

STATE OF MICHIGAN
COURT OF APPEALS

FIRE INSURANCE EXCHANGE,

Plaintiff-Appellee/Cross-Appellant,

v

DETROIT EDISON COMPANY,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

June 19, 2001

No. 216834

Oakland Circuit Court

LC No. 97-539672-NZ

Before: Bandstra, C.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment on the jury verdict in this subrogation action. We affirm.

This case arises out of a fire at a home owned by Michelle and Steven Hinkle. Plaintiff insured the home and paid the Hinkles' claim of \$86,928.91. Thereafter, plaintiff filed the present suit. Plaintiff's negligence claim proceeded to a jury trial. At trial, plaintiff advanced the theory that a bird contacted a primary electrical line near the Hinkles' house, which resulted in the operation of a breaker at defendant's nearby electrical substation. According to plaintiff, when the breaker was re-closed, transient voltage traveled through defendant's electrical lines and caused arcing in the secondary wires near the Hinkle home. That arcing allegedly produced high voltage, which damaged the wires leading from the electrical meter on the Hinkles' home to the home's fuse box, and led to the fire inside the house. Plaintiff alleged that defendant was negligent in failing to include a 75-amp fuse on the lines leading to the Hinkles' home and a spark gap mechanism in the meter installed on the home. Defendant claimed that the fire was not the result of any problem in the electrical distribution system, but rather was the result of an improperly installed fuse box inside the home. The jury returned a verdict for plaintiff and a judgment was entered in the amount of \$86,928.91, plus interest.

I

On appeal, defendant first argues that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict (JNOV) or a new trial. Defendant contends that plaintiff failed to establish a prima facie case of negligence.

We review a trial court's denial of a motion for a directed verdict de novo. *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 278; 608 NW2d 525 (2000). All the evidence presented up to the time of the motion must be reviewed to determine whether a factual question existed. *Id.* We must view the evidence in the light most favorable to the nonmoving party, must grant the nonmoving party every reasonable inference and must resolve any conflict in evidence in the nonmoving party's favor. *Id.* A trial court's decision to grant or deny a motion for JNOV is also reviewed de novo. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999); *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 672; 591 NW2d 438 (1998). In reviewing a decision on a motion for JNOV, we must view the testimony and all legitimate inferences in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Only if the evidence fails to establish a claim as a matter of law is JNOV appropriate. *Forge, supra*.

To establish a prima facie case of negligence, the plaintiff must prove: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Company*, 463 Mich 1, 6; 615 NW2d 17 (2000). In *Laney v Consumers Power Co*, 418 Mich 180; 341 NW2d 106 (1983), our Supreme Court established the standard of care applicable to determining whether an electrical utility breached a duty, holding that a utility owes a duty of reasonable care "measured by what a reasonably careful person or company engaged in maintaining electrical power lines would do under the same circumstances." *Id.* at 186.

In the present case, plaintiff's witness, Dr. Eugene Klingler, testified that the fire resulted from transient voltage produced on defendant's electrical lines. Klingler opined that the fire would have been prevented had defendant installed a 75-amp fuse on the lines leading to the Hinkles' house or a spark gap in the electrical meter attached to the house. Defendant contends that plaintiff's claim fails because plaintiff did not introduce testimony that a reasonably careful utility would have installed a 75-amp fuse or spark gap.¹

Considering the evidence in a light most favorable to plaintiff, *Forge, supra*; *Roulston, supra*, plaintiff presented sufficient evidence at trial to create an issue of fact regarding whether

¹ Defendant claims in its brief on appeal that a plaintiff must present expert testimony in order to establish the standard of care described in *Laney*. We note that defendant never challenged Klingler's qualifications as an expert below and refers to Klingler as "plaintiff's expert" in its brief on appeal. While it is true that Klingler acknowledged he is not "an expert in meters," his testimony regarding his qualifications and experience established that he had sufficient knowledge and expertise related to electrical principles and distribution systems to testify regarding his theory of what occurred within defendant's distribution system to cause the fire and what could have been done to prevent the fire. Given these circumstances, we need not decide the specific issue whether expert testimony is always needed to establish the *Laney* standard of care.

defendant's failure to include a fuse or spark gap resulted in negligence. Klingler offered testimony from which jurors could infer that the absence of a 75-amp fuse or spark gap was unreasonable under the circumstances. Klingler's theory of the cause of the fire was supported by evidence that a dead bird was found at the base of nearby service pole, photographs and testimony regarding the burnt secondary lines, testimony from neighbors regarding their own brief power losses, and testimony that a loud "boom" was heard just prior to the fire. Klingler's testimony that high voltage traveled through the meter and into the home's fuse box was not inconsistent with the burnt condition of the meter and fuse box or testimony regarding the condition of the house. Klingler offered a plausible explanation regarding the manner in which fire burns to explain why the fire could not have started in the home's fuse or auxiliary boxes. According to Klingler, had a 75-amp fuse actually been in place as indicated on defendant's utilities map, the fuse would have broken the electrical connection after the initial arcing event. Defense witness, Ronald Martineau, acknowledged at trial that a 75-amp fuse installed within the secondary system may have interrupted the flow of electricity to the Hinkles' home during the incident. Furthermore, while Klingler recognized that the main purpose of a spark gap is to preserve the accuracy of a meter in instances of high voltage, he explained that a spark gap in the Hinkles' meter would have dissipated the high voltage that led to the fire. Overall, plaintiff produced sufficient evidence from which the jury could infer that a reasonably careful utility would have installed the 75-amp fuse or a spark gap meter under the circumstances and that defendant breached its duty of care by failing to do so. The fact that defense witnesses presented alternative theories of causation does not alter that conclusion. The credibility of the witnesses was an issue for the jury to decide. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 622; 600 NW2d 66 (1999).²

Defendant further claims that plaintiff failed to prove negligence because it did not present evidence on the magnitude of the risks involved with defendant's electrical distribution system and the reasonableness of alternative designs. We disagree. Plaintiff's claim was not premised on a defect in the design of the distribution system, but instead was based on defendant's failure to maintain the system in a reasonable manner. For example, plaintiff complained that a 75-amp fuse was not installed, contrary to the design shown on defendant's utilities map. Therefore, plaintiff was not required to present evidence regarding the magnitude of the risks and the reasonableness of alternatives. See *Case, supra, Groncki v Detroit Edison Company*, 453 Mich 644; 557 NW2d 289 (1996), *Schultz v Consumers Power Co*, 443 Mich 445; 506 NW2d 175 (1993), *Laney, supra, Ransford v Detroit Edison Co*, 124 Mich App 537; 335 NW2d 211 (1983), and *Wilhelm v Detroit Edison Co*, 56 Mich App 116; 224 NW2d 289 (1974). Cf. *Owens v Allis-Chalmers Corp*, 414 Mich 413; 326 NW2d 372 (1982) (involving a product liability claim), *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431; 542 NW2d 612

² We clarify that our decision to affirm the jury verdict in this case does not imply that defendant is required to fit all of its meters with spark gaps to avoid future liability from all similar claims. This jury's finding that the fire resulted from defendant's negligence in failing to install an appropriate fuse or spark gap, amidst the presentation of multiple theories of causation, is not per se evidence that defendant's meters that lack spark gaps are defective or that failing to include spark gaps is, itself, tantamount to negligence.

(1995) (involving a premises liability claim where a design defect was at issue), and *Buckeye Union Fire Ins Co v Detroit Edison Co*, 38 Mich App 325; 196 NW2d 316 (1972) (analyzed as a product liability case because the plaintiff asserted a breach of implied warranty claim).

II

Defendant next argues that the trial court erred in refusing to give defendant's proposed special jury instruction regarding a utility's standard of care. This Court reviews claims of instructional error de novo. *Case, supra* at 6. Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990); *Willoughby v Lehrbass*, 150 Mich App 319, 336; 388 NW2d 688 (1986). Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A), *Case, supra*. There is no reversible error if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

Defendant claims that the trial court should have instructed the jury that its determination of what a reasonably careful utility would do under the circumstances must be based on expert testimony. As noted prior, defendant never objected to Klingler's testimony at trial on the basis that Klingler was not qualified to testify as an expert. Thus, specifying that the standard of care be based on expert testimony would not have affected the jury's analysis of the evidence because there was no suggestion during trial that Klingler's testimony was not, in fact, expert testimony. The trial court properly instructed the jurors that they must decide the issues based on the evidence presented, not based on their own knowledge. Under these circumstances, the instructions given by the trial court were not inconsistent with substantial justice and reversal is not warranted. MCR 2.613(A); *Case, supra*.

III

Defendant also argues that a new trial should have been granted because Klingler's theory of causation was against the great weight of the evidence. The grant or denial of a motion for new trial on the ground that the verdict was against the great weight of the evidence rests within the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless a clear abuse is shown. *Arrington v Detroit Osteopathic Hospital Corporation v (On Remand)*, 196 Mich App 544; 493 NW2d 492 (1992). An abuse of discretion occurs when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion or bias. *Alken-Ziegler v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

Notwithstanding that defense witnesses disputed Klingler's theory and opined that an improperly installed fuse box caused the fire, the trial court did not abuse its discretion in denying defendant's motion for a new trial. Defendant focuses on testimony from defense witnesses, which suggests that each of the five houses connected to the relevant secondary wires would have experienced similar fires if high voltage was produced in the manner suggested by Klingler. Klingler did not deny that nearby houses were affected by the transient and high voltages. He opined that neighboring houses would have experienced momentary power outages and dimming of lights. Two other witnesses testified that neighboring homes, in fact,

experienced short power outages. Klingler theorized that the Hinkles' house suffered the most damage because it was the "weakest link" of the houses connected to the secondary wires and explained that it is common for one particular house to suffer significant damage in circumstances involving high voltage. Klingler's overall theory was not inconsistent with the physical evidence. The fact that defendant also presented a seemingly plausible theory of causation does not cause us to find an abuse of discretion. *Arrington, supra*.

Insofar as defendant argues that a new trial is warranted because the jury's conclusion that a secondary fuse should have been in place was against the great weight of the evidence, that argument lacks merit. Defendant's witnesses acknowledged that defendant's utilities map indicates a 75-amp fuse was supposed to have been installed on the relevant secondary lines.³ Klingler testified that such a fuse would have broken the electrical connection and Martineau acknowledged that a 75-amp fuse within the secondary system may have interrupted the flow of electricity. Under these circumstances, the evidence does not clearly preponderate against the jury verdict. See *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000).

IV

Last, defendant argues that the trial court erred in denying its motion for summary disposition on the basis that the Michigan Public Service Commission (MPSC) had primary jurisdiction over plaintiff's claim. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).⁴ Moreover, the applicability of the primary jurisdiction doctrine presents an issue of law that is reviewed de novo. *Michigan Basic Property Ins Ass'n v Detroit Edison Company*, 240 Mich App 524, 528; 618 NW2d 32 (2000).

Here, plaintiff's claim arises in tort, rather than contract, and the present claim was properly left in the trial court's general jurisdiction. *Id.* at 534-535. Furthermore, the circumstances do not weigh in favor of allowing the MPSC to decide the present claim. *Rinaldo's Constr Corp v Michigan Bell Telephone Co*, 454 Mich 65, 71-72; 559 NW2d 647 (1997); *Michigan Basic, supra* at 538.

Given our conclusion that defendant's issues on appeal lack merit, we need not consider plaintiff's issues on cross-appeal.

³ Defense witnesses claimed that changes in the distribution system made the fuse unnecessary.

⁴ The trial court analyzed defendant's primary jurisdiction claim under MCR 2.116(C)(4) (subject-matter jurisdiction). *Michigan Basic Property Ins Ass'n v Detroit Edison Company*, 240 Mich App 524; 618 NW2d 32 (2000), makes clear that claims regarding the primary jurisdiction doctrine are most properly analyzed under MCR 2.116(C)(7). *Id.* at 528-529, citing *Travelers Ins Co v Detroit Edison Co*, 237 Mich App 485, 492-493; 603 NW2d 317 (1999), lv granted 463 Mich 906 (2000).

Affirmed.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Patrick M. Meter