in Instructions 14 and 15.

Since this issue is dispositive, we do not further consider defendant's other assignments of error. Reversed and remanded for a new trial.

All judges concur, except Oxberger, C. J., who dissents.

OXBERGER, C. J. (dissenting)

I dissent. The defendant, Northwestern Bell Telephone Company did not produce any evidence to rebut the plaintiff's evidence that the pole in question was jointly used by the plaintiff's employer and the defendant. It seems evident to me if there was not an agreement for joint use of the pole the defendant would have so testified at the first trial. In my opinion, the undisputed evidence established a joint use arrangement between plaintiff's employer and Northwestern Bell for the use of the pole in question. The pole contained two identification marks, and a witness testified that those symbols indicate the pole is a joint use pole. Furthermore, defendant's construction manager testified that an agreement existed between Northwestern Bell and General Telephone for the use of Northwestern's poles such as occurred in the instant case. Clearly, then, plaintiff was an implied licensee and not a trespasser when he undertook to climb the pole on the day of the accident. See Reasoner v. Chicago, R. I. & P. R. Co., 251 Iowa 506, 510, 110 N.W.2d 739 (1960). Defendant thus owed plaintiff the duty of using reasonable care under all the circumstances. Rosenau v. City of Estherville, 199 N.W.2d 125, 135 (Iowa 1972). That standard was articulated to the jury in Instruction 15. I would affirm the jury's verdict.