

IN THE COURT OF APPEALS OF IOWA

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No. 0-401 / 89-1737

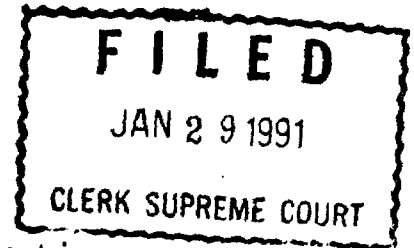
LEROY F. DECKER, et al.,

Appellees,

vs.

IOWA ILLINOIS GAS & ELECTRIC COMPANY, a Corporation,

Appellant.



Appeal from the Iowa District Court for Scott County,
Edward B. deSilva, Jr., Judge.

Iowa Illinois Gas & Electric appeals a jury verdict finding it seventy percent at fault for injuries Decker sustained as a result of contacting a noninsulated electric power line with a tree limb. **AFFIRMED.**

Charles W. Brooke of Lane & Waterman, Davenport, for appellant.

Michael K. Bush and J. Hobart Darbyshire of Carlin, Hellstrom & Bittner, Davenport, for appellee.

Considered by Oxberger, C.J., Hayden and Sackett, JJ.
Habhab, J., takes no part.

OXBERGER, C.J.

Leroy Decker sustained injuries while trimming a tree in his backyard on August 21, 1986. At the time the injuries occurred, Decker was approximately twenty-two feet up in the tree he was trimming without any type of safety equipment to protect him from falling. Decker sawed a fourteen foot branch partially through which caused the branch to fall on a bare electrical power line owned by the defendants, Iowa Illinois Gas and Electric Company (Iowa-Illinois). When Decker sawed through the rest of the branch and tapped into the sapwood layer of the branch, he was electrocuted and eventually fell from the tree. He suffered injuries from both the electrocution and the subsequent fall.

Decker and his wife sued Iowa-Illinois for damages. The jury returned a verdict in favor of Decker but not his wife in the amount of \$750,000. The jury found Decker thirty percent at fault, and Iowa-Illinois seventy percent at fault.

Iowa-Illinois challenges the verdict, contending the district court erred in numerous ways throughout the trial. Iowa-Illinois contends the district court should have directed a verdict in its favor because Decker failed to present sufficient evidence of the foreseeability of human contact at the site.

Next, Iowa-Illinois argues the district court erred by improperly admitting a public opinion poll, commissioned by

Decker's attorneys, into evidence. The poll addressed Quad-City resident's knowledge about electricity, electrical wires and the dangers of both. Iowa-Illinois asserts the poll was irrelevant, biased, and hearsay.

Iowa-Illinois also claims the court improperly restricted its redirect examination of one of its experts. In response, Decker points out the court restricted the expert's testimony because of Iowa-Illinois' failure to comply with pretrial discovery regarding the expert.

Iowa-Illinois further objects to the district court's submission of numerous jury instructions. Generally, it claims instructions 9, 17, 18, and 19 incorrectly state its duty to Decker. Iowa-Illinois also claims the instructions were confusing and contradictory.

Finally, Iowa-Illinois argues the district court erred by failing to submit one of its requested instructions which addressed a utility's general duty. In addition, Iowa-Illinois contends the court should have submitted to the jury more specifications of Decker's fault as it requested.

We review this case for corrections of errors at law. Iowa R. App. P. 4.

DIRECTED VERDICT. Generally, questions of negligence and contributory negligence are for the jury; it is only in exceptional cases that they may be decided as matters of law. Iowa R. App. P. 14(f)(10).

In Cronk v. Iowa Power and Light Company, 258 Iowa 603, 611-12, 138 N.W.2d 843, 847-48 (1966), the court found:

It is the duty of a person or corporation that maintains and controls wires or cables for the furnishing of electricity to others, to carefully and properly insulate their wires at all places where there is a likelihood or reasonable probability of human contact by persons whose business or duty, or rightful pursuit of mere diversion or pleasure brings them without contributory fault on their part into the zone of danger. However, in the absence of statute or municipal ordinance, this duty does not compel the company to insulate or adopt safeguards for their wires everywhere but only at places where people may legitimately go for work, business or pleasure - that is, where they may reasonably be expected to come in proximity to them. [authorities omitted].

The law is well settled in this state that one furnishing electricity, while not an insurer, is held to the highest degree of care consistent with the conduct and operation of the business. The [power company] had the duty to use reasonable care commensurate with the danger to prevent the escape of electricity from its lines. [authorities omitted].

Compliance with National Electrical Safety Code standards, although relevant, are not not conclusive on the question of defendant's due care. Id. at 612, 138 N.W.2d at 848.

Iowa-Illinois argues Decker failed to present any evidence of the likelihood or foreseeability that an adult would contact the power line running across part of Decker's yard. We disagree. Decker presented evidence of the residential location, the tree was fast growing and he had climbed the tree before and trimmed the branches. The jury was the proper party to decide if human contact with the line was foreseeable and if Iowa-Illinois failed to exercise reasonable care commensurate with the corresponding danger to prevent escape of electricity from

the line. No one factor was determinative, but all of the factors could combine to create foreseeability in the situation.

Iowa-Illinois also argues that if human contact was reasonably probable, it could either insulate or warn, but need not do both to fulfill its duty to protect the public. Iowa-Illinois asserts that if the jury found it warned the public of the danger, it need not insulate. Iowa-Illinois argues that since the jury did not find it failed to warn, then it cannot be held liable for any of Decker's injuries. This argument arises from the fact the jury did not specifically find Iowa-Illinois failed to warn of the dangers of noninsulated wires in its answers to interrogatories. We disagree.

The language of Cronk clearly requires those furnishing electricity to properly insulate their wires where a reasonable probability of human contact exists. If the jury found a reasonable likelihood of human contact then it could also find the duty commensurate with the danger required insulation rather than general warnings about the danger to the public. After reading the jury's verdict against the jury instructions, we feel this is what the jury found.

We find that the trial court properly submitted the case to the jury for determination of whether Iowa-Illinois failed to carry out its duty to Decker. We also find Decker presented sufficient evidence to support the submission of his claims to the jury in all respects.

OPINION POLL. The defendants claim the trial court erred by admitting into evidence an opinion poll commissioned by the plaintiffs. The survey's stated purpose was "to test the knowledge and awareness of Quad-City residents with respect to elevated power lines in their neighborhoods." The poll was used to show Iowa-Illinois failed to effectively warn the public of the danger of electric power lines in the plaintiff's community as well as showing the general public's lack of awareness that some power lines in residential areas of the community were not insulated.

Iowa-Illinois does not argue about the general admissibility of opinion polls or surveys, but rather cites multiple inadequacies in the survey as well as claiming it was irrelevant and unduly prejudicial. The parties did not provide us with, nor have we found, any Iowa law pertaining to the admissibility of opinion polls. In Lutheran Mutual Life Ins. Company v. United States, 816 F.2d 376, 378 (8th Cir. 1987), the court set out a test to establish the trustworthiness of surveys with respect to admissibility. For a survey to be trustworthy it must be shown:

(1) that a proper "universe" was examined and a representative sample was chosen; (2) that the persons conducting the survey were experts; (3) that the data were properly gathered and accurately reported; (4) that the sample design, the questionnaires, and the manner of interviewing met the standards of objective surveying statistical techniques; and (5) that the interviewers, as well as the respondents, were unaware of the purpose of the survey. (citations omitted).

The test set out by the Lutheran Mutual court ensures accuracy and reliability, which circumstantially guarantee the trustworthiness of poll results testing the public's general knowledge about a specific subject. See Pittsburgh Press Club v. United States, 579 F.2d 751, 759-61 (3rd. Cir. 1978). We therefore adopt the "test" set out by Lutheran Mutual and find the survey in this case met the requirements of trustworthiness. Many of Iowa-Illinois' concerns dealt with the weight the jury should place on the survey rather than it's admissibility. See Jellibeans, Inc. v. Skating Clubs of Georgia, Inc., 716 F.2d 833, 845 (11th Cir. 1983).

The trial court possesses wide discretion in issues of relevancy and materiality. Carter v. MacMillan Oil Company, 355 N.W.2d 52, 55 (Iowa 1984)(citations omitted). The trial court did not abuse its discretion by admitting the survey into evidence and allowing the jury to decide the weight to give it.

EXCLUDED REBUTTAL TESTIMONY. Iowa-Illinois complains the trial court improperly limited the testimony of one of its experts. Iowa-Illinois failed to inform this court the limitation arose from a discovery sanction. The sanction followed Iowa-Illinois' failure to timely supplement its answers to interrogatories and its failure to provide the trial court with a valid reason for the failure.

The imposition of discovery sanctions lies within the discretion of the trial court and we reverse only upon an

abuse of that discretion. Suckow v. Boone State Bank & Trust Company, 314 N.W.2d 421, 425 (Iowa 1982). We find no abuse of discretion in the trial court's imposition of discovery sanctions. We assume the defendant's failure to fully apprise us of the reasons for the limitation was an oversight and not an intentional effort to mislead this court.

JURY INSTRUCTIONS. Iowa-Illinois cites multiple errors in the jury instructions submitted to the jury, as well as errors in not submitting some of its proposed instructions.

Jury instructions explain the applicable law to jurors so the law may be applied to the facts proven at trial. See State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978).

All issues which are pled and for which there is substantial support in the evidence must be submitted. It is error not to do so, just as it is error to submit those which do not conform to both these conditions.

Seaway Candy, Inc. v. Cedar Rapids YMCA, 283 N.W.2d 315, 316 (Iowa 1979) (citing Mora v. Savereid, 222 N.W.2d 417, 419 (Iowa 1974)).

It is the trial court's duty to instruct with reasonable fullness on the pleaded issues which have evidentiary support. A mere abstract definition of the law having no application to the facts is insufficient. The giving of instructions which are conflicting and confusing is reversible error.

Hartwig v. Olson, 158 N.W.2d 81, 88 (Iowa 1968)(citations omitted).

Jury instructions are considered as a whole. McCracken v. Edward D. Jones & Company, 445 N.W.2d 375, 382 (Iowa App. 1989)(citation omitted). The trial court may phrase instructions in its own words so long as the instructions fully and fairly inform the jury of the issues and applicable law. Id. Denying submission of an instruction where the substance of the requested instruction is included in other instructions does not constitute error. State v. Freeman, 267 N.W.2d at 70 (authorities omitted).

With these principles in mind we find the instructions submitted to the jury fully and accurately instructed the jury on the applicable law and were not confusing when read as a whole. Additionally, the trial court properly refused to list the multiple specifications Iowa-Illinois requested with respect to Decker's negligence. Iowa-Illinois' requested instruction did not inform the jury of the law of the case, but rather provided the jury with a laundry list of facts that could combine to create negligence.

CONCLUSION. We affirm the trial court in all respects.

AFFIRMED.