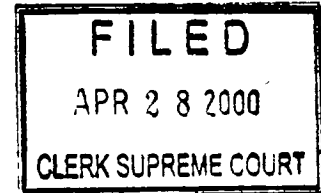


IN THE COURT OF APPEALS OF IOWA

No. 0-180 / 99-1137

Filed April 28, 2000

**KENT F. THOMPSON, Executor of the
Estate of DARYL M. THOMPSON,
Deceased, KENT F. THOMPSON,
Individually, and TODD J. THOMPSON,
Individually,
Plaintiffs-Appellants,**



vs.

**KEITH SCHULDT and CARLENE JOY
SCHULDT, Husband and Wife, d/b/a
J & K PROPERTIES, and KEITH SCHULDT,
Individually, and MID AMERICAN ENERGY
COMPANY, f/k/a B & C HOLDINGS,
Defendants-Appellees.**

Appeal from the Iowa District Court for Bremer County, Jon Stuart Scoles,
Judge.

Daryl Thompson, a tenant in an apartment building owned by defendants-appellees Keith and Carlene Joy Schuldt, was injured and died as a result of a natural gas explosion upon entering his apartment in the building. The executor of Daryl's estate, plaintiff-appellant Kent F. Thompson, brought this suit contending the explosion was the result of the negligence of the Schuldts and defendant-appellee MidAmerican Energy Company, who supplied natural gas to the apartment building. The case was submitted to a jury which failed to find negligence on the part of any defendant. On appeal plaintiff contends that the district court erred in (1) not including in the instructions to the jury an allegation that Keith Schuldt, who was remodeling the building at the time of the explosion,

was negligent in not obtaining a building and demolition permit from the City of Waverly, and (2) in not allowing the testimony of Paul Lageschulte, a former employee of a local LP gas company. **AFFIRMED.**

Gary J. Boveia of Boveia Law Firm, Waverly, for appellants.

Gene Yagla and Karla J. Shea of Yagla, McCoy & Riley, P.L.C., Waterloo, for appellees-Schulds.

Stephen J. Powell and Jim D. DeKoster of Swisher & Cohrt, P.L.C., Waterloo, for appellee-MidAmerican Energy Company.

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

SACKETT, C.J.

Daryl Thompson, a tenant in an apartment building owned by defendants-appellees Keith and Carlene Joy Schuldt, was injured and died as a result of a natural gas explosion upon entering his apartment in the building. The executor of Daryl's estate, plaintiff-appellant Kent F. Thompson, brought this suit contending the explosion was the result of the negligence of the Schuldts and defendant-appellee MidAmerican Energy Company, who supplied natural gas to the apartment building. The case was submitted to a jury which failed to find negligence on the part of any defendant. On appeal plaintiff contends that the district court erred in (1) not including in the instructions to the jury an allegation that Keith Schuldt, who was remodeling the building at the time of the explosion, was negligent in not obtaining a building and demolition permit from the City of Waverly, and; (2) in not allowing the testimony of Paul Lageschulte, a former employee of a local LP gas company. We affirm.

The explosion occurred on June 5, 1996, the day after Keith commenced the remodeling project and began tearing out walls and ceilings. The Schuldts had taken possession of the building on May 30 of the same year. Keith began remodeling without a building or demolition permit, though it was conceded the Waverly city ordinances provided he should have applied for and received a permit before beginning.

The fire marshal was of the opinion that the explosion was the result of the ignition of natural gas that leaked from a fitting behind the gas stove in decedent's apartment. The stove, belonging to the Schuldts, was connected to the main gas supply line to the apartment by a flexible stove connection line.

Plaintiff contends Keith, during remodeling, moved a pipe carrying natural gas to decedent's apartment causing the flexible stove connection line to break. It is without dispute that Keith on the day of the explosion removed a wall exposing three galvanized steel pipes. One of the pipes was the gas line to decedent's apartment. Keith was to testify he assumed all three pipes were water pipes because of their color. A gas line is supposed to be black and none of the three pipes were. There was no bracket to hold the pipes. Keith was not aware he had touched the pipes but admitted he may have.

The fire marshal noted that movement of the gas pipe in the area where Keith had exposed it caused the end of the pipe in decedent's apartment to move. The marshal was of the opinion that the movement of this line caused the flexible stove connection line to separate on the fitting resulting in the escape of gas and ultimate explosion.

The claim against defendant MidAmerican was premised on the claim that it was aware of the danger associated with flexible connectors such as the one on the stove in decedent's apartment, and MidAmerican's failure to warn their customers of this danger was negligence that was the proximate cause of decedent's injuries and ultimate death.

The first contention is that the district court should have given a requested instruction including a specification that Keith was negligent in not obtaining a building and demolition permit, and the jury should have been instructed that this failure was either negligence per se or evidence of negligence.

We review claims of erroneous jury instructions for errors at law, *Lovick v. Wil-Rich*, 588 N.W.2d 688, 692 (Iowa 1999). The standard of review for jury

instructions is whether prejudicial error by the trial court has occurred. *Thavenet v. Davis*, 581 N.W.2d 233, 236 (Iowa 1999). Instructions must be considered as a whole, and if the jury has not been misled there is no reversible error. *Id.*

In general, litigants are entitled to have their legal theories submitted to the jury if they are supported by the pleadings and substantial evidence in the record. *Lane v. Coe College*, 581 N.W.2d 214, 216 (Iowa App. 1998); *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). Evidence is substantial when reasonable minds would accept it as adequate to reach the conclusion. *Lane*, 564 N.W.2d at 216. The sufficiency of the evidence to warrant submission of a pleaded issue to the jury is decided by giving the evidence the most favorable construction it will reasonably bear in favor of the party urging submission. *Collegiate Mfg. Co. v. McDowell's Agency, Inc.*, 200 N.W.2d 854, 858 (Iowa 1972). If the requested instruction states a correct rule of law which applies to the facts of the case, and the concept is not already contained in the court's instructions, the requested instruction, or the court's own instruction with the same legal substance, should be submitted to the jury. *Lane*, 564 N.W.2d at 216; *Erickson v. Des Moines Water Works*, 421 N.W.2d 155, 157 (Iowa App. 1988).

The jury was instructed as to Keith's alleged negligence in applicable part:

The plaintiff claims that defendant Keith Schuldt, individually, was at fault due to his negligence. In order to recover on his claim against defendant Keith Schuldt, individually, the plaintiff must prove all of the following propositions:

1. Keith Schuldt, individually, was negligent in one or more of the following ways:

- a. In failing to shut off the supply of natural gas before commencing demolition activities; or
- b. In failing to shut off the supply of natural gas after coming into contact with or otherwise disturbing the natural gas pipe leading to the upstairs apartment at 1161/2 5th Street, N.W., Waverly, Iowa.

2. That said negligence was a legal cause of damage to the plaintiff.

The City of Waverly building code is found at chapter 90 of the City Code of Ordinances. Section 90.5 of the code requires a permit to be obtained prior to beginning demolition of a building. It states as follows:

SEC. 90.5 DEMOLITION. No person shall engage in the business of demolition without a permit issued under the supervision of the public works director. The director may stipulate any reasonable conditions for the issuance of a permit . . .

Section 90.7(1) of the code provides that all work for which a permit is required shall be inspected by the building inspector, who may "inspect any part of the work performed periodically and when the work is completed." Section 90.10 authorizes the director to "order that the supply of any city service, including utility services, to a premises be disconnected if the director determines substantial cause exists for disconnecting the service to protect life or property."

Defendant asserts that while he may have been negligent in not getting the permits, there is no evidence his failure to do so was the proximate cause of Daryl's injuries.

There is no evidence that had Keith obtained the required permits that there would have been an inspection or if there was an inspection that the inspector would have discovered one of the three pipes carried natural gas or required Keith to shut off the natural gas to the building. On the record made we

agree with the district court that there was insufficient evidence to support a finding that the failure to obtain a permit was a proximate cause of the injury and death. Plaintiff has not shown the prejudice for reversal on this issue.

Keith admits he was negligent in not obtaining the required permits. The issue therefore focuses on the questions of whether there was evidence to support an instruction that this negligence was a proximate cause of decedent's injury and ultimate death.

Negligence is only actionable if it is a proximate cause of injury. *Crookham v. Riley*, 584 N.W.2d 258, 265 (Iowa 1998). Even though negligence may have been established, it does not necessarily follow that proximate cause exists; this question must be separately determined. *Hassselman v. Hasselman*, 596 N.W.2d 541, 545 (Iowa 1999); *Blackhawk Bldg. Systems Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288, 290 (Iowa 1988). 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 the court. Iowa R. App. P. 14(f)(10); *Crookham*, 584 N.W.2d at 265; *Hagen v. DeNooy*, 563 N.W.2d 4, 7 (Iowa App. 1997).

The element of proximate cause has two components: "(1) the defendant's conduct must have in fact caused the plaintiff's damages, and (2) '[t]he policy of the law must require the defendant to be legally responsible for the injury.'" *Hasselman*, 596 N.W.2d at 545; *Gerst v. Marshall*, 549 N.W.2d 810, 815 (Iowa 1996). Our focus in the present case is on the first component, commonly known as causation in fact. See *Gerst*, 549 N.W.2d at 815. To prove causation in fact, the plaintiff must at a minimum establish that, but for the defendant's

negligence, the plaintiff's injury would not have occurred. *Hasselman*, 596 N.W.2d at 546; see *Gerst*, 549 N.W.2d at 815, 817. In other words, "[T]here must be some causal relationship between the defendant's conduct and the injury or event for which damages are sought." *Hasselman*, 596 N.W.2d at 545; *Gerst*, 549 N.W.2d at 818 (quoting *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. 1993) (en banc)).

When a jury is left to speculate on whether the defendant's conduct in fact caused the plaintiff's damages, the evidence is insufficient to support a finding of proximate cause. *Hasselman*, 596 N.W.2d at 546; See *Gerst*, 549 N.W.2d at 818-19. Rather, a jury must be provided with facts affording a reasonable basis for ascertaining the loss. See *Blackhawk*, 428 N.W.2d at 291.

Plaintiff alleges a jury could have determined from the evidence defendant's failure to obtain the building or demolition permit was a proximate cause of the explosion and fire for the following reasons: In order to obtain a permit, defendant would have had to submit plans and specifications to the city. Plaintiff advances this may have resulted in defendant examining the house for the location of the utilities, including the gas lines, throughout the building; the possibility of defendant either turning off the gas on his own or being advised or required by the building inspector to turn it off; or defendant being more careful not to disturb the gas line during his demolition work.

Jeff Junker, the City of Waverly building inspector in June of 1996, testified. He said the process of obtaining an interior demolition permit for remodeling purposes would first involve providing plans showing the scope of the work pertaining to remodeling. He further said whether there would be any

discussions about utilities would depend on the scope of the work and the level of knowledge of the builder about construction. Junker said he considered defendant a general contractor and presumed he had a basic understanding of construction practices. Junker said he would expect Keith to discern the difference between gas and water pipes.

Junker further testified he would not normally inspect the building in this situation unless requested to do so. He said had he gone to the house before the work began, he would not have been able to see the enclosed pipes. He viewed a photograph of the pipes and commented if even he had seen them after the walls had been removed, he would have believed without further investigation the pipes were galvanized water pipes and he would not have required defendant to shut off the gas. He thought it might have been appropriate to have defendant trace where these pipes went or came from, but couldn't say this for sure.

Plaintiff next contends the district court abused its discretion in not allowing Lageschulte to testify.

Lageschulte, a liquid propane gas service person in Waverly, was to testify to the frequency of failure of flexible gas appliance connectors. Plaintiff contends the purposes of Lageschulte's testimony was: (1) to counter the testimony of two of defendant's witnesses, also gas service personnel, that the failure of flexible connectors in the Waverly area was an infrequent or isolated problem; and (2) to show a local LP company had notified its customers these flexible gas appliance connectors were subject to failure and needed to be checked or otherwise replaced. Plaintiff asserts this testimony was relevant to

his claim defendant MidAmerican failed to adequately warn customers of the dangers associated with flexible connectors.

The district court, after reviewing Lageschulte's deposition and considering plaintiff's offer of proof, concluded Lageschulte was not an expert in the area of the use of flexible connectors and the delivery of natural gas. Accordingly, the court sustained defendant MidAmerican's motion in limine to prohibit Lageschulte to testify as an expert.

Plaintiff contends the district court abused its discretion. In *Leaf*, 590 N.W.2d at 533, the test for admission of expert testimony is set forth as follows:

To be admissible in an Iowa court the evidence, of course, must be relevant. Iowa R. Evid. 402. Second, it must be evidence in the form of 'scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.' Iowa R. Evid. 702. Third, the witness must be 'qualified as an expert by knowledge, skill, experience, training, or education.' In addition, any potential for an exaggerated effect of the proffered evidence should be considered.

Whether a witness is qualified to give expert testimony lies within the discretion of the district court. *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 309 (Iowa 1998). We will not reverse its decision absent an abuse of that discretion and prejudice to the complaining party. *Id.*; *Hylar v. Gamer*, 548 N.W.2d 864, 868 (Iowa 1996). A trial court may unreasonably commit an abuse of discretion if it unreasonably refuses to allow an expert qualified by experience. *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 11 (Iowa 1999). A witness' ability to testify as an expert is determined in reference to the topic under examination. *Hylar*, 548 N.W.2d at 868. "[T]he witness need not be a specialist in the particular area of testimony so long as the testimony falls within the witness' general area of expertise." *Mensink v. American Grain*, 564 N.W.2d 376, 379 (Iowa 1997)

(quoting *Hunter v. Board of Trustees*, 481 N.W.2d 510, 520 (Iowa 1992)).

However, if a witness's practical knowledge does not provide the requisite expertise in the area on which they are asked to offer an expert opinion, the witness's testimony may be excluded. *Reedy v. White Consol. Industries, Inc.*, 890 F.Supp. 1417, 1447 (N.D. Iowa 1995).

Plaintiff's made an offer of proof. There Lageschulte testified an LP gas company in Waverly employed him for seven and a half years. He said 80-85% of his duties included delivering bulk LP gas to farmers. He spent his remaining time performing service work. As part of his employment, he received training once or twice a year on flexible connectors. From this training, he learned older appliance connectors would corrode and break, due to an electronic reaction between the gas and the tubing. He generally replaced ten or fifteen connectors per year. His company's LP gas customers were notified at least twice per year of potential problems with these connectors.

In deposition, Lageschulte testified he learned at meetings put on by appliance manufacturers that flex connectors for both LP and natural gas were unsafe. He admitted he did not ever hook up natural gas. In addition, he did not have information about the natural gas industry and its standards with respect to flexible connectors or the corrosive effects of natural gas on flexible connectors. He stated he just knew they were unsafe.

The district court did not abuse its discretion by prohibiting Lageschulte from testifying. Lageschulte admitted his experience was limited to working with LP gas appliances. Also, he was not familiar with either the standards of the natural gas industry regarding flexible connectors or the information available to

natural gas service persons. Therefore, the district court could have reasonably found that Lageschulte was not qualified to testify as an expert witness concerning the frequency of the failure of flexible connectors for appliances using natural gas.

Evidence is relevant if it renders the existence of a fact more probable or less probable than without it. Iowa R. Evid. 401; *Garren v. First Realty, Ltd.*, 481 N.W.2d 335, 339 (Iowa 1992). Lageschulte's testimony regarding notices to LP customers about problems with flexible connectors is not relevant to what notices should have been sent to customers of natural gas, a different industry.

Furthermore, plaintiff was not prejudiced by the absence of Lageschulte's testimony. There were a number of exhibits admitted showing that other gas companies had notified their customers of the frequency of failure of similar appliance connectors. Consequently the jury was made aware that they failed in other places. Lageschulte's testimony would have told them little more.

AFFIRMED.