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Lloyd E. Lish, Jr. v. Utah Power & Light Company, A Maine Corporation : Brief of Appellant

Utah Supreme Court

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In The Supreme Court of the State of Utah

LLOYD E. LISH, JR.,

Plaintiff-Respondent

vs.

UTAH POWER & LIGHT COMP-

ANY, a Maine Corporation,

Defendant-Appellant

BRIEF OF APPEAL

Appeal from the Judgment of the
District Court in and for Weber County,
Honorable Calvin G. ...

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In The Supreme Court of the State of Utah

LLOYD E. LISH, JR.,

Plaintiff-Respondent,

vs.

UTAH POWER & LIGHT COMP-
ANY, a Maine Corporation,

Defendant-Appellant.

} Case No.
12474

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This was an action for personal injuries received by plaintiff allegedly sustained when he brought a metal pole he was holding in his hands in contact with defendant's power line.

DISPOSITION IN LOWER COURT

The case was tried before the Honorable Calvin Gould sitting with a jury. From a verdict and judgment for plaintiff, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment and

judgment in its favor as a matter of law, or that failing, a new trial.

FACTS

On the morning of February 28, 1969, plaintiff went to a grain bin owned by Willard R. Smith, Jr. (Tr. 262). Plaintiff went to the bin to obtain grain samples in connection with his occupation as a grain buyer and trucker (Tr. 93). The grain bin was located in Holbrook, Idaho, which is very sparsely populated farming village with few buildings (Tr. 246). The temperature on the date in question was very cold (Tr. 96).

After arriving at the bin plaintiff parked his pickup truck just off the highway approximately under defendant's power lines (Tr. 96). He then got out of his truck and took four (Tr. 212, 236) three foot (Tr. 57) sections of a probe rod out of a gunny sack (Tr. 97). The gunny sack contained twelve three foot sections (Tr. 97). Plaintiff then proceeded to climb up the side of the bin and into the bin. Once inside he assembled the four sections of probe and then attached an end probe section, which was approximately fifteen inches in length, to the rod and proceeded to take grain samples (Tr. 98). Upon completion of collecting grain samples plaintiff decided not to disassemble the probe rod because he was planning to use the rod at another bin located nearby (Tr. 99, 100). Plaintiff then proceeded to climb back up out of the bin. When he reached the

top, he put one leg over the edge of the bin while leaving the other in the bin (Tr. 100). He then pulled the approximately thirteen foot metal rod out of the bin. In pulling the assembled rod from the bin plaintiff brought the probe in contact with defendant's power line and received injuries as a result of touching the line (Tr. 100).

Plaintiff was familiar with the bin and the road upon which the line was located and, in fact, had purchased grain from Willard Smith on previous occasions (Tr. 172). He had traveled the road on which the bin was located on many occasions and was aware of the utility poles (Tr. 176) along the side of the road and of the power lines on the poles (Tr. 188). There was also undisputed evidence that the lines themselves were bright (Tr. 277), and plaintiff testified that he had twenty-two vision at the time of the accident (Tr. 188). Plaintiff indicated that he was aware of the danger involved in touching power lines (Tr. 187, 193). Notwithstanding these factors plaintiff did not pay particular attention to the utility poles before climbing up the side of the bin (Tr. 176).

The probe rod used by plaintiff was over thirteen feet long (Tr. 236, 57) and could have been increased to a length of forty (Tr. 175) or fifty feet (Tr. 57). The probe rod could have been easily disassembled before plaintiff left the bin, but it was not disassembled for plaintiff's convenience (Tr. 99). As a matter of fact

Galen Christensen who was plaintiff's partner in the grain business testified that he told his employees to dismantle the probe on top of grain bins if they could (Tr. 66).

The evidence indicated that the nearest charged wire to the bin was at least 9.01 feet (Tr. 10) away and was likely more than 9.77 feet (Tr. 285) from the bin on the day of the accident since it was extremely cold day and the wires contract in cold weather (Tr. 286). The wires were 28 feet from the ground (Tr. 286) and each of the three charged wires was carrying 7200 volts (Tr. 284, 296).

POINT I

PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

This Court has clearly established that where a plaintiff is guilty of contributory negligence he may not recover from defendant. Defendant contends that under the facts established at trial, plaintiff negligently contributed to his own injuries and is therefore barred from recovery from defendant.

The evidence established that plaintiff was familiar with the area, the utility poles and the power lines. In fact, plaintiff admits at Tr. 188 that a person would have to be blind not to see the power lines. After completing his work in the bin plaintiff pulled his 13 foot

probe out of the bin without watching where it was going and negligently allowed it to come in contact with the power line.

Plaintiff could have easily avoided this accident by either disassembling the probe before leaving the bin or by watching where the probe was going as it was being pulled from the bin.

This Court has previously dealt with the question of contributory negligence in connection with electrical equipment. In the case of *Koch v. Telluride Power Co.*, 116 Utah 237, 209 P.2d 241 (1949), this Court held that contributory negligence may bar recovery against an electric company for personal injuries caused by electrical equipment.

This Court has also been explicit in denying recovery in other situations where plaintiffs have been guilty of contributory negligence as a matter of law.

In the case of *Johnson v. Syme*, 6 Utah 2d 319, 313 P.2d 468 (1957), plaintiff was held guilty of contributory negligence as a matter of law. The plaintiff, while driving on a four-lane highway, collided with a car which, with headlights burning, was driving onto the highway from an intersecting road without stopping for a stop sign. The plaintiff admitted that she did not see the defendant's car until it was directly in front of her at a distance of twenty to thirty feet. This Court stated that:

Under such circumstances we cannot but conclude that *plaintiff either looked and failed to see the obvious or failed to look at all and as a matter of law negligently contributed to her own injuries* and the death of another motorist. In other circumstances of negligent failure to look or to see that which is there to be seen, where the facts were no stronger than those here, we have concluded, as we do here, that there was contributory negligence as a matter of law which precluded recovery. (Emphasis added) *Johnson* at 469.

In *Richards v. Anderson*, 9 Utah 2d 17, 337 P.2d 59 (1959), the trial court granted summary judgment against the plaintiff on the grounds that he was contributory negligent as a matter of law. The plaintiff was traveling on Highway U.S. 40 when the defendant entered the intersection in front of him. This Court stated that:

It is a well settled rule that *one may not be heard to say that he did not see what was plain to be seen*. He either failed to look or saw and failed to heed, either of which makes him negligent. (Emphasis added) *Richards* at 61.

In the case of *Whitman v. W. T. Grant Co.*, 16 Utah 2d 81, 395 P.2d 918 (1964), the plaintiff was held guilty of contributory negligence as a matter of law. The plaintiff, a truck driver, while making a delivery opened a door and stepped off backward into an elevator shaft without looking. This Court affirming the trial court stated that:

The plaintiff is confronted with the basic proposition that when there is a hazard which is plainly visible, ordinarily one is charged with the duty of seeing and avoiding it and if he fails to do so, it is concluded that he is negligent either in failing to look, or in failing to heed what he saw. *Whitman* at 920.

* * *

He (the plaintiff) appears to have violated the sound and often echoed dictum which arises out of experience and common sense to "*watch where you are going*" when no excuse was shown for his failure to do so. (Emphasis added) *Whitman* at 920-921.

In the case of *McAllister v. Bybee*, 19 Utah 2d 40, 425 P.2d 778 (1967), the plaintiff alighted from her car along the curb of a Kanab City street and was injured when she fell over something in the unpaved, weedy area between the curb and sidewalk. She initially said she did not know what caused her to stumble and fall. Finally, however, she attributed the accident to a cement anchor used many years before to hold up a pole supporting a canopy in connection with a service station, which, with the pole, had been removed many years before. Mrs. McAllister had known of the cement anchor which was about six or eight inches above the ground, and had seen it there for many years. In ruling that the plaintiff was contributorily negligent as a matter of law, this Court stated:

. . . Even had there been no speculation as to

whether she tripped over the cement obstruction, she had known of its existence for many years, that it was in plain sight on a clear day—and there to see if anyone but looked.

This court consistently has said that under such circumstances there would be a defense on the ground of contributory negligence. . . . *McAllister* at 779.

In the case of *Eisner v. Salt Lake City*, 120 Utah 675, 238 P.2d 416 (1951), plaintiff was walking along a dry sidewalk on a clear day and was aware of and had an unobstructed view of a hole in the sidewalk in front of her. Just as she approached the hole her attention was distracted by a large group of children and as a consequence she stepped into the hole and fell breaking her wrist. The court held that the plaintiff was guilty of contributory negligence as a matter of law because even though her attention was distracted, she knew of the danger and her behavior fell short of the standards attributable to the reasonably prudent man.

Other jurisdictions that have dealt with the question of contributory negligence as a matter of law in cases involving power lines have denied recovery in fact situations similar to the one presented here by plaintiff.

In the case of *Hale v. Montana-Dakota Utilities Co.*, 192 F.2d 274 (8th Cir., 1951), plaintiff was acting as a rodman with a surveying crew. He was using a surveying rod which was constructed in sections.

When the rod was fully extended it was fifteen feet in length, but *it could easily be collapsed to a length of five or six feet*. In attempting to set the rod in a vertical position he touched defendant's power line and was seriously injured. In holding that plaintiff was guilty of contributory negligence as a matter of law, the court made the following observations:

But we think there is another conclusive reason why the court did not err in directing a verdict for the defendant. According to his own testimony plaintiff was well aware of the presence of these overhanging wires. He knew that they were conductors of electricity, carrying high voltage. He was a mature and intelligent young man and knew the dangerous nature of electricity, and one with knowledge of the nature and characteristics of electricity and the danger arising from contact with its conductors is charged with the same degree of care as is the company producing and transmitting it and failure to exercise such care by a plaintiff seeking to recover constitutes contributory negligence on his part. * * *

Knowing the presence of these lines and the danger arising from contact with them, *ordinary care required either that he shorten the rod to five or six feet or place it to one side of the lines. There was no necessity of bringing it directly under these lines and the failure to take any precaution whatever constituted negligence as a matter of law, and we think*

reasonable men could not differ in this conclusion.

* * *

In affirming a directed verdict for the defendant the court said [82 P.2d 968]: *Plaintiff was in no danger at all until he raised the rod to the height of the wires. He knew the wires were somewhere above him. He did not ascertain their exact location. He did not know if the wires were insulated. He could have determined this fact by simply looking at them. He did not look at what was in plain sight. This unfortunate young man simply 'took a chance' and was terribly injured.*" (Emphasis added) *Hale* at 28.

In *Hamilton v. Southern Nevada Power Co.*, 273 P.2d 760 (Nev., 1954), plaintiff was held guilty of contributory negligence when he touched a power line that was in plain view six to eight feet above his head with an iron pipe he was raising from a well. Plaintiff and his father both knew the wires were there but they paid little attention to them.

In the case of *Southern Maryland Electric Co-operative v. Blanchard*, 212 A.2d 301 (Md., 1965), plaintiff was held to have been contributorily negligent in bringing a television antenna he was installing in contact with electrical wires. Plaintiff claimed that he did not know the wires were there, but the court held that he was chargeable with knowing they were there in view of the fact that he had lived there

for one month and was working directly under the wires at the time of the accident.

For other cases in which courts have held plaintiffs guilty of contributory negligence for touching power lines see *Smith v. Virginia Electric and Power Company*, 129 S.E. 2d 655 (Va., 1963); *Dresser v. Southern California Edison Co.*, 82 P.2d 965 (Cal., 1938); and *May v. Illinois Power Co.*, 96 N.E.2d 631 (Ill., 1951).

A section from C.J.S. also states the standards for finding contributory negligence when one is injured by a power line:

One who has notice of the dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself into contact with it, as by touching it with conductors of electricity, is guilty of negligence, and cannot hold the company for the resulting injuries, and this is true of any adult, although he is wholly unskilled in the handling of electricity. To give rise to this defense, however, it must be shown that plaintiff in coming into contact with the appliances voluntarily and unnecessarily or negligently exposed himself to danger.

To constitute want of due care on his part it is not required that he should have anticipated the exact risk which occurred or that the peril was a deadly one, it is sufficient that he placed himself in a position of known danger where

there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his acts. 29 C.J.S., Electricity, Sec. 53 (1965).

Because plaintiff negligently and carelessly allowed his probe to come in contact with the power lines, this Court should find him guilty of contributory negligence as a matter of law.

POINT II

JURY INSTRUCTION NUMBER FOURTEEN WAS ERRONEOUS AND PREJUDICIAL.

Jury instruction number fourteen was given over defendant's objection (Tr. 316, 317) and was erroneous and prejudicial. This instruction was argumentative, inflammatory, biased in plaintiff's favor and was not a correct instruction of law.

Jury instruction number fourteen as stated in the Instructions to the Jury starting on page R. 28 state that:

You are instructed that a high tension transmission wire is one of the most dangerous things known to man. Not only is the current deadly, but the danger is hidden away in an innocent-looking wire ready at all times to kill or injure anyone who touches it or comes too near it. For the average citizen, there is no way of knowing whether the wire is harmless or

lethal until it is too late to do anything about it. Therefore, a high degree of duty is imposed upon one who transmits electricity in high tension wires to see that no harm befalls a person rightfully in proximity thereto when that person is himself guilty of no wrongdoing. In other words, the highest degree of care must be used to prevent harm from coming to others.

Failure to comply with this duty by Utah Power and Light Company would be negligence.

Defendant contends that this was an improper instruction in that it was not a mere instruction on the law, but in the context of this trial was an inflammatory instruction which editorialized and argued the dangers of high tension transmission wires. The instruction would also have been confusing to the jury in that at one point it states that “. . . a *high* degree of duty is upon one who transmits electricity . . .” and in another place the instruction states “. . . the *highest* degree of care must be used . . .” If the *highest* degree of care is required, it implies a strict liability on the part of one who transmits electricity, and this Court has expressly held that strict liability does not apply in the case of electrical transmissions. *Brigham v. Moon Lake Electric Association*, 24 Utah 2d 292, 470 P.2d 393 (1970).

The entire instruction was slanted against the defendant and had the effect of depriving the defend-

ant of a fair trial and was prejudicial in that it emphasized in several biased ways the nature of transmission wires.

One authority states that it is error to appeal to the sympathies and prejudices of the jury:

A litigant has a right to a trial by a fair and impartial jury, whose consideration of his cause is not influenced by any language of the court which would create resentment or prejudice against him. Thus, it is error for the court in its charge improperly to appeal to the sympathies and prejudices of the jury, and requested instructions containing such appeals are properly refused. However, the mere fact that a statement of matters, otherwise proper to be taken into account by the jury, may create sympathy in favor of one party or the other does not render such statement erroneous. 88 C.J.S., Trial, Sec 343 (1955).

Apparently plaintiff's counsel took the language of this instruction verbatim from this Court's decision in the *Brigham* case, supra. In that case plaintiff, his father, two brothers and a neighbor boy went searching for indian arrowheads in an isolated area. Plaintiff and his fifteen year old brother came upon a grounded wire which the brother touched with no harm. Plaintiff asked his brother if they were electric wires and was told that they were not. In going under the wire, plaintiff reach-

ed up and touched the charged wire and was severely injured.

The language contained in Lish's instruction was taken from an introductory comment made by this Court prior to stating that Moon Lake Electric Association was not strictly liable. The comment was clearly dictum and should not have been offered by Lish as a statement of the law or the holding of the case.

It is also important to note that these two cases are factually different in that Brigham saw the wire and deliberately touched it. Also the wire was near the ground where it could be touched by anyone who walked by. Defendant contends it was prejudicial error for the trial court to permit an inflammatory instruction to be lifted out of context from dictum in a case that was factually different from the one then at bar.

In the case of *Ireland v. Mitchell*, 359 P.2d 894 (Ore., 1961), the Oregon Supreme Court stated:

A trial judge is not a mere automaton whose function is limited to reciting the words approved by statute or by the Supreme Court. On the contrary, it is not advisable in charging the jury to use the exact words of an appellate court opinion in stating the law in similar cases. *Mason v. Allen et al.*, 183 Or. 638, 645. 195 P.2d 717. The judge must preside over the trial. His office calls for the exercise of an informed intellect. *Ireland* at 897.

Defendant also contends that jury instruction num-

ber fourteen was erroneous and prejudicial in that it was argumentative. Not only is the language of this instruction argumentative, but it is also to be noted that plaintiff's counsel prejudicially emphasized this instruction by reading the entire instruction to the jury both in his closing argument and again in his rebuttal to defendant's closing argument.

Rule 51 of the Utah Rules of Civil Procedure states in part:

Argument for the respective parties shall be made after the court has instructed the jury. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jury that they are the exclusive judges of all questions of fact.

Defendant contends that by giving jury instruction number fourteen the trial court violated Rule 51 in that the instruction constituted argument during the instructing of the jury and that it constituted commenting on the evidence. One authority clearly states that argumentative instructions are objectionable:

Argument, which lies properly within the domain of counsel in the case, finds no place in instructions of the court. A court should not give, and may properly refuse, argumentative instructions. But the giving of such a charge is not ground for reversal, unless prejudice to the party complaining results.

A charge is objectionable as being argumentative when it directs the jury to look to or consider certain facts as tending toward certain conclusions, or when it suggests to the jury the probable or possible effect of the conduct of one person toward another. 53 Am. Jur., Trial, Sec 552 (1945).

In the case of *State v. Brown*, 39 Utah 140, 115 P. 994 (1911), this Court held that an instruction that is argumentative is properly refused. The defendant had been charged with passing a forged instrument, and at trial several instructions relating to defendant's character were refused. In a concurring opinion, Chief Justice Frick stated that:

... The italicized portion of the charge which was refused by the court, while it, in legal effect, embodies the principle of law I have outlined above, also contained matter which, in my judgment, was improper if not vicious. Much of what is said in that portion of the charge is mere argument and does not state a proper legal principle. *Brown* at 1002.

The *Brown* court also stated another principle of the law that is relevant to the arguments found in this Point as well as Point III and Point IV, *infra*.

The general rule, of course, is that every error is *prima facie* an injury to the party against whom it is made; and that where error is shown injury is presumed, and that it had an effect upon the result of the trial, unless the

record affirmatively shows the contrary, or, not that probably no harm was done, but that no harm could have been or was done by the committed error. *Brown* at 1001.

The case of *Milford Canning Company v. Central Illinois Public Service Company*, 188 N.E.2d 397 (Ill., 1963), also dealt with an argumentative instruction. Plaintiff's claim was based on damages suffered from an interruption of electrical service. During the trial the court refused an instruction submitted by defendant because the court ruled it was argumentative. In sustaining the trial court, the appellate court said:

Complaint is made that the court erred in refusing defendant's instruction 4, which charged that "defendant was not an insurer or a guarantor * * * but * * * *." This instruction is argumentative in that it emphasizes that defendant was not an insurer, and minimizes its duty to exercise ordinary care. *Milford Canning* at 400.

Jury instruction number 14 is likewise argumentative in that it argues the dangers of power lines and points out that the danger is hidden until it is too late. Such language may have been appropriate for plaintiff's closing argument but certainly not for an instruction from the court.

POINT III

JURY INSTRUCTION NUMBER THIRTEEN WAS ERRONEOUS AND PREJUDICIAL TO DEFENDANT.

Jury instruction number thirteen was given to the jury over defendant's objection (Tr. 316). Said instruction states:

You are instructed that the State of Idaho has adopted National Bureau of Standards Handbook 81 entitled *Safety Rules for the Installation and Maintenance of Electric Supply and Communication Lines* regulating the construction and operation of electrical power lines. You are further instructed that Section 234.C. (b) provides in part as follows:

"GUARDING OF SUPPLY CONDUCTORS. Supply conductors of 300 volts or more shall be properly guarded by grounded conduit, barriers, or otherwise, under the following conditions: . . .

- (2) Where such conductors are placed near enough to windows, verandas, fire escapes, or other ordinarily accessible places, to be exposed to contact by persons."

If you find from a preponderance of the evidence that the defendant violated the regulation above *which is designed for the safety of the plaintiff* and other persons engaged in similar activities, such conduct would be negli-

gence on the part of defendant Utah Power and Light Company. (Emphasis added)

This instruction was erroneous and prejudicial for two independent reasons. In the first place, the trial court refused to include with this instruction the definition of "guarded". The definition of "guarded" was read to the jury during the course of the trial (Tr. 307) and was discussed at trial. The definition of "guarded" is an intregal and essential part of said section and it is necessary in order to properly interpret the section. In other words, the jury was given only a part of the section. The part of the code which defines "guarded" and that was not given defines "guarded" as:

Guarded means covered, shielded, fenced, enclosed, or otherwise protected by means of suitable covers or casings, barrier, rails, or screens, matter or platforms, to remove the liability of dangerous contract or approach by persons or objects to the point of danger (Tr. 307).

The code goes on to indicate that if a wire is insulated but otherwise unprotected, it is not considered as "guarded" (Tr. 307).

It is defendant's contention that the jury could not properly interpret this provision without knowing what "guarded" meant. As it was, they were left to their own interpretations as to how defendant should have guarded the power lines in question. They may well have conceived the duty on the defendant to have been greater than it was.

Defendant believes that this instruction was incomplete and in a sense taken out of context thereby prejudicing defendant.

Defendant secondly contends that this instruction should not have been given to the jury at all because the facts of the case had determined that it was not applicable.

It is first to be noted that according to the applicable code provision, these wires were more than the required distance from the bin even if, as the plaintiff contended, the voltage involved were 12,500 volts (Tr. 295, 296). The code provided that if the voltage in question were 12,500 volts then the wires would have to be at least eight diagonal feet from the bin. As was stated in the Facts, *supra*, these wires were at least 9.01 feet from the bin.

It should also be noted that part (1) of this section requires "guarding" when the wires cannot be removed from buildings by the distances required by the code. It therefore would appear that this section requires "guarding" when wires cannot for any reason be kept out of the reach of persons when they are in "ordinarily accessible places". Plaintiff could not have touched the wires with his person and was therefore in no danger until he began waving a thirteen foot metal rod around the top of the bin. Since this probe could have been extended to at least forty feet and since the ground under

the wires is certainly an "ordinarily accessible place", the instruction might imply that defendant had a duty to guard the wires all the way through Holbrook, Idaho, since they could be reached from the ground. It is to be remembered in this regard that Holbrook was a small sparsely populated village with few buildings.

When it is kept in mind that these wires could not have been properly "guarded" by insulating them, the inapplicability of this section becomes more apparent. Defendant would have been required to encase all of these wires or build some suspended structure around these wires to comply with this section. This is not a reasonable interpretation of the section.

Even if the section and facts are viewed in a light most favorable to plaintiff, the applicability of this code section to these facts should have been a question for the jury. However, because the instruction states that "... which is designed for the safety of the plaintiff . . .", the jury could conclude that the court had ruled as a matter of law that the section was binding on defendant and that a violation was negligence (see Point IV). Such an impression on the part of the jury would certainly be prejudicial to defendant.

POINT IV

JURY INSTRUCTION NUMBER SEVENTEEN WAS ERRONEOUS AND PREJUDICIAL TO DEFENDANT.

Jury instruction number seventeen was given to the jury over defendant's objection (Tr. 317). Said instruction stated:

Before you can return a verdict in favor of the plaintiff, you must find by a preponderance of the evidence that each of the following two propositions are true:

PROPOSITION NO. 1:

That the defendant was negligent in one or more of the following particulars:

A. In failing to comply with the National Bureau of Standards Handbook No. 81 relating to guarding of supply conductors; or

B. Failing to warn the public of a hazardous condition.

PROPOSITION NO. 2:

That the said negligence of the defendant, if any, was the proximate cause of the injury.

If you find that the two foregoing propositions are true, you should then consider the issue of contributory negligence as later defined in these instructions.

The thrust of this instruction was that if the jury found that defendant was guilty of either A or B under proposition number one and either was the proximate cause of plaintiff's injury, defendant was to be found

liable barring contributory negligence on the part of the plaintiff. Defendant contends that both A and B under proposition number one are erroneous instructions and obviously prejudicial to defendant.

Proposition No. 1A was erroneous for the reasons set forth in Point III, *supra*.

Jury instruction number seventeen is further erroneous and prejudicial in that proposition No. 1B instructed the jury that defendant had a duty to warn the public of a hazardous condition. There was no evidence whatever introduced that indicated that the defendant did have a duty or that if such duty was owed, how that duty was to be fulfilled. This instruction was totally without foundation and is contrary to the law under these circumstances.

Even if defendant did have a duty to warn, there was a complete absence of any definition or instruction to the jury as to what was meant by a duty to warn. That error was called to the attention of the trial court at the time the instructions were read to the jury, but before the instructions were given to the jury and before they retired to the jury room. This was called to the court's attention by means of a handwritten instruction prepared by defendant (R.20) which stated that:

There is no duty to warn of an obvious danger or that which is readily apparent to the ordinary prudent person.

This instruction was refused so that the jury was left without any instructions as to what constituted a duty to warn or under what circumstances the duty arose or failed to arise.

Defendant first contends that there is no duty to warn where there is an obvious danger. The dangers of coming into contact with high powered lines are so obvious that no warning of those dangers need be given. Plaintiff himself stated that he knew of the dangers of coming into contact with power lines and that he knew he would be injured if he did so. In this case there was no need to warn the plaintiff because he was already aware of the facts that any warning would have contained.

Defendant secondly contends that the law imposes no such duty to warn under these circumstances. In the case of *Berry v. Atlantic Coastline Railroad Company*, 273 F.2d 572 (4th Cir., 1960), the decedent was electrocuted while assisting in the unloading of steel from a railroad car when the crane being used for such unloading came in contact with the defendant's power line. The court held that even if the defendant had been negligent in the placement of its power lines, still there would have been no duty to warn since the decedent was already aware of the existence, location and the dangers of the power line. Therefore, the court concluded warning signs could have accomplished only that which the crane operator already knew—that contact with the line should be avoided.

In the case of *Lewis v. Pacific Gas & Electric Co.*, 212 P.2d 243 (Cal., 1950), the court held that knowledge that a sewer line was being laid along a street beneath an overhead electric line imposed no duty on the electric company to warn of the high voltage line so as to render the company liable for the death of a workman electrocuted when a crane moving sewer pipe came in contact with the line. The court said that there is no duty to warn if from all of the circumstances it could not have been reasonably anticipated that an accident of the general nature of that which killed the plaintiff would have occurred. It is to be remembered in this regard that the power line with which Lish came in contact was twenty-eight feet off the ground and at least nine feet from the grain bin. It was only when plaintiff negligently brought the long metal pole in contact with the wire that the accident occurred. This is not the kind of happening which an electric company is bound to foresee and guard against. Had the grain bin been full, the plaintiff would have had a much longer probe rod and would have still come in contact with an electric wire had it been even a greater distance from the bin. This accident occurred because of the negligence of the plaintiff and was not one which the defendant could have anticipated.

CONCLUSION

Defendant respectfully submits that the trial court erred in failing to grant defendant's motion (Tr. 205)

for an involuntary non-suit on the ground that plaintiff was contributorily negligent as a matter of law. The trial court also committed prejudicial error in giving jury instructions 13, 14 and 17 and in refusing to give instructions regarding the duty to warn, the lack of necessity to give a warning concerning that which is obvious, and defining "guarding". If this Court does not grant defendant's motion for an involuntary non-suit, it should grant a new trial.

Respectfully submitted,

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