

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN SHIVELY and CAROL SHIVELY,

UNPUBLISHED

May 19, 2011

Plaintiffs-Appellants,

and

PROGRESSIVE MICHIGAN INSURANCE
COMPANY,

Plaintiff,

v

No. 295057

Jackson Circuit Court

CONSUMERS ENERGY COMPANY,

LC No. 08-000989-NO

Defendant-Appellee.

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting summary disposition to defendant Consumers Energy Company in this personal injury action. We affirm.

The basic underlying facts are not in dispute. On June 30, 2007, plaintiffs were riding their motorcycle down Springbrook Road in Jackson County.¹ They struck an electric cable that was hanging approximately 3 to 3½ feet off of the ground. The parties agree that the wires were in a position where they caused the accident because a limb from a nearby oak tree broke off and fell onto the crossarm of an electrical pole, shattering the crossarm and causing the overhead line to drape closer to the road. Both plaintiffs sustained injury, albeit not from an electrical shock, either because the wire was "neutral" or the circuit had shut off automatically after the limb hit the pole.

¹ The Shivelys had motorcycle insurance through plaintiff Progressive Michigan Insurance Company. Progressive's separate claim against defendant was dismissed by stipulation.

Plaintiffs' sole issue on appeal is that the trial court erred when it disregarded the testimony of their proffered expert witness and then granted summary disposition to defendant. During the hearing on its motion for summary disposition, defendant argued that the opinion testimony of plaintiffs' expert should be deemed inadmissible because he admitted that he did not have relevant experience or qualifications in tree management, trimming, or clearing power lines, and thus plaintiffs had presented no admissible evidence that either defendant's standards or its actions were unreasonable under the circumstances. The trial court agreed, finding that plaintiffs could not present any admissible proof at the time of trial that defendant was not acting as a reasonable utility when it failed to remove the limb prior to the accident.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

In reviewing a ruling made under [MCR 2.116(C)(10)], a court tests the factual support by reviewing the documentary evidence submitted by the parties. We review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id.* at 567-568 (citations and quotation marks removed).]

A trial court's decision concerning the admissibility of evidence, including the qualifications of an expert witness and the basis for his testimony is reviewed for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010), citing *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *Safian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

"The requisite elements of a negligence cause of action are that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered." *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). In discussing the scope of the duty, least as far as electrocution danger to the general public,² *Schultz* adopted what appears to be a "reasonable utility" test:

Where service wires erected and maintained by an electric utility company carry a powerful electric current, so that persons coming into contact with or proximity to them are likely to suffer serious injury or death, the company must exercise reasonable care to protect the public from danger. The degree of care

² See, e.g., *Case v Consumers Power Co*, 463 Mich 1, 10-11; 615 NW2d 17 (2000) (finding *Schultz* inapplicable to stray voltage cases).

required is that used by prudent persons in the industry, under like conditions and proportionate to the dangers involved, to guard against reasonably foreseeable or anticipated contingencies. Electric companies must exercise ordinary care to guarantee that equipment is kept in a reasonably safe condition. Although we do not follow a rule of absolute liability, the defendant's duties to inspect and repair involve more than merely remedying defective conditions actually brought to its attention. [*Id.* at 453-454 (internal citation omitted).]

In response to the defendant's argument that it was not negligent because the location of the power lines exceeded the clearance requirements published in the National Electric Safety Code (NESC), the Court held:

Compliance with the NESC or an industry-wide standard is not an absolute defense to a claim of negligence. While it may be evidence of due care, conformity with industry standards is not conclusive on the question of negligence where a reasonable person engaged in the industry would have taken additional precautions under the circumstances. *Owens v Allis-Chalmers Corp*, 414 Mich 413, 422-423; 326 NW2d 372 (1982); 2 Restatement Torts, 2d, § 295A, p 62. An argument on the basis of industry standards, therefore, goes to the question whether a defendant breached its duty of ordinary care, not whether a duty existed. If the plaintiff can convince a jury that a reasonably prudent company would have taken auxiliary measures beyond those required by industry standards, then the jury is clearly at liberty to find that the defendant breached its duty, regardless of the industry's guidelines. [*Shultz*, 443 Mich at 456.]

Discussing foreseeability, the Court further held that, given the circumstances, "a reasonable person could certainly anticipate that a painter could be electrocuted if his aluminum ladder came close to, or touched, a pitted, corroded and frayed electric wire. *Id.* at 452. Furthermore, a reasonable person could confidently conclude that this event would cause serious injury or death to the painter." *Id.* And as recognized by plaintiffs here, the Court noted, "A plaintiff need not establish that the mechanism of injury was foreseeable or anticipated in specific detail. It is only necessary that the evidence establishes that some injury to the plaintiff was foreseeable or to be anticipated." *Id.* at 452 n 7.

In the present case plaintiffs cannot show that the trial court erred when it concluded that they had not presented substantively admissible evidence to show that defendant acted objectively unreasonably. "[T]he proponent of evidence bears the burden of establishing relevance and admissibility." *People v Crawford*, 458 Mich 376, 386 n 6; 582 NW2d 785 (1998). The admissibility of expert witness testimony is governed by MRE 702, which states:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

While the trial court did not specifically discuss this rule in its holding, it implicitly relied on it by finding that plaintiffs would be unable to provide “any admissible proof at the time of trial that Consumers Energy was not acting as a reasonable utility.” Plaintiffs’ proffered expert, an electrical engineer, admitted virtually complete ignorance over anything having to do with forestry, or in making decisions concerning when, and whether, to trim trees. He admitted that, as a former employee of defendant, he had no training or involvement in utility line clearing standards. He did not recall having any such training in his previous position in Los Angeles, and did not remember any standards used because it had been “too long.” He admitted that he did not know the standard used by other Michigan utilities. He did not testify that he was familiar with the standard or system that defendant’s proffered expert stated defendant used to determine when to trim trees. He instead relied solely on the standards set forth in the NESC for his opinion. And not only could he not explain how the NESC distance requirements would constitute the “objectively reasonable” standard in terms of any cost-benefit analysis, he admitted that no company was using such a standard. Based upon this testimony, even if plaintiffs’ expert’s testimony were admitted, there is no indication that such testimony would assist the trier of fact to understand the evidence or to determine a fact in issue.

Given the lack of evidence to refute the testimony of defendant’s expert witness, this Court concludes that the trial court did not err when it granted summary disposition for defendant.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter