

IN THE COURT OF APPEALS OF IOWA

No. 9-028 / 98-0519

Filed March 31, 1999

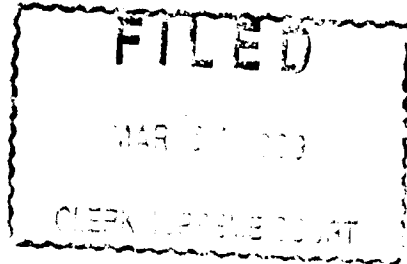
IOWA LAKES ELECTRIC COOPERATIVE,

Plaintiff-Appellant,

vs.

JOHN TODD,

Defendant-Appellee.



Appeal from the Iowa District Court for Cherokee County, John P. Duffy,
Judge.

Plaintiff appeals from a portion of the district court's ruling in its favor in an action to collect on a debt allegedly owed to plaintiff for under-reported electrical usage by defendant. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH DIRECTIONS.**

Harold W. White of the Fitzgibbons Law Firm, Estherville, for appellant.

John A. Wibe of Martin, Wibe & Cozine, LLP, Cherokee, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ. Vogel, J., takes no part.

MAHAN, J.

Plaintiff appeals from a portion of the district court's ruling in its favor in an action to collect on a debt allegedly owed to plaintiff for under-reported electrical usage by defendant. Plaintiff maintains the district court erred in applying the wrong burden of proof and in awarding recovery at only eight cents per kilowatt hour. We affirm in part, reverse in part, and remand with directions.

Iowa Lakes Electric Cooperative (ILEC) is a cooperative association organized pursuant to chapter 499 of the Iowa Code. ILEC supplies electricity to rural residents in Cherokee County, Iowa. ILEC uses a "self-read, self-bill system" which requires its customers to read their electric meters on the first of each month. Specifically, the customers are to calculate their bill from a rate chart provided by ILEC and return payment to the cooperative on or before the fifth day of the following month. The form provided shows the previous month's reported reading and allows the customer to insert the present reading and do the necessary calculations. This system is important to the cooperative as well as its members. It allows ILEC to save approximately \$100,000 per year by not hiring meter readers and allows the customers to save on electric rates.

John Todd is a member and customer of ILEC. Todd purchases electricity for a bin site. The electricity furnished is the subject of the instant action. Todd returned his May 5, 1995 billing report to ILEC with a meter reading of 18,130 kwh. The meter was routinely replaced by ILEC on June 6, 1995. At that time, the meter

reading was 56,340 kwh.¹ The difference between the two readings represented an unreported difference of 38,210 kwh. The meter was tested by ILEC and found to be accurate prior to its installation in 1991² and upon its removal in June 1995. In addition, two independent testers found the meter to be accurate.³ Todd's expert found, "All components of the meter were functioning properly and without defects."

ILEC charged Todd for the difference in the readings at a rate of fifteen cents per kilowatt hour⁴ pursuant to section 10.1 of its approved electric tariff. Section 10.1 provides, in part:

Meters shall be read by the member-consumer at monthly intervals on the date designated by the Cooperative. Accurate meter readings shall be mailed monthly by the member-consumer to the principal business office of the Cooperative.

Said section also provides:

When it is evident that readings are misrepresented by the member-consumer with the intent to short the Cooperative of energy sales, all kilowatt hours in discrepancy will be billed at \$0.15 per kwh. If payment is not made, the account will be subject to disconnection in accordance with Section 6.1.

¹ Before the discovery on the meter, Todd's billing report for June 5, 1995 was late. It was estimated by ILEC to be 18,150 kwh.

² Todd had under-reported his electrical usage in 1991 by 6750 kwh. He was charged fifteen cents per kilowatt hour on the under-reported usage and did not object.

³ ILEC and Todd each selected an independent expert.

⁴ The normal rate for electricity is eight cents per kilowatt hour.

The total amount sought by ILEC was \$6387.42. Todd refused to pay and his service was disconnected. He then filed a complaint with the Iowa Department of Commerce, Utility Division. The Utility Division, however, ruled in favor of ILEC.

The matter proceeded to a bench trial. The district court stated, "The meter taken from the bin site at the Todd property has been conclusively found to be accurate." Thus, the district court found ILEC was entitled to recover for the unreported difference of 38,210 kwh. However, the district court further found and concluded ILEC had failed to establish Todd misrepresented the readings with an intent to short the cooperative. Finally, the district court concluded the fifteen-cent rate was unreasonable and the rate of eight cents was used by the district court to calculate damages. ILEC appealed.

I. STANDARD OF REVIEW. Our review is for correction of errors at law. Iowa R. App. P. 4. We are bound by the trial court's findings of fact if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1). Evidence is substantial for purposes of sustaining a finding of fact if a reasonable person would accept the evidence as adequate to reach a conclusion. *Frunzar v. Allied Property & Cas. Ins. Co.*, 548 N.W.2d 880, 884-885 (Iowa 1996).

Moreover, when the trial court, following a bench trial, denies recovery because a party has failed to sustain its burden of proof on an issue, we will not interfere unless we find the party carried its burden as a matter of law. *Schmitz v. Crotty*, 528 N.W.2d 112, 115 (Iowa 1995) (citing *Whiteaker v. State*, 382 N.W.2d

112, 114 (Iowa 1986)). We will conclude a party has carried such a burden only when the evidence is so overwhelming that only one reasonable inference on each critical fact issue can be drawn. *Id.*

II. BURDEN OF PROOF. ILEC contends the district court erred in applying the wrong burden of proof. ILEC alleges it was held to a higher burden than necessary -- a preponderance of clear, satisfactory, and convincing evidence.⁵ Because the case at bar is not a civil fraud action, the proper burden of proof is a preponderance of the evidence, as ILEC claims. *See State ex re. Miller v. Rahmani*, 472 N.W.2d 254, 257 (Iowa 1991). Our review of the record indicates the district court did correctly apply this burden.

III. ILEC'S FIFTEEN-CENT-PER-KWH CHARGE. The district court awarded recovery at only eight cents per kilowatt hour because it found (1) ILEC did not establish Todd misrepresented the meter readings with the intent to short the cooperative of sales, and (2) the fifteen-cent rate is not reasonable. ILEC contends this was error. We agree.

A. Intent to Short the Cooperative of Sales. After review of the record, we find the evidence that Todd misrepresented the meter readings with intent to short the cooperative of sales is overwhelming. The meter taken from Todd's property was "conclusively found to be accurate." Todd checked the meter monthly and testified

⁵ Some confusion arose because the district court used the term "clear" in its decision.

his electric usage at the bin site was 300 to 350 kwh per month, yet the discrepancy between his May 1995 reported reading and the June 1995 reading is over 38,000 kwh. Finally, Todd had previously under-reported his electric usage in 1991. Under this set of facts, we find the only reasonable inference is that Todd had been intentionally under-reporting his electric usage.

B. Reasonableness of the Fifteen-Cent Rate. ILEC members elect the board of directors. *See* Iowa Code § 499.36(1). ILEC members, through its board of directors, set the eight-cent normal rate and fifteen-cent under-reported usage rate. *See* Iowa Code §§ 476.1A, 499.7. These rates were set to provide an incentive for members to honestly and accurately report meter readings so ILEC and its members could save money through the use of a “self-read, self-bill” system. Todd knew of the fifteen-cent under-reported usage rate and had never objected.

In the absence of anything to the contrary in the charter or by-laws of the association or in any contract between the association and its members, a cooperative association is free to deal with its members on any reasonable basis.

18 Am. Jur. 2d *Cooperative Associations* § 31, at 298 (1995). Under these circumstances, we find the fifteen-cent charge is not unreasonable; to award recovery at only the eight-cent normal rate would destroy any incentive for honest and accurate reporting of electric usage. This result would have a detrimental effect upon the stated purpose of cost savings to ILEC and its member customers.⁶

⁶ We do not address the issue of liquidated damages because it was not briefed or argued by the parties.

For these reasons, we affirm Todd's liability, reverse the award of recovery at eight cents per kilowatt hour, and remand with directions to enter a judgment against Todd in the total amount of \$6,387.42 reduced by the \$410 awarded Todd on his counterclaim. We do not retain jurisdiction.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED
WITH DIRECTIONS.**