

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WOOD COUNTY

Toledo Edison Company

Court of Appeals No. WD-14-063

Appellee

Trial Court No. CVE1300415

v.

The Ohio Bell Telephone Company  
(dba AT&T Ohio), et al.

**DECISION AND JUDGMENT**

Appellants

Decided: June 19, 2015

\* \* \* \* \*

James B. Restivo, for appellee, Toledo Edison Company.

Richard P. Cuneo and Jacob M. Lowenstein, for appellee, Thomas A. Schaller.

Cormac B. DeLaney, Stephen E. House, and Edward L. Bettendorf, for appellants.

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**SINGER, J.**

{¶ 1} This is an appeal from the Perrysburg Municipal Court awarding judgment against appellant, The Ohio Bell Telephone Company, d.b.a.”AT&T” Ohio (“AT&T”), for negligence. For the reasons that follow, we affirm.

{¶ 2} On April 10, 2013, appellee, Toledo Edison Company (“Edison”), filed a complaint against appellee, Thomas Schaller (“Schaller”), and AT&T alleging negligence against Schaller and AT&T and breach of contract against AT&T. The complaint stemmed from a May 2, 2012 incident wherein Schaller, while operating farm machinery on a city road, snagged and damaged AT&T’s telephone line. The line was attached to Edison’s utility poles and the poles were damaged as a result of the incident. Claiming AT&T had failed to properly maintain its telephone line and that Schaller was negligent when he struck the line, Edison sought damages in the amount of \$4,650.11. Schaller filed a cross-claim for negligence against AT&T.

{¶ 3} A jury trial commenced on July 23, 2014. On July 25, 2014, the jury found that only AT&T was negligent and directly and proximately caused the damage to Edison’s property in the amount of \$4,650.11. The jury also found that AT&T’s negligence directly and proximately caused the damage to Schaller’s property in the amount of \$1,039.48. AT&T now appeals setting forth the following assignments of error:

I. The trial court erred in denying the repeated motions for a directed verdict made by defendant-appellant AT&T.

II. The trial court erred in permitting the representative of and witness for plaintiff-appellee Toledo Edison Company to testify to impermissible and prejudicial other acts/course of conduct evidence.

III. The trial court erred in granting plaintiff-appellee Toledo Edison Company's motion in limine and precluding the representative of and witness for defendant-appellant AT&T from giving material testimony based on first-hand knowledge of records of which she was the keeper, her own personal observations, and her review of photographs admitted into evidence.

{¶ 4} In AT&T's first assignment of error, it argues that the trial court erred in failing to grant directed verdicts against Edison's and Schaller's claims for negligence.

{¶ 5} Civ.R. 50(A)(4) states that "[w]hen a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue." A motion for a directed verdict tests the sufficiency of the evidence, not the weight of the evidence or the credibility of witnesses. *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119–120, 671 N.E.2d 252 (1996). A trial court's grant or denial of a motion for directed verdict presents a question of law, which an appellate court reviews de novo. *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 257, 741 N.E.2d 155 (2d Dist.2000).

{¶ 6} Here, AT&T contends its directed verdict motions should have been granted because both appellees failed to produce sufficient evidence on the essential elements of their negligence claims.

{¶ 7} In order to establish a negligence claim, the plaintiff must demonstrate a duty owed by the defendant to the plaintiff, a breach of that duty, and that the plaintiff's injury proximately resulted from the defendant's breach of duty. *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614 (1989).

{¶ 8} Initially we note that it is undisputed that Schaller's farm machinery stood 14 feet, 6 inches tall. The evidence showed that when placing lines across roadways, AT&T followed, at the very least, the National Electric Safety Code guidelines which call for lines to be 15 feet, 5 inches above the roadway. When an AT&T manager was asked on the stand if, based on these measurements, the line must have been lower than Schaller's machinery, she replied: "[y]ou have to assume that."

{¶ 9} Beginning with the existence of a duty, Ohio Supreme Court requires a public utility "to exercise the highest degree of care consistent with the practical operation of its business in the construction, maintenance, and inspection of its equipment." *Otte v. Dayton Power and Light Co.*, 37 Ohio St.3d 33, 38, 523 N.E.2d 835 (1998). Under Ohio negligence law, the issue of whether or not a duty exists is a question of law for the court to determine. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, ¶ 24. Further, the duty element of negligence may be established by common law, by legislative enactment, or by the

particular circumstances of a given case. *Wallace* at ¶ 23. There is no set formula for ascertaining whether a duty exists. *Id.* Duty is the court's expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. *Id.*

{¶ 10} It is also undisputed that AT&T owned the line at issue. Here, appellees produced some evidence that a duty existed in the form of exhibit No. 1, a joint operating agreement both AT&T and Edison voluntarily entered into in 2011. The agreement assigns each party a duty to maintain their respective property. Specifically, Article 8.105 of the agreement provides that “[E]ach party shall, at its own expense, place, maintain, repair, rearrange, transfer and remove its own attachments and shall at all times perform such work promptly \* \* \*.”

{¶ 11} As for breach of duty, AT&T claims to have no actual notice of the low hanging line and therefore argues, it could not have breached any duty owed to appellees. However, this argument is without merit because here, the circumstances call for the owner to have the duty to inspect, discover and fix its low lines. Thus, constructive notice would apply where a line was hung but no proper inspection or maintenance occurred. Moreover, there was nothing prohibiting AT&T from inspecting and maintaining its line, and reasonable minds could find that it is indeed foreseeable that such damages would result from an omission to do so.

{¶ 12} In sum, appellees provided evidence showing that AT&T had a duty to maintain its line, AT&T breached its duty by failing to maintain its line and as a result, appellees sustained property damage.

{¶ 13} When the party opposing a directed verdict motion fails to produce *any* evidence on one or more of the essential elements of a claim, a directed verdict is appropriate. *Hargrove v. Tanner*, 66 Ohio App.3d 693, 695, 586 N.E.2d 141 (9th Dist.1990). Viewing the record in its entirety, we find that the evidence was sufficient to defeat the directed verdict motions and the claims were properly submitted to the jury. Accordingly, the trial court did not err in denying the directed verdict motions. AT&T's first assignment of error is found not well-taken.<sup>1</sup>

{¶ 14} In AT&T's second assignment of error, it asserts that the trial court abused its discretion to allowing a witness to testify regarding other acts which purportedly show a course of conduct.

{¶ 15} Pursuant to Evid.R. 404(B), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. The admission of this evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice. *State v. Sage*, 31 Ohio St.3d 173, 180,

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<sup>1</sup> Appellant has raised the issue of Res Ipsa Loquitur in its brief. We need not consider this as the jury was not instructed on the doctrine.

510 N.E.2d 353, 358 (1987). Abuse of discretion requires reversal only where the trial court's attitude is deemed unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E. 1140, 1142 (1983).

{¶ 16} At trial, an employee and witness for Edison testified that she was aware of instances where low hanging lines were reported to AT&T and the company did nothing to address the problem. AT&T contends that the court arbitrarily, unreasonably, or unconscionably allowed this statement as evidence showing AT&T had the negligent propensity to ignore its low lines, and therefore, it must have acted in accordance regarding the subject line.

{¶ 17} Evid.R. 103(A) provides that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party has been affected. This court accordingly finds Evid.R. 103(A) here controlling because, even assuming arguendo there was an error, given the evidence, the error was harmless in that there was no reasonable probability that the outcome of the trial would have been different but for the "error." AT&T's second assignment of error is found not well taken.

{¶ 18} In AT&T's third assignment of error, it asserts that the trial court abused its discretion in granting Edison's motion in limine thereby precluding testimony from AT&T's representative.

{¶ 19} A motion in limine is a precautionary request directed to the discretion of the court to limit introduction of specified evidence until its admissibility may be determined outside the presence of the jury. *Staerker v. CSX Transp., Inc.*, 6th Dist.

Lucas No. L-05-1416, 2006-Ohio-4803, ¶ 19. A ruling on a motion in limine is interlocutory, pending the court's assessment of the evidentiary issue in the context of trial. *Id.* (Citation omitted.) The ruling is thus subject to change if the evidence introduced at trial properly raises the issue. *Id.* (Citation omitted.) For this reason, a ruling on the motion does not preserve any error for review. *Id.* (Citation omitted.) The evidence thus must be presented at trial and a proper objection made to preserve the error for appeal. *Id.* (Citation omitted.) The appealable error, however, may not be predicated upon a ruling which excludes evidence unless a substantive right of a party is affected. Evid.R. 103(A).

{¶ 20} Decisions involving the admissibility of evidence are reviewed for an abuse of discretion. *Kinn v. HCR ManorCare*, 998 N.E.2d 852, 2013-Ohio-4086, ¶ 24 (6th Dist.) Likewise, we review a trial court's decision granting a motion in limine for an abuse of discretion. *Id.* (Citation omitted.)

{¶ 21} Here, AT&T contends that its representative should have had the opportunity to present testimony that the subject wire was properly installed. Following the conclusion, at trial, to grant Edison's motion, AT&T made a proffer of the excluded testimony alleging two findings. First, the 1991 installation of the subject wire was in accordance with the National Electric Safety Code. Second, the connection of the subject wire exceeded current National Electric Safety standards. Hence, AT&T argues it was materially prejudiced by the evidentiary ruling to exclude this testimony.

{¶ 22} AT&T however, is incorrect as neither of the proffered findings negate the appellees' negligence claims. This evidentiary ruling thus implicates Evid.R. 103(A), and even assuming arguendo that there was an error, once again there is no reasonable probability that the outcome of the trial would have been different. Accordingly, AT&T's third assignment of error is found not well taken.

{¶ 23} For the forgoing reasons, the judgment of the Perrysburg Municipal Court is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R.24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

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JUDGE

Stephen A. Yarbrough, P.J.

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JUDGE

James D. Jensen, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.