No. 1-10-0502

SIXTH DIVISION
March 31, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Antonia Farfan, as Special Administrator of the Estate of Bruno Farfan, Luis Mendez, Jr., Santiago Jimenez, Felipe Ferrusquia, Jose M. Ortiz, and Isidro de la Paz, Plaintiffs-Appellants, v. Commonwealth Edison Company, an Illinois corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County 05 L 66002 Honorable Loretta Edie-Daniels, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred in the judgment.

O R D E R

HELD: Where homeowner and his friends intentionally cut down a tree limb overhanging a live electric line which was clearly visible, utility company could not reasonably anticipate and guard against their conduct and owed no duty of care under the circumstances; the trial court's entry of summary judgment for the utility company was affirmed.

Bruno Farfan was killed and his friends Luis Mendez, Jr., Santiago Jimenez, Felipe Ferrusquia, Jose M. Ortiz, and Isidro de la Paz were injured when they made contact with a

Commonwealth Edison Company high voltage electric line which was more than 30 feet above the ground. The accident happened in the backyard of a single family home in Sauk Village, Illinois, when the men tied a bare metal cable around a large tree branch overhanging the power line and pulled the branch to the ground as another friend was cutting it with a chainsaw. Farfan's widow and the five surviving men brought the present action against the power company alleging negligence, expenses compensable under the statute commonly known as the family expense act (750 ILCS 65/15 (West 2002)), and damages compensable under the survival act and the wrongful death act. 755 ILCS 5/27-6 (West 2002); 740 ILCS 180/1 (West 2002). Following a motion for summary judgment, the trial court found the power company owed no duty to protect against the known and obvious danger of encountering power lines. The court entered judgment in favor of the defendant power company and denied the plaintiffs' motion to reconsider. On appeal, the plaintiffs contend the power company could have reasonably anticipated the contact with the live power line and, therefore, owed a duty of care to prevent the incident, and further argue for application of the deliberate encounter exception to the doctrine of open and obvious danger.

We will first address the contention that the contact was reasonably foreseeable or objectively reasonable to expect and therefore imposed a duty of care on the power company to take whatever steps were necessary and feasible to remedy the hazardous condition.

The purpose of a summary judgment proceeding is to determine whether a triable issue exists. *Tinder v. Illinois Power Co.*, 325 Ill. App. 3d 606, 608, 758 N.E.2d 483, 486 (2001). Summary judgment should be granted only when the pleadings, deposition transcripts,

admissions, and affidavits on file show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Tinder*, 325 Ill. App. 3d at 608, 758 N.E.2d at 486. Whether a defendant owes a duty to a plaintiff is a question of law that is appropriately resolved by a trial judge in a summary judgment proceeding. *Tinder*, 325 Ill. App. 3d at 609, 758 N.E.2d at 486. Questions of law are addressed *de novo* on appeal. *Tinder*, 325 Ill. App. 3d at 609, 758 N.E.2d at 486.

An electric utility company owes a legal duty of care to those who in their ordinary and lawful activities are liable to come into contact with the company's power lines. *Watkins v. Mt. Carmel Public Utility Co.*, 165 Ill. App. 3d 493, 498, 519 N.E.2d 10, 13 (1988); 27A Am. Jur. 2d Energy & Power Sources §182 (2008). Close proximity to a residence does not mean that an electric company should anticipate the risk of contact with its lines. 26 Am. Jur. 2d Energy & Power Sources §182 (2008). In order to find a utility company negligent when an injury occurs it must be shown that the company omitted some precaution that should have been taken under the circumstances. 27A Am. Jur. 2d Energy & Power Sources §182 (2008). Voltage as low as 120 volts may be sufficient to cause injury or death. *Estate of Dickens v. Avanti Research & Development, Inc.*, 161 Ill. App. 3d 565, 571, 515 N.E.2d 208, 209 (1987). Utility companies are expected to safely position their power lines and maintain them in proper condition (*Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 314-15, 45 N.E.2d 665, 674 (1942)), and, if the circumstances warrant, take additional measures such as insulating their wires and erecting warning signs. *Smith v. Florida Power & Light Co.*, 857 So.2d 224, 231-32 (Fla. 2003) (categorizing fact patterns sufficient to impose duty on power company to protect against injury).

Nonetheless, utility companies are not insurers of the public's safety and are not expected to safeguard their lines or equipment to the extent that injury is impossible. *Watkins*, 165 Ill. App. 3d at 498-99, 519 N.E.2d at 13-14.

> "Economic realities make unrealistic the possibility that utility companies might insulate all of their power lines, which in many instances amount to thousands of miles. Likewise, it is unreasonable for economic and aesthetic reasons that utility companies place warning signs at any location where injury might be possible, regardless of how remote the possibility may be." *Watkins*, 165 Ill. App. 3d at 499, 519 N.E.2d at 14.

When determining whether a duty of care exists in a particular set of circumstances, a court will consider, among other factors, the reasonable foreseeability of injury. *Tinder*, 325 Ill. App. 3d at 609, 759 N.E.2d at 486. Other considerations include the likelihood of injury, the magnitude of guarding against it, and the consequences of placing that burden on the defendant. *Tinder*, 325 Ill. App. 3d at 609, 759 N.E.2d at 486. "In a sense, in retrospect, almost everything is to some extent foreseeable." *Tinder*, 325 Ill. App. 3d at 609, 758 N.E.2d at 486. However, a utility company cannot be expected to anticipate every possible set of circumstances that might cause injurious contact with its lines. 27A Am. Jur. 2d Energy & Power Sources §184 (2008). Foreseeability means that which is objectively reasonable to expect, not everything that might conceivably occur. *Tinder*, 325 Ill. App. 3d at 609, 758 N.E.2d at 486; *Watkins*, 165 Ill. App. 3d at 499, 519 N.E.2d at 14.

In *Genaust*, the Illinois Supreme Court held that the danger of electrocution from

touching electric lines or having metal objects in close proximity to electric lines is common knowledge to persons with ordinary intelligence and experience. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 466, 343 N.E.2d 465, 471 (1976). Accordingly, there is no duty to warn an invitee on one's land that such danger exists. *Genaust*, 62 Ill. 2d at 467, 343 N.E.2d at 471. *Genaust* involved a contractor who was installing a galvanized steel tower and citizens band radio antenna in Belleville, Illinois, when the antenna came close to uninsulated power lines near the boundary of the property. *Genaust*, 62 Ill. 2d at 460, 343 N.E.2d at 468. Electric current arced from the wire to the antenna, passed down through the tower, and struck the man, causing him serious injury. *Genaust*, 62 Ill. 2d at 460, 343 N.E.2d at 468. The court held it was not objectively reasonable to expect that a person would attempt to install metal equipment in such close proximity to live electric wires "when the harsh consequences of the slightest mishap *** are so obvious." *Genaust*, 62 Ill. 2d at 467, 343 N.E.2d at 471. The fact that the injury resulted from arcing electricity rather than actual contact with the wires was irrelevant. *Genaust*, 62 Ill. 2d at 467, 343 N.E.2d at 471.

Genaust is one of many cases indicating that because power lines pose an open and obvious danger, utility companies and property owners have no duty to warn or otherwise protect individuals from the danger. See *Carroll v. Commonwealth Edison Co.*, 147 Ill. App. 3d 909, 914, 498 N.E.2d 645, 648 (1986) (farm owner in northern Illinois under no duty to warn contractor injured while installing lightening rods on newly constructed shed); *First Trust & Savings Bank of Kankakee v. Commonwealth Edison Co.*, 141 Ill. App. 3d 668, 490 N.E.2d 255 (1986) (power company owed no duty to two men killed in downstate Illinois while removing

citizens band antenna from seller's backyard); *Lopez v. Florida Power & Light Co.*, 501 So.2d 1339 (Fla. 1987) (power company under no duty to warn homeowner not to climb backyard tree and extend 16' metal pole to pick avocados); *Rice v. Florida Power & Light Co.*, 363 So.2d 834 (Fla. 1978) (power company not liable when model airplane touched uninsulated power lines); *Florida Power & Light Co. v. Lively*, 465 So.2d 1270 (Fla. 1985) (power company under no duty to pilot who hit transmission lines during emergency landing).

Even children are expected to appreciate the danger presented by overhead power lines. In *Bonder v. Commonwealth Edison Co.*, 168 Ill. App. 3d 80, 522 N.E.2d 227 (1988), two ninth graders were electrocuted while climbing a backyard tree near a utility pole. The 14 year old plaintiff noticed his 15 year old friend was lying over one of the tree limbs with his hand touching one of the power lines. *Bonder*, 168 Ill. App. 3d at 81, 522 N.E.2d at 228. When he attempted to pull the friend free of the line by grabbing his leg, the 14 year old was also injured. *Bonder*, 168 Ill. App. 3d at 81, 522 N.E.2d at 228. Both boys admitted being aware of the lines prior to the incident, but denied knowing they were power lines. *Bonder*, 168 Ill. App. 3d at 81, 522 N.E.2d at 228. Based on these facts, the trial judge granted the power company's motion for summary judgment as to negligence. *Bonder*, 168 Ill App. 3d at 81, 522 N.E.2d at 228. The appellate court affirmed, stating there is an "open and obvious danger posed by power lines" and "[i]n this cause we find that because boys of plaintiff's age and experience are as a matter of law deemed to be capable of understanding the dangers involved in contacting power lines, the [electric company and property owners] had no duty to warn *** or otherwise remedy the dangerous condition." *Bonder*, 168 Ill. App. 3d at 81-82, 522 N.E.2d at 228-29. Similarly, in

Estate of Dickens, the court declined to find that an antenna manufacturer had a duty to warn a 15 year old to watch for electrical lines while installing an antenna on top of his house. *Estate of Dickens*, 161 Ill. App. 3d at 570, 515 N.E.2d at 211. "Generally a duty to warn exists where there is unequal knowledge between the manufacturer and user." *Estate of Dickens*, 161 Ill. App. 3d at 570, 515 N.E.2d at 211. "When the danger is obvious there is no need to warn because the user has equal knowledge." *Estate of Dickens*, 161 Ill. App. 3d at 570, 515 N.E.2d at 211.

Instances where a utility company could reasonably anticipate contact with its live power lines include *Austin*, in which a live wire was within reach of the top of a public bridge which inevitably municipal employees would need to paint or repair. *Austin v. Public Service Co.*, 299 Ill. 112, 119, 132 N.E. 458 (1921). Even so, the court found that a sixth grader who climbed the bridge to retrieve a bird's nest was not exercising due care for his own safety. "A boy fourteen years old, who has been raised in the city, knows as well as a man that insulated wires carried upon poles are likely to be charged with a deadly load of electricity, and that it is not safe to touch them or go where he is likely to fall into them." *Austin*, 299 Ill. at 121, 132 N.E. 458.

With these principles in mind, we consider plaintiffs' argument that their conduct was reasonably foreseeable. Again, the reasonable foreseeability of injury is a key element in determining whether the defendant owes a duty of care to the plaintiff. *Tinder*, 325 Ill. App. 3d at 609, 759 N.E.2d at 486. In determining whether an accident was reasonably foreseeable, a court must limit the defendant's liability to "any injury which is *objectively reasonable* to occur, and not everything that might conceivably occur." Emphasis supplied. *Watkins*, 165 Ill. App. 3d at 499, 519 N.E.2d at 14, citing *Genaust*, 62 Ill. 2d at 466, 343 N.E.2d at 471. We find that the

accident at issue falls within the latter category.

The record on appeal leads only to the conclusion that the six men were electrocuted because they created a high-voltage hazard which did not previously exist. The record on appeal includes the deposition testimony of an employee of the power company's "vegetation management department" who indicated the company followed a regular inspection schedule and used an independent tree service to trim trees and shrubs that could cause reliability problems with the electric power lines. Despite these procedures, neither the company nor its subcontractor trimmed the tree branch involved in the accident or posted warning signs at the property. The record also includes the deposition testimony of the homeowners Anselmo Jimenez and his then-wife, Lourdes. She described the tree in the backyard of their Sauk Village property as "old" and "pretty big size." In the year or so before the accident, she telephoned the power company at least three times to complain that in windy or inclement weather, the large tree branch would sway into the power line and create sparks. During such weather, the Jimenezes would not sleep in the back bedroom close to the power line or let their two young children play in the backyard. The power company told Mrs. Jimenez that homeowners were responsible for maintaining trees on private property, but they sent an inspector in the late fall or summer of 2002 who was noncommital as to who was responsible for trimming the tree limb away from the power line. Mrs. Jimenez offered to pay the inspector to cut the limb, but he said he could not do that and that she would have to make another telephone call to the power company. When she made that phone call, the power company said it was not responsible for the limb because it was on the Jimenezes' private property. At that point, the couple decided to trim the tree in the

Spring when it was not very leafy. The deposition testimony of the surviving men establishes that they were adults, experienced construction workers, and friends of the Jimenez family. They admitted that they were aware of the power lines overhanging the backyard and the conductivity of metal. They discussed the presence of the live power line and the danger it posed. Despite their awareness of the deadly voltage, they used a mechanical lift to raise two men 30 feet into the tree top to make a V-cut into one of the thick limbs that hung over the power line, cut off smaller branches, and wrap a rope and an uninsulated metal cable around what remained of the limb. Even on appeal they characterize the overhanging limb as a "large" one. Their estimates of the distance between the limb and the live power line ranged from as little as six inches to as much as four feet above the line. Nevertheless, their plan was to quickly pull the limb away from the power line as the limb was cut free of the tree trunk. Five men on the ground formed a line and took hold of the attached rope. Six other men formed a parallel line a short distance away and took hold of the attached metal cable. The decedent took the rear-most, anchor position on the cable crew, and wrapped the uninsulated metal around his body. Another man ascended in the mechanical lift with a chain saw, and as the rope crew and cable crew created tension on their lines, he cut further and further into the limb. Despite the efforts of the rope crew and cable crew to pull the limb clear of the power line, the collapsing limb fell onto the live line. A blue flash of electricity shot down the cable, fatally electrocuting the anchorman and burning the five others. The power company could not have reasonably anticipated that a group of more than a dozen men would expose themselves to the danger of contacting a clearly visible and unobstructed live wire suspended at a height of approximately 30 feet above the Jimenez family's backyard. The

crew enhanced the danger posed by the live electric line when they not only cut off the large tree limb, but also used a metal chainsaw, mechanical lift, and uninsulated cable in close proximity to the live wire. We reject the plaintiffs' contention that these steps are ones which the power company "could have easily anticipated" would be taken by the homeowner and his friends. The crew's activities in the face of obvious danger were so extreme and reckless that the power company could not have guarded against them. If we were to find otherwise, we would be finding the power company was an insurer of the crew's safety. The precedent set out above leads us to conclude that adult men, as a matter of law, are capable of understanding the dangers involved in contacting power lines and that the defendant power company had no duty to warn or otherwise prevent the dangerous situation which the work crew created.

The plaintiffs next argue, however, that they come within an exception to the open and obvious hazard doctrine. Illinois recognizes two situations in which a possessor of land should anticipate, and therefore guard against the harm arising from an open and obvious or known danger. *LeFever v. Kemlite Co.*, 185 Ill. 2d 380, 391, 706 N.E.2d 441, 448 (1998). The first situation being the distraction or forgetfulness exception, and the second, adopted in *LeFever*, is the deliberate encounter exception. *LeFever*, 185 Ill. 2d at 391, 706 N.E.2d at 448. The deliberate encounter exception to liability arises where a land possessor is given reason to expect that a person will " ' "encounter a known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." ' " *LeFever*, 185 Ill. 2d at 391, 706 N.E.2d at 448, quoting *Sollami v. Eaton*, 201 Ill. 2d 1, 15, 772 N.E.2d 215, quoting Restatement (Second) of Torts §343A(1), cmt. *f* (1965).

We have assumed for the purposes of argument that the deliberate encounter doctrine applies not only to possessors of land, but also to utility companies such as the defendant. The plaintiffs cite an unpublished federal district (trial) court decision for the proposition that the deliberate encounter doctrine is not necessarily limited to work or economic situations. Federal trial court opinions are not controlling precedent in this Illinois state court. *Riemer v. KSL Recreation Corp.*, 348 Ill. App.3d 26, 807 N.E.2d 1004 (2004). Furthermore, in both the federal district court case and *LeFever*, there was a work or economic compulsion. Thus, the precedent does not indicate we should apply the deliberate encounter exception to this non-work situation. The plaintiffs try to persuade us by emphasizing that Mrs. Jimenez repeatedly called to complain about the tree limb. The plaintiffs contend that when the power company failed to remove the tree limb, the Jimenezes were left with only two choices: leave the tree limb in place and risk injury or remove it themselves. The Jimenezes, however, were not in any imminent danger. The was no compulsion or impetus under which a reasonable person in the Jimenezes' position would have disregarded the obvious risk of the live electric lines. Furthermore, they never asked the utility company to shut down power to the backyard electric wires. Most importantly, the Jimenezes are not the plaintiffs in this case. The plaintiffs were friends of Mr. Jimenez and were not compelled by any threat to their own property or personal safety to bring down the tree limb. Even if the plaintiffs had persuasively argued for extension of the deliberate encounter exception to this case, the circumstances do not indicate that a reasonable person would believe that the advantages of deliberately encountering the power line in a friend's backyard outweighed the risk of doing so.

For these reasons, we conclude summary judgment was properly entered for the defendant as to the plaintiffs' negligence claim, based on the plaintiffs' failure to create a material fact as to a duty of care. The entry of summary judgment by the circuit court of Cook County is affirmed.

Affirmed.