

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-3221

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**RICHARD G. SCULLION AND TERESA SCULLION,
HUSBAND AND WIFE, RICHARD M. SCULLION,**

**PLAINTIFFS-RESPONDENTS-CROSS-
APPELLANTS,**

V.

WISCONSIN POWER & LIGHT COMPANY,

**DEFENDANT-APPELLANT-CROSS-
RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Iowa County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 ROGGENSACK, J. Wisconsin Power & Light Company appeals a judgment against it, claiming numerous errors occurred at trial. Richard (Ric) G.

Scullion and his wife, Teresa Scullion, cross-appeal the jury's finding that they were contributorily negligent. We conclude that no reversible errors were committed by the circuit court in its evidentiary decisions, the instructions it gave to the jury or in its legal conclusion that the statute of limitations had not run before Ric, Teresa and Ric's father, Richard (Dick) M. Scullion (the Scullions) filed suit. Additionally, we conclude that the real issue was fully and fairly tried and that there was sufficient credible evidence in the record from which the jury could have found thirty percent contributory negligence. Therefore, we affirm the judgment of the circuit court.

BACKGROUND

¶2 The Scullions operate a dairy farm in Iowa County. In 1978, they built a new barn. Shortly after moving their cows into the barn, the Scullions began to experience problems with the cows. The cows jumped without apparent reason and were resistant to moving in and out of the barn, especially in wet weather. The cows also became ill with mastitis at an increasing rate, and they suffered feet and hock problems which caused them to have difficulty walking. Their milk production dropped significantly, and they drank very little water when they were in the barn. These problems were greater in winter when the cows were confined most of the day.

¶3 The Scullions called their electrician when they noticed tingling in their fingers as they worked around some of the new equipment because they thought the equipment might be faulty. Their electrician found nothing irregular. However, the problems with the cows persisted.

¶4 In December 1987, they were informed by a farm assistance representative, Roger Mueller, that the problems they were having with their cows

could possibly be caused by a phenomenon known as “stray voltage.”¹ Mueller called WP&L, the farm’s electricity supplier, and described what the Scullions were experiencing. WP&L said that it provided a service to check for stray voltage, and it sent Brian Hood to test the farm. After he had completed his initial investigation, Hood told Ric he had found no evidence of a stray voltage problem. However, he recommended the Scullions install more electrical grounds on their equipment, which they did.

¶5 The Scullions’ problems with the cows continued, notwithstanding the large numbers of grounds installed, and they continued to speak with Hood, who made repeated visits to the farm. In August of 1992, the Scullions’ farm was certified as an organic milk producer, and their certifier asked them to check on certain erratic cell counts in the milk, which he thought might be due to a stray voltage problem. Ric then called Hood to conduct another investigation. It was after that 1992 investigation that Hood, while still denying a stray voltage problem existed, first suggested that perhaps something could be done by WP&L to prevent electric current from entering the land on which the farm stood. He conducted numerous additional tests on the farm, and he told the Scullions that he had never measured stray voltage greater than .5 volts, an insignificant level according to the standards that WP&L was then using. However, when Hood’s data was examined

¹ Neutral-to-earth electric current is referred to as “stray voltage” when it moves from a location where one would expect to find electric current. After the energizing power of electricity is spent, the electricity returns to its source through the neutral wire on the electrical service or through the earth. The source of stray voltage which occurs on farm property may be the power-supplying utility, the wiring of the farm itself or the electrical equipment used there. On a farm, stray voltage causes problems when it enters a metallic piece of equipment, such as a cow’s drinking cup, feed trough, tie stall or milking machine, or wet earth or concrete on which the cows stand. When a cow contacts an affected metal or wet area, the current travels through the cow’s body, causing it to experience an electric shock. The shocks can vary greatly in severity and frequency. Peter G. Yelkovic, Note, *Homogenizing the Law of Stray Voltage: An Electrifying Attempt to Corral the Controversy*, 28 Val. U.L.Rev. 1111 (1994).

at a later date, it showed that he had measured stray voltage in amounts greater than .5 volts.

¶6 In January of 1994, when the Scullions' problems continued, they hired Andrew Johnson, D.V.M., to do an independent stray voltage investigation. He contacted Bradley Kolpin and Tom Beane, two farmers who had significant experience with stray voltage. They helped inspect the power lines to and from the farm, where they identified frayed wires. They also took measurements from many locations on the farm and pointed out bent metal tie stalls in the barn, which showed the cows' responses to the electric current they were experiencing.

¶7 William Schmidt, a Certified Master Electrician with experience in stray voltage evaluation, also investigated the voltage levels on the farm. He measured .9 volts of electricity at cow contact points in the feeders. He also found problems with the half mile of WP&L line that leads to the farm. He suggested WP&L install a neutral isolator to prevent electric current from reaching the cows.

¶8 William English, an electrical engineer with significant stray voltage experience, also evaluated the farm. He was assisted by Francis Penterman, who searched for stray voltage and found significant amounts in the ground. English and Penterman found both excessive steady-state stray voltage (where there is a constant low level of electric current present) and transient stray voltage (where there are spikes of current that come through the farm property at irregular and unpredictable times). Based on their own independent experts' assessments and their opinions that WP&L was the source of the farm's stray voltage problem, the Scullions brought suit against WP&L on May 1, 1995.

¶9 At trial, WP&L attempted to admit into evidence certain Public Service Commission (PSC) reports from two prior PSC dockets. WP&L opined

that the PSC findings in the dockets set the standard for what was an acceptable level of stray voltage. The trial court did let in most of the information in document form, as well as in testimony, but it denied admission of the PSC's written reports of the findings from those dockets. However, it did permit WP&L's expert to describe the PSC standards and to tell the jury that it was his opinion that the PSC standards were the most appropriate standards for measuring when stray voltage was excessive.

¶10 The Scullions' experts testified about their views of the correct standards for measurement of and acceptable levels of stray voltage. Those experts explained why they believed that the standards set out in the PSC reports were not appropriate or were not controlling. In addition, English testified that it was reckless for WP&L, through its employees, to fail to provide reasonable, adequate service and facilities to the Scullions after their problems with stray voltage were repeatedly brought to its attention.

¶11 The jury returned a verdict finding that: (1) WP&L was negligent in the manner in which it provided electricity to the Scullions; (2) WP&L's failure to provide reasonably adequate electrical services was wanton, willful or reckless; (3) WP&L provided electricity in a manner that was a nuisance; and (4) Ric and Teresa were thirty percent contributorily negligent. The jury awarded damages of \$5,000 to Dick Scullion and \$250,000 to Ric and Teresa Scullion.

¶12 Subsequent to motions after verdict, the circuit court trebled the damages in accord with WIS. STAT. § 196.64 (1997-98),² subtracted thirty percent

² WISCONSIN STAT. § 196.64 states in relevant part:

(1) If a ... public utility, in the course of the discharge of ... duties, wilfully (sic), wantonly or recklessly does, causes

(continued)

of those damages for the negligence accorded to Ric and Teresa and entered the following judgment against WP&L: Ric Scullion, \$262,500, plus costs and interest; Teresa Scullion, \$262,500, plus costs and interest; and Dick Scullion, \$15,000, plus costs and interest. WP&L appeals the verdict on numerous grounds, and Ric and Teresa cross-appeal the jury's finding that they were thirty percent negligent.

DISCUSSION

Standard of Review.

¶13 We examine the circuit court's decision about whether to admit or deny the admission of evidence under the erroneous exercise of discretion standard. *State v. Edmunds*, 229 Wis. 2d 67, 74, 598 N.W.2d 290, 294 (Ct. App. 1999). We will uphold a circuit court's discretionary decision if it examined the relevant facts of record, applied the correct legal standard to them, and reached a conclusion that a reasonable judge could reach. *Id.* (citation omitted). The specific jury instructions that are given in a case are also discretionary decisions of the circuit court. However, we review, *de novo*, whether those instructions correctly stated the law that is applicable to the questions presented. *State v. McCoy*, 143 Wis. 2d 274, 289, 421 N.W.2d 107, 112 (1988); *Ansani v. Cascade*

or permits to be done any matter, act or thing prohibited or declared to be unlawful under this chapter or ch. 197, or wilfully (sic), wantonly or recklessly fails to do any act, matter or thing required to be done under this chapter, the public utility shall be liable to the person injured thereby in treble the amount of damages sustained in consequence of the violation.

Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Mountain, Inc., 223 Wis. 2d 39, 45, 588 N.W.2d 321, 324 (Ct. App. 1998); *State v. Simplot*, 180 Wis. 2d 383, 404, 509 N.W.2d 338, 346 (Ct. App. 1993).

¶14 The construction of the statute of limitations under the facts of a particular case is a question of law that we review without deference to the circuit court's decision. *Kolpin v. Pioneer Power & Light Co.*, 162 Wis. 2d 1, 18, 469 N.W.2d 595, 601 (1991). When a request for a new trial in the interest of justice is made by an appellant who asserts the real controversy has not been tried, we review the record below, *de novo*, to determine the merits of that contention. *State v. Johnson*, 149 Wis. 2d 418, 429, 439 N.W.2d 122, 126 (1989). And finally, we review whether there was sufficient evidence to support the jury's finding that Teresa and Ric were contributorily negligent by examining the record to determine if there is any credible evidence that, under any reasonable view, supports the jury's verdict. *D'Huyvetter v. A.O. Smith Harvestore Prods.*, 164 Wis. 2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991).

Evidentiary Decisions.

¶15 WP&L contends the trial court erred in its decisions on whether to admit or exclude evidence in three different ways: (1) the exclusion of the PSC reports of the findings from two prior stray voltage dockets and the admission of testimony that conflicted with the PSC standards stated therein; (2) the admission of the testimony of English in regard to whether WP&L's conduct was reckless; and (3) the admission of Michael Behr's testimony about the statistical deficiencies in a report that WP&L's experts utilized.

1. PSC Report.

¶16 WP&L argues both that the PSC reports of its findings in two prior dockets pertaining to stray voltage should have been admitted and that evidence contrary to those PSC docket reports should not have been received because of the PSC's superior technical knowledge and its supervisory role over WP&L. While the circuit court did permit WP&L's experts to testify about the PSC's findings, it did not admit the reports of ultimate findings and conclusions of the commission under Docket Nos. 05-EI-115 and 05-EI-106, concluding that those findings and conclusions were not relevant to this case. It also permitted the Scullions' experts to describe why they believed that the PSC's standards were neither appropriate nor controlling.

¶17 To be admissible, evidence must be relevant. *In the Interest of Michael R.B.*, 175 Wis. 2d 713, 723, 499 N.W.2d 641, 645 (1993); WIS. STAT. § 901.04. Relevant evidence is that evidence which tends to make any fact of consequence in the proceedings more or less likely. *Michael R.B.* at 724, 499 N.W.2d at 646. However, a circuit court may exclude relevant evidence if it is cumulative. *State v. Speese*, 199 Wis. 2d 597, 605, 545 N.W.2d 510, 514 (1996); WIS. STAT. § 904.03.

¶18 WP&L attempted to have the docket reports admitted ostensibly to show that it had provided reasonable and adequate service to the Scullions. The circuit court ruled only part of the reports were relevant to that issue. However, it also ruled that WP&L's experts could testify about those findings as one of the foundations upon which they had relied in forming their opinions. They did so. Therefore, the jury had before it the PSC's findings linked to why WP&L's experts believed there were no stray voltage problems of consequence on the

Scullion farm. While the docket reports may have had some arguable relevance, we see no erroneous exercise of discretion in the circuit court's limiting this cumulative evidence.

¶19 WP&L also attempted to prevent the Scullions' experts from testifying contrary to the PSC docket reports, claiming that the court was bound to defer to the agency. However, as the Scullions correctly point out, this is not a contested case review under ch. 227. Additionally, the circuit court was presented with testimony showing that the standards for stray voltage are disputed within the expert community. The Scullions' experts were well qualified in their fields of testimony. Their opinions were based on their investigations of the farm and the electrical service provided to it, as well as on nationally recognized standards to which each applied his individual expertise. Therefore, we conclude that the circuit court properly exercised its discretion in permitting the jury to hear opinions other than those proffered by WP&L.

2. *Recklessness.*

¶20 WP&L next contends that English should not have been permitted to testify that its conduct in continuing to provide inadequate service to the Scullion farm was reckless because his opinion was based on an "incorrect perception of facts." WP&L also asserts, for the first time on appeal, that recklessness is a legal concept that requires a jury instruction; and therefore, the testimony was improper under *Lievrouw v. Roth*, 157 Wis. 2d 332, 351, 459 N.W.2d 850, 857 (Ct. App. 1990).

¶21 An expert may testify about his opinion if it is based on facts within his knowledge and the matter is within his area of expertise. *Bituminous Cas.*

Corp. v. United Military Supply, Inc., 69 Wis. 2d 426, 433, 230 N.W.2d 764, 768 (1975). The weight to be accorded to such testimony is for the jury. *Id.*

¶22 The facts relating to stray voltage conditions and their effects on the dairy herd were disputed at trial. WP&L maintained that only the PSC's standards could be considered, and the Scullions' witnesses testified that the PSC's standards had changed over the years and that its current standard was not well founded under national guidelines. However, such a dispute is no basis for excluding English's testimony. Furthermore, that testimony was not the only evidence from which the jury could have found that WP&L acted recklessly. They also heard of Hood's inaccurate statements to Ric about the voltage readings he obtained over the course of his many visits to the farm; WP&L's refusal to install a neutral isolator on the farm unless Ric complied with its demands that went beyond the PSC order; and the years and years of problems the Scullions suffered through because of WP&L's continuing denial that a stray voltage problem existed on the farm.

¶23 In regard to the *Lievrouw* objection, WP&L did not object on this basis before the circuit court, thereby giving the court no opportunity to apply the law WP&L now argues should have excluded the testimony. Therefore, we will not address on appeal whether this argument has merit. *County of Columbia v. Bylewski*, 94 Wis. 2d 153, 171, 288 N.W.2d 129, 138-39 (1980). Accordingly, we conclude the circuit court did not erroneously exercise its discretion in permitting English's testimony.

3. *Statistical Deficiencies.*

¶24 WP&L also appeals the circuit court's decision to permit Behr to testify in a critical fashion about the quality of the data and the sample size used

by two researchers who had prepared a study relied on in part by PSC Docket No. 05-EI-115. WP&L argues that Behr lacks the requisite expertise to do so.

¶25 Behr, who has a doctorate in agricultural economics and significant experience in calculating the economic effects of stray voltage on dairy herds, testified as a forensic economist about the monetary damages the Scullions suffered. The testimony objected to was bottomed on his professional familiarity with the types of statistical methods that are necessary to research projects, in order to reach statistically valid conclusions.

¶26 His testimony focused on a study of the effects of stray voltage on cows, for which he had been given the original research data. The study examined forty cows. The authors maintained that ten cows received no voltage, ten cows received one volt, ten cows received two volts and ten cows received four volts. All cows used in the study were identified by tag number. Because of this and Behr's use of the original research data, he was able to identify the voltage each cow actually received during the course of the experiment. His review of the raw data convinced him that the cows were not consistently placed in the same voltage level group throughout the study. Additionally, even though the study claimed to be a "full lactation" study, it did not include first lactation animals, which are more affected by stray voltage than are older animals. Due to these and other deficiencies, he opined that the authors' conclusions were questionable. Given Behr's education and years of experience working with statistics relative to many types of research, as well as that involving stray voltage, we see no erroneous exercise of discretion in permitting the testimony. The weight to be given it was for the jury to decide.

Jury Instructions.

¶27 WP&L next argues that the circuit court erred in the jury instructions it gave on the standard to be used in determining whether WP&L had provided adequate service. It contends that because those instructions made no reference to the PSC 1.0mA level of concern or the findings in Docket No. 05-EI-115, the jury was misled. The Scullions maintain there was no erroneous exercise of discretion in the instructions the circuit court gave. We agree with the Scullions.

¶28 A circuit court has wide discretion in deciding how to phrase the instructions given to a jury. *State v. Lenarchick*, 74 Wis. 2d 425, 455, 247 N.W.2d 80, 96 (1976). If the instructions adequately cover the law applicable to the facts presented to the jury, there is no erroneous exercise of discretion, even though the refused instructions would not have been erroneous. *D'Huyvetter*, 164 Wis. 2d at 334, 475 N.W.2d at 597.

¶29 In regard to the jury question on willful, wanton or reckless conduct by WP&L, the circuit court instructed the jury that:

A public utility has the duty to provide reasonably adequate service and facilities. With respect to questions of stray electricity, utility service is inadequate if it generates excessive levels of electricity in cow contact areas and it fails to mitigate the problem in accordance with codes, regulations, statutes or the Wisconsin Public Service Commission orders.

In order to be willful, wanton or reckless, the party accused must be found to have so disregarded the Plaintiffs' rights that it demonstrates an indifference on the Defendant's part to the consequences of its actions even though it may not have intended insult or injury.

¶30 The testimony about the PSC's 1.0mA level of concern and the findings in Docket No. 05-EI-115 were presented to the jury as the controlling

standards through WP&L's expert witnesses. The jury could have found that those were the appropriate standards to apply. Or, because of other testimony, such as the PSC's use of other levels of concern on previous occasions and the on-going controversy among stray voltage experts about what is the correct standard, it could have rejected the testimony WP&L repeatedly argues it was compelled to accept. In our view, the circuit court permitted the jury to be the ultimate finder of fact, as is appropriate, and its instruction did not misstate the applicable law.

Statute of Limitations.

¶31 WP&L next contends that the circuit court should have submitted a statute of limitations question to the jury. The Scullions' claim is controlled by the six-year statute of limitations set forth in WIS. STAT. § 893.52. A claim for relief sounding in tort law accrues on the date the injury and its cause were discovered, or, with reasonable diligence, should have been discovered. *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578, 583 (1983); *Kolpin*, 162 Wis. 2d at 27, 469 N.W.2d at 605.

¶32 The Scullions filed this action May 1, 1995. Therefore, for it to have been barred by the six-year statute of limitations, they would have had to have known, or with reasonable diligence should have known, before May 1, 1989, that the problems with their cows were caused by stray voltage and that WP&L was the source of the stray voltage. *Kolpin*, 162 Wis. 2d at 27, 469 N.W.2d at 605. There was no testimony to support such a finding. Ric testified that he noticed differences in cow behavior shortly after moving them into the new barn, but it was not until 1987 that Mueller first raised the possibility that stray voltage might be the cause. On Ric's behalf, Mueller then sought the assistance of WP&L, but its employee, Hood, said he found no evidence of a stray voltage problem. Even

though he conducted subsequent tests, this remained Hood's position through 1992. It was not until 1994, when Ric hired his own experts, that a stray voltage problem was conclusively identified. And initially, his experts were not certain that WP&L was its source, rather than the barn's wiring, a defective milking system or some other source on the Scullions' farm. WP&L cites no testimony which would show that the Scullions had, or should have had, knowledge that the source of the stray voltage was WP&L prior to May 1, 1989. Therefore, we conclude the circuit court correctly applied *Kolpin* and submitted no jury question on this issue.

New Trial.

¶33 As a last argument, WP&L contends that it should be afforded a new trial in the interests of justice. We have the power to order a new trial if we determine that the real controversy has not been fully tried, either because the jury was erroneously not given the opportunity to hear significant testimony or because it heard evidence that should not have been admitted and that evidence clouded a crucial issue. *Johnson*, 149 Wis. 2d at 429, 439 N.W.2d at 126. We have reviewed the transcripts of the trial testimony and the exhibits offered and admitted into evidence, and we conclude that no evidence was either improperly excluded or included in the trial. Additionally, we have concluded that the jury was properly instructed. Therefore, the real issue was fully tried, and we deny WP&L's request for a new trial.

Contributory Negligence.

¶34 Ric and Teresa cross-appeal the jury's finding that they were thirty percent contributorily negligent. Therefore, we must review the record to determine whether there was any credible evidence presented to the jury that

would support this finding. *D'Huyvetter*, 164 Wis. 2d at 320, 475 N.W.2d at 592. Our review causes us to conclude that the jury was presented with sufficient evidence to sustain its finding.

¶35 The jury heard that some of the animals appeared to be in poor condition because of a lack of adequate veterinary care and that Ric's milking procedure contributed to a lowered milk production, as did his feeding practices. This is sufficient to support the jury's determination that some of the Scullions' problems with their cows which caused them damage were of their own making. Therefore, we cannot overturn the jury's finding on contributory negligence.

CONCLUSION

¶36 We conclude that no reversible errors were committed by the circuit court in its evidentiary decisions, in the instructions it gave to the jury or in its legal conclusion that the statute of limitations had not run before the Scullions filed suit. Additionally, we conclude that the real issue was fully and fairly tried and that there was sufficient credible evidence in the record from which the jury could have found that Ric and Teresa were thirty percent contributorily negligent. Therefore, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

