



367

IN THE COURT OF APPEALS OF IOWA

T. LEE MANLEY AND LEONE MANLEY,)

Appellants,)

Filed December 28, 1977

vs.)

280
2-59508

O'BRIEN COUNTY RURAL ELECTRIC)
COOPERATIVE, a Corporation,)

Appellees.)

Appeal from O'Brien District Court - Murray S. Underwood, Judge.

Plaintiffs appeal jury verdict in favor of defendant utility alleging the trial court erred in instructing the jury regarding assumption of risk. - Reversed and remanded for new trial.

H. R. Grigg, of Smith & Grigg, of Primghar, for Appellants.

Richard J. Barry, of James, Greer, Hoover, Nelson, Bertell, Montgomery
& Barry, of Spencer, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

The sole issue on this appeal by plaintiffs T. Lee and Leone Manley is that the trial court erred in instructing the jury. The jury returned a verdict in favor of the defendant O'Brien County Rural Electric Cooperative. The trial court overruled the Manley's motion for new trial. We reverse and remand for new trial.

Since *Rosenau v. City of Estherville*, 199 N.W.2d 125, 133 (Iowa 1972), "in a common-law tort case in which defendant raises the issue of plaintiff's negligence, the elements of 'assumed risk' shall no longer be pled and instructed on as a separate defense." There was no instruction upon assumption of risk as a separate defense in the instant case. Notwithstanding this facial compliance with *Rosenau*, the introduction of assumption of risk language in Instructions 22, 24, and 26 effectively accomplished the forbidden result of *Rosenau*: duplicitous instructions on a single aspect of the case, giving undue emphasis to the potential contributory negligence of the plaintiff.

Instruction No. 22 describes the defense of contributory negligence and specifies the following particulars in which the defendant claims the plaintiff Manley was negligent:

- (a) working in a place of known danger without insulated gloves and clothing when he knew or should have known coming into contact with the supply line without such protection would cause injury to him.
- (b) "assuming the known risk" of working in an area of known danger without wearing insulated gloves and clothing when he knew or should have known that coming in contact with the supply lines without such protection would cause injury to him.
- (c) working in a place of known danger to accomplish his task by placing the ladder northwest of meter pole whereas reasonable prudence would have dictated placement of the ladder southeast of the meter pole to avoid supply lines.
- (d) "assuming the known risk" of working in an area of known danger whereas he could have accomplished his task without placing himself in the area of defendant's supply lines where he knew or should have known that

- 2 -

coming into contact with the supply line would cause injury to him.

- (e) allowing a portion of his body to come in contact with an electrical supply line known to be carrying electricity when he knew or should have known that coming in contact with the supply line would cause injury to him.
- (f) failing to keep a proper lookout during the period of time he was at the top of the pole.

Instruction No. 24 sets out the defendant's allegation that Manley was "negligent in assuming the known risk" of working in an area of known danger without wearing insulated gloves and clothing when he knew or should have known that coming in contact with the supply lines without protection would cause injury to him. It further specifies that "in assuming a risk", if any, which was known to him in doing the work, Manley's duty was to exercise reasonable care under the circumstances. It relates to the same act or omission instructed upon in Instruction No. 23.

Instruction No. 26 sets out defendant's allegation that Manley was negligent "in assuming the known risk" of working in an area of known danger, whereas the task could have been accomplished without placing himself in the area of defendant's supply lines, when he knew or should have known that coming in contact with the supply lines would cause injury to him. It further specifies "in assuming a risk, if any," it was Manley's duty to exercise reasonable care under the circumstances including the known risk. It relates to the same act or omission instructed upon in Instruction No. 25.

We find within Instruction No. 22 alone there is unwarranted repetition in subparagraphs (a) and (b) and in subparagraphs (c) and (d). Instructions 24 and 26 instruct on the standard for judging the same acts or omissions treated in Instructions 23 and 25. The cumulative effect of these instructions is to introduce assumption of risk as an additional defense. **Rosenau** seeks to assure a just decision made by a jury deliberating unhampered by the intricacies of legal doctrines which allow one party a favored status. We find the instructions' repetitive and frequent reference to Manley's assuming the risk does indeed impermissibly focus upon a

single aspect of the case thereby giving undue emphasis to the alleged contributory negligence of Manley.

On retrial, should the facts be similar, Instruction 22 with the deletion of subparagraphs (b) and (d) should suffice to fully apprise a jury of the defendant's allegation that Manley negligently incurred the electrocution injuries he suffered. Instructions 23 and 25 are sufficient to give the jury the standard of care by which subparagraphs (a) and (c) of Instruction 22 should be judged. Instructions 24 and 26 should be eliminated. Assumption of the risk language should be avoided.

To provide guidance for retrial, we reach two other issues urged by the Manleys. Instruction 27 refers to the allegation of plaintiff's "negligence in allowing a portion of his body to come in contact with an electrical supply line. . . ." Such an allegation is one of general negligence impermissible under *Tieling v. Heles*, 195 N.W.2d 704, 708 (Iowa 1972). In contrast we believe an allegation of "touching" would constitute a charge of specific negligence.

We agree with the Manleys that Instruction 17 erroneously allows the jury to conclude the plaintiff has to prove his freedom of contributory negligence. Such a result is obviously counter to § 619.17, The Code 1975, which places the burden of proving contributory negligence upon the defendant. *Nelson v. Iowa-Illinois Gas and Electric Co.*, 160 N.W.2d 448, 452 (Iowa 1968), which served as the basis for Instruction 17, was an appeal from the trial court's directed verdict at the close of all evidence. There was no issue regarding proper instruction of the jury before the supreme court in that case. We believe the *Nelson* "correct statement of the law" embodied in the jury instruction in the instant case fails to pass the ultimate test of *Rosenau*: whether an instruction is likely to confuse or mislead the jury. *Collegiate Manufacturing Co. v. McDowell's Agency, Inc.*, 200 N.W.2d 854, 859 (Iowa 1972). Upon retrial the jury should not be instructed regarding plaintiff's contributory fault in the instruction setting out the defendant's duty to properly insulate its electrical supply lines.

Reversed and remanded for new trial.

Donielson, J. dissents.

- 1 -

DONIELSON, J. (dissenting)

I dissent. I cannot subscribe to an interpretation of these jury instructions requiring reversal and a new trial. Plaintiffs concede that Instruction No. 17 is a correct statement of the law, *Nelson v. Iowa-Illinois Gas and Electric Co.*, 160 N.W.2d 448, 452 (Iowa 1968), but argue that the language "without contributory fault on their part" is impermissible in light of *Rosenau v. City of Estherville*, 199 N.W.2d 125, 133 (Iowa 1972).

In the instant case, the jury was instructed to consider the instructions as a whole. By viewing Instruction No. 17 and some others in isolation, the majority ignores the fact that each instruction should be construed in the light of and in harmony with every other instruction, and applied as a whole to all the evidence admitted at trial. *Dickman v. Truck Transport, Inc.*, 224 N.W.2d 459, 464 (Iowa 1974); *State v. Johnson*, 243 N.W.2d 598, 604 (Iowa 1976).

Instruction No. 22 more than adequately cleared up any confusion regarding contributory negligence and assumption of the risk which may have been created by Instruction No. 17. Instruction No. 22 provides in part:

"... The law of Iowa provides that if a person who has been injured or damaged was himself negligent and such negligence was a proximate cause of his injury or damage, then he cannot recover from another. This is known as the defense of contributory negligence, and the burden of proof of such defense is upon the defendant. ...

"Proximate cause has been heretofore defined. A particular result may have more than one proximate cause, and the negligence of two or more persons may combine so that the negligence of each is a proximate cause of an injury or damage. With respect to this defense, the negligence of the injured person must be a proximate cause of his injury or damage, but it need not be the only proximate cause.

"To sustain this defense, the burden is on the defendant to prove by a preponderance of evidence both of the following propositions:

1. That the plaintiff himself was negligent in one or more of the particulars as asserted by the defendant.
2. That such negligence was a proximate cause of his injury or damage.

"If the defendant has so proved both of the foregoing propositions, then the plaintiff is not entitled to recover and your verdict should be for the defendant on the plaintiff's claim. ..."

Furthermore, even if the reference to contributory negligence contained in Instruction No. 17 was impermissible, the law is settled that it does not constitute

- 2 -

reversible error unless it rises to the level of undue emphasis. *Clarke v. Hubbell*, 249 Iowa 306, 316, 86 N.W.2d 905 (1957). Although plaintiffs allege undue emphasis in the instant case, a review of all the instructions leads me to conclude that such emphasis did not occur here. *Miller v. Town of Ankeny*, 253 Iowa 1055, 1060-1061, 114 N.W.2d 910 (1962); *Andrews v. Struble*, 178 N.W.2d 391, 400 (Iowa 1970); see *Wiedenfeld v. Chicago & N. W. Transp. Co.*, 252 N.W.2d 691, 696-697 (Iowa 1977).

The court in *Hoyt v. Chicago Rock Island & Pacific Railroad Co.*, 206 N.W.2d 115, 120 (Iowa 1973) responded to an argument similar to the one made in the instant case in the following manner:

"The court fully and fairly presented the issues to the jury. Any repetition in stating the duties of the plaintiff or the elements necessary to find contributory negligence were no more than required for a clear presentation of the issues."

The record reflects that several days or parts of days were spent by the trial judge and experienced trial attorneys in drafting the instructions to be given. Upon a careful review of this case, I am convinced that the trial court was attempting to achieve dual purposes with its instructions--to correctly state the law pursuant to Nelson and to comply with the requirements of Rosenau. I cannot say that it failed in either regard.