



IN THE COURT OF APPEALS OF IOWA

IOWA ILLINOIS GAS & ELECTRIC CO.,)

Appellee,)

Filed April 28, 1978

vs.)

COUNCIL BLUFFS SAVINGS BANK,)

Executor of the ESTATE OF MORRIS)

C. SMEAD, Deceased,)

$$\frac{297}{2-59359}$$

Appellant.)

Appeal from Pottawattamie District Court - Bennett Cullison, Judge.

Executor appeals trial court's findings which allowed utility company's claim against the estate for unpaid electricity bill of the decedent, the amount having been redetermined, the result of an incorrect meter connection, and an understating of the actual amount of electricity used. - Affirmed.

Lyle A. Rodenburg, Council Bluffs, for Appellant.

Jerry C. Estes, of Kersten, Opheim, Carlson & Estes, Fort Dodge, for Appellee.

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

PER CURIAM

Defendant Council Bluffs Savings Bank, as executor of the Estate of Morrie C. Smead, appeals the trial court order allowing plaintiff Iowa-Illinois Gas & Electric Company's claim in probate for \$11,367.64 for unbilled electricity. The decedent was the owner of an office building in Fort Dodge, Iowa, known as Executive Building. Executive Building was built after a fire partially destroyed a bowling alley which was previously located at the same address. All that remained of the bowling alley was the basement. The previous electrical service was three-phase and when Executive Building was constructed new internal wiring was installed.

When the electrical contractor hired by Smead wired the building to the service connection supplied by plaintiff, new phase one was crossed to old phase three thereby causing a "buck" in the current transformers feeding the meter. The effect of the "buck" was that the current on phases one and three partially cancelled each other due to magnetic interaction between the crossed phases. As a result, the actual current used was considerably greater than the actual current registered on the meter.

Although the meter was tested when it was installed, the wiring problem was not discovered until February, 1972, during a routine meter inspection. The old meter was replaced, tested and found to be accurate within the tolerances prescribed by the commerce commission. The original electrical contractor was called and the wiring problem corrected. After an initial three months check on the new meter, Smead received a corrected billing based on the estimated amount of electricity actually used, less payments received. Plaintiff's estimates showed that Smead had been paying for less than fifty percent of the actual electricity used by Executive Building. Smead refused to pay the claim and when he died, plaintiff filed this claim in probate. From an adverse allowance of the claim, the executor appealed.

Trial of a claim in probate is by ordinary proceedings and the court's findings of fact have the effect of a special verdict. In re Estate of Kneeb, 246 Iowa 1053, 70 N.W.2d 537 (1955); section 633.444, The Code. If supported by substantial

evidence, the trial court's findings must stand and the matter is not triable de novo upon appeal. Estate of Kneeb, supra.

Defendant's first contention on appeal is that there was no sufficient and competent evidence from which the trial court could find that a meter error occurred in July, 1966. Donald Johnson, the present owner of the electrical company which did the original wiring of Executive Building, testified the criss-cross wiring error was made by his company at the time of the original installation. He thought that was in 1964 or 1963, but was not sure. There was no testimony the wiring had been changed from the time it was originally installed. Plaintiff's record of electrical service to the building dated back to July, 1966. The trial court found this then automatically became the date for the purpose of determining when the meter error occurred. The trial court did not err.

Defendant's second contention on appeal is that there is no sufficient and competent evidence from which the trial court could find a rate basis for calculating the unbilled and unpaid electricity. First, defendant argues that the method of calculation is deficient because the second meter was never tested for accuracy after its initial installation. Secondly, plaintiff did not test the individual phases to see how much or what percentage of electricity was being measured off of each phase. Thirdly, it was impossible to measure the effect of increases or decreases in customer usage and changes in building occupancy which allegedly occurred over the six year period. Fourthly, although the underage was recalculated to give defendant the benefit of lower kilowatt hour rates, no consideration was given by the trial court to rate rebate orders from the commerce commission for the same time period. Finally, installation of new equipment was not taken into account.

In rejecting defendant's claim, the trial court found that the prior bills from which plaintiff used to calculate the amount of the deficiency, were based on actual meter readings taken at the time by plaintiff's employees. The evidence also shows that the electrical usage remained fairly constant for the entire period, with little variation from year to year. In fact, the electrical usage was greater in the winter than in the summer, which is unusual for an air conditioned building.

When the actual meter readings are taken into consideration for the sixteen months after the wiring correction was made, the result is that the new electrical consumption and kilowatt demand are slightly more than double the old rates.

Plaintiff's expert testified the effect of the wiring error would cause the meter to read only half of what it was supposed to read. Defendant's expert testified there was no way of knowing how much less the meter was reading without knowing the percentage of total power being drawn from each of the three phases. He suggested temporarily installing a second meter, wired correctly, to determine the difference in meter rates between the first, incorrectly, and the second, correctly wired meters. However, there was no evidence that this test would be any more reliable than the plaintiff's estimates as it also fails to take into account any changes in occupancy, equipment and usage in any of the three phases over the same time period. The trial court did not err in its findings.

Plaintiff was not required to prove its damages with mathematical precision. It was its duty only to establish the claim with some reasonable measure of certainty and to show facts affording a reasonable basis for ascertaining the loss. *Conrad v. Dorweiler*, 189 N.W.2d 537, 540 (Iowa 1971).

Defendant's third contention on appeal is that the trial court erred in not finding plaintiff was barred, by equitable estoppel and laches, from enforcing its claim due to its own negligence. Defendant argues plaintiff did not check the meter and inspect the service connection every four years as required by Iowa Departmental Rule (I.D.R.) § 20.6(7), 1973. Further, Mr. Smead, when alive, paid the electrical bill as billed and on the basis of the electrical usage, computed his tenants' rent accordingly. Allowing plaintiff's claim would thus work an inequity on Smead's estate.

As stated earlier, the problem was not with the meter itself, but the method in which the electrical wires were connected between the meter and the transformers. Therefore, any negligence in failing to comply with § 20.6(7), I.D.R. 1973, was not the proximate cause of plaintiff's failure to discover the wiring error. Although plaintiff gave the owner and the electrical company permission to hook up the meter and supplied the electrical service to the building, it had nothing to do

with the internal wiring of the building. When plaintiff found out about the meter error, it immediately contacted the electrical company which originally installed the wiring and the mistake was then corrected. Thereafter, Smead was billed for the underage.

The elements of equitable estoppel or estoppel in pais are found in *Walters v. Walters*, 203 N.W.2d 376, 379 (Iowa 1973); *Holden v. Construction Machinery Co.*, 202 N.W.2d 348, 355-6 (Iowa 1972). Nothing in the record demonstrates plaintiff falsely represented or concealed the true amount of electrical bill. Nor was there any intention on plaintiff's part that Smead rely to the contrary. Defendant failed to establish his entitlement to relief on the doctrine of estoppel.

Laches is an equitable doctrine based on public policy. It relates to a delay in the assertion or prosecution of a claim, working to the disadvantage or prejudice of another. *Davenport Hosp. Assn. v. Hospital Service*, 261 Iowa 247, 261-2, 154 N.W.2d 153 (1967); *Copeland v. Voge*, 237 Iowa 102, 139-10, 20 N.W.2d 2 (1945). Plaintiff promptly recalculated the amount owing on the unmetered electricity and submitted the claim to Smead. There was no delay in asserting plaintiff's claim.

Defendant's fourth contention is that the trial court erred in not applying the proper commerce commission rules and regulations to defeat plaintiff's claim. Specifically, defendant argues the court failed to apply the proper statute of limitations. It argues that § 20.4(14) limits adjustments for slow meters to six months; § 20.3(2) prohibits the installation of meters which are known to be defective or that have not been tested or adjusted if necessary and § 20.6(3) requires the accuracy of each meter to be certified within the tolerance permitted by § 20.6(12). Finally, § 20.6(7) requires plaintiff to test the type of meters involved herein for accuracy at least every four years. Defendant argues that since none of the foregoing regulations have been followed, the trial court erred in finding in plaintiff's favor.

Section 20.4(16)(b) authorizes back billing for underages which occur as a result of an incorrect reading, incorrect application of the rate schedule or an incorrect connection of the meter (emphasis added). Section 20.4(14) only limits adjustments due to slow meters or when the date the error in registration began

cannot be determined. Otherwise, where the date when the error in registration began can be determined, that date becomes the starting point for determination of the amount of the adjustment. Section 20.4(14), I.D.R. (1973).

Plaintiff's records commence in July, 1966, and the trial court found this to be the date the error occurred. The problem was not a slow meter, creep or a defect in the meter itself. The trial court correctly found the meter problem was due to an incorrect connection. The record also indicates the meter was inspected and tested when it was installed. When the meter was replaced it was then tested and found to be within the tolerations permitted. The failure to test the meter within four years of installation as required by § 20.6(7) cannot be said to prejudice defendant because the purpose of that section is to discover metering errors and in the instant case the meter was not defective. There was no error.

Defendant's final contention on appeal is that the trial court erred in examining witnesses and in becoming an advocate and in not ruling on defense counsel's objections thereto. The extent of examination of a witness by the trial court is peculiarly within the discretion of the trial court. *Hackman v. Beckwith*, 245 Iowa 791, 804, 64 N.W.2d 275 (1954). However, that discretion is not unlimited and the trial court should avoid extreme use of its power to question witnesses in order not to assume the role of an advocate. *State v. Thornburgh*, 220 N.W.2d 579, 585 (Iowa 1974).

In the instant case, much of the testimony regarding the effect of the cross-wiring and the exact amount of electricity which was not measured was of a technical nature and easily confused. The purpose of the trial court's questions was not only to elicit the facts but also for the purpose of clarifying the testimony in its own mind. See *Hackman, supra*. The trial court was the fact finder and it had the responsibility of making sure plaintiff proved its case by acceptable methods. It also had the problem of sorting through the technical testimony and deciding whether the overage was correctly calculated. We do not find any abuse of discretion.

AFFIRMED.