

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1487

Cir. Ct. No. 2001CV815

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

GEORGE G. MUTH AND KATHY L. MUTH,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN ELECTRIC POWER COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. The Wisconsin Electric Power Company (WEPCO) appeals from a judgment awarding George G. and Kathy L. Muth economic damages of \$650,000, nuisance damages of \$200,000, and costs of \$257,289.96, for a total judgment of \$1,107,289.96. We affirm the judgment.

¶2 The Muths sued WEPCO on claims of negligence and nuisance, alleging that neutral current from WEPCO's electrical distribution system was flowing through their farm and causing damage to the health and productivity of their dairy herd. After a four-week trial, the jury returned a special verdict finding that WEPCO was negligent with respect to the maintenance or operation of its distribution facilities or the electric service provided to the Muth farm. The jury also found that WEPCO's negligence was a cause of damages to the Muths. In addition, the jury found that WEPCO distributed electricity in a manner that constituted a nuisance to the Muths and that this nuisance was a cause of damages sustained by the Muths. The trial court denied WEPCO's motions after verdict and sustained the jury's verdict.

¶3 WEPCO raises five issues on appeal: (1) whether credible evidence supports the jury's finding that WEPCO negligently caused harm to the Muths' dairy herd; (2) whether WEPCO should be absolved of liability as a matter of public policy; (3) whether the trial court erroneously exercised its discretion by excluding evidence proffered by WEPCO; (4) whether the evidence supports the jury's award of \$200,000 for nuisance damages; and (5) whether Wisconsin should adopt the criteria for the admission of expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

¶4 Appellate review of a jury's verdict is limited and narrow. *Hoffmann v. Wisconsin Elec. Power Co.*, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55. We must view the evidence in the light most favorable to the jury's verdict and sustain the verdict if there is any credible evidence to support it, regardless of whether there is evidence to support a different verdict. *Id.* The credibility of witnesses and the weight to be given their testimony is for the jury. *Id.* Special deference is afforded to a jury verdict that has been upheld by the trial

court. *Id.* The jury's verdict will be upheld even if it is contradicted by evidence that is stronger and more convincing. *Id.* "Therefore, this court will not upset a jury verdict unless there is such a complete failure of proof that the verdict must have been based on speculation." *Id.*

¶5 Applying these standards, we discern no basis to disturb the jury's finding that WEPCO was causally negligent in the maintenance or operation of its distribution facilities or the electric service provided to the Muth farm. Evidence at trial indicated that the Muths are part of a long-time dairy farming family. Between 1980 and mid-1992, they operated a dairy farm in West Bend, Wisconsin. Around June 1992, they moved their herd to their present farm. Evidence indicated that prior to and at the time of the move, they had a rolling herd average of 19,000 pounds of milk per cow, approximately 30% above the state average.

¶6 Testimony indicated that when they made the move, the Muths made an effort to maintain the same or similar facilities, equipment, and management practices, including keeping the same milking equipment, feeding system, bedding, and tunnel ventilation. They also kept the same professional consultants, including their veterinarian and nutritionist. However, soon after the move, they began experiencing significant problems with their herd, including decreased milk production, increased cell counts indicating infection, breeding difficulties, and excessive illness and deaths. The cows also exhibited odd and belligerent behavior, including resisting entering the barn and stalls and not drinking properly.

¶7 The Muths' primary veterinarian, Dr. Gregory Ogi, testified concerning the superior quality of the Muths' herd management skills and practices. However, he also described the difference in general herd health

between the two farms as being like “day and night.” In 1996, after electrical consultants informed the Muths that they had stray voltage problems coming from the utility, Dr. Ogi and the Muths wrote to WEPCO regarding the problem and asked WEPCO to correct the stray voltage problems. Although WEPCO performed some testing and installed an isolator on the Muth farm at the Muths’ expense, it took the position that no other action was necessary because the level of stray voltage was below one milliamper.

¶8 Gerald Bodman, a professional engineer and retired professor of agricultural engineering with over twenty-five years of experience in the areas of dairy farming and stray voltage, conducted an investigation on the Muth farm in June 2001. He concluded that the facilities and equipment were adequate and that the Muths were above average managers. He testified that their herd was adversely affected by electrical current from WEPCO’s distribution system, and had been adversely affected by utility current since 1992.

¶9 Evidence also indicated that in December 2002, a neighbor of the Muths disconnected and removed a buried WEPCO cable from a field across the street from the Muth farm. The cable consisted of three individual bare concentric neutral cables (bcnc) bundled together. The bcnc exhibited evidence of mild corrosion when removed. Evidence indicated that the herd improved after the bcnc was removed, exhibiting significant increases in milk production and improvement in cow breeding and behavior. Bodman testified that the reduction in voltage variations after removal of the bcnc was a contributing factor in the improvement of the herd. Although WEPCO presented evidence to support its contention that other factors led to the improvement, the jury was entitled to accept Bodman’s testimony.

¶10 In challenging the sufficiency of the evidence, WEPCO argues that it cannot be found negligent for failing to take corrective action because there were no defects in its electrical system and all stray voltage measurements were below the level of concern for dairy cows and the utility action level established by the Wisconsin Public Service Commission (PSC).¹ This argument fails for multiple reasons.

¶11 As provided in *Hoffmann*, 262 Wis. 2d 264, ¶14, a utility may be liable for negligence for damages caused by stray voltage even when no measurements exceed one milliamperere. In addition, a utility may be liable for damages caused by nontraditional stray voltage, for which no level of concern has been established.² *See id.* Nontraditional stray voltage includes ground and earth currents. *Id.*, ¶4.

¹ The PSC’s “level of concern” for dairy cows and the level of stray voltage at which it concluded a utility should take corrective or mitigating action (the utility action level) was set at one milliamperere in 1989. Public Service Commission of Wisconsin, Investigation on the Commission’s Own Motion Into the Practices, Policies and Procedures Concerning Stray Voltage for Electric Distribution Utilities in Wisconsin, Docket #05-EI-106 at 4 (1989) (Docket 106); *See Hoffmann v. Wisconsin Elec. Power Co.*, 2003 WI 64, ¶¶4-5 & nn. 4 & 6, 262 Wis. 2d 264, 664 N.W.2d 55. The level of concern for dairy cows increased to 2 milliampere in 1996, but the utility action level for utility sources remained one milliamperere. Public Service Commission of Wisconsin, Investigation on the Commission’s Own Motion Into the Practices, Policies and Procedures Concerning Stray Voltage for Electric Distribution Utilities in Wisconsin, Docket #05-EI-115 at 10, 29 (1996) (Docket 115).

² The PSC concluded that it was unclear whether ground and earth currents cause problems for dairy herds, although it acknowledged that they might. Public Service Commission of Wisconsin, Investigation on the Commission’s Own Motion Into the Practices, Policies and Procedures of Providing Electric Utility Service as It Relates to the Potential Adverse Effects on Dairy Livestock From Electromagnetic Fields, Ground Currents, and Direct Currents Associated With That Service, Docket #05-EI-108 at 7 (1995) (Docket 108); *see Hoffmann*, 262 Wis. 2d 264, ¶¶5, 14 & nn. 4 & 11. It established no level of concern or utility action level for ground currents or earth currents in Docket 108.

¶12 It is true that in affirming the damages award against WEPCO in *Hoffmann*, the court relied upon evidence that nontraditional stray voltage resulting from WEPCO's deteriorated bcnc was a cause of damage to the Hoffmanns' dairy herd. *See id.*, ¶22. However, nothing in the decision holds that evidence of a corroded bcnc or similar defect was a prerequisite to liability for negligence.

¶13 In any event, the record in this case provides evidence of both a stray voltage measurement in excess of one milliamper and defects in WEPCO's system and distribution. In December 1996, one of the Muths' electrical consultants made measurements that exceeded one milliamper in the Muth barn with all farm power turned off. In addition, Bodman estimated a voltage measurement made in 1994 by one of WEPCO's employees to be in excess of one milliamper.

¶14 Other evidence also supported a finding that corroded bcncs and substandard distribution voltage contributed to stray voltage on the Muth farm. Testimony was received from William English, an electrical engineer and retired public utility engineer specialist at the Michigan PSC in charge of stray voltage matters. He testified that the bcnc across the street from the Muth farm was installed in July 1981 in a farm field exposed to fertilizer and manure spread. Evidence indicated that in June 1981, WEPCO had stated in a policy that corrosion of bcncs was a valid concern, and corrosion-prone installation areas, including heavily fertilized farm areas, should be avoided. Evidence also indicated that WEPCO policy provided that the only reasonable alternative was to avoid the use of bcncs in such contaminated areas and use jacketed cable or overhead lines as alternatives.

¶15 Evidence indicated that bcncs of the type located in the vicinity of the Muth farm were known to suffer from premature corrosion and deterioration, leading to stray voltage and current problems. Although evidence indicated that the bcnc removed from across the street from the Muth farm was only mildly corroded, English testified that it was highly likely that other bcncs in the vicinity were corroded. In addition, evidence indicated that in response to the discovery of widespread corrosion of bcncs in WEPCO's system in the 1980s, WEPCO discontinued installation of them but did not replace existing ones, instead relying on testing of existing bcncs for corrosion, repairing and replacing corroded bcncs, and protecting existing bcncs from corrosion with cathodic protection.

¶16 Evidence at trial indicated that, except for testing the bcnc removed by the Muths' neighbor, WEPCO never tested, repaired, replaced or protected any of the other bcncs in the immediate vicinity of the Muth farm. English testified that as corrosion occurs, the ability of the cable to carry current is reduced, resulting in increased levels of neutral current straying from the cable and entering the earth. English and Bodman testified that bcncs in the vicinity of the Muth farm, including the one removed by the Muths' neighbor, were collectively contributing to the earth currents accessing the Muth farm. This conclusion was corroborated by evidence that milk production dropped and cow deaths rose on the Muth farm in 1999 when current was increased in the bcnc located across the street.

¶17 English also testified regarding the impact of the bcnc located across the street on the voltage at the outside waterer on the Muth farm. Testing showed that the voltage dropped by more than ninety percent after the bcnc was disconnected. English testified that this testing and previous testing done in 1999, showed that utility neutral current was coming off the bcnc and going through the

Muth farm. Bodman testified that the December 2002 removal of the bcnc and the resulting reduction in voltage variations at the Muth farm contributed to the improvement in the Muth herd after 2002.

¶18 Based upon this evidence, the jury could reasonably find that WEPCO failed to exercise ordinary care by failing to follow its own policies regarding installing, testing, and protecting existing bcncs. It could reasonably find that WEPCO negligently failed to follow its policies in regard to the bcncs in the vicinity of the Muth farm and negligently failed to maintain its electrical system and that its negligence was a cause of the Muths' damages. Based upon the numerous complaints from the Muths to WEPCO regarding stray voltage problems, the jury could also conclude that WEPCO had notice of problems with its system and operation.

¶19 The evidence also provided other bases for a finding of negligence. Evidence indicated that the WEPCO employee who performed testing at the Muth farm in 1993 and 1994 failed to complete many of the recommended test procedures set forth in WEPCO's written policies for stray voltage investigations, including monitoring the highest point of voltage he found on the Muth farm.

¶20 In addition to opining that WEPCO was negligent for failing to mitigate utility neutral current accessing the Muth farm, Bodman and English were also critical of the distribution voltage of the distribution system serving the Muth farm. English testified that the distribution voltage of 4800 volts on WEPCO's system was lower than industry standards. Bodman also indicated that 4800 volts was uncommon and low. Both experts explained that distribution voltage was important because the higher the distribution voltage, the lower the amount of neutral current entering the earth and accessing the Muth farm. Bodman testified

that increasing the distribution voltage is generally known to be a method of reducing stray voltage on dairy farms. Both men testified that increasing the distribution voltage on the feeder serving the Muth farm would significantly reduce the levels of stray voltage and earth currents on the Muth farm. Testimony was also presented that such an upgrade was feasible, as were other options for reducing voltages on the farm.

¶21 In its brief-in-chief and reply brief, WEPCO discusses at length the evidence in the record which could have supported a jury verdict finding that it was not negligent. However, as previously stated, we must uphold a jury's verdict if any credible evidence supports it, particularly where it has received the approval of the trial court. Viewing the evidence in the light most favorable to the verdict, we conclude that the jury could reasonably find that WEPCO was negligent for performing incomplete testing, failing to take corrective measures to reduce stray voltage and ground currents, and operating its distribution system at a voltage below industry standards. Based upon the totality of the evidence, the jury could also reasonably find that WEPCO's negligence was a cause of harm to the herd and damage to the Muths.

¶22 WEPCO next argues that, even if the jury could find it to be causally negligent, it should be absolved of liability as a matter of public policy. We reject this argument on the ground that issues of public policy in stray voltage cases are appropriately decided by either the Wisconsin Supreme Court or the legislature, not this court. See *Vogel v. Grant-Lafayette Elec. Coop.*, 195 Wis. 2d 198, 214, 536 N.W.2d 140 (Ct. App. 1995), *rev'd on other grounds*, 201 Wis. 2d 416, 548 N.W.2d 829 (1996). Moreover, the *Hoffmann* court noted that a bill had been proposed in the legislature to render public utilities immune from liability for damages resulting from stray voltage when the stray voltage is below the PSC's

level of concern. *Hoffmann*, 262 Wis. 2d 264, ¶13. However, the provision was withdrawn in the face of severe public criticism and was never passed into law. *Id.* After discussing the legislature's action, the *Hoffmann* court rejected WEPCO's invitation to hold that a utility may never be held liable when stray voltage measurements are below the PSC's level of concern. *See id.*, ¶14. Because the legislature and the *Hoffmann* court have declined to rule that utilities should be absolved of liability in cases like this regardless of their causal negligence, it is not our place to make a contrary ruling based on public policy grounds.

¶23 We also reject WEPCO's argument that it is entitled to a new trial based upon the trial court's exclusion of evidence. The trial court precluded WEPCO from presenting testimony from Carl Turner, the owner of the Muths' farm prior to their purchase of it. WEPCO contends that Turner should have been permitted to testify that he did not experience problems with stray voltage and earth current on the farm during the period he operated it and that his cows were among the most productive in the state. WEPCO contends that his testimony was relevant to establish that the problems the Muths experienced resulted from their farm management practices, not stray voltage and earth current.

¶24 Relevant evidence is evidence having any tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. WIS. STAT. § 904.01 (2003-04).³ However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

³ All references to the Wisconsin Statutes are to the 2003-04 version.

confusion of the issues, misleading the jury, or by considerations of undue delay or waste of time. WIS. STAT. § 904.03.

¶25 We review a trial court's decision admitting or excluding evidence under an erroneous exercise of discretion standard. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The trial court has broad discretion, and our review of its decision is highly deferential. *Id.*, ¶¶28-29. When reviewing evidentiary issues, the question is not whether this court agrees with the trial court's ruling but whether the trial court exercised discretion in accordance with accepted legal standards and the facts of record. *State v. Mainiero*, 189 Wis. 2d 80, 94-95, 525 N.W.2d 304 (Ct. App. 1994).

¶26 The trial court excluded Turner's proffered testimony on the ground that its relevance was outweighed by the danger of unfair prejudice and confusion of the issues and because its admission would have wasted time by resulting in a mini-trial. No basis exists to disturb this determination. As noted by the trial court, Turner's experience on the farm prior to the Muths' purchase of the property in 1992 would have involved many variables. WEPCO's presentation of evidence regarding his experience operating the farm and the Muths' presentation of evidence challenging or rebutting that evidence and explaining why their experience was different would have resulted in a mini-trial within what was

already a four-week trial.⁴ The trial court acted within the scope of its discretion in concluding that this would confuse the issues and waste the time of the jury.⁵

¶27 WEPCO also attempted to present evidence regarding the specific costs of modifying or replacing its electrical system in the manner suggested by the Muths' experts. WEPCO contends that while the trial court ruled that it could refer to costs associated with a given option in generalities, it could not present evidence of specific cost figures. It contends that specific cost evidence was relevant to the jury's assessment of the reasonableness of its conduct and thus to the issue of its alleged negligence.

¶28 An expert witness for WEPCO was permitted to testify in general terms regarding the disadvantages associated with other types of distribution systems and that conversion or modification of WEPCO's system as suggested by the Muths' experts would be complicated and costly. However, the trial court prohibited more specific evidence concerning costs on the ground that its relevance was remote, it would unnecessarily expand the issues and lengthen the trial, and the danger of unfair prejudice was substantial.

¶29 No basis exists to disturb the trial court's determination. As reasonably concluded by the trial court, presentation of the evidence would have created a risk that the jury's verdict would be affected by jurors' personal concerns

⁴ For example, the Muths contended that no electrical measurements were taken while Turner was on the farm, that there were changes to the electrical system of the farm and the utility system after they moved in, and that Turner lacked records verifying his herd's health and productivity and detailing his operations.

⁵ For similar reasons, the trial court prohibited the Muths from presenting evidence regarding their expert witnesses' experiences on other farms similar to the Muths.

about increasing their own utility rates. In light of this risk, the limited probative value of more detailed evidence regarding the expense of changing or modifying the system, and the time necessary to present such evidence, no basis exists to disturb the trial court's decision.

¶30 We also uphold the trial court's decision refusing to reduce the jury's award of nuisance damages. WEPCO contends that the award is excessive based upon the evidence and in relation to the award of economic damages.⁶ We disagree.

¶31 Remittitur is not required merely because the damages awarded for the nuisance exceed those awarded in some other stray voltage cases. *Cf. Allen v. Wisconsin Public Serv. Corp.*, 2005 WI App 40, ¶¶21-23, 279 Wis. 2d 488, 694 N.W.2d 420 (jury award of \$750,000 in economic damages and one million dollars in nuisance damages upheld despite claim that nuisance damages exceeded award in other stray voltage cases), *review denied*, 2005 WI 136, 285 Wis. 2d 627, 703 N.W.2d 376. "If there is any credible evidence which under any reasonable view supports the jury finding as to the amount of damages, especially where the verdict has the approval of the trial court, this court will not disturb the finding unless the award shocks the judicial conscience." *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 446, 405 N.W.2d 354 (Ct. App. 1987).

⁶ WEPCO has also filed several statements of supplemental authority discussing recent nuisance cases in nonstray voltage situations, including *Butler v. Advanced Drainage Systems*, 2005 WI App 108, 282 Wis. 2d 776, 698 N.W.2d 117, *review granted*, 2005 WI 150, ___ Wis. 2d ___, 705 N.W.2d 659 (No. 2004AP1991). However, underlying its discussion of these cases are claims that it was not aware that its electrical system was defective or causing harm to the Muths' cows and was not negligent. Based upon the evidence indicating that WEPCO was aware of the Muths' claims regarding stray voltage problems on their farm and the evidence supporting a finding that WEPCO was causally negligent for failing to take measures to correct the problems, we address WEPCO's supplemental authority no further.

¶32 A nuisance damages award of \$200,000 is not excessive in light of the Muths' experiences. As noted by the trial court, commencing in 1992 the Muths experienced significant difficulties with their herd, including illness, death, difficulties in handling the animals, and decreased milk production. Although they requested assistance from WEPCO on multiple occasions, each time WEPCO told them that the problem was not a result of its electrical system. Consequently, they continued to search for sources of the problem. Based upon this evidence and the evidence supporting the jury's finding of causal negligence, the award for nuisance damages cannot be deemed excessive. *See Allen*, 279 Wis. 2d 488, ¶23.

¶33 WEPCO's final argument is equally unavailing. WEPCO moved the trial court to preclude the testimony of English and Bodman on the ground that neither qualified as an expert under *Daubert*. However, it concedes in its appellant's brief that *Daubert* is not the law in Wisconsin. It acknowledges that only the Wisconsin Supreme Court could adopt *Daubert* as the law in this state, and requests that this court certify the issue to that court.

¶34 WEPCO's request for certification or other relief is denied. The Wisconsin Supreme Court has recently reaffirmed that WIS. STAT. § 907.02 constitutes the standard for admission of expert testimony. *Hoffmann*, 262 Wis. 2d 264, ¶16. This court is bound by decisions of the Wisconsin Supreme Court. *Livesey v. Copps Corp.*, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979). If WEPCO seeks a change in the law, it must do so in the Wisconsin Supreme Court or the legislature.

By the Court.— Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

