

IN THE COURT OF APPEALS OF IOWA

No. 0-433 / 89-1313

FILED

APR 02 1991

CLERK SUPREME COURT

JIM SPURGEON,

Plaintiff,

vs.

SOUTHEAST IOWA COOPERATIVE ELECTRIC ASSOCIATION,

Defendant.

JIM SPURGEON,

Plaintiff,

vs.

ALPHA TRANSFORMER SERVICE, A Division of Jim's Electric Company,

Defendant-Appellee.

**ROBERT SIZEMORE, TERESA SIZEMORE, KURTIS WAYNE SIZEMORE and
BARRETT MORGAN SIZEMORE, by Parent and Next Friend, TERESA
SIZEMORE,**

Plaintiffs-Appellees,

vs.

SOUTHEAST IOWA COOPERATIVE ELECTRIC ASSOCIATION,

Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines
County, John C. Miller, Judge.

Defendant appeals Sizemore's verdict alleging comments
made by Spurgeon's counsel were prejudicial and further
contends the trial court erred in directing a verdict in
favor of Alpha. **AFFIRMED.**

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Gregory R. Brown, Hugh J. Cain, and Stephen R. Eckley of Duncan, Jones, Riley & Finley, Des Moines, for appellant.

J. Bryan Schulte and Steven J. Crowley of Ruther, Bauer, Schulte, Hahn, Swanson & Crowley, Burlington, and Michael C. Vance of the Vance Law Offices, Mount Pleasant, for appellees Robert Sizemore, Teresa Sizemore, Kurtis Wayne Sizemore, and Barrett Morgan Sizemore.

Robert B. Hanson of Hanson, Bjork & Russell, Des Moines, for appellee Alpha Transformer Service.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Southeast Iowa Cooperative Electric Association (REC) supplies electrical service to the Goodyear plant in Mount Pleasant. The REC's electricity enters the plant and then passes through three single phase transformers to decrease the voltage to a usable level. The transformers are manufactured by Alpha Transformer Service.

On May 12, 1986, one of the transformers failed, shutting off the power to the plant. REC installed a different Alpha transformer. During the start-up of the plant, two Goodyear employees, Sizemore and Spurgeon, were injured from an electrical flash explosion that occurred while taking a voltage reading with a volt meter.

Sizemore and Spurgeon sued REC and Alpha. At the request of Alpha and without apparent objection from any of the other interested parties, the cases were consolidated for trial. Following the plaintiffs' presentation of evidence, the district court directed a verdict in favor of Alpha. The jury returned a verdict in favor of Spurgeon for \$1,300,000 and Sizemore for \$519,440. The REC has satisfied its judgment in favor of Spurgeon; therefore, Spurgeon is not part of this appeal. But the REC appeals the Sizemore verdict and the grant of a directed verdict to Alpha. We affirm.

REC, in its claim, for a new trial against Sizemore alleges that comments made by Spurgeon's counsel, Tom Riley, during opening statement and closing argument

prejudiced the Sizemore verdict. There is no claim of misconduct by Sizemore's attorney. Thus, the plaintiffs Sizemore find themselves in the position of defending their favorable verdict for the alleged misconduct of the attorney for Spurgeon, whose judgment has been satisfied.

REC specifically objected to Tom Riley's comments during his opening statement. Riley first commented that his client (Spurgeon) had incurred some \$220,000 to \$230,000 in medical expenses and approximately \$20,000 in lost wages. Riley further stated the plaintiff's employer had paid these, but that Spurgeon would have to repay his employer from his recovery. Additionally, Riley stated the REC had a right to sue Alpha for contribution. And during closing arguments he pointed out the absence from the proceedings of an REC representative. It further contends the district court improperly directed a verdict for Alpha based on the lack of proximate cause evidence and the plaintiffs' acquiescence in the motions. REC concluded by claiming there was sufficient evidence to submit Alpha's liability to the jury.

I. We first address REC's contention the trial court erred in not granting a new trial as to Sizemore due to certain alleged prejudicial comments by the attorney for Spurgeon.

A. The first comment involved a reference by Spurgeon's attorney during his opening statements. In its claim for a new trial as to the Sizemores, REC contends

Spurgeon's attorney made prejudicial comments regarding insurance benefits and subrogation which violated a prior motion in limine.

We note at the outset the opening statements were not recorded. According to the trial court, the remarks were

contained in one perhaps two sentences. There was a statement that he had about 220,230 thousand dollars of medical expenses, approximately \$20,000 of lost wages and that the next comment--one sentence to the best of my recollection, my notes--was, his employer paid for these but he has to pay them back from any recovery. It was a one-sentence comment. It was very limited. It wasn't emphasized.

The trial judge listened to the entire opening statements and concluded that when the objected-to remarks were considered in the context of the entire statement, they were, in his words, relatively innocuous. We agree, particularly after the attorney agreed that the word "insurance" was not used.

As it relates to this statement, we note from the record that at the time the attorney for REC raised the objection, he carefully directed it to the plaintiff Spurgeon. He did not ask for a mistrial as against the plaintiffs Sizemore. Factually, it appears that when the attorney for the Sizemores attempted to speak to the subject, REC's attorney objected and stated to the court, "Under the present state of the record, this is entirely an issue now between plaintiff Spurgeon and the defendant REC." The court then commented that it agreed that it was

solely between REC and Spurgeon, although it did permit the Sizemores' attorney to speak to the subject.

The trial court denied the defendant's motion for a mistrial. We are unable to find that the trial court abused its discretion. Rasmussen v. Thilges, 174 N.W.2d 384, 391 (Iowa 1970).

B. The second statement which REC contends requires a new trial as to the Sizemores was a statement again made by Spurgeon's attorney. During his closing argument he brought to the attention of the jury the fact that attorneys for the defendant "know they have a right to sue Alpha for contribution if a verdict is returned against them". Once again, REC asserts the trial court erred in not granting a mistrial at the time the statement was made and additionally, now on appeal, contends a new trial is warranted. The trial court responded to REC's objection by sustaining the objection and immediately admonishing the jury to ignore the statement made by counsel for Spurgeon.

The rule regarding misconduct provided by our supreme court states that "[b]efore a new trial will be granted for misconduct in argument it must appear that prejudice resulted or that a different result would have been probable but for such misconduct." Johnson v. Kinney, 7 N.W.2d 188 (Iowa 1942). Further, the supreme court has also stated that ordinarily where a trial court in response to a request promptly admonishes the jury to disregard an improper argument, there is no prejudicial error. Turner

v. Jones, 215 N.W.2d 289, 291 (Iowa 1974). When this comment was objected to by counsel for REC the trial court sustained the objection and immediately admonished the jury to ignore the statement made with regard to the rights of one party against another party. Ordinarily where a trial court promptly admonishes the jury to disregard an improper argument, there is no prejudicial error. Id.

C. The final statement which was objected to by REC once again involved counsel for Spurgeon. During his closing argument, he pointed out to the jury the fact that representatives from REC were not present. REC contends this statement implies REC does not care about the lawsuit or the men who were injured and would result in jury prejudice. Initially we must again revert to our reliance on the supreme court's statement regarding prejudicial comments.

On many occasions, the court has said that if an admonishment is given to disregard an improper statement there will generally be no prejudicial error. Id. The trial court did warn the jury that the absence of the REC representatives was of no significance and to disregard the statement. Additionally, when the statement was made counsel for REC spoke out to inform the jury the representatives had personal obligations which prevented them from attending the trial. Based upon both the admonishment as well as comments made by defense counsel, we are unable to find that the trial court abused its

discretion in denying defendant's motion for mistrial. We affirm the trial court in its refusal to grant either a mistrial or a new trial.

II. The second main issue promulgated by REC involves the trial court's grant of directed verdict for the codefendants Alpha. It is REC's contention that there is a question as to Alpha's liability and thus it was error for the trial court to grant a directed verdict.

In reviewing whether the court was correct in granting Alpha's motion for directed verdict we must determine whether there is substantial evidence on every element of the claim. Swanson v. McGraw, 447 N.W.2d 541, 543 (Iowa 1989). Evidence is considered in the light most favorable to the party against whom the motion is directed. Id. Evidence is substantial if a jury could reasonably infer from it the existence of every element of the claim. Id. If the evidence is not substantial, a directed verdict is appropriate. Id. A mere scintilla of evidence is not sufficient to require denial of a motion for directed verdict. Peterson v. Farmers Casualty Co., 226 N.W.2d 226, 232 (Iowa 1975). The trial court is vested with considerable discretion in determining whether evidence is sufficient to submit an issue to the jury. Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376, 383 (Iowa 1975).

While accepting the above statements with regard to directed verdicts, this court is also mindful of the

supreme court's statements that "questions of fault and proximate cause are questions of fact, and only in exceptional cases may these questions be taken from the jury and decided as a matter of law by this or any other Iowa Court." Johnson v. Junkmann, 395 N.W.2d 862, 864 (Iowa 1986). However, these types of cases do exist. See, Strong v. E.I. DuPont de Nemours Co., Inc., 667 F.2d 682, 688 (8th Cir. 1981) ("If, despite deficient warnings by the manufacturer, a user is fully aware of the danger which a warning would alert him or her of, then the lack of warning is not the proximate cause of the injury"); Cansler v. Grove Mfg. Co., 826 F.2d 1507, 1511 (6th Cir. 1987).

The trial court granted Alpha's motion for directed verdict because there was not substantial evidence to demonstrate that Alpha's label proximately caused Sizemore's injuries. We agree and accordingly affirm.

Jack Bivens is employed by the REC and is the employee who installed the transformer at the Goodyear plant. The evidence shows that he was an experienced electrician and had considerable experience in the installation of transformers. Mr. Bivens testified he was familiar with the REC's Application Guide for Transformers. This guide recommended interconnection of the primary and secondary neutrals, and grounding of the same. Bivens testified that he discussed the installation of the transformer with Goodyear officials. He explained to these officials that excess voltage could be generated inside the plant if the

transformer was installed ungrounded. However the Goodyear officials insisted they did not want to stop production and Bivens proceeded to install the transformer. The REC contends it was Alpha's schematic, placed on the transformer, which misled Bivens and proximately caused the injuries to Sizemore and Spurgeon. However the evidence is clear that Bivens knew what he wanted to do. He testified he wanted to separate the neutrals and unground them. Notwithstanding the diagram provided by Alpha, Bivens intended to install the transformer in a manner directly contrary to the REC's application guide.

The application guide recommended that the primary and secondary neutrals be interconnected and grounded in order to avoid the generation of dangerous voltages on the secondary side (inside the plant). Bivens testified he intended to separate the neutrals and unground them. An expert for the REC testified this should never be done. Because Bivens warned Goodyear about the possible high voltages in the plant it is clear he was aware of the ramifications of his actions. Bivens stated that he purposely removed the ground and further stated he was "probably not" misled by the label. Based upon the evidence provided we are convinced the trial court was correct in granting the motion for directed verdict.

REC contends the directed verdict was inequitable because they now will be estopped from bringing a suit for contribution and indemnity against Alpha. We neither agree

nor disagree with that statement. That issue is not before us.

Because we determined the directed verdict was supported by the evidence, we need not address the appellant's contention regarding the trial court's comments likening the directed verdict to a dismissal, nor need we address the issue of standing.

AFFIRMED.