

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE ELECTRIC	§
COOPERATIVE, INC.,	§
	§
Defendant Below,	§
Appellant,	§ No. 304, 2000
	§
v.	§ Court Below: Superior Court
	§ of the State of Delaware in and
CHRISTINA M. WELLS,	§ for Kent County
individually and as personal	§ C.A. No. 96C-05-020
representative of the Estate of	§
Tony Lee Wells, and TYLER	§
WELLS, by his next friend,	§
Christina M. Wells,	§
	§
Plaintiffs Below,	§
Appellees.	§

Submitted: June 20, 2001
Decided: August 3, 2001

Before VEASEY, Chief Justice, WALSH, and BERGER, Justices.

ORDER

This 3rd day of August 2001, upon consideration of the briefs of the parties, it appears that:

(1) This is an appeal from the Superior Court following a verdict in a wrongful death action arising from the electrocution of Tony Lee Wells (“Wells”) while an employee of EMT Construction Company (“EMT”). At the time of the accident, EMT was performing electric pole relocation work pursuant to a contract

with the appellant, Delaware Electric Cooperative, Inc. (“DEC”). At trial, DEC contended that Wells’ death was the result of his own negligence and/or the superseding, intervening conduct of EMT.

(2) Following a week-long trial, the jury ultimately awarded Wells’ surviving wife and child \$375,000 and \$106,000 respectively. The jury determined, however, that the awards should be reduced by 25 percent due to Wells’ own negligence. After return of the verdict, DEC moved for a mistrial and subsequently for a new trial and/or judgment in its favor based on an alleged irregularity in the rendering of the jury verdict. DEC also claimed that the evidence was insufficient to support the verdict. The Superior Court rejected DEC’s motions and this appeal followed.

(3) In this appeal, DEC advances three claims of error: (i) that the trial judge “interfered” with the rendering of the jury verdict; (ii) that the trial judge erred in excluding testimony of a DEC witness on the ground that the witness had not been identified as an expert; and, (iii) that the plaintiffs failed to refute the affirmative defense of superseding, intervening negligence. We find no merit to these claims and, accordingly, affirm.

(4) DEC's claim of error with respect to the rendering of the jury's verdict arises from the jury's treatment of its contributory negligence finding. The jury was instructed that its award of damages would be reduced by the court, percentage-wise, to reflect any finding of contributory negligence. Because the verdict sheet did not contain the usual notation that the actual reduction would be accomplished by the court (by applying any contributory negligence factor to the total damage award) the jury apparently made the reduction itself. Following the submission of the special verdict form, the court announced, in the presence of the jury, that the reduction would be made after conferring with the lawyers. Apparently, there was a noticeable reaction from the jury, who the trial judge described as "looking quizzical" and "shaking their heads." The trial judge then requested the jury to return to the jury room to reconsider their verdict to see if it was consistent with the instruction. The jury returned with answers on the verdict sheet in the higher amounts, *i.e.*, not reflecting a 25 percent reduction for contributory negligence. The court then applied the 25 percent reduction to the new awards.

(5) DEC contends that the trial judge interfered with the jury's deliberations and coerced the jury into awarding a verdict different from that intended. We find no merit to this claim. The trial judge enjoys a wide range of discretion in the

management of a trial, including ensuring that the jury properly performs its function. *See Polk v. State*, Del. Supr., 567 A.2d 1290, 1293 (1989). The trial judge occupies a unique vantage point in assessing trial dynamics and, as this case illustrates, must often interpret jury reaction to gain insight into irregularities. In this case, it is obvious that the jury misunderstood their role in reducing the damages award after a finding of contributory negligence. The trial judge had an obligation to correct the apparent error, if in fact, error had occurred, by affording the jury a further opportunity to render the damages award in a proper fashion. To the extent the original award did not reflect the intention of the jury, it would have been a miscarriage of justice to have entered such a verdict.

We conclude that the trial judge properly exercised his discretion in permitting the jury to modify the damages portion of its verdict to reflect its real intent.

(6) DEC next argues that the Superior Court erred in not permitting Mark Nielson, a DEC employee, to testify concerning how EMT employees could perform the pole relocation work in a safe manner. Nielson had not been identified as an expert and plaintiffs objected on that ground. The trial court sustained the objection and noted that Nielson had already testified as a witness for plaintiffs and the proposed testimony was cumulative. Nielson testified as a fact witness for plaintiffs

and DEC concedes that he had not been designated as an expert prior to trial. Under the circumstances, and in considering the fact that the trial judge viewed the proffered factual testimony as cumulative, we conclude that the trial judge did not abuse his discretion in barring the witness from testifying as an expert. *See Duphily v. Delaware Elec. Co-op*, Del. Supr., 662 A.2d 831, 835-36 (1995).

(7) DEC's third claim of error is directed to the Superior Court's refusal to grant a new trial on liability on the ground that DEC had established the affirmative defense of superseding negligence on the part of EMT and the jury's rejection of that defense was not supported by the evidence. In denying the motion for a new trial, the Superior Court noted that, under the evidence presented at trial, the jury could have concluded that three entities were negligent: DEC, Wells and, on a superseding basis, EMT. But, as the Superior Court noted, proximate cause is ultimately a fact question and the jury "could rationally conclude that EMT's continued use of the manner of operation that had worked well where the wires were higher was not extraordinarily negligent." We construe that language to mean that while negligent, EMT's conduct did not necessarily constitute a superseding cause and a jury finding to that effect was not against the greater weight of the evidence. We conclude that the Superior Court's ruling properly applied the standards for the application of

superseding cause set forth in *Duphily*. Accordingly, we affirm the denial of a new trial.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh
Justice