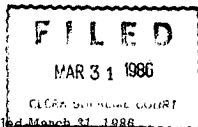


IN THE COURT OF APPEALS OF IOWA



ROBERT CRAIG RABE,)

Plaintiff-Appellant,)

vs.)

IOWA POWER AND LIGHT COMPANY, An)
Iowa Corporation,)

Defendant-Appellee,)

DARIN LEE BALLARD, LARRY DAVID)
JOHNSON, and JODY LEE HESS,)

Defendants.)

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Appeal from the Iowa District Court for Polk County (No. CL 40-23234)

- Robert O. Frederick, Judge.

Plaintiff appeals from judgment for defendant in a negligence action.

AFFIRMED.

Verne Lawyer, Des Moines; Richard H. Doyle IV, Des Moines; and Robert G. Tully, Des Moines, for plaintiff-appellant.

Gregory R. Brown, of Duncan, Jones, Riley & Finley, Des Moines, for defendant-appellee.

Roland D. Peddicord, of Peddicord & Wharton, Des Moines, for defendants Johnson and Hess.

Richard J. Sapp, of Nyemaster, Goode, McLaughlin, Emery & O'Brien, P.C., Des Moines, for defendant City of Ankeny.

Heard by Schlegel, P.J., and Snell, and Sackett, JJ.

Plaintiff Robert Rabe sustained injuries in 1980 when the car in which he was a passenger struck a utility pole during an attempt to avoid a collision with another vehicle. He alleges the defendant Iowa Power was negligent with regard to the placement of the pole. The pole in question was located on a right-of-way approximately seventeen feet from the traveled portion of the road and approximately four feet beyond the shoulder. The jury returned a verdict in favor of defendant Iowa Power.

Plaintiff appeals asserting the trial court erred: (1) in refusing to allow the jury to consider provisions of a safety code adopted after the erection of a utility pole alleged to have been negligently placed, and (2) in refusing to submit to the jury various instructions relating to the hazardous nature of the placement of the pole. Defendant Iowa Power does not cross-appeal but asserts: (1) that the evidence was insufficient to establish breach of any duty owing to plaintiff and that a directed verdict therefore should have been entered; (2) that error was not preserved on the safety code issue when its provisions were presented to the court through an offer of proof during the testimony of an improper rebuttal witness; and (3) that any error was harmless. In reply plaintiff asserts that the testimony of the rebuttal witness was proper and that, assuming *arguendo* that it was not, the court should have taken judicial notice of the safety code when it has been adopted as a statutory standard.

Our review is for correction of errors at law. Iowa R. App. P. 4. The findings of fact by the jury are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. Safety Code

Defendant Iowa Power, in its Motion in Limine, requested the court to enter an order that all counsel refrain from referring to the provisions of any editions of the National Electrical Safety Code which were not in effect at the time the pole was installed.

Plaintiff Rabe argued Iowa Power had the duty to upgrade its system with regard to new statutes and codes as they became effective. Plaintiff contended the newer Code was relevant as to the degree of care required by Iowa Power and to show what was reasonable under the circumstances.

The court sustained Iowa Power's Motion in Limine. Plaintiff made an offer of proof concerning the provisions of the 1977 Electrical Safety Code. The court again ruled the evidence inadmissible. Additionally, plaintiff requested the trial court to give to the jury plaintiff's instructions which embodied a section of the 1977 National Electrical Safety Code. The court denied the request.

The trial court has discretion to keep out of the record what it believes to be irrelevant, immaterial evidence. Thompson v. Bohlken, 312 N.W.2d 501, 509 (Iowa 1981); Mercer v. Chi, 282 N.W.2d 697, 700 (Iowa 1979). A trial judge can and should exclude evidence when convinced it will create a danger of prejudice outweighing its probative value. E.I. du Pont de Nemours v. Berkley & Co., Inc., 620 F.2d 1247, 1272 (8th Cir. 1980)(discussing Fed.R.-Evid. 403; identical to Iowa R. Evid. 403). The judge has wide discretion in ruling on the admissibility of evidence; his decisions will not be disturbed "unless there is a clear and prejudicial abuse of discretion." Id.; Henkel v. R. and S. Bottling Co., 323 N.W.2d 185, 193 (Iowa 1982).

Carter v. Wiese Corp., 360 N.W.2d 122, 130-31 (Iowa App. 1984).

In support of its position, Iowa Power argued the National Electrical Safety Code that was in effect at the time the pole was installed was a 1961 edition. They argue the 1977 edition of the Code was not applicable at the time the pole was installed and therefore should not be allowed into evidence, citing Coleman v. Hall, 161 N.W.2d 329 (Iowa 1968). Iowa Power noted the 1977 Code indicates that existing installations, including maintenance replacements, which comply with prior editions of this Code need not be modified to comply with the '77 edition except as may be required for safety reasons by the proper administrative authority. Plaintiff, however, contended Coleman v. Hall is distinguishable since it involved a structure that was specifically excluded from the statute,

and that in this situation the pole does not have a specific exclusion. Also, plaintiff argues Iowa Power had the duty to upgrade its system to comply with new statutes and codes as they became effective, and therefore, the 1977 National Electrical Safety Code is clearly relative and material. Iowa Power contends the Iowa State Commerce Commission is the proper administrative authority and the commission had not passed anything requiring Iowa Power to put the pole in a different location.

Plaintiff attempted to introduce the 1977 Electrical Safety Code at trial for the limited purpose of showing the validity of the testimony already in the record that the utility pole should be placed as far as practicable from the road-way edge. The court stated in part:

THE COURT: . . . I understand plaintiff's theory in the matter, but this testimony has already been in the record by the witnesses referred to and with the instruction the Court would give, it would be putting undue weight on this provision of the Code so far as what was in 1977.

MR. LAWYER: That's just the point, Your Honor.

THE COURT: So the Court rules it would not be admissible.

We will not interfere with the trial court's decision in excluding evidence unless it has clearly abused its discretion to prejudice the complaining party. Henkel v. R. and S. Bottling Co., 323 N.W.2d 185, 193 (Iowa 1982). The trial court has discretionary authority to exclude evidence when the probative value thereof is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. Id.

We do not find the trial court abused its discretion. The admission of the 1977 Code provision could have misled the jury to believe Iowa Power had a statutory duty to comply with the standard. The Commerce Commission has adopted the 1977 National Electrical Safety Code, but the provisions of this '77 Code were not to be applied retroactively unless the commission required it. The commission did not apply the rules retroactively. The trial court did

not err in refusing to allow the jury to consider certain provisions of the 1977 National Electrical Safety Code. We need not address the remaining arguments.

II. Jury Instructions

Plaintiff contends the trial court erred in refusing to submit to the jury plaintiff's requested instructions numbers 12, 13, 15, and 27. We look at the following guidelines.

Where a party requests an instruction stating a correct rule of law having application to the facts of the case, and the concept is not otherwise embodied in the Court's instructions, he is entitled to have his requested instruction or its substance given.

Adam v. T.I.P. Rural Electric Cooperative, 271 N.W.2d 896, 901 (Iowa 1978); Porter v. Iowa Power and Light Company, 217 N.W.2d 221, 234 (Iowa 1974).

The instructions submitted must be considered as a whole and if all necessary matters pertaining to the case are included, the failure to include some unnecessary specific circumstances do not form the basis for reversal.

Bryan v. Iowa State Highway Comm'n, 251 Iowa 1093, 1097, 104 N.W.2d 562, 564 (1960).

In determining whether there is an error in trial court's failure to submit a requested instruction, we look to all relevant instructions. If the substance of the requested instruction is covered in instructions given it is not error to refuse the request made.

Palleson v. Jewell Cooperative Elevator, 219 N.W.2d 8, 17 (Iowa 1974).

Plaintiff's requested instruction number 12 reads: "The presence of a utility pole in a highway right-of-way is a hazard." Plaintiff contends there was sufficient evidence in the record to support giving such an instruction to the jury and that it was not contained in any of the other instructions given to the jury.

We find the trial court did not err in refusing to give requested instruction number 12. The language of this instruction is conclusory as to the issue of

fact the jury was to decide. The jury was properly instructed as to the hazard posed by a utility pole in Instruction No. 23 which provides in part:

Defendant Iowa Power and Light Company installed the power pole involved on the right-of-way on S.W. Ordinance Road in the City of Ankeny. In making such an installation, Defendant Iowa Power and Light Company was required to exercise ordinary care such as not to create an unreasonable hazard to others who might with reasonable foreseeability be brought into contact with such pole. This duty would extend to those who with reasonable care are either travelling upon the street involved or who might with reasonable foreseeability deviate from the ordinary course of travel. (emphasis added).

The trial court properly refused to give requested instruction number 12.

Plaintiff's requested instruction number 13 states:

You are instructed that Defendant Iowa Power and Light Company knew, at least as early as 1962, that the presence of utility poles along the right-of-way added considerably to the hazard when a driver on the highway loses control of his vehicle or for any reason is diverted to the shoulder or generally untravelled portion of the right-of-way.

You are further instructed Defendant Iowa Power and Light Company also knew that collision with a heavy pole is always a dangerous possibility if the pole is within the right-of-way.

Therefore, if you find that Defendant Iowa Power and Light Company, armed with this knowledge did, in 1966, install a utility pole 40 feet south of the north right-of-way line on SW Ordinance Road when it could have reasonably been installed at least 20 feet north of the position where it was located on November 15, 1980, then Defendant Iowa Power and Light Company would be negligent in such installation and you should so find.

Plaintiff urges the requested instruction embodies the concept contained within Iowa Power and Light Co. v. Iowa State Highway Comm'n, 254 Iowa 534, 541, 117 N.W.2d 425, 429 (1962). A reading of the case proves otherwise. The court in Iowa Power was discussing the authority of the state highway commission and whether the commission in its discretion could prevent utilities from constructing powerlines along interstate highways. Id.

So we think Highway might well, and as a proper exercise of discretion, refuse to permit utility facilities along and upon the rights of way. It is urged that the utility lines will be at the outer edges of the right of way, and so harm or inconvenience no one. There are at least two answers to this that readily occur. Interstate highways, in fact, all highways, are subject to increasing traffic burdens; it seems certain that in the foreseeable future it will be desirable to widen many of them and so use a greater part of the right of way for carrying traffic; and again, the presence of utility poles along the right of way adds considerably to the hazard when a driver on the highway loses control of his vehicle or for any reason is diverted to the shoulder or generally untraveled portion of the right of way. Collision with a heavy pole is always a dangerous possibility under such circumstances.

Id (emphasis added).

Plaintiff is attempting to take the court's holding out of context and apply it so that the instruction would lead the jury to believe anytime a vehicle hits a utility pole located in the right-of-way the utility is negligent. The trial court did not err in refusing to give plaintiff's requested instruction number 13.

Plaintiff's requested jury instruction number 15 provided:

At the time Iowa Power and Light Company placed and erected the utility pole involved, an Ankeny ordinance provided as follows:

All poles shall be erected, adjusted and maintained in a manner so as to not endanger persons or property or to unnecessarily hinder or obstruct the free use of the streets, alleys or private or public property.

If you find that Defendant Iowa Power and Light Company failed to comply with this provision of the law, it was negligent.

Plaintiff argues the trial court erred in not giving this instruction which was the ordinance applicable at the time of the pole installation. Instead, the court instructed on the ordinance existing at the time of the collision, and plaintiff alleges this is inconsistent in light of the court's ruling on the admissibility of the 1977 National Electrical Safety Code.

The instruction (number 22) the trial court did give to the jury read:

At the time of the occurrence, an Ankeny city ordinance provided as follows:

Installation and maintenance of service facilities. The grantees (Iowa Power) plant and equipment, including all transmission lines, whether overhead or underground, and other distribution facilities shall be installed in accordance with good engineering practices and shall be located, erected, constructed, re-constructed, replaced, removed, repaired, maintained and operated so as not to endanger or interfere with the lives of persons, or to unnecessarily hinder or obstruct pedestrian or vehicular traffic to public way, places and structures. The erection, installation, construction, replacement, removal, repair, maintenance and operation of the electric energy systems shall be in accordance with all applicable laws, regulations and codes of the State and applicable ordinances, regulations and codes of the city.

If you find that either Defendant to Cross-Petitioner City of Ankeny or Iowa Power and Light Company failed to comply with this provision of the law, this may be found to be evidence of negligence.

Plaintiff's requested instruction number 15 is embodied in instruction number 22 which was given to the jury. The trial court did not err in refusing to give the requested instruction.

Finally, plaintiff contends the trial court erred in failing to give its requested instruction number 27 which provides:

In the interests of safety to the travelling public, it was recommended in the highway safety industry as early as the 1950's decade that utility poles in rural areas should be placed at least forty-five (45) feet from the center line of the travelled portion of the roadway towards the right of way line, or fifty-five (55) feet from the center line of the travelled portion of the roadway towards the right of way line if there was sufficient right of way.

If you find that Defendant Iowa Power and Light Company failed to comply with this provision of the law, it was negligent.

This instruction relates to utility poles in rural areas. The pole in question was located in a residential area. Furthermore, the trial court gave an instruction (number 21) on the issue of noncompliance with regard to safety codes, standards,

or recommendations. Requested instruction number 27 is also misleading when it states failure to comply with this provision of the law is negligence. Violation of a private safety code which has not been given the force of law is evidence on the issue of negligence but is not negligence per se. Jorgensen v. Horton, 206 N.W.2d 100 (Iowa 1973). The trial court did not err in refusing to give the requested instruction.

We affirm the trial court.

AFFIRMED.

All judges concur except Schlegel, J., who dissents.

I dissent. The trial court sustained defendant's motion in limine concerning the safety code of 1977, because it was not in effect when the pole in question was placed. The majority fails to determine whether that safety code applies to the pole, and holds that the court did not abuse its discretion in failing to allow that code to be introduced for any purpose. At the very least, the plaintiff was entitled to introduce the code provision for consideration as to reasonable care in the placement of poles. It seems to me that the majority discovered the case of Jorgensen v. Horton, 206 N.W.2d 100 (Iowa 1973), too late for the use of the 1977 edition of the National Electric Safety Code, but in time to use it on the issue of the recommendations of the highway safety code.

I would reverse on the issue of the failure of the court to permit the introduction of the 1977 edition of the Electric Safety Code, and would permit it as evidence of the standard of care thought to be required by that industry.