

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 25, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-1806**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**FRED J. KULIG AND, LINDA J. KULIG,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**TREMPEALEAU ELECTRIC COOPERATIVE AND FEDERATED  
RURAL ELECTRIC INSURANCE CORPORATION,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Fred and Linda Kulig appeal a judgment dismissing their stray voltage claim seeking damages for injuries to their dairy herd. The Kuligs argue that the trial court erroneously determined that Trempealeau Electric Cooperative was entitled to notice before it owed a duty to the Kuligs and that

Trempealeau has a duty to maintain an electrical system that does not cause stray voltage. Because the Kuligs do not demonstrate reversible error, we affirm the judgment.

¶2 The Kuligs' dairy herd suffered health problems and decreased milk production that the Kuligs attributed to stray voltage from Trempealeau. The Kuligs brought this action for damages and tried it to the court without a jury. At the close of their case, the trial court granted Trempealeau's motion to dismiss based upon a failure to demonstrate a prima facie case. In so ruling, the trial court found the following facts:

[T]he Kuligs operated a dairy farm in rural Independence in 1990. The Kuligs have been involved in dairy farming most of their lives. They had experienced a stray voltage problem on their farm in the 1980's. This was resolved with a settlement between the same parties on February 8, 1990. In addition, at the time of the settlement, remedial steps were undertaken by Trempealeau Electric Cooperative for the alleged stray voltage in the '80's. [A]ccording to the testimony of Fred Kulig, he observed the condition of the herd suffer in the beginning of 1992. [S]ome of the symptoms ... included lameness and arthritic conditions and lower milk production and illnesses, and calves dying at a higher rate than would be expected. He checked with his veterinarian ... and ... changed nutritionists.

¶3 The court was shown videotape of the herd from 1994 and 1996. It found that the videotape was inconclusive to establish the comparative condition of the herd, because in 1996 half the herd was different. The court had not been provided with individual cow and milk records. The court continued:

[T]he only records [were of] the whole herd milk production level ... contained in the testimony of Mr. [Nile] Beck. Mr. [Thomas] Beane testified, who was not an engineer, and he testified that he believed anything over .10 volt was too high exposure to a cow. He was self-

taught and wasn't an engineer. I would have to agree with the opinion at page 22 of the PSC Docket ... in which they commented that Mr. Beane's background does not qualify him as an expert. He admitted having no formal education as an electrician and no particular expertise in isolation transformers, and he had taken no formal engineering classes or statistics classes and never completed the stray voltage investigator's training course. They made the finding that his broad criticism of researchers, veterinarians, SVAT, which is the Stray Voltage Advisory Team, utilities and farm service personnel was of little value. Similarly here, based on his statements, I gave no weight to his testimony. In fact, in cross-examination, they asked him what he thought scientific method meant to him, and he said it meant documentation, and then he proceeded to have no documentation other than some sketchy notes marked as Exhibit 4 which were entered into evidence.

¶4 The court was also unpersuaded by the testimony of Francis Penterman, a stray voltage consultant.

Mr. Penterman testified that he was self-taught and not an engineer. In fact, he had no certifications of any kind even as an electrician. The Court allowed him to testify, and [his report] states there are spurious impulses, he called them, that accessed the livestock facilities, and that there was high current on the primary neutral. Even with that, he gave no indication or could not testify that the impulses caused problems in the cows ....

¶5 The court stated that it did not permit Penterman to testify whether the impulse levels were excessive and so the court was without a standard to determine whether the impulses were too high or too low. Penterman also provided no data showing what impulse level was good or bad. The court noted that one of the exhibits stated that occasionally, transients are probably accepted by animals just as static discharges are accepted by people, without causing permanent effects. The court found that there was no evidence indicating that occasional transients were a problem.

¶6 Additionally, the court found that the testimony of Dr. Paul Dettloff, a veterinarian, was “not credible enough to indicate that the problems he saw in the herd were related to stray voltage problems and ... directly caused by the defendant [cooperative].” The court determined, based upon the report of the state veterinarian, that there were many recommendations that could have been made to improve herd health, but that many were not followed up. “I can’t make any finding that the other sources of the problem can be ruled out.” The court also determined that the testimony of Brad Kolpin, dairy farmer and stray voltage consultant, and Donald Woychik, a semi-retired electrician and dairy farmer, did not substantiate that there was an injurious level of stray voltage at the cow contact areas. “I can’t find that there was excessive levels that the cows were exposed to. There’s no evidence that the impulses caused the problems or ... that there is even a problem ....”

¶7 The court additionally determined that there was no proof that Trempealeau knew of any problems associated with stray voltage or impulses on the Kulig farm until the fall of 1994. It stated that there is no evidence “that there’s a continuing duty to check and monitor the current on relatively new transmission lines.” It found that the Kuligs never established a proper standard for a correct level of voltage on the primary neutral system. The court concluded that on the record before it, it was not able to find that the cooperative was negligent. As a result, it granted Trempealeau’s motion to dismiss.

¶8 In cases tried to the court without a jury, WIS. STAT. § 805.17 (1997-98)<sup>1</sup> governs motions to dismiss at the close of the plaintiffs’ case.<sup>2</sup> It provides

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version.

<sup>2</sup> Section 805.17 provides in part:

(continued)

that “[t]he court as trier of the facts may then determine [the facts] and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence.” WIS. STAT. § 805.17(1). It further provides that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” WIS. STAT. § 805.17(2). Credibility is the province of the trial court, and we do not overturn the trial court’s weight and credibility assessments unless they are patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. *See Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

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(1) MOTION AT CLOSE OF PLAINTIFF’S EVIDENCE. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his or her evidence, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in sub. (2). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

(2) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an opinion or memorandum of decision filed by the court. ... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

¶9 In support of their claim, the Kuligs rely on the duty of reasonable care of all persons to refrain from those acts that unreasonably threaten the safety of others. See *Klassa v. Milwaukee Gas Light Co.*, 273 Wis. 176, 77 N.W.2d 397 (1956). To establish a negligence claim, a plaintiff must show a duty of care, a breach of that duty, a causal connection between the conduct and the injury, and an actual loss as a result of the injury. See *Rockweit v. Senecal*, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995). Here, the trial court found that the Kuligs failed to demonstrate: (1) Trempealeau's duty of care; (2) that it breached a duty by supplying injurious levels of stray voltage; and (3) a causal connection between the level of voltage and the injury to the dairy herd.

¶10 The Kuligs do not challenge the trial court's findings of fact or its weight and credibility assessments. Instead, they contend that the trial court made an error of law when it determined that Trempealeau needed to be given notice before it owed a duty to the Kuligs. They assert that Trempealeau has a duty of reasonable care to maintain the electrical system in a manner that does not cause stray voltage problems for customers. We are unpersuaded. That the Kuligs failed to establish Trempealeau's duty of care is just one component of the trial court's decision. The court also determined that the Kuligs failed to demonstrate that the injuries to the dairy herd were caused by stray voltage. Therefore, even if the court erroneously determined the standard of care, its findings with respect to causation preclude imposition of liability.

¶11 Citing *Mechanical Appliance Co. v. A. Kieckhefer Elev. Co.*, 164 Wis. 65, 159 N.W. 557 (1916), the Kuligs nevertheless argue that because the trial court erroneously interpreted Trempealeau's legal duty, its entire decision is infected to the point of warranting reversal. They further argue that when the trial court makes serious errors of law, its findings of fact are not entitled to weight,

relying on *Truelsch v. Miller*, 186 Wis. 239, 202 N.W. 352 (1925). The Kuligs interpret these cases too broadly. In both cases, our supreme court referred to legal errors that went to the heart of the fact-finding process. For example, in *Truelsch*, the supreme court found that the trial court erroneously excluded letters written by the decedent on grounds of hearsay. *See id.* at 248. It concluded that it was not clear that the findings of fact would have been the same had the letters been admitted. *See id.* Here, any alleged error by the trial court with respect to determining Trempealeau’s duty of care is distinct from the court’s credibility assessments and fact-finding on the separate issues of causation. As a result, the cases cited are not persuasive.

¶12 The Kuligs also rely on *Chase v. Woodruff*, 133 Wis. 555, 113 N.W. 973 (1907), and *Figge v. Bergenthal*, 130 Wis. 594, 110 N.W. 798 (1907), for the proposition that “[t]he ordinary rule that the conclusion of the trial court as to facts should not be overruled unless it be clearly wrong does not apply where the court’s conclusion was reached by applying a wrong rule of law.” Again, the cases do not apply here, where the legal issue as to duty is distinct from the court’s factual inquiry as to causation. The record does not suggest that the trial court’s determination with respect to Trempealeau’s duty, even if erroneous, has any bearing on its assessment of weight and credibility of the witnesses testifying as to causation.

¶13 Therefore, we do not address the Kuligs’ second argument, that Trempealeau had a duty regardless of notice. We conclude that even if it had such a duty, the trial court’s separate factual determination, that the evidence in the record failed to establish that harmful levels of stray voltage caused injuries to the dairy herd, precludes liability. As a result, the Kuligs have failed to demonstrate reversible error.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE  
809.23(1)(b)5.



