

IN THE COURT OF APPEALS OF IOWA

No. 1-424 / 90-1688

FILED

DEC 31 1991

CLERK SUPREME COURT

FRANK HANGARTNER, PEGGY HANGARTNER, DEBRA HANGARTNER and
LANCE HANGARTNER,

Appellants,

285

vs.

INTERSTATE POWER COMPANY,

Appellee.

Appeal from the Iowa District Court for Fayette County,
James L. Beeghly, Judge.

Plaintiffs appeal, challenging several evidentiary
rulings. **AFFIRMED.**

Morris L. Eckhart of Milroy & Eckhart, Vinton, Iowa,
and B.J. Hammarback of River Falls, Wisconsin, for
appellants.

David L. Hammer and Angela C. Simon of Hammer, Simon &
Jensen, Dubuque, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden,
JJ.

HAYDEN, J.

Frank and Peggy Hangartner and their adult children, Lance and Debra Hangartner, operate a family dairy farm. Hangartners filed this suit against Interstate Power Company alleging Interstate's electric lines running across their property had "stray voltage" which harmed their dairy herd and reduced the herd's production of milk. Hangartners further alleged the reduced dairy production caused them financial losses and emotional distress.

The case was tried to a jury. The jury returned a verdict finding Interstate Power Company negligent, but its negligence was not a proximate cause of Hangartners' damages. Accordingly, judgment was entered for Interstate Power Company. Hangartners appeal.

Hangartners first contend the trial court erred by permitting Interstate to amend its answer on the first day of trial to include the affirmative defenses of comparative fault and mitigation of damages. Hangartners claim the amendment raised a different issue which they were not prepared to meet, thereby prejudicing their case.

Amendments should be allowed as a general rule and denied only in exceptional cases, but they should not be permitted when they substantially change the issues. Kellar v. Peoples Natural Gas Co., 352 N.W.2d 688, 692 (Iowa App. 1984). The trial court has considerable discretion in determining whether to allow amendment of pleadings. We will interfere with that decision only upon a clear showing the court abused its discretion. Id.

We determine the trial court did not abuse its discretion by allowing the amendment. Because of discovery which had already taken place, Hangartners had adequate notice of the affirmative defenses. The comparative fault evidence was not generated by Interstate. Hangartners' own witness generated this evidence by assigning a percentage of fault to Hangartners in his report after visiting the farm five months prior to trial. In addition, Hangartners' attorney stated to the court he had an inclination comparative fault would be raised and therefore had exhibits marked if they were necessary. This issue presents no grounds for reversal.

Hangartners next claim the trial court erred by admitting evidence that Frank Hangartner had abused his children. Initially, the trial court ordered this evidence was to be excluded. That order would have remained in force but for the direct examination of Lance Hangartner by his own attorney. The intent of the direct examination was to lead the jury to infer Lance Hangartner's relationship with his father had been good prior to the alleged stray voltage and had the resulting problems not occurred Lance would not have moved from the farm.

It is within the proper scope of cross-examination to bring forth facts contrary to those presented on direct examination and to rebut or explain inferences that might be drawn from the testimony. Dioptron Co. v. Dimmitt, 245 Iowa 450, 455-56, 62 N.W.2d 749, 751-52 (1954). It was

therefore proper for the trial court to permit on cross-examination further questions as to the quality of the parent-child relationship, the emotional strain resulting, and its effect on Lance's decision to leave the family farm and his father.

Hangartners next claim the trial court erred by allowing Dale Sharp to testify as an expert. In compliance with the trial court's pretrial order, Interstate served its supplemental answers to interrogatories on August 23, 1990, six days prior to commencement of trial. Mr. Sharp was disclosed as an Interstate employee having knowledge of facts relating to the liability allegations made by Hangartners. Interstate indicated the general nature and source of information for Mr. Sharp as "Interstate Power Company and certain management practices with respect to customer relations and complaints." The supplemental answer did not indicate Mr. Sharp would testify as an expert witness with regard to matters involving electricity and stray voltage, nor was Mr. Sharp one of three experts previously designated by Interstate. After establishing he was an electrical engineer, Sharp testified to whether the National Electrical Code applied to farms and to the significance of electrical grounds.

We agree with Hangartners that Sharp's testimony constituted expert testimony. See Iowa R. Evid. 702. We also agree with Hangartners the party responding to an interrogatory has a duty to supplement a response to

include the identify of each person expected to be called as an expert witness at trial, his qualifications, the subject matter on which he is expected to testify, and the substance of his testimony. Iowa R. Civ. P. 125(c). If the identify of an expert witness is not disclosed, the rule is clear the court in its discretion may, but is not required to, exclude the testimony of such expert. Id. We will reverse only when the trial court abused its discretion. An abuse of discretion is found only when such discretion is exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Hubby v. State, 331 N.W.2d 690, 697 (Iowa 1983).

Plaintiffs contend because Interstate failed to designate Sharp as an expert witness or to disclose the substance of his testimony they were deprived the opportunity to engage in meaningful discovery and to formulate their position at trial, thus allowing Mr. Sharp to express opinions as an electrical engineer was prejudicial. We disagree. Steve Mauer, an Interstate employee was called as an adverse witness by Hangartners during their case-in-chief. Testimony similar to Mr. Sharp's was elicited from this witness. Hangartners cannot claim prejudice when Mr. Sharp's testimony corroborated testimony already received as part of plaintiffs' case-in-chief.

Hangartners next assert we should reverse this case because of prejudicial misconduct by Interstate's counsel

in final argument. The arguments were not reported. No objection was made when the alleged misconduct occurred. Ordinarily this waives any impropriety in remarks of counsel. Team Central, Inc. v. Teamco, 271 N.W.2d 914, 926 (Iowa 1978). The reason for this rule is that failure to object deprives the trial court of the opportunity to avoid reversible error by timely admonition. Id. We find no merit in this complaint.

Finally, Hangartners contend various Production Credit Association records were improperly admitted under the business records exception to the hearsay rule. Counsel raises this objection with respect to a multitude of documents. We will consider only those documents specifically addressed by counsel in his brief.

Exhibits D-4 and D-5 constitute a memo from Production Credit Association to Frank Hangartner. At trial, plaintiffs' counsel objected to the admission of this memo on the grounds it was a settlement discussion. Exhibit D-19 consists of pleadings from the bankruptcy court which were contained in Production Credit Association's files. Plaintiffs' counsel objected to this exhibit at trial as misleading, confusing, and its prejudicial impact outweighed its probative value. On appeal, however, counsel claims exhibits D-4, D-5, and D-19 were inadmissible because they were not within the business record exception to the hearsay rule. Objections to the admission of evidence on different grounds than those

specifically urged in the trial court will not be considered on appeal. Luse v. Waco Community School District, 258 Iowa 1087, 1097, 142 N.W.2d 607, 613-14 (1966)..

Exhibit D-26 is a letter written by an attorney employed by Production Credit Association. Again, plaintiffs urge it is not a business record created by Production Credit Association and therefore it should not have been admitted by the trial court. Page 1912 of the trial transcript reveals, however, it was plaintiffs' counsel who requested its admission into evidence. Counsel cannot now complain.

Exhibit D-29 is a letter written by an attorney to a loan officer at Production Credit Association. Plaintiffs' counsel directs our attention in the record to his statement "[w]e would object for the grounds previously urged." However, counsel does not identify where he lodged a specific objection to this evidence. Accordingly, we find no preserved error as to this assignment.

In conclusion, we affirm the trial court on all issues. Costs of this appeal are assessed to Hangartners.

AFFIRMED.