

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED84331

THEODORE J. HOFFMAN and DEBORAH L. HOFFMAN,

Plaintiffs/Appellants,

-vs-

UNION ELECTRIC COMPANY,
d/b/a AmerenUE,
a Missouri Corporation,

Defendant/Respondent

BRIEF OF APPELLANTS

Oral Argument Requested

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JURISDICTIONAL STATEMENT

This appeal arises from summary judgment entered in favor of respondent Union Electric Company and against appellants Theodore J. Hoffman and Deborah L. Hoffman on Appellants' action for negligence against Respondent for the wrongful death of Appellants' daughter, Tiffany Hoffman.¹ Legal File (hereinafter ALF@) at 439. Appellants brought the pending suit in the Circuit Court of the City of St. Louis, State of Missouri. LF at 14. In the trial court below, the Honorable Steven R. Ohmer entered summary judgment in favor of Respondent on February 26, 2004. LF at 446. Appellants filed their Notice of Appeal on March 8, 2004, in the time provided by law. LF at 447.

The appeal of appellants Theodore J. Hoffman and Deborah L. Hoffman raises no issues within the exclusive appellate jurisdiction of the Supreme Court of Missouri as set forth in Article V, section 3 of the Constitution of Missouri. Mo. Const. Art. V, ' 3. Thus, pursuant to said section, this case falls within the general appellate jurisdiction of the Missouri Court of Appeals. Territorial jurisdiction rests with the Eastern District Court of Appeals. Mo. Rev. Stat. § 477.050 (1987).

¹ Rule 74.01(b) of the Missouri Rules of Civil Procedure is not at issue in this instance because Respondent was the only party-defendant to Appellants' underlying cause of action.

STATEMENT OF FACTS

A. The Collision of September 19, 1998

On September 19, 1998, trooper Gilbert Lee Rodenberg of the Missouri State Highway Patrol observed a 1990 Pontiac Sunbird traveling in excess of the speed limit on U.S. 69, just north of Highway B in Clay County, Missouri. LF at 66, p. 8. The Pontiac Sunbird was driven by Randi Simpson. LF at 34. Tiffany Hoffman was a passenger in Simpson's vehicle. LF at 15; 53, p. 37.

Trooper Rodenberg initiated pursuit of Simpson's vehicle at approximately 9:53 p.m. (21:53). LF at 68, p. 15. Simpson failed to stop for trooper Rodenberg, contrary to pleas from the passengers in his vehicle. LF at 54, p. 43; 66, p. 9. Instead, Simpson turned south off of U.S. 69 onto McCleary Road. LF at 66, p. 10. McCleary Road turns from a concrete road into a gravel road. LF at 67, p. 11. Once Simpson's vehicle entered the gravel stretch of McCleary Road, trooper Rodenberg lost sight of the vehicle due to dust and discontinued the pursuit. LF at 67, p. 12.

After trooper Rodenberg lost sight of Simpson's vehicle, and according to another passenger in Simpson's vehicle, it left the roadway, became airborne, struck a utility pole owned by respondent Union Electric Company (hereinafter "Union Electric") and came to rest on its roof. LF at 15; 60, pp. 97-100; 68-69, pp. 15-22. A live electric transmission line held by the pole came to rest on the undercarriage of the vehicle. LF at 15; 70, p. 26. The power line energized the vehicle and the vehicle caught fire. LF at 15.

As a result of the collision with the utility pole, Tiffany Hoffman suffered electrical burns, pulmonary injuries from the inhalation of toxic fumes, and conscious pain and

suffering. LF at 17; 404-05. On October 15, 1998, Tiffany Hoffman died as a direct result of her aforesaid injuries. LF at 17.

B. The Timeline of Actions Subsequent to the Collision

Trooper Rodenberg arrived at the scene between one and five minutes after the collision. LF at 359, pp. 17-18. Upon arriving at the scene, trooper Rodenberg observed arcing – an intermittent blue light and humming sound coming from the power line contacting Simpson’s vehicle. LF at 361, pp. 26-27.

Shortly after 9:56 p.m. (21:56:22) on September 19, 1998, Union Electric’s regional dispatcher, Ronald Ramer, received an audible alarm with respect to a 34.5 KV circuit at the location of the incident. LF at 28; 78-79, pp. 10-15. Union Electric’s on-call supervisor, Steve Litrell, called Ramer and said his lights were blinking and that he would call a troubleman to investigate the happening. LF at 29; 81-82, pp. 24-26. Ramer testified that he then received some phone calls from customers complaining that their lights were out, indicating that there was an outage on the 12.5 KV distribution circuit. LF at 28; 81, p. 22.

The ambulance report indicates rescue personnel arrived at the scene of the collision at 9:59 p.m. (21:59). LF at 206; 335. Fire personnel were en route to the scene at 9:54 p.m. (21:54) and arrived at the scene shortly thereafter. LF at 207; 337, pp. 15-16. Union Electric’s construction supervisor, Dean Merritt, was contacted at home at approximately 10:06 p.m. (22:06) by Debra Willimetz, a dispatcher for the Excelsior Springs Police Department. LF at 29; 113-14, pp.8-10; 206; 247, p. 4.

Willimetz testified that she told Merritt at 10:06 p.m. (22:06) that there was a

collision involving power lines down on a vehicle, there were occupants trapped inside, and that medical personnel were unable to render any medical treatment to the occupants due to the presence of power lines. LF at 206; 247, p. 4; 253, pp. 25-26. Merritt then contacted Ramer via radio and advised him that there had been an accident. LF at 29; 82, pp. 25-26; 114, p. 11.

Merritt arrived at the scene between 10:22 p.m. and 10:25 p.m. (22:22 and 22:25) on September 19, 1998 – about fifteen minutes after he was first contacted. LF at 30; 117, pp. 22-24. At or about 10:33 p.m. (22:33), Merritt removed the power line from the vehicle with a fiberglass pole he obtained from the fire department. LF at 30; 117, p. 23.

Emergency medical personnel were at the scene of the collision for approximately thirty (30) to forty (40) minutes before personnel from the utility arrived. LF at 346, p. 36. It was not until Merritt removed the power line from the vehicle that rescue personnel were able to afford Tiffany Hoffman medical attention. LF at 207; 346, pp. 36-38; 347, p. 39-40.

C. The Testimony of Rescue Personnel

Doug Fales, a firefighter/paramedic for the Excelsior Springs Fire Department, and trooper Rodenberg testified that upon arrival at the scene, rescue personnel were unable to provide medical attention to Tiffany Hoffman because such personnel did not know whether the power line remained energized. LF at 207; 338, p. 3; 348, p. 43; 365, p. 44. Trooper Rodenberg testified that he believed the power line was energized, as no one from the utility company had advised him otherwise. LF at 365, p. 44.

All the while at the scene, fire personnel possessed the means to remove the power

line from the vehicle. LF at 266, p. 23. When Merritt finally arrived at the scene, he used a fiberglass pole to remove the power line from the vehicle. LF at 266, p. 23. Merritt obtained the fiberglass pole from the Excelsior Springs Fire Department. LF at 266, p. 23.

Fales, the paramedic, testified that he would have extricated Tiffany Hoffman from the vehicle after his arrival at the scene and provided medical treatment to her had Union Electric informed him that there was “no current on the power line.” LF at 207; 348, pp. 44-45.

D. Utility Circuitry

The utility pole that was struck carried two circuits, one for the 12.5 KV line and one for the 34.5 KV line. LF at 204; 287, p. 39. Each circuit consisted of three conductors. LF at 204; 287, p. 39. Each circuit was equipped with a three-phase circuit breaker. LF at 204; 287, p. 40. Frederick Brooks, Union Electric’s expert witness, testified that when a three-phase circuit breaker “locks open,” the designed mechanism of operation is that all three conductors protected by the breaker are de-energized. LF at 205; 287, p. 40; 290-91, pp. 52-53.

The circuit breaker for the 34.5 KV circuit, which was located at the Maurer Lake substation, “locked open” at 9:57 (21:57:08). LF at 205; 215, p. 24; 213, p. 15. The circuit breaker for the 12.5 KV circuit, which was located at the West Mosby substation, “locked open” by 9:58 (21:58:08). LF at 205; 225, p.63; 289, p. 48. Once “locked open,” a circuit breaker remains open until utility personnel manually close the breaker at the substation. LF at 205; 268, p. 32.

Ramer knew the 34.5 KV circuit was “locked open” at 9:57 p.m. (21:57:08). LF at

205; 213, pp. 15-16. The 12.5 KV circuit fed electricity to those customers making the “no light” calls. LF at 206; 215, p. 22. Ramer knew that once a “circuit is open,” the conductor is de-energized. LF at 206; 223, pp. 54-55.

E. Procedural History before the Trial Court

Appellants’ First Amended Petition was filed on April 28, 2003. LF at 8. In said Petition, Appellants alleged two (2) counts of negligence against Respondent. LF at 14, 16. On July 2, 2003, Appellants dismissed Count I of their First Amended Petition. LF at 23.

On October 20, 2003, Respondent filed its Motion for Summary Judgment with respect to Count II of Appellants’ First Amended Petition. LF at 23. Appellants filed their Memorandum of Law in Opposition thereto on November 21, 2003. LF at 198. Oral argument was heard by the Honorable Steven R. Ohmer on December 11, 2003. LF at 12. On February 26, 2004, Judge Ohmer granted summary judgment in favor of Respondent and issued a written opinion. LF at 439.

POINTS RELIED ON

- I. **The trial court erred in granting summary judgment in favor of Union Electric because Union Electric owed a duty to protect Tiffany Hoffman from harm, in that the harm suffered by Tiffany Hoffman was foreseeable.**

Calderone v. St. Joseph Light & Power Co., 557 S.W.2d 658 (Mo.App. 1977).

Lopez v. Three Rivers Elec. Co-op., Inc., 26 S.W.3d 151 (Mo.banc 2000).

Pierce v. Platte-Clay Elec. Co-op., Inc., 769 S.W.2d 769 (Mo.banc 1989).

Rothwell v. West Cent. Elec. Co-op., Inc., 845 S.W.2d 42 (Mo.App. W.D. 1992).

ARGUMENT

STANDARD OF REVIEW

“When considering appeals from summary judgments, we review the record in the light most favorable to the party against whom judgment was entered.” McDowell v. Waldron, 920 S.W.2d 555, 557 (Mo.App. E.D. 1996). Appellate review of a summary judgment is essentially *de novo*. Hart v. Kupper Parker Communications, Inc., 114 S.W.3d 342, 345 (Mo.App. E.D. 2003). “We will affirm the trial court’s grant of summary judgment if we find that: (1) there is no genuine dispute of material fact; and (2) that on those facts, the movant is entitled to judgment as a matter of law.” Stotts v. Progressive Classic Ins. Co., 118 S.W.3d 655, 660 (Mo.App. W.D. 2003); *see also* ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 378 (Mo.banc 1993).

The burden rests with the movant to demonstrate a right to judgment flowing from material facts about which there exists no genuine dispute. ITT Commercial Fin. Corp., 854 S.W.2d at 380; *see also* Hart, 114 S.W.3d at 345. Where the trial court’s order granting summary judgment does not state the reasons for the court so holding, the appellate court shall presume that the trial court based its decision on the grounds specified in the motion. McDowell, 920 S.W.2d at 562.

I. The trial court erred in granting summary judgment in favor of Union Electric because Union Electric owed a duty to protect

Tiffany Hoffman from harm, in that the harm suffered by Tiffany Hoffman was foreseeable.

At issue in this appeal is whether Union Electric owed a duty to protect Tiffany Hoffman from injury. Appellants argue Union Electric had such a duty. Specifically, Appellants argue Union Electric had a duty to communicate to rescue personnel at the scene information solely in its possession regarding the status of the power line so as to allow Tiffany Hoffman the opportunity to receive timely medical treatment. Union Electric's failure to communicate such information caused harm to Tiffany Hoffman because nearly forty (40) minutes elapsed before she was able to receive medical treatment for her injuries. LF at 346, p. 36. Tiffany Hoffman later died as a result of her injuries.

A. Negligence in Missouri; Foreseeability and the Existence of a Duty

A utility company shall be liable for negligence. *See Calderone v. St. Joseph Light & Power Co.*, 557 S.W.2d 658, 667 (Mo.App. 1977). "In any action for negligence, the plaintiff must establish that the defendant had a duty to protect the plaintiff from injury, the defendant failed to perform that duty, and the defendant's failure proximately caused injury to the plaintiff." *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 155 (Mo.banc 2000). "Whether a duty exists is purely a question of law." *Id.*

"A duty exists when a general type of event or harm is foreseeable." *Pierce v. Platte-Clay Elec. Coop., Inc.*, 769 S.W.2d 769, 776 (Mo.banc 1989). "In determining foreseeability for the purpose of defining duty, it is immaterial that the *precise* manner in

which the injury occurred was neither foreseen nor foreseeable.” Id. (emphasis in original).

“For purposes of determining whether a duty exists, this Court has defined foreseeability as the presence of some probability or likelihood of harm sufficiently serious that ordinary persons would take precautions to avoid it.” Lopez, 26 S.W.3d at 156.

In considering whether a duty exists, a court must weigh: “the foreseeability of the injury, the likelihood of the injury, the magnitude of the burden of guarding against it and the consequences of placing that burden on the defendant.” Rothwell v. West Cent. Elec. Co-op., Inc., 845 S.W.2d 42, 43 (Mo.App. W.D. 1992). In this instance, the harm suffered by Tiffany Hoffman was foreseeable because ordinary persons would take precautions to avoid prolonged delay in receiving medical treatment following an automobile collision and exposure to electric current.² Such a prolonged delay also increases the likelihood of injury. The magnitude of the burden placed upon Union Electric for guarding against the injury is low in this instance because all Union Electric had to do was communicate information about the status of the power line. Finally, there are no adverse consequences of placing that burden on Union Electric – communicating such information would merely allow rescue personnel at the scene to use their own judgment with respect to how they wished to proceed.

B. Union Electric owed Tiffany Hoffman a Duty to Communicate to Rescue Personnel at the Scene Information

² The fact that the precise manner in which Tiffany Hoffman suffered injury may not have been foreseeable is immaterial pursuant to Pierce. See 769 S.W.2d at 776.

**Solely in its Possession Regarding the Status of the Power
Line so as to Allow Tiffany Hoffman the Opportunity to
Receive Timely Medical Treatment**

Appellants argue that Union Electric could have prevented harm to Tiffany Hoffman had it communicated information about the status of the power line to rescue personnel at the scene. Here, the evidence shows that within mere minutes of the vehicle's collision with the utility pole, Union Electric was made aware of the collision, that there were occupants trapped inside the vehicle, and that rescue personnel at the scene were unable to treat the occupants due to the presence of a downed power line on the vehicle. LF at 206; 247, p. 4; 253, pp. 25-26.

Union Electric knew that the utility pole carried two circuits, one for a 12.5 KV line and one for a 34.5 KV line, and that each circuit was equipped with a three-phase circuit breaker. LF at 204; 287, pp. 39-40. Union Electric also knew that the downed line was "locked open" and that it conducted no electricity. LF at 206; 223, pp. 54-55. The circuit breaker for the 34.5 KV circuit "locked open" at 9:57 (21:57:08). LF at 205; 215, p. 24; 213, p. 15. The circuit breaker for the 12.5 KV circuit "locked open" by 9:58 (21:58:08). LF at 205; 225, p.63; 289, p. 48. Once "locked open," a circuit breaker remains open until utility personnel manually close the breaker at the substation. LF at 205; 268, p. 32.

The fact that the downed electric transmission line was de-energized was **solely** in the possession of Union Electric; rescue personnel at the scene did not – and could not – have known such information. LF at 207; 338, p. 3; 348, p. 43; 365, p. 44. Appellants argue

that, pursuant to Lopez and Pierce, cited above, Union Electric had a duty to communicate information that was solely in its possession.

In Lopez, the Supreme Court of Missouri held that a utility company had a duty to a helicopter crew that struck electric transmission lines spanning the Osage River. 26 S.W.3d at 157. The power lines hung less than two hundred (200) feet above ground level and spanned nine hundred thirty-nine (939) feet. Id. at 155. The power lines were greenish-brown in color, three-eighths of an inch thick in diameter, and were not marked with any warning device. Id. The structures supporting the power lines on both sides of the river were obscured by trees and other vegetation. Id. The plaintiffs argued that the utility company had a duty to warn the helicopter pilots of the potential danger of flying into the power lines. The court found that such evidence created a duty of care.

In Pierce, the Supreme Court held that a utility company had a duty to inform a farmer of the presence of a guy wire that secured a utility support pole on a farmer's field. 769 S.W.2d at 776. There, a farmer struck the unmarked guy wire as he operated a tractor while fertilizing his field. Id. at 770-71. The utility pole was placed in the midst of trees at the edge of the farmer's field, and the guy wire extended into the vegetation. Id. at 771. Upon striking the wire, the utility pole was caused to break and a non-electrically charged cable fell across an adjacent highway. Id. The farmer was then injured as he ran toward the highway in an attempt to warn motorists of the cable. Id.

The Lopez and Pierce decisions are applicable in this instance because they stand for the proposition that a utility company has a duty to communicate information in its

possession that is not readily available to the public when the disclosure of such information could circumvent injury. Union Electric in this instance was in possession of information not readily available to the public. Here, Union Electric – in contrast to rescue personnel at the scene – knew that the power line contacting the vehicle was “locked open” and de-energized. Union Electric knew rescue personnel could safely render medical treatment to Tiffany Hoffman. Rescue personnel, however, had their hands tied by Union Electric’s failure to inform.

As in Lopez and Pierce, Union Electric had a duty to communicate. As a result of Union Electric’s negligence, Tiffany Hoffman was deprived of the opportunity to receive timely medical treatment. Rather than provide medical assistance, rescue personnel had to stand idly by for nearly forty (40) minutes due to the presence of a downed power line that conducted no electricity. LF at 346, pp. 36-38; 347, p. 39-40.

C. Testimony from Paramedic Fales and the Fact that the Excelsior Springs Fire Department Possessed the Necessary Means to Remove the Power Line From the Vehicle Establishes that an Issue of Material Fact Exists as to Whether Tiffany Hoffman Would Have Received Timely Medical Treatment had Rescue Personnel Been Informed of the Status of the Power Line by Union Electric

Willimetz, the dispatcher for the Excelsior Springs Police Department, testified that she told Merritt at 10:06 p.m. (22:06) that there was a collision involving power lines on a

vehicle, there were occupants trapped in the vehicle, and that medical personnel were unable to render medical treatment to those occupants. LF at 247, p. 4; 253, pp. 25-26. Merritt admitted a deposition that he had been contacted by Willimetz and that he then shared such information with Ramer. LF at 82, pp. 25-26; 114, p. 11.

Rescue personnel arrived at the scene at 9:59 p.m. (21:59). LF at 335. Upon arrival, rescue personnel were unable to provide medical assistance to Tiffany Hoffman. LF at 346, p. 36. Had Union Electric communicated information about the status of the power line to rescue personnel at the scene, the rescue personnel would then be in a position to use their own judgment as to how they wished to proceed. Testimony from paramedic Fales unequivocally indicates that he would have extricated Tiffany Hoffman from the vehicle and provided medical treatment to her had he known the line did not conduct electricity. LF at 207; 348, pp. 44-45.

Furthermore, fire personnel at the scene possessed the means necessary to remove the power line from the vehicle. LF at 266, p. 23. This is evidenced by the fact that the fiberglass pole used by Merritt to remove the power line was obtained from the fire department. LF at 266, p. 23. Paramedic Fales' testimony and the fact that the fire department had the necessary means for removing the power line establish that a material issue of fact exists as to whether or not Tiffany Hoffman would have been afforded timely medical treatment had rescue personnel been informed of the status of the power line. As such, summary judgment is improper.

CONCLUSION

Appellants contend that both Lopez and Pierce stand for the proposition that a utility company owes a duty to the public to communicate information regarding its electrical equipment when such information is solely in the possession of the utility. Here, Union Electric was in sole possession of information concerning the downed power line. Specifically, Union Electric knew that the power line was “locked open” and that it was de-energized within minutes of the collision. Because this information was not available to rescue personnel at the scene, Union Electric had a duty to protect Tiffany Hoffman from further injury by communicating such information to rescue personnel. Testimony from paramedic Fales indicates that had such information been communicated, he would have provided timely medical treatment to Tiffany Hoffman.

WHEREFORE, for the reasons set forth herein, appellants Theodore J. Hoffman and Deborah L. Hoffman respectfully request this Court make and enter its Order reversing the Judgment entered by the trial court granting respondent Union Electric Company’s Motion for Summary Judgment and remanding this cause to the Circuit Court of the City of St. Louis for reinstatement and further proceedings.

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**CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE
84.06(b) AND RULE 84.06(g)**

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on the word processing program by which it was prepared, contains 3,918 words, exclusive of cover, the Certificate of Service, this Certificate of Compliance, the signature block, and Appendix.

The undersigned further certifies that the diskette filed herewith containing the Brief of Appellants in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

A true copy of the foregoing has been served upon all parties by depositing the same in the United States mail, postage pre-paid, this 4th day of June, 2004, as follows: Mr. James J. Virtel and Ms. Ann E. Buckley, attorneys for Respondent, One Metropolitan Square, Suite 2600, St. Louis, Missouri 63102; Mr. John J. Bengel, attorney for Appellants, 4310 Madison Avenue, Suite 200, Kansas City, Missouri 64111.

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Subscribed and sworn to before me this ____ day of June, 2004.

Notary Public

My commission expires: