2000

Deseret Livestock Company, Anschutz Land and Livestock Company, Inc. v. Utah Power and Light Company : Brief of Appellant

Utah Supreme Court

(1)

IN THE SUPREME COURT

OF THE STATE OF UTAH

DESERET LIVESTOCK COMPANY, a corporation, and ANSCHUTZ LAND & LIVESTOCK COMPANY, INC., a corporation,

Plaintiffs-Appellants,

vs.

UTAH POWER & LIGHT COMPANY, a corporation,

Defendant-Respondent.

Case No. 14008

BRIEF OF APPELLANTS

APPEAL FROM THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
HONORABLE STEWART M. HANSON, PRESIDING

DAVID A. ROBINSON, Esq.
531 South State Street
Salt Lake City, Utah 84111

RICHARD L. BIRD, JR., Esq., of
RICHARDS, BIRD & KUMP
200 Law Building
333 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Plaintiffs-Appellants

ROBERT GORDON, Esq.
1407 West North Temple
Salt Lake City, Utah 84104

Attorney for Defendant-Respondent

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

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NATURE OF THE CASE

This is an action for damages by users of electric power against the supplier for damages to pumps and loss of crops and forage resulting from negligence of the supplier, for breach of its contract to supply electricity, and for breach of implied warranties.

DISPOSITION OF CASE IN LOWER COURT

After a full trial, the trial court, Honorable Stewart M. Hanson, granted the motion of defendant for dismissal made at the close of the plaintiff's case.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment of the District

Court for errors in law and remand to the District Court for determination of damages.

STATEMENT OF MATERIAL FACTS

The appellants, who are the plaintiffs, will be referred to as Deseret and Hatch (Hatch being the name of the ranch which is owned by the appellant Anschutz), and the respondent as Power Company.

Deseret and Hatch are owners of cattle and hay ranches in Skull Valley, which is south and west of Tooele in Tooele County. The ranches cannot raise hay or feed cattle without water (R. 7 and 28). Both appellants pump water from wells through use of electric motors (R. 7 and 27). On about June 20, 1970, the pumps stopped on both ranches (R. 7 and 28). Both managers called Utah Electric Motor for assistance and under the direction of Al Nytch, whose deposition was taken, the pumps were repaired.

Deseret had five pumps, of which three were running at the time of stoppage, one was seriously damaged, one needed superficial attention, and one was not damaged (R. 8, 17). Hatch had two pumps running, of which one was seriously damaged (R. 28 and 38).

In his deposition, Al Nytch testified that he was pump foreman for Utah Electric Motor and acquainted with the pumps and motors at the Deseret and Hatch ranches in Skull Valley prior to June 18, 1970 (Dep. 3). The pumps were damaged on June 20,

1970, and he was called Sunday morning, first by Wells Beck of Deseret (Dep. 17) and while at Deseret was called by George Slaugh of the Hatch ranch (Dep. 5, 17). The motors were undamaged, but one pump at each ranch was seriously damaged by having been operated in reverse (Dep. 3, 4, 7). The damage was caused by an outage, followed by a phase reversal, followed by a correction of the reversal, and the damage to the pumps was caused by operation of the motors and the pumps in reverse (Dep. 12, 19, 20, 23 and 27). The phase reversal on a three-phase circuit can be caused only by man (Dep. 15) and a phase reversal can be corrected only by man (Dep. 26). The delay in getting the pumps operative was due to delay in getting necessary materials and parts (Dep. 7). Ordering new pumps rather than repair parts and materials would have run into the same delays (dep. 30, 31).

Exhibit P-6 shows the location of the Deseret and Hatch ranches. The power comes to the ranches from the south and goes first to the Hatch ranch and then to Deseret. Mr. Nytch testified that a reversal caused by a man at the Deseret ranch could not cause damage to the pump on the Hatch ranch and that a reversal at the Hatch ranch could not cause damage to the pump at the Deseret ranch. A phase reversal south or upstream from the Hatch ranch could cause damage to the pumps at both ranches (Dep. 26-27).

Arthur H. Nielson, Jr., the electrical engineer called

by appellants, has had considerable experience with motors being reversed and testified that the reversal must be the result of human error. It can occur no other way and only three-phase equipment is affected, doing no damage to the motors (R. 101). A phase reversal could not happen accidentally and could not occur while the motor was running (R. 106). To cause damage at both ranches, the phase reversal must have been caused by human error upstream from the Hatch ranch (R. 107).

Dale Brown, a professional engineer employed by the Power Company, testified that a phase reversal involves "the reconnection in some manner of phase conductors so as to cause a rotation of the electrical current, one phase with respect to another, to change the direction." (R. 61) He testified that a phase reversal must be man-corrected (R. 62), and testified that it is conceivable that a phase reversal could result from a unique combination of circuits where a single-phase device is inadvertently opened by lightning and the right given combination of circuits in the vicinity might produce a temporary condition of phase reversal (R. 61-62). There was no evidence of any lightning at either ranch at the time in question or of any damage to any single phase appliances or outlets. Wells Beck testified that there was none at Deseret and George Slaugh testified that there was none at Hatch (R. 95 and 98).

Dale Brown testified that a phase reversal at the Hatch ranch could not affect the Deseret ranch and that if phase reversals

occurred on the same day at both ranches, it would have been man caused or the coincidence of the unique circumstances postulated by him (R. 65). Mr. Nielson testified that the phase reversal must have been upstream from the Hatch ranch and could have been at the generating plant or at the substation (R. 107).

The damage from the pumps being down was loss of crops of hay and forage. The pump at the Deseret covered 500 acres and cost 1,000 tons of hay, and the loss of pasturage for six weeks for 1,000 head of cattle (R. 9, 10). Sixty or seventy tons of protein block were also purchased (R. 17). Hay in 1970 was worth from $30 to $35 a ton in the stack and would have cost $7 to $8 a ton to put it up (R. 20), as testified by Daniel Freed. The forage was worth fifteen cents per day per head and the repair bills at Deseret were $7,837.11 (R. 21-22).

At Hatch, the pump was down 60 to 70 days with repair bills of $1,679.84 (R. 30) and loss of 90 days of feed for 300 head of cattle or 900 Animal Unit Months worth $4.50 per unit (R. 29). The complaint was amended to reflect $7,837.11 damage for pumps and motors at Deseret and $29,300 for loss of hay and forage or a total of $37,137.11 for the first three Causes of Action and for the Fourth, Fifth and Sixth Causes of Action $1,679.84 for repair to pumps and motors and $4,050 for loss of forage, or a total of $5,729.84 (R. 114).

Dale Brown testified that because of the way the line

is conducted, it would be extremely difficult for a phase reversal to be caused (R. 85-88) and in his opinion, it couldn't happen on the Power Company's system (R. 88).

There was testimony about protective devices. The pumps were equipped in 1970 with time delay devices (Dep. 9, R. 18). Protective devices against phase reversal used to cost $5,500 to $7,000 (R. 104) and now approximately $200 (R. 104, Dep. 9).

The only proof of formal notice to Power Company was Exhibit 5-P dated February 11, 1971 (R. 45). The Power Company's records contain no reports of trouble, repair work or outage on the Skull Valley line at or about June 18-21, 1970 (R. 51).

A. R. Dunn testified that Exhibit 2-P is a standard electric service agreement and that the service of both appellants is subject to Regulations issued by the Public Service Commission, including regulations 18 and 22, portions of which appear at R. 72 as follows:

> "Regulation 18. Continuity of Service. The Company shall use reasonable diligence to provide steady and continuous service, but does not guarantee its service against irregularities and interruptions. The Company having used reasonable diligence shall not be liable to Customers for any damages occasioned by irregularities or interruptions."
>
> "Regulation 22. Customer's Responsibility. The Customer assumes all responsibility on Customer's side of the Point of Delivery for service supplied or taken, as well as for the electrical installation and appliances used in connection therewith, and will indemnify, save harmless and defend the Company against all claims, demands, costs or expenses, for loss,

> damage or injury to persons or property, in any manner directly or indirectly connected with, or growing out of, the transmission or use of electric service by the Customer, at or on the Customer's side of the Point of Delivery."

At the close of plaintiffs' case, defendant made a motion to dismiss for lack of proof, which was taken under advisement (R. 44). This motion was not renewed. The defendant put on its case and at the close of the case, the matter was argued and taken under advisement.

The Memorandum Decision of the Court granted the defendant's motion to dismiss (R. 156). Order of Dismissal was entered (R. 159-160, 167-168). Later, Findings of Fact and Conclusions of Law were made and entered (R. 162).

ARGUMENT

Point I: Finding of Fact No. 14 and Conclusion of Law No. 1 are based on defendant's evidence and are inconsistent with the Order of Dismissal.

Point II: Finding of Fact No. 14 is not supported by evidence and Conclusion of Law No. 1 is unsupported.

Point III: Review by this Court should be of plaintiffs' evidence only.

Point IV: Res ipsa loquitur is applicable to the facts of this case:

A. From plaintiffs' evidence;

B. From all the evidence.

Point V: There was a breach of the electrical service

agreements.

Point VI: There was a breach of implied warranty of fitness.

Point VII: Plaintiffs' damages exceeded the cost of repairs of pumps.

POINT I

FINDING OF FACT NO. 14 AND CONCLUSION OF LAW NO. 1 ARE BASED ON DEFENDANT'S EVIDENCE AND ARE INCONSISTENT WITH THE ORDER OF DISMISSAL.

Defendant's motion, made at the close of plaintiffs' main case, was "to have the complaint dismissed because there has been no showing whatever of any negligence on the part of the company to support the plaintiffs' claim. I think the proof presented by plaintiffs has been completely lacking in attaching any liability to this defendant on any ground." (R. 43)

Following statements by counsel, the Court ruled:

> "Well, I will take your motion under advisement, Mr. Gordon, and you can stop now or you can proceed without waiving your motion." (R. 44, Lines 11-13)

The defendant elected to proceed without waiving its motion, and the motion was not renewed at the close of all the evidence.

The Court's Memorandum Decision (R. 156-157)

> "finds and concludes that the defendant's motion to dismiss should be granted."

And thereafter, an Order of Dismissal was prepared and signed

(R. 159-160) and objected to by the plaintiffs for the reason that Findings of Fact are required by Rules 41(b) and 52(a).

Thereafter, Findings of Fact and Conclusions of Law were prepared and submitted (R. 162-166), including Finding of Fact No. 14 and Conclusion of Law No. 1, which are based upon evidence submitted by the defendant.

Since the only motion to dismiss made by the defendant was made at the close of plaintiffs' case, the granting of the motion and the subsequent dismissal are of necessity limited to the plaintiffs' evidence. This is true under the Federal Rule 41(b), because under that Rule there is no provision for taking the motion under advisement. It follows that evidence admitted after the motion cannot support the Findings made to effectuate the motion to dismiss. Charles v. Judge and Dolph, (C.A. 7th 1959), 263 F.2d 864. (Does not support the proposition!)

The Utah Rule 41(b) as to this portion of the Rule is identical with the Federal Rule and provides:

> "The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

There is nothing which empowers the Court to hear the defendant's case and then rule on the motion to dismiss in the light of the defendant's evidence. The practice of taking the motion under advisement until the defendant has presented its evidence is

only a delay of the ruling and not an expansion of the evidence upon which the ruling is made.

POINT II

FINDING OF FACT NO. 14 IS NOT SUPPORTED BY EVIDENCE AND CONCLUSION OF LAW NO. 1 IS UNSUPPORTED.

The second sentence of Finding of Fact No. 14 is supported by evidence that the records of the Power Company do not contain any complaints or trouble calls from the customers. The first and third sentences of Finding No. 14 are based exclusively upon the silence of the Power Company's records. Gail A. Parker testified that the files of the Company were silent on complaints concerning these incidents, reports of outage, or reports of maintenance or repair work done (R. 50-51). It is obvious that if the incidents were reflected in the company's records, the case would not have been attended by difficulty of proof and the doctrine of res ipsa loquitur would not have loomed so significant. But absence of reports in the company's files, and absence of activity by agents or employees of the company which were unreported are two different things. Mr. Nielson, Mr. Brown, and Mr. Nytch, as well as Mr. Parker, recognized the damage as resulting from a phase reversal and that the correction of the phase reversal, however caused, would have to be done by men (R. 58, 62, 100, Nytch Dep. 15), and the evidence was so plain and overwhelming that the phase reversal in the first place could

have been induced only by an act of man that the negative evidence of the power company must be rejected, since it does not elucidate what happened and who was responsible.

Conclusion of Law No. 1 being based on Finding of Fact No. 14 must be rejected along with the Finding of Fact.

POINT III

REVIEW BY THIS COURT SHOULD BE OF PLAINTIFFS' EVIDENCE ONLY.

This follows from the argument made under Point I. Objection was made to Finding of Fact No. 14 and Conclusion of Law No. 1 before the trial court and the objections were denied (R. 170, 172) for reasons that seemed ambivalent. The entire record is brought before this Court to avoid further proceedings in the event this Court holds that even though the form of the Order was erroneous, the intent was to weigh the evidence on both sides and find in favor of the defendant.

Appellants submit that the logical approach to the question is to determine whether the plaintiffs' evidence made a prima facie case on all of the Causes of Action, with the assistance of the doctrine of res ipsa loquitur on Causes of Action 1 and 4. If that be established, the question then is whether the evidence of defendant as reflected in Finding of Fact No. 14 and Conclusion of Law No. 1 is supportable and dispositive of the Causes of Action.

Since Findings of Fact were made, it appears that the

scope of review by this Court of the Findings of Fact properly made would be in a light favorable to the trial court and to the Findings. Lawrence v. Bamberger R.R. Co., 3 Utah 2d 247, 282 P.2d 335.

The failure of the Court to make any Findings of Fact as to the Second, Third, Fifth and Sixth Causes of Action, despite the objections of the plaintiffs thereto (R. 170), means that the evidence as to those Causes of Action shall be reviewed by this Court in a light most favorable to appellants. Davis v. Payne and Day, Inc., 10 Utah 2d 53, 348 P.2d 337.

POINT IV

RES IPSA LOQUITUR IS APPLICABLE TO THE FACTS OF THIS CASE.

A. FROM PLAINTIFFS' EVIDENCE.

The trial court ruled that the doctrine of res ipsa loquitur does not apply because the damage sustained by plaintiffs occurred entirely on their own property (Conclusions of Law, Paragraph 2, R. 166; Memorandum Decision, R. 156). The trial court's ruling was clearly an erroneous application of the doctrine of res ipsa loquitur.

This Court has frequently considered the doctrine, which consideration has resulted in a precise definition. In Moore v. James, 5 Utah 2d 91, 297 P.2d 221 (1956), this Court declared that the doctrine would give rise to an inference of

negligence when three conditions are met.

> "(1) The accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used the due care, (2) The instrument or thing causing the injury was at the time of the accident under the management and control of the defendant, and (3) The accident happened irrespective of any prticipation at the time by the plaintiff." 5 Utah 2d at 96.

The first condition requires a finding that the accident is of a type which does not ordinarily happen. Plaintiffs' experts testified that the damage to plaintiffs' pumps was caused by a phase reversal, a phenomenon which ordinarily does not occur and is always man-caused (R. 101 and Nytch Dep. 15).

The first condition further requires a finding that the accident would not ordinarily happen unless the defendant did not exercise due care. The only evidence before the Court was that a phase reversal results from a faulty power source caused by a man-made, physical act of switching or reversing one electrical line with another. (Findings of Fact, ¶ 10, R. 165; Nytch Dep. p. 15; R. 101). The evidence further showed that the plaintiffs did not tamper or otherwise interfere with the electrical power lines or associated equipment at or just before the time of the damage (R. 8, 12, 37, 41). The highly improbable coincidence of a phase reversal on both plaintiffs' ranches provides compelling evidence that the phase reversal was caused

by a lack of due care by the defendant, the common source of electrical power used by the two ranches.

To conclude that a phase reversal--an event so uncommon as to be considered a "freak" happening--occurred simultaneously on two separate, unrelated ranches when no ranch employees were working on or were near the motors or the transmission lines and for lack of proof dismiss the common supplier as the cause, stretches plausibility to the limit.

Reason and logic, as well as the weight of the evidence, compel the conclusion that a phase reversal on two separate ranches was an event which would not have happened had the defendant used due care.

The second condition requires a finding that the instrumentality causing the accident was exclusively controlled by the defendant. The trial court apparently read this condition as requiring a finding that the damage have a physical situs within the exclusive control of the defendant. The trial court concluded that because the damaged pumps were physically upon the property of plaintiffs, and because plaintiffs maintained their own transmission lines and equipment, the second condition could not be met (Conclusions of Law, ¶ 2; Memorandum Decision, R. 166, 156). The trial court obviously confused "cause" which definitely must be within the control of the defendant, with

"injury" which need not be physically within the control of the defendant.

The difference between the control of "cause" and "injury" was made readily apparent by this Court in Lund v. Phillips Petroleum Company, 10 Utah 2d 276, 351 P.2d 952 (1960), where the paint on plaintiffs' automobiles was allegedly damaged by some deleterious substance in smoke and soot emitted from a flare stack at the defendant's oil refinery. The application of the doctrine of res ipsa loquitur was appropriate there, even though the damaged cars were under the control of the plaintiffs. The doctrine was applicable because the cause--smoke--was controlled by the defendant. The cause of the injury in the instant case was a faulty electrical current which was being supplied to both plaintiffs. Neither plaintiff had any degree of control whatsoever over the common source of electrical power which was the cause of the injury.

The third condition requires a finding that neither of the plaintiffs participated at the time of the accident. The uncontroverted evidence is that neither of the plaintiffs nor their employees or agents interfered in any way with the operation of the pumps at the time of the damage (R. 8, 12, 37, 41). More important, however, is the fact that because neither plaintiff had any control whatsoever over the common electrical source,

neither plaintiff could interfere with the factual cause of the damage.

All of the admissible evidence before the trial court leads to the inescapable conclusion that the doctrine of res ipsa loquitur should be applied. This Court has never hesitated to apply the doctrine when it is appropriate, such as in the Lund case and in the present case. In Moore v. James, supra, this Court held that it would be prejudicial error for a court not to instruct the jury on res ipsa loquitur in a case where, as in the present case, all of the elements have been satisfied.

In Wightman v. Mountain Fuel Supply Co., 5 Utah 2d 373, 302 P.2d 471 (1956), this Court refused to apply the doctrine of res ipsa loquitur to a fact situation which at first blush appears to be somewhat similar to the present case. There, the administratrix of an estate sued the defendant for the death of the deceased, which resulted from a natural gas explosion and fire. The defendant, as in the present case, maintained the means to deliver the energy source--gas--up to the home of the deceased, and deceased maintained the various appliances beyond that point. The real issue for the Court to determine was where the explosion occurred. The Court held that there was no evidence to lead the finder of fact to conclude that there was greater probability that the explosion occurred in that part of the system maintained by the gas company.

The present case may be distinguished in several

important respects. In Wightman, the Court said:

> "* * * To give rise to a jury question, there must be something in evidence from which the jury could reasonably believe that there is a greater probability that the explosion occurred in that part of the installation than in the pipes or appliances installed by and under the control of the plaintiff. Only if there is some such basis in the evidence would there be any foundation to permit the jury under res ipsa loquitur to infer that some defect or lack of due care on the gas company's part of the installation caused the leak and the resulting explosion." 5 Utah 2d 376. (Emphasis added)

In the present case the coincidence of a phase reversal on two separate ranches makes it logically conclusive that the phase reversal occurred in a portion of the transmission system maintained by the defendant herein. This proof was lacking in the Wightman case.

In the Wightman case, the gas per se was not faulty. Rather, the gas in combination with some faulty-associated equipment caused the injury. In the present case, the electrical power was faulty or delivered in a faulty manner, independent of associated equipment.

B. FROM ALL THE EVIDENCE.

There was no evidence whatever of anyone working on plaintiffs' pumps, motors, or transmission lines or of even being near them at the time of the outage and reversal. The experts agreed that there had to be an outage, transmission of energy

in reversed phase, then an outage, then correction of the reversed connections. Even the unique and completely unproven speculation of Dale Brown that on two ranches, at or about the same time, lightning shorted a single-phase device and a certain unknown and undescribed combination of three-phase circuitry caused a reversal of phases, is disproved. Dale Brown agreed that there had to be a correction by a man (R. 62). In this he agreed with Arthur Nielson (R. 100), as did Mr. Nytch (Dep. 15). Plaintiffs did not correct the reversal; Al Nytch did not correct it; the correction had to be made on the power company's line by someone who did not report his blunder.

Defendant's evidence does not help establish the precise nature and location of the phase reversal. The real question is, in what form, and with what effect does the doctrine of res ipsa loquitur survive the defendant's inconclusive showing? Appellants submit that the effect of the doctrine survives, whether it be called inference or presumption, and that the balance of probabilities weighs heavily in favor of a finding that the phase reversal occurred upstream from the Hatch ranch and on the power company's line and was man-caused and man-corrected.

In Lund v. Phillips Petroleum Co., supra, at page 280 of 10 Utah 2, the Court thus described the procedure of res ipsa loquitur, that it permits the injured party:

> "To present his grievance to a court or jury on the basis that an inference of negligence may reasonably be drawn from such facts; and cast the burden upon the other to make proof of what happened. This inference of negligence remains in the case: It justifies its submission to the jury; and will sustain a finding of negligence, even though there be countervailing evidence, unless such adverse evidence so conclusively shows non-negligence of the defendant that reasonable minds, acting fairly could not find it negligent."

In Burghardt v. Detroit United R.R., (1919), 206 Mich. 545, 173 N.W. 360, 5 A.L.R. 1333, at 1335 the Court, in considering the sufficiency of the defense of a system of inspection of trolley moorings, against the plaintiff's action that the trolley fell off the car and hit him, a pedestrian, which was held sufficient to raise a prima facie case of negligence, or an inference of negligence, as the court's substitution for res ipsa loquitur, said:

> "But defendant insists that it has established an inspection, and that, there being direct proof on the subject, the prima facie case, if one was made by the plaintiff, must fail. This was the view entertained by the learned trial judge. Our difficulty in agreeing with this conclusion lies in the fact that there is no competent evidence of an actual inspection of the car in question. The most that can be said of defendant's proof is that it established a system of inspection inferentially in consonance with good railroading. But the proof does not establish that an inspection was in fact made. Where the duty to inspect exists, it is not discharged alone by the adoption of a system of inspection, or the promulgation of a

> set of rules. The system must be used; the rules must be enforced; the inspection must be made. It was competent for the defendant to show that it had adopted a system of inspection, what that system was, that it comported with the requirements of good railroading; and plaintiff's objections to the introduction of such proof were properly overruled; but to overcome plaintiff's prima facie case it was necessary that defendant prove an inspection in fact. This it failed to do. The court, therefore, was in error in directing a verdict."

In Bergen v. Tulare County Power Co., (1916), 173 Cal. 709, 161 P. 269, the Court observed that California recognized a rule that where electricity is furnished to a system installed and operated exclusively by the owner of the premises, the doctrine of res ipsa loquitur will not apply. It nevertheless held that instructions to a jury involving a death that if the decedent was exercising ordinary care and was killed by an excessive and dangerous current furnished by the defendant through an electric light wire, it was the burden of the defendant to show that the excessive voltage was not due to its negligence and that this was not an improper extension of the doctrine of res ipsa loquitur since the control of the deceased over his pumping plant could not have resulted in an increase of the voltage.

And so it is in this case. The fact that the transmission line beyond the meter was owned by plaintiffs did not prevent application of the doctrine of res ipsa loquitur, because the evidence plainly showed that the phase reversal occurred upstream

from the meters and, therefore, on the line of the defendant, it being impossible that the outage and reversal on the Hatch ranch could have been caused by Deseret or that the outage and reversal on Deseret could have been caused from the Hatch ranch.

Defendant's showing here also was very similar to the showing in Burghardt, supra, there being a system of asking for reports of trouble and of repairs, but with a complete absence of the very necessary report causing the reversal in the first place, and of absolute necessity of correcting the reversal in the second place.

It is conceivable (although barely so) that had the trial judge correctly applied the rules of res ipsa loquitur, he might have found a sufficient defense from the evidence offered by the defendant. But the evidence that there were no reports and that the line was well-constructed were only negative proof and did not avoid the inference that since plaintiffs did not cause any phase reversal, and certainly did not correct any phase reversal, the events occurred somewhere on the Power Company's line. And the absence of reports is a sort of tacit confession that there was a negligent employee, who was either embarrassed or afraid to report what had happened, and to report that he had corrected a phase reversal would only have given rise to an inquiry of whether he had also caused the reversal.

POINT V

THERE WAS A BREACH OF THE ELECTRICAL SERVICE AGREEMENTS.

The Power Company entered into written contracts in the form of electric service agreements with both Deseret and Hatch. Pursuant to the terms of these contracts, the Power Company agreed to supply both Deseret and Hatch electric service in the amount of 150 kilowatts in the form of three-phase alternating current at approximately 60 cycles per second and 480 volts for Deseret's and Hatch's irrigation pumping operation. (Exhibit 2-P, R. 5, 26, 50, 71)

The evidence as heretofore discussed leads inescapably to the conclusion that the electrical power delivered to both Deseret and Hatch was defective. Neither Deseret nor Hatch contracted with the Power Company to receive electrical power which was subject to reversing phases. By delivering defective, harmful power, the Power Company breached its contractual agreement and is thereby liable to plaintiffs for any damage they sustained.

While plaintiffs have not been able to find any cases where this Court has considered a similar situation, courts in other jurisdictions have frequently dealt with similar problems. Two older cases demonstrate that basic principles of contract law have always been applied to cases involving breach of contract by power companies. In Kimball Brothers Co. v. Citizens' Gas & Electric Co., 141 Iowa 632, 118 N.W. 891

(1908), the plaintiff claimed that the defendant power company had breached the terms of a contract which required it to furnish electrical power for an elevator system. The elevator system required 240 volts of current in order to operate its three-phase monocylic system. While the court reversed on other grounds, it did hold that it was a question for the jury to determine whether the defendant power company was liable in damages for breach of contract. The Court noted that there was sufficient evidence to support a finding that defendant power company expressly agreed to furnish the amount of voltage in question.

In Roben v. Ryegate Light & Power Co., 91 Vt. 402, 100 A. 768 (1917), the Court recognized that a power company would be liable in damages for breach of contract in failing to provide sufficient current to operate a business concern, as it had contracted to do.

It might be argued that the electrical service agreements in the present case do not expressly require the power company to deliver electrical current free from phase reversal. However, courts in other jurisdictions have expanded the notion of contract liability in public utlility cases to include situations involving implied contracts. In these other jurisdictions, courts have concluded that an agreement to supply adequate power or some other similar agreement will give rise to an implied agreement

to deliver power which is free from defects.

In Curry v. Norwood Electric Light & Power Co., 125 Misc. 279, 211 N.Y.S. 441 (1925), two movie theaters were allowed to recover when the power company's failure to provide sufficient power made it necessary for the plaintiff to refund the purchase price of admission tickets sold. The Court expressed the opinion that the measure of liability should be that of a common carrier and that any excuse for non-performance could rest only upon a showing that an "act of God" or an "inevitable accident" had caused the injury. The Court ruled that the defendant power company could have anticipated the situation which gave rise to the damages and further concluded that the occurrence was one which could reasonably have been anticipated and allowed a recovery on a breach of implied warranty theory.

In Lund v. Princeton, 250 Minn. 472, 85 N.W.2d 1907 (1957), the defendant power company was held liable for damages based on the reduced egg production in the plaintiff's hatchery. The power company failed to provide the plaintiff with reasonably adequate and continuous electrical power under an implied contract to do so.

In the Lund case, the village that supplied its residents with electrical power determined that it would be appropriate to change from a Delta to a Wye transformer system and the change resulted in a loss of power. The village raised the defense that

its action was not negligence and argued to the Court that negligence is an element of all breach-of-contract actions. The Court pointed out, however, that although some breach-of-contract actions are necessarily based on negligence, it did not follow that all actions based on implied contract between a supplier and a consumer are dependent upon a showing of negligence.

Defendant offered in evidence Electric Service Regulations approved by the Public Service Commission (R. 72). There is, of course, no evidence that plaintiffs were aware of those regulations. Regulation 18 purports to waive "irregularities and interruptions" to service, and liability to customers for "damages occasioned by irregularities or interruptions" if the Company has "used reasonable diligence" (R. 72).

Sending power over a line and to a customer in reversed phase without notice was held actionable negligence in Sugar Brothers Company v. City of Monroe, 173 La. 760, 138 So. 658. The reversal caused the elevator controls to work backwards, causing the elevator to crash, resulting in repairs to the elevator and building and loss of profits.

Furthermore, power in reverse appears to be more than an irregularity, but a dangerous condition requiring notice as in Sugar Brothers Company. Defendant will say it could not give notice if it did not know of the reversal. But it has contracted to deliver electricity for running electric motors attached to

pumps. It is charged with knowing its product to fulfill its contract.

POINT VI

THERE WAS A BREACH OF IMPLIED WARRANTY OF FITNESS.

The Complaint was filed March 15, 1971 (R. 116). The Order granting leave to file the Amended Complaint was dated June 4, 1974 (R. 147). Causes of Action Third and Sixth plead breach of implied warranty of electrical energy of merchantable quality and fit for power to run electric motors and pumps. Written notice of this claim was given in February 1971 (Exhibit 5-P) and on April 26, 1974 (Exhibit 9-P), receipt of which was admitted by the Answer to Amended Complaint (R. 148).

The Memorandum Decision does not mention these Causes of Action (R. 156). Appellants objected to the failure to cover them in the Findings of Fact (R. 170), although Conclusion of Law No. 3 (R. 166) holds that no specific or implied warranties were made.

Electricity is a commodity. Helvey v. Wabash County REMC (Ind. Court of Appeals 1972) 278 N.E.2d 608. The company delivered excessive voltage, causing damage to machines and giving rise to a cause of action under the Uniform Commercial Code and controlled by the statute of limitations of the U.C.C. The sections cited were 1-202(2)(c), 2-105(1)(2) and 2-725(2), which in Utah are: 70A-1-102(2)(c), 70A-2-105(1)(2), 70A-2-725(2). That is why plaintiffs gave the notice required by Section

70A-2-607(3)(a) before filing the Amended Complaint Exhibit 9-P).

Gardiner v. Philadelphia Gas Works, (1964) 413 Pa. 415, 197 A.2d 612, holds, on the other hand, that the sale of electricity is a service but subject nevertheless to implied warranties of fitness and merchantability, and directing a verdict for the defendant was error.

Appellants submit that defendant makes implied warranties of fitness and merchantability whether electricity be a commodity, or the supplying of it a service.

POINT VII

PLAINTIFFS' DAMAGES EXCEEDED THE COST OF REPAIRS OF PUMPS.

The trial court gratuitously commented on the matter of damages:

> "The Court is further of the opinion that if damages were awarded the only actual damages would have been the amount spent by the plaintiffs in the repair of their respective motors. As to loss of crop and forage there is abolutely no showing that they suffered any loss therefrom." (R. 157)

Without the pumps the land went dry and hay didn't grow and the crops were lost. Also, because of no water there was no forage.

Deseret failed to get the customary 1,000 tons of hay and six weeks' pasturage for 1,000 head of cattle (R. 9, 10).

Daniel Freed testified to the value of the lost hay and forage (R. 21-22). Hatch lost 90 days of feed for 300 head of cattle or 900 Animal Unit Months worth $4.50 per unit (R. 29). Deseret used up its carry-over hay on this and other ranches (R. 24). Hatch lost forage for 300 head and just didn't have cattle on the ranch that year (R. 32). This loss of hay and forage was proximately caused by the phase reversal and its loss was compensable.

In Community Public Service Co. v. Gray (Tex. Civ. App. 1937), 107 S.W.2d 495, Gray sued for damage to his machine and for loss of profits while the machine was down resulting from reversal of current by the power company's employee. Both types of damage were allowed.

And in Kohler v. Kansas Power & Light Co., 192 Kan. 226, 387 P.2d 149, damage from food spoilage was allowed when the power company improperly cut off the power.

Recovery for inability to raise crops on proof that other crops in the vicinity were raised and were not planted with the defective onion seed was allowed in Malone v. Hastings, (Cir. Ct. N.Y.), 193 F. 1, 6. See also, Putnam v. Lower, (CCA-1956), 236 F.2d 561, 571-572.

And here the only crop failures were on the portions of land irrigated ordinarily by the damaged pumps (R. 9-10, 20-21, 29, 38).

CONCLUSION

The Court erred in granting the motion to dismiss. All the required elements were present for application of the doctrine of res ipsa loquitur with its consequent inference of negligence of the defendant. Since the phase reversal occurred while no one was near the motors on the plaintiffs' transmission lines, it is inescapable that the reversal occurred on the defendant's line and damaged pumps on both ranches. This transmission of current in reverse phase also constituted a breach of the Power Company's contracts with the plaintiffs and breached the Power Company's warranty of fitness and merchantability of the electric current.

The judgment of dismissal should be reversed and the case remanded for trial under the doctrine of res ipsa loquitur and for determination of damages. Or, alternatively, judgment should be entered for the plaintiffs under the theory of breach of contract or breach of warranty of the electricity with remand for determination of damages.

Respectfully submitted,

DAVID A. ROBINSON
531 South State Street
Salt Lake City, Utah 84111

RICHARD L. BIRD, JR.
200 Law Building
333 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Appellants

CERTIFICATE OF SERVICE

The foregoing brief was served on the Defendant-Respondent this 7th day of May, 1975, by mailing copies to its attorney, Robert Gordon, at 1407 West North Temple, Salt Lake City, Utah 84104.

Lorraine Starkie