

IN THE COURT OF APPEALS OF IOWA

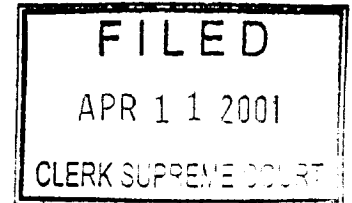
No. 0-2004 / 98-0581

April 11, 2001

IOWA LAKES ELECTRIC COOPERATIVE,
Plaintiff-Appellant/Cross-Appellee,

vs.

JAMES SCHMITT,
Defendant-Appellee/Cross-Appellant.



JAMES SCHMITT,
Counterclaim-Plaintiff-Appellee/Cross-Appellant,

vs.

IOWA LAKES ELECTRIC COOPERATIVE
Counterclaim-Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Buena Vista County, Charles H. Barlow, Judge.

Plaintiff appeals and defendant cross-appeals the district court's judgment in favor of plaintiff in its collection action and the court's judgment in favor of defendant in his negligence counterclaim. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR ENTRY OF JUDGMENT.**

Gregory R. Brown and Scott P. Duncan of Duncan, Green, Brown, Langeness & Eckley, P.C., Des Moines, and Stuart G. Mondschein of Wheeler, Van Sickle & Anderson, Madison, Wisconsin, for appellant.

Dan Connell and David Jennett, Storm Lake, and Laura L. Pattermann of Sheldon M. Gallner Law Offices, P.C., Council Bluffs, for appellee.

Heard by Sackett, C.J., and Huitink and Hecht, JJ.

HECHT, J.

1. Background Facts and Proceedings: In 1993 defendant, James Schmitt, contacted the plaintiff, Iowa Lakes Electrical Cooperative ("ILEC") regarding suspected stray voltage he believed was harming his dairy cows. After an investigation of the matter, ILEC determined stray voltage had been gaining access to Schmitt's farm through an interconnection between ILEC's neutral, the Schmitt farm neutral, and a transformer serving both Schmitt and his neighbor. ILEC installed a "neutral isolator" to block stray voltage from entering the secondary neutral on Schmitt's farm through ILEC's primary neutral.

When Schmitt refused to pay ILEC for the installation of the isolator, the Cooperative filed a small claims action seeking to recover the cost of its material and labor. Schmitt counterclaimed against ILEC alleging negligence and strict liability theories in support of his claim that stray voltage transmitted onto his property over the years caused extensive damage to his dairy cattle and a resulting loss of production and profit. The action was tried to the court. The district court found in favor of ILEC on its claim against Schmitt. ILEC's motion for directed verdict on the counterclaim was sustained in part and denied in part. The district court found ILEC negligent in failing to exercise reasonable care to discover and remedy the stray voltage on Schmitt's property. The court also found ILEC breached its duty to Schmitt by failing to warn him of the potential harm to his dairy herd resulting from stray voltage. The district court concluded ILEC was liable to Schmitt under a theory of strict liability. The court allocated fifty-five percent of the fault to ILEC and the remaining forty-five percent to Schmitt for various deficiencies in his dairy operation.

The district court entered judgment in the amount of \$234.06 in favor of ILEC against Schmitt. The court entered judgment in the amount of \$303,022 in favor of Schmitt against ILEC on Schmitt's counterclaim. The judgment on the counterclaim included \$54,741 for "additional interest costs because of loss of operating capital incurred" during the period from January of 1991 to February 1, 1994. ILEC appealed and Schmitt cross-appealed.

II. Appellate claims: ILEC claims the trial court should have granted its motion for directed verdict because Schmitt failed to present sufficient evidence in support of his negligence claims. In particular, ILEC contends Schmitt's evidence was insufficient because no expert testimony was offered to establish the applicable standard of care or its breach; and documentary evidence received in evidence as exhibits 82, 83 and 84 was inadmissible hearsay that could not be relied upon to establish the standard of care. ILEC also argues the district court erred in holding the Cooperative had a duty to warn Schmitt about the dangers of stray voltage. ILEC challenges the district court's legal conclusion strict liability applies to the facts of this case. Finally, ILEC contends the district court erred in awarding prejudgment interest to Schmitt on damages incurred prior to the commencement of this action.

III. Remand. In an order¹ dated October 19, 2000, we decided ILEC's directed verdict and strict liability claims. We also determined the admissibility of the challenged exhibits. Based on the analysis of the evidentiary issue, we determined the specification of negligence for negligent design, operation and

¹ A copy of the Order is attached as an addendum to this opinion. The analysis and rulings set forth in the Order are incorporated in this opinion as if fully set forth.

maintenance was not supported by substantial evidence. We also determined *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 13 (Iowa 1999) precludes liability under a theory of strict liability. From the record before us, we were unable to determine what effect, if any, elimination of two of Schmitt's claims would have on the district court's allocation of fault between the parties. Therefore we remanded this case to the district court for the sole purpose of determining whether the rulings made in our order would change the court's allocation of fault based on the remaining negligent-failure-to-warn claim. See *Cook v. State*, 476 N.W.2d 617, 623 (Iowa 1991).

The district court, after considering our order, the admissible evidence in the record, the conduct of the parties, the extent of the causal relationship between their conduct and the damages claimed, and new briefs of the parties, determined "the comparative fault allocation percentages would be the same as to each of the three theories or any one of them." See Iowa Code § 668.3(3); Iowa Civ. Jury Inst. 402.2. The court found Schmitt forty-five percent at fault and ILEC fifty-five percent at fault.

Following the district court's ruling, ILEC moved this court for leave to amend its notice of appeal to include the new ruling and for leave to file additional briefs. We permitted the parties to file additional briefs and we consider ILEC's appeal from the district court's ruling after remand as part of this decision.

IV. Allocation of Fault. ILEC claims the district court erred as a matter of law in its allocation of fault because "eliminating two of the three bases upon which ILEC fault was founded, . . . compels a finding that the fault of Schmitt

exceeded that of ILEC.” Schmitt responds the court’s allocation of fault is supported by substantial evidence.

The district court’s findings have the effect of a special verdict and are binding on us on appeal if supported by substantial evidence. *Land O’Lakes, Inc. v. Hanig*, 610 N.W.2d 518, 522 (Iowa 2000). We view the evidence in the light most favorable to upholding the district court’s judgment. *Data Documents, Inc. v. Pottawattamie County*, 604 N.W.2d 611, 615 (Iowa 2000). Questions of negligence, comparative fault, and proximate cause are ordinarily for the trier of fact. *Nichols v. Westfield Indus., Ltd.*, 380 N.W.2d 392, 398 (Iowa 1985) (quoting *Casey v. Koos*, 323 N.W.2d 193, 198 (Iowa 1982)).

The relevant inquiry on the failure to warn claim is whether ILEC knew or should have known of the danger, yet failed to provide adequate warning to users or consumers. *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 290 (Iowa 1994). The district court reviewed the admissible evidence in the record, the conduct of the parties, and the extent of the causal relationship between their conduct and the damages claimed. In viewing only the negligent-failure-to-warn claim on remand, the court determined ILEC’s fault to be fifty-five percent and Schmitt’s to be forty-five percent. Substantial evidence in the record supports this allocation of fault between the parties. We adopt as our own the district court’s finding “the scientific complexities of the subject of stray voltage and its potential danger are not generally known and recognized.” Under the circumstances presented in this case, a reasonable fact finder could find, as the district court did, “an ordinary and prudent supplier of electricity, being aware of the concepts and dangers of

stray voltage to livestock would do more than [send] an occasional warning about stray voltage as part of a newsletter. . . .”

ILEC contends the district court could not, as a matter of law, allocate to it fifty-five percent of the fault because two of three theories of liability were eliminated from the case by our remand order. No authority is presented, however, for the proposition the extent of a party’s comparative fault must be in proportion to the number of theories of liability found against the party. Because we find substantial evidence supporting the district court’s allocation of fault, we affirm on this issue.

V. *Pre-Judgment Interest.* Our order remanding this case did not address ILEC’s claim the trial court improperly awarded Schmitt “additional interest costs because of loss of capital incurred between January 1991 and February 1, 1994.” ILEC claims the court awarded pre-suit interest. We review interest awards for errors at law. Iowa R. App. P. 4; *Vasquez v. LeMars Mut. Ins. Co.*, 477 N.W.2d 404, 406 (Iowa 1991). In this tort action involving an allegation of comparative fault, an award of interest is controlled by Iowa Code chapter 668. *Long v. Jensen*, 522 N.W.2d 621, 625 (Iowa 1994).

The district court’s finding with respect to “interest costs” was based upon the testimony of Schmitt’s economist, Michael Behr. The witness opined in addition to milk loss, herd loss, and increased expenses, Schmitt sustained an “implicit and explicit capital cost” of twelve percent per annum on his investment. The magnitude of this “cost” depends, according to witness Behr, upon the interest rate that a business person such as Schmitt pays on borrowed funds (the explicit cost) and the opportunity cost he incurs by electing not to invest his

capital in some alternative investment (the implicit cost). Schmitt characterizes this element of damage as a "loss of operating capital." ILEC contends the award of \$54,741 was for pre-suit interest.

We conclude this element of damage is actually interest on past damages. As such, it can only accrue from the date of the commencement of this action. Iowa Code § 668.13(1) (1993). Although this statutory provision may preclude a plaintiff from recovering the full amount of his actual economic loss, the legislature has made a policy choice which the court is not free to ignore. The district court erred in awarding interest for the period before February 1, 1994.

VI. Conclusion. We reverse the district court's award of pre-suit interest in the amount of \$54,741. We conclude the district court properly allocated fault between the parties and entered judgment on Schmitt's counterclaim against ILEC for negligent failure to warn. Accordingly, the judgment of the court on Schmitt's counterclaim, less the pre-suit interest is affirmed. Costs of this appeal are taxed equally to the parties. We remand this case to the district court for entry of judgment consistent with our decision.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR ENTRY OF JUDGMENT.

IN THE COURT OF APPEALS OF IOWA

No. 0-2004 / 98-0581

Buena Vista County No. 23928

ORDER

IOWA LAKES ELECTRIC COOPERATIVE,
Plaintiff-Appellant/Cross-Appellee,

vs.

JAMES SCHMITT,
Defendant-Appellee/Cross-Appellant.

JAMES SCHMITT,
Counterclaim-Plaintiff-Appelle/Cross-Appellant,

vs.

IOWA LAKES ELECTRIC COOPERATIVE,
Counterclaim-Defendant-Appellant/Cross-Appellee.

I. Background Facts and Proceedings: In 1993 defendant, James Schmitt, contacted the plaintiff, Iowa Lakes Electrical Cooperative ("ILEC") regarding suspected stray voltage he believed was harming his dairy cows. After an investigation of the matter, it was determined that stray voltage had been gaining access to Schmitt's farm through an interconnection between ILEC's neutral, the Schmitt farm neutral and a transformer serving both Schmitt and his

neighbor. ILEC installed a "neutral isolator" to block stray voltage from entering the secondary neutral on Schmitt's farm through ILEC's primary neutral.

When Schmitt refused to pay ILEC for the installation of the isolator, the Cooperative filed a small claims action seeking recovery for the cost of its material and labor. Schmitt counterclaimed against ILEC alleging negligence and strict liability theories in support of his claim that stray voltage transmitted onto his property over the years caused extensive damage to his dairy cattle and a resulting loss of production and profit. The action was tried to the court. The district court found in favor of ILEC on its claim against Schmitt. ILEC's motion for directed verdict on the counterclaim was sustained in part and denied in part. The district court found ILEC negligent in failing to exercise reasonable care to discover and remedy the stray voltage on Schmitt's property. The court also found that, because the dangers associated with stray voltage are not generally known or recognized, ILEC breached its duty to Schmitt by failing to warn him of the potential harm to his dairy herd resulting from stray voltage. The district court further concluded ILEC was liable to Schmitt under the theory of strict liability. The court allocated 55% of the fault to ILEC and the remaining 45% to Schmitt for various deficiencies in his dairy operation.

The district court entered judgment in the amount of \$234.06 in favor of ILEC against Schmitt. The court entered judgment in favor of Schmitt and against ILEC in the amount of \$303,022 on the counterclaim. The judgment on the counterclaim included \$54,741 for "additional interest costs because of loss of operating capital incurred" during the period from January of 1991 to February 1, 1994. ILEC appealed and Schmitt cross-appealed.

II. Appellate claims: ILEC claims the trial court should have granted its motion for directed verdict because Schmitt failed to present sufficient evidence in support of his negligence claim. In particular, ILEC contends Schmitt's evidence was insufficient because: 1.) no expert testimony was offered to establish the applicable standard of care or its breach; and 2.) documentary evidence received in evidence as exhibits 82, 83 and 84 was inadmissible hearsay that could not be relied upon to establish the standard of care. ILEC also argues the district court erred in holding the Cooperative had a duty to warn Schmitt about the dangers of stray voltage. ILEC challenges the district court's legal conclusion that strict liability theory applies to the facts of this case. Finally, ILEC contends the district court erred in awarding prejudgment interest to Schmitt on damages incurred prior to the commencement of this action.

III. Admissibility of Exhibits 82, 83 and 84: The admissibility of exhibits 82, 83 and 84 is a central issue in this case. Schmitt offered no expert testimony to establish: 1.) the parameters of the standard of care against which ILEC's conduct in the design, operation and maintenance of the electrical system is to be judged; 2.) breach of the applicable standard of care with respect to design, operation and maintenance of the electrical system by ILEC; 3.) the nature and extent of ILEC's duty to warn its members of the hazard posed by stray voltage under the circumstances of this case; and 4.) ILEC's failure to comply with the standard of care with respect to warning. The documentary exhibits in question evidence: 1.) ILEC's knowledge of the hazard to dairy farms arising from stray voltage; 2.) procedures and equipment available to ILEC and its members for detection of stray voltage and identification of its origin; 3.) measures available to

ILEC and its members to control or eliminate stray voltage; 4.) ILEC's knowledge of the hazards associated with stray voltage; and 5.) ILEC's knowledge of its members' need for warnings about the hazards of stray voltage, symptoms or indicators of the problem, procedures for detection of the problem, and suggested remedial measures to eliminate or control it. The district court overruled ILEC's hearsay objections, received the three exhibits, and relied on them as proof of the essential elements of Schmitt's negligence claim.

ILEC contends the district court erred in receiving the three exhibits in evidence over hearsay objections. We review the district court's rulings concerning admission of evidence for correction of errors at law. *Bangs v. Maple Hills, Ltd.*, 585 N.W.2d 262, 265 (Iowa 1998). "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Iowa R. Evid. 103(a). The trial court has broad discretion in admitting evidence. *Oberreuter v. Orion Indus., Inc.*, 398 N.W.2d 206, 210 (Iowa App. 1986). We will not disturb the trial court's evidentiary rulings "unless there is a clear and prejudicial abuse of discretion." *Gamerdinger v. Schaefer*, 603 N.W.2d 590, 594 (Iowa 1999).

a.) *Exhibit 82.* Exhibit 82 consists of two memoranda from an Assistant Administrator of the Rural Electrification Administration¹ to "Electric Borrowers." The memoranda, bearing the dates of September 24, 1981, and April 27, 1983, generally address the subject of "Stray Voltage in Dairy Farms." The 1981 memo refers to "a large increase in complaints related to stray voltage on farms." It

¹ The memoranda bear the seal of the United States Department of Agriculture.

summarizes the causes of stray voltage and discusses methods of controlling the phenomenon. The author advises power suppliers to: 1.) consider dairy operations "as critical loads with stringent requirements which are not met by the normal electric service;" and 2.) "strive to keep the voltage on the neutral as low as practical through system grounding practices." The 1981 memorandum also provides a bibliography of recommended reading materials for personnel of power suppliers. The 1983 memorandum authored by the same REA administrator strongly urges power suppliers to provide "critically important" information about stray voltage to their consumer-customers to help them avoid or alleviate stray voltage problems. This memo also suggests utilization of a "bill stuffer or letter" alerting customers that dairy cattle "are very sensitive to extremely low voltages" and urges dissemination of a list of symptoms a dairy farmer might see in a herd exposed to stray voltage.

The district court received Exhibit 82 in evidence after concluding: 1.) it was not hearsay because it constituted an admission of a party-opponent under Iowa Rule of Evidence 801(d)(2)(c); or 2.) if it was hearsay, the exhibit was nonetheless admissible as a public record under Iowa Rule of Evidence. 803(8). The two memoranda within the exhibit are, in their entirety, statements of an administrator of the Rural Electrification Administration, a public agency within the U.S. Department of Agriculture. We find no error in the district court's ruling because "studies, investigations and reports concerning the progress of electrification . . . in rural areas" are within the scope of regularly recorded

activities of the REA². It was within the express authority of the Administrator of the REA to publish and disseminate such information³. Having found no error in the district court's admission of Exhibit 82 pursuant to Rule 803(8), we need not decide whether the exhibit was admissible as an admission pursuant to Rule 801(d)(2).

b.) Exhibit 83. Exhibit 83 consists of an August 1, 1985, memorandum and article authored by Al Bierbaum. The author is identified in the memorandum as "Chief Engineer" of the Iowa Association of Electric Cooperatives. The memo addressed to the Association's service personnel and REC managers recommends updated information about stray voltage contained in Bierbaum's article be made available to the Cooperatives' members "as needed." Exhibit 83 also includes a checklist of "procedures to investigate stray voltages." The contents of this exhibit were located in storage by ILEC and produced in response to Schmitt's discovery requests.

Bierbaum's article discusses causes of stray voltage and methods of investigating and controlling it. Of particular relevance to Schmitt's counterclaim are the author's: 1.) illustration of how stray voltage on a farm can be affected by the electrical load on other farms on the same distribution system; and 2.) opinion that if stray voltage originates off the farm, "the power supplier should thoroughly check the primary neutral on the entire distribution system to be sure of proper grounding, no high resistance connections, and no large-fault loads on

² 7 U.S.C. § 902 (1988).

³ *Id.*

neighboring farms.” Among the remedies suggested in Bierbaum’s article for stray voltage originating on neighboring farms was installation of a device designed to isolate the primary neutral from either the entire farm, or at least from the dairy barn’s neutral. We note that costs associated with the installation of such an isolator-device by ILEC at the Schmitt farm on December 17, 1993, were the subject of ILEC’s claim in this case.

Schmitt offered Exhibit 83 as an admission of ILEC pursuant to Iowa Rule of Evidence 801(d)(2)(A), (B), and (C) and as a business record of ILEC pursuant to Iowa Rule of Evidence 803(6). The district court correctly concluded Exhibit 83 was not admissible under Rule 803(6), but received it in evidence as an admission of ILEC. The Findings of Fact, Conclusions of Law and Judgment clearly document the district court’s reliance upon this exhibit as evidence of ILEC’s knowledge of the potential off-farm source of stray voltage, procedures a power supplier should follow in the investigation of the origin of stray voltage, and recognized methods to control or eliminate the problem.

The documents contained in Exhibit 83 are clearly hearsay because Schmitt offered their contents to prove the truth of the matters asserted in them⁴. Iowa R. Evid. 801(c). Accordingly, the exhibit was inadmissible unless it fit within an exception to the hearsay rule. ILEC contends the district court abused its

⁴ During trial, Schmitt’s counsel argued the exhibit was not offered to prove the truth of the statements contained in the documents. However, Schmitt apparently reconsidered this position and in his post-trial brief only urged the exhibit’s admission pursuant to Iowa Rules of Evidence 801(d)(2)(A), (B), and (C) and 803(6).

discretion in admitting this exhibit as an admission.⁵ We agree. The documents in the exhibit were not authored by ILEC or its predecessor cooperatives individually or in a representative capacity. Consequently, they were not admissible pursuant to Iowa Rule of Evidence 801(d)(2)(A). Although the documents were found among ILEC's records and produced during discovery, their mere retention by a party is not tantamount to a manifestation of adoption or belief in its truth. *White Industries v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1062 (D.C. Mo. 1985) ("the mere existence of a document in a party's files does not, without more, necessarily stamp the statements in the documents as admissions attributable to that party under the scope of Rule 801(d)(2)."). The burden of proof is on the proponent to show that the party opponent's conduct was intended as an adoption of the statement. *White Industries*, 611 F. Supp. at 1063.

Schmitt asserts ILEC's conduct with respect to Exhibit 83 was sufficient to establish its adoption or belief in the truth of the statements contained in it. See Iowa R. Evid. 801(d)(2)(B). He correctly points out that ILEC did more than simply store the exhibit among its files. The General Manager of ILEC testified that the company made the documents available to its engineer and other employees for reference purposes. We are not convinced, however, that ILEC's retention of the documents for reference purposes constituted a manifestation of adoption or belief in the truth of the statements contained in them. The *White Industries* court observed:

⁵ We note the district court did not disclose which of the subsections of Iowa Rule of Evidence 801 formed the basis for this ruling that the exhibit constituted an admission.

Both individuals and businesses inevitably assimilate and to some degree “use” – for one reason or another – information from an enormous variety of outside sources. That, indeed, is the stuff of our daily lives; yet it would seem highly unrealistic to suggest that each of these innumerable occasions should be viewed as representing an “adoptive” admission of the truth of the information.

On balance, it seems appropriate to suggest that before this sort of internalized “use” of information from another can be qualified as an adoptive admission, it must be shown that the party acted (or failed to act) in some significant, identifiable way, in direct reliance upon the specific information in question, so as to demonstrate clearly the party’s belief in and intentional adoption of that information.

White Industries, 611 F. Supp. at 1063. We conclude ILEC’s retention of Exhibit 83 for reference purposes is, standing alone, insufficient to establish significant, identifiable action in direct reliance upon the statements contained in the exhibit. A company or individual must be free to retain unsolicited information without fear that it will be deemed to have manifested adoption or belief in its truth. Indeed, a company may choose, in furtherance of the goal of maintaining a well-informed workforce, to retain for reference purposes information with which it strongly disagrees. We conclude Exhibit 83 was not admissible as an adoptive admission pursuant to Iowa Rule of Evidence 801(d)(2)(B).

Schmitt also urged admission of Exhibit 83 pursuant to Iowa Rule of Evidence 801(d)(2)(C) as a statement by a person authorized by ILEC to make a statement concerning the subject. This rule requires that the declarant be an agent of the party-opponent against whom the admission is offered. *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164 (3d Cir. 1995), *cert. denied*, 516 U.S. 1145, 116 S. Ct. 1015, 134 L. Ed. 2d 95 (1996). The author of the exhibit’s memorandum and article about stray voltage was Al Bierbaum, the chief engineer for the Iowa Association of Electric Cooperatives. ILEC is a member of

the Association. It could reasonably be argued that members implicitly authorize the Association to publish and disseminate information about topics of interest to them; and that the important subject of stray voltage is within such authority. Although the necessary proof may be circumstantial, there must be an adequate foundational showing that the agent or servant was in fact authorized to make the statement. *White Industries*, 611 F. Supp. at 1064. "Mere showing that a statement was made by one who is identified generally as an agent or employee of the party, without some further proof as to the extent of his authority to make the statement" is insufficient. *Id.* There is no evidence of Bierbaum's authority to make the statements found in Exhibit 83 in a representative capacity for ILEC. Accordingly, we find no sufficient foundation for the admission of this exhibit pursuant to Iowa Rule of Evidence 801(d)(2)(C). Finding no applicable exception to the hearsay rule to justify admission of Exhibit 83, we conclude the district court erred by receiving it in evidence.

c.) *Exhibit 84.* This exhibit consists of a compilation of documents received by ILEC from various third parties. Each of the documents was produced by ILEC during discovery. In the district court, Schmitt urged: 1.) that the exhibit was not offered to prove the truth of the statements in it, but instead to prove the extent of ILEC's knowledge as it relates to the duty to warn Schmitt about stray voltage; and 2.) that the exhibit was admissible to prove the truth of the statements contained in it because it constitutes an admission of ILEC pursuant to Iowa Rule of Evidence 801(d)(2)(B). The district court ruled the exhibit was admissible as an admission of ILEC, but did not specify what

subsection(s) of Rule 801(d)(2) supported its ruling. We will discuss each document separately.

Pages 1 and 2 are a memorandum authored by Orvel E. Johnson, Manager of the REA's North Central Area – Electric Distribution Systems Division. The memo, dated March 2, 1981, was directed to Mr. Bierbaum, chief engineer of the Iowa Association of Electric Cooperatives. It was clearly not authored by ILEC in its individual or representative capacity, and was not admissible pursuant to Iowa Rule of Evidence 801(d)(2)(A). The memorandum discusses the problem of stray voltage in dairy barns and several alternative remedial measures to deal with it. For the reasons set out in our discussion of the admissibility of Exhibit 83, we conclude these pages of the exhibit were not admissible as adoptive admissions of ILEC pursuant to Iowa Rule of Evidence 801(d)(2)(B). However, we are committed to the rule that we must affirm the trial court's ruling if any sufficient basis appears in the record to sustain it. *Stover v. Central Broadcasting Company*, 78 N.W.2d 1, 4 (Iowa 1956). We affirm a ruling which admits evidence over a hearsay objection on any proper ground appearing in the record, even if it was not raised below. *State v. Weaver*, 608 N.W.2d 797, 805 (Iowa 2000). We conclude the memo is relevant and was admissible under the public records exception to the hearsay rule for the same reasons articulated in our discussion of Exhibit 82 above. See Iowa R. Evid. 803(8).

Pages 3 through 6 of Exhibit 84 contain a letter dated March 2, 1981, from Robert J. Gustafson, Associate Professor at the University of Minnesota, to Mr. Bierbaum. Gustafson was called by ILEC to testify as an expert in this case. In his letter, Gustafson responds to correspondence from Bierbaum about the use

of arresters for neutral isolation. Schmitt offered this correspondence as an admission pursuant to Iowa Rule of Evidence 801(d)(2)(B). The district court admitted the evidence, but did not articulate a rationale for doing so. We conclude these pages of the exhibit are clearly hearsay. We find no exception to the hearsay rule that would justify their admission in evidence. However, error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected. Iowa R. Evid. 103(a). ILEC offers no explanation of how it was prejudiced by the admission of this portion of Exhibit 84 authored by its expert, and we find no reversible error resulting from its admission.

The district court gave no explanation of its ruling admitting pages 7 and 8 of Exhibit 84. Page 7 appears to be a case history of an investigation of stray voltage at an unrelated location. Page 8 appears to contain data collected from a stray voltage investigation, but we are unable to discern if it has relevance to this case. Again, ILEC provides no explanation of how its substantial rights were prejudiced by the admission of these pages, and we find no resulting reversible error.

Pages 9 through 11 of this exhibit are a memorandum authored by Mr. Bierbaum, the chief engineer for the Iowa Association of Electric Cooperatives, and addressed to "All REC Managers and Directors." The memo bearing the date of April 23, 1991, suggests that it was precipitated by adverse national publicity surrounding the subject of stray voltage. The author provides a brief history of the stray voltage phenomenon and makes recommendations to rural electric cooperatives about responding to stray voltage problems. He encourages Cooperatives to inform members about the design of the electric

system and to train and inform employees, wiremen, and farmers about the subject of stray voltage through workshops and newsletter articles. These pages were offered by Schmitt and received in evidence as admissions⁶ of ILEC. We conclude these pages of the exhibit are hearsay. They were not authored by ILEC in its individual or representative capacities, and were therefore not admissible pursuant to Iowa Rule of Evidence 801(d)(2)(A). For the reasons set out in our discussion of the admissibility of Exhibit 83, we conclude these pages of the exhibit were not admissible as adoptive admissions of ILEC pursuant to Iowa Rule of Evidence 801(d)(2)(B). Furthermore, there is no foundation in the record for a finding that Bierbaum was authorized by ILEC to make the statements so that their admission could be justified by Iowa Rule of Evidence 801(d)(2)(C). Finding no other applicable exception to the hearsay rule, we conclude the district erred in admitting these pages of Exhibit 84.

Pages 13 through 24 of Exhibit 84 include a letter on the letterhead of the United States Department of Agriculture's Agricultural Research Service and an enclosure. The letter dated June 29, 1994, bears the signature of LaVerne Stetson, a professional engineer, and is addressed to ILEC. The enclosure is a copy of Engineering Practice 437 ("Equipotential Plane in Animal Containment Areas") published by the American Society of Agricultural Engineers. The ASAE engineering practice discusses the installation of wire mesh, reinforcing bars, or other conductive elements in concrete floors within livestock enclosures to control stray voltage. These pages were offered by Schmitt as an adoptive

⁶ The district court did not identify which subsection of Iowa Rule of Evidence 801(d) (2) formed the basis of his ruling.

admission of ILEC and received in evidence by the district court⁷. For the reasons set forth in our discussion of Exhibit 83 above, we conclude these pages were not admissible under Iowa Rule of Evidence 801(d)(2). However, they were cumulative of expert testimony offered by ILEC on the same subject. Accordingly, no substantial right of ILEC was affected by their admission. Iowa R. Evid. 103(a); *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996) (finding no prejudice where hearsay evidence is admitted and substantially similar evidence was admitted without objection).

Pages 67 through 77 of Exhibit 84 include a memorandum authored by Mr. Bierbaum, chief engineer of the Iowa Association of Electric Cooperatives to “all REC Managers and Member Service Personnel” and a summary of stray voltage research presented during a workshop held on August 10-11, 1983. Among the authors of the summary are two of ILEC’s expert witnesses: Robert Gustafson and John Kirk. Schmitt urged admission of these pages as an adoptive admission of ILEC. The district court admitted them but did not disclose the evidentiary rationale for doing so. We find no basis in the record to justify admission of these pages in evidence and conclude the district court erred in receiving them.

Pages 86 through 122 of Exhibit 84 consists of: 1.) an article co-authored by Plaintiff’s expert, Gerald Bodman, entitled “Digital Voltmeter for Checking Quality of Electrical Connections and Conductors”; 2.) “Selected Electrical Terminology” also authored by Bodman; and 3.) other technical information

⁷ *Id.*

whose origin could not be determined from our review of the record. These documents were clearly hearsay and were offered by Schmitt as adoptive admissions of ILEC. They were received in evidence, but the district court did not articulate an exception to the hearsay rule that would justify their admission in evidence. We have carefully reviewed the record and find no basis for their admission. The district court erred in receiving them.

Pages 123 through 166 of Exhibit 84 apparently represent technical materials presented at a stray voltage workshop presented by the Iowa Food and Energy Council in 1990. Like the other hearsay documents within the exhibit, they were retained by ILEC for reference purposes. Schmitt offered them as adoptive admissions. The district court received them as admissions, but did not articulate a subsection of Iowa Rule of Evidence 801(d)(2) that would justify its ruling. For the reasons set forth in our discussion of Exhibit 83, we conclude these pages were not adoptive admissions of ILEC. Finding no other justification in the record for their admission, we conclude the district court erred by receiving pages 123 through 166 of Exhibit 83 in evidence.

Pages 167 through 314 of the exhibit represent a stray voltage handbook published by the United States Department of Agriculture in December of 1991. The handbook was produced by 15 professors and scientists interested in the subject of stray voltage. Among the authors were Robert Gustafson, an expert who testified in this case for ILEC, and two engineers affiliated with the USDA's Agricultural Research Service. We find no abuse of discretion in the admission of this portion of Exhibit 84 over ILEC's hearsay objection. It was admissible as a public record or report pursuant to Iowa Rule of Evidence 803(8). Furthermore,

the subject pages of Exhibit 84 were admitted in evidence without objection as Exhibit 76 and no substantial right of ILEC was affected by the district court's ruling.

IV. Sufficiency of the Evidence Supporting Negligence Theory: This court reviews the trial court's judgment for errors of law. Iowa R. App. P. 4. The trial court's fact findings have the effect of special verdicts and are upheld if supported by substantial evidence. *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 846 (Iowa 1989). Findings are viewed in the light most favorable to upholding the trial court's judgment. *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). Under a substantial evidence standard, if reasonable minds could disagree on an issue in light of the evidence presented, the question is for the fact finder. Evidence is substantial when a reasonable mind could accept it as adequate to reach the same findings. *Papenheim v. Lovell*, 530 N.W.2d 668, 671 (Iowa 1995). Evidence is not insubstantial merely because it would have supported contrary inferences. *Grinnell*, 431 N.W.2d at 785. We construe the trial court's findings broadly and liberally. *Id.* In case of doubt or ambiguity we construe the court's findings of fact to uphold, rather than defeat, the judgment. *Id.* In addition, the standard of review prohibits us from weighing the evidence or the credibility of witnesses. *Id.*

ILEC claims expert testimony is necessary to show the appropriate standard of care just as it is in a claim of negligence against a professional. In *Schlader v. Interstate Power Co.*, 591 N.W.2d 10 (Iowa 1999), however, our supreme court rejected a power company's claim that expert testimony was

essential to a stray voltage claim. The court reasoned that “the nature of electricity and the results of contact with it by humans and animals is not beyond a common person’s understanding.” *Schlader*, 591 N.W.2d at 14. Thus, expert testimony was not essential to establish the standard of care against which ILEC’s acts and omissions are to be measured in this case. Accordingly, we proceed to determine whether Schmitt presented other sufficient evidence to support the district court’s findings of fact.

a.) *Negligent Design, Operation and Maintenance.* The district court found that “the interconnection at the transformer of the [neighbor’s] neutral and the Schmitt neutral (on ILEC’s side of the meter)” constituted “a defective condition and an operational defect . . . that, in the exercise of ordinary care, [ILEC] should have discovered and remedied.” This finding was expressly derived, in part, from the district court’s reliance upon inadmissible documents found at pages 13, 19, and 20 of Exhibit 83 and pages 11, 135, and 136 of Exhibit 84. The district court found that ILEC knew or should have known: 1.) that Schmitt’s stray voltage problem had an off-farm origin; and 2.) that Schmitt’s stray voltage problem could and should be promptly investigated and remedied with available technology. After careful review of the admissible evidence in the record, however, we find no substantial evidence in the record supporting a finding that ILEC failed to meet a standard of care with respect to the design, operation or maintenance of its electrical system. Although there is substantial evidence in the record to support a finding that stray voltage entered Schmitt’s farm through ILEC’s electrical system and by reason of the use of a common transformer to serve Schmitt’s and a neighbor’s farms, there is no substantial

evidence to support a finding that the design or configuration of ILEC's system failed to meet a standard of care for the power industry. We find no evidence in the record to support a finding that a reasonable power company would have operated or maintained its system in a manner different than ILEC did in this case. Accordingly, the district court should have granted ILEC's motion for directed verdict on this aspect of Schmitt's negligence claim.

b.) Failure to Warn. In testing the defendant's liability for negligence in failing to warn, the defendant is held to the standard of care of an expert in its field. *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994). The relevant inquiry is whether the defendant knew or should have known of the danger in light of the generally recognized and prevailing best scientific knowledge, yet failed to provide adequate warning to users or consumers. *Id.* at 289-90.

Exhibit 82 constitutes substantial evidence that electric cooperatives were aware of the stray voltage phenomenon and alternative methods of controlling it at least as early as 1981. A reasonable fact finder could find from the evidence that electric cooperatives were strongly urged to make "critically important" information about the phenomenon and remedial measures available to consumers as early as 1983. There is substantial evidence in the record without reference to Exhibit 83 and the inadmissible portions of Exhibit 84 to support a finding that ILEC knew or should have known of the risk posed by stray voltage from off-farm sources during the 1980's. Exhibit 76, a stray voltage handbook published by the United States Department of Agriculture in December of 1991, is substantial evidence that ILEC knew or should have known of several methods of mitigating the harmful effects of stray voltage. The district court found that a

reasonable power supplier “would have done more than sending an occasional warning about stray voltage as part of a newsletter distributed to its customers.”

We think reasonable minds could differ on the issue of whether given ILEC’s superior knowledge of the stray voltage, its risks for dairy farmers, its potential off-farm origin, and the alternative means of controlling it, ILEC should have done more than it did to warn Schmitt.

ILEC contends Schmitt was aware of the stray voltage phenomenon, and that, as a matter of law, it had no duty to warn Schmitt of the dangers associated with it. We acknowledge Schmitt’s admission of his basic awareness of the subject of stray voltage from reading articles about it in industry publications. However, we conclude ILEC’s argument is for the fact-finder. We are not persuaded we should hold as a matter of law that the power company with its considerable knowledge and expertise with regard to dangers resulting from off-farm sources of stray voltage had no duty to warn a farmer with limited general knowledge about the phenomenon and methods of controlling it. *See West v. Broderick & Bascom Rope Company*, 197 N.W.2d 202, 211 (Iowa 1972). Accordingly, we reject ILEC’s contention that it was entitled to a directed verdict on the warning claim.

V. Strict Liability Claim: The Iowa Supreme Court’s decision in *Schlader v. Interstate Power Co.*, 591 N.W.2d 10 (Iowa 1999), is controlling in this case. A utility company is not liable to its customers for stray voltage under strict liability theory in this State. *Id.* at 591 N.W.2d 13. Accordingly, strict liability principles may not be applied to the facts of this case.

VII. Conclusion. After careful consideration of the issues presented, we remand this case to the district court for the sole purpose of reallocation of fault between the parties. See *Cook v. State*, 476 N.W.2d 617, 623 (Iowa 1991). The district court shall make its findings on the reallocation of fault consistent with the terms of this order within 60 days. No new evidence shall be taken. No further briefs will be accepted by this court unless we request them following remand. We retain jurisdiction.⁸

Dated this 19th day of October, 2000.

/s/ Rosemary Shaw Sackett
Rosemary Shaw Sackett, Chief Judge

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⁸ We acknowledge that the procedure we follow here (remand in advance of the issuance of our decision) is not identical to that utilized by the court in *Cook v. State*, 476 N.W.2d 617, 623 (Iowa 1991). We believe the procedure chosen will, however, promote the most efficient use of the time and resources of the litigants and the courts.

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