

STATE OF MICHIGAN
COURT OF APPEALS

ROSS BRADLEY and JACQUELINE
BRADLEY,

UNPUBLISHED
March 5, 2002

Plaintiffs,

v

No. 222035
Missaukee Circuit Court
LC No. 97-003617-CK

HAMILTON MUTUAL INSURANCE,

Defendant¹-Appellant,
Cross-Plaintiff,

and

CONSUMERS ENERGY,

Defendant-Appellee,
Cross-Defendant.

Before: Griffin, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, plaintiff appeals as of right the court's entry of judgment for defendant. We reverse and remand for a new trial.

Plaintiff argues that the court improperly denied its motion for new trial based on instructional error. We agree.

We review a trial court's decision to deny a motion for new trial for abuse of discretion. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). However, we review claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The jury instructions must be examined as a whole to determine whether there is error requiring reversal. *Id.* "Even if somewhat imperfect, instructions do not create error requiring

¹ Because this is a subrogation claim, we refer to Hamilton Mutual Insurance as plaintiff.

reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury.” *Id.* Reversal for instructional error is only appropriate where failure to do so would be inconsistent with substantial justice. *Id.*

The trial court gave two instructions to the jury relating to defendant’s standard of care and duty. The first stated that defendant was obligated to use the care that a reasonably careful utility company, engaged in the business of maintaining electric power lines, would use under the same circumstances. The court also stated that the law does not say what a reasonably careful utility company would or would not do under the circumstances, leaving that specific determination to the jury. The second instruction stated that defendant was required to use reasonable care to protect the public from danger, including the duty to inspect and repair its wires and other instrumentalities so as to discover and remedy hazards and defects. The duty of inspection involved more than remedying defects brought to defendant’s attention.

Plaintiff contends that these instructions conflict. We agree. Where a court gives conflicting instructions, one of which is erroneous, we generally presume that the jury followed the erroneous instruction. *Sudul v Hamtramck*, 221 Mich App 455, 461; 562 NW2d 478 (1997); see *Kirby v Larson*, 400 Mich 585, 606; 256 NW2d 400 (1977). Therefore, we must determine which instruction was proper to determine if substantial justice requires reversal. *Case, supra* at 6. If the first instruction accurately reflected the law, plaintiff was not prejudiced by the conflict and reversal would be unnecessary.

At issue in this case is the correct standard of care for an electric utility company in a negligence case. Our Supreme Court addressed this issue in several decisions, determining on each occasion that the appropriate standard is reasonable care under the circumstances. *Case, supra* at 6-7; *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993); *Laney v Consumers Power Co*, 418 Mich 180, 186; 341 NW2d 106 (1983). However, reasonable care under the circumstances is not the same in every case; in fact, our Supreme Court described it as a sliding scale. *Case, supra* at 9. “The more severe the potential injury, the more resources a reasonable person will expend to try and prevent that injury. Similarly, that the greater the likelihood that a severe injury will result, the greater the lengths a reasonable person will go to prevent it.” *Id.* Moreover, whether a duty exists depends on several factors, including the relationship of the parties together with the foreseeability and nature of the risk. *Schultz, supra* at 450.

In *Schultz*, the Court determined that the utility company had an obligation to reasonably inspect and repair wires and other instrumentalities to discover and remedy defects and other hazards. *Schultz, supra* at 451. In that case, a man was electrocuted while painting a house when his ladder came near a frayed electric wire located close to the house. *Id.* at 447-448. The Court held that the failure to conduct routine inspections of the wires made it reasonably foreseeable that the company’s failure to discover or repair a problem could result in injury or death to people working near the house. *Id.* at 453. The Court further held that the duty to inspect and repair wires involved more than merely remedying defective conditions brought to the utility company’s attention. *Id.* at 454.

Since *Shultz*, the Court has carefully limited the duty to inspect and repair. See *Case, supra* at 9. In *Groncki v Detroit Edison Co*, 453 Mich 644; 557 NW2d 289 (1996), three

combined cases involving professional tradesmen who inadvertently contacted electric wires during the course of their respective employment, the Court distinguished *Schultz*, stating that the cases did not concern defective wires and focused on foreseeability. *Id.* at 654, 657, 660. In *Case*, involving the effect of stray voltage on dairy production, the Court again distinguished *Schultz*, noting the difference in severity between the dangers of high-voltage electricity, including fire, electrocution and death, and the dangers of stray voltage. The Court stated that “*Schultz* represents a very limited exception to the general rule that the jury determines the specific standard of care owed by a defendant in a particular case” *Case, supra* at 9.

In this case, a primary distribution wire hanging over a flea market collapsed, falling onto the building and setting it on fire. Plaintiff argues that the wire was defective, with a preexisting condition that weakened the wire, causing it to separate when a fault current ran through the wire from a tree on the wire in another part of the circuit. Because the flea market was directly below the wire, it was foreseeable that a failure to inspect or repair the wire could result in injury or fire by the wire falling on the building below. We conclude that this case is factually most like *Schultz*; therefore, the second jury instruction requiring inspection was correct and the first jury instruction impermissibly allowed the jury to decide defendant’s specific standard of care.

We presume the jury followed the erroneous instruction. *Sudul, supra* at 461. Because the applicable law was not adequately and fairly presented to the jury, substantial justice requires reversal. *Case, supra* at 6.

We remand for a new trial solely on the issue of instructional error. We find that plaintiff’s alternative arguments for new trial do not warrant reversal. We also decline plaintiff’s request to reverse the trial court’s decision denying plaintiff’s motion for judgment notwithstanding the verdict (JNOV). Viewing the evidence in the light most favorable to defendant, we find that reasonable jurors – following the correct instructions – could have reached different conclusions. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000); *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260-261; 617 NW2d 777 (2000).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra