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Bliss S. Elmer v. A. H. Mortensen, Dba A. H.
Mortensen Plumbing & Heating Company :
Appellant's Brief

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

BLISS S. ELMER,

Plaintiff and Respondent,

VS

A. H. MORTENSEN, d/b/a
A. H. MORTENSEN PLUMBING
& HEATING COMPANY,

Defendant and Appellant.

Case No.
10915

APPELLANT'S BRIEF

Appeal from the Judgment of the District Court
of Utah County, Utah
The Honorable Allen B. Sorensen, Judge

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IN THE SUPREME COURT
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Case No.
10915

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action to recover for personal injuries received by the plaintiff in an accident that occurred on April 3, 1964, during the construction of the Allen's Market in Springville, Utah. The defendant's employee drove a truck over some concrete reinforcing wire on which plaintiff was standing. The wire caught on the truck and pulled the plaintiff's feet from under him resulting in injury to his back.

DISPOSITION IN LOWER COURT

The case was tried by the Honorable Allen B. Sorensen with a jury and resulted in a verdict in favor of the plaintiff for the total sum of \$45,000.

RELIEF SOUGHT ON APPEAL

Appellant and defendant seeks reversal of the judgment below and a new trial, or in the alternative that the court reduce the judgment by the sum of \$30,000, or in the alternative that the judgment be reduced by the sum of \$19,450.

STATEMENT OF FACTS

In April, 1964, plaintiff was employed by his brother, a general building contractor, and was the foreman in general charge of the construction of the Allen's Super Market in Springville, Utah. Defendant, A. H. Mortensen, was the plumbing subcontractor on said building (T 28). The building in question was 120 feet wide and 146 feet long (T 27, Ex 1). There was an entrance way to it on the east side that was approximately 15 to 20 feet in width (T 34, 108, 210). This entrance way was the only method of ingress and egress for trucks and other vehicles. The foundation wall ran the full width of the entrance and had a dirt ramp on either side of it approximately 12 to 14 feet wide (T 142), which was the main traveled portion for the trucks driving in and out of the building. There was a conflict in the testimony as to whether the foundation wall was completely covered with the dirt ramp or whether approximately three to four inches of the foundation wall extended above the dirt ramp.

On the day of the accident the plaintiff and his crew of men were in the process of getting the concrete floors ready for pouring. The defendant, the

plumbing subcontractor, was in the process of getting the underground plumbing installed. There was a conflict in the testimony as to whether there was a mud puddle on the outside of the building in front of the entrance way. The testimony varied from no mud or no water outside the building at all to a statement that there was a mud puddle beginning approximately three feet east of the entrance way and extending a distance of 8 to 10 feet in width.

On the day of the accident, April 3, 1964, the defendant's son, Clyde Mortensen, who was acting as his foreman, and two other employees, Douglas Poulsen and Lorin Davies, were in the building in the northwest portion of it doing their plumbing work. The plaintiff had four or five men on his crew. Among other things, they were preparing the floor for the concrete pour. At plaintiff's direction, his brother, Marion Elmer, was in the process of rolling out strips of steel reinforcing wire. The wire came in rolls 6 feet wide and approximately 200 feet in length. This was a mesh wire. Each roll weighed approximately 250 pounds (T 366, Ex 42). There were several rolls of this wire located approximately in the center of the building and in a line approximately even with the north portion of the entrance way. The plaintiff's brother would roll this wire out in strips of approximately 32 feet long. He would cut the wire and then roll the wire back to the west end where he would cut it again and

would thus keep rolling the wire laying one layer of wire on top of another. This wire was rather springy and it would tend to curl up on the ends a distance of 12 to 16 inches. Plaintiff's brother put some kind of a timber on the west end of the wire he had rolled out, and he also put timber on the east end to help hold it down. The east end of the wire was located approximately three or four feet west of the east wall of the building (T 33, 34). There were four lengths of wire rolled out, and they were stacked one on top of the other. These were 32 feet long and 6 feet wide. The four pieces of wire were located right in the entrance way. There was some difference in testimony as to how far the north edge of the wire was from the north portion of the entrance way. The testimony would indicate it was far enough from the north entrance way so a man could walk in and out, which would be about three feet (T 121).

Clyde Mortensen, the defendant's foreman and son, told the defendant's employee, Doug Poulsen, to take their pickup truck, which was then inside the building, and go down to their shop and pick up some kind of a plumbing part. Poulsen got in the truck and drove it from where it had been parked somewhere in the northwest portion of the building down on the south side of the lengths of wire that were in the entrance way. As he approached the wire in the entrance way, the plaintiff saw him coming and motioned for him to stop. Poulsen stopped

the truck about 30 feet from the east wall of the building and about 10 feet south of the wire (T 121). At this time, the four pieces of wire were about 2 or 3 inches high, but on the ends the wire was curled up 12 to 14 inches (T 35). There was a 4 x 4 about 16 inches from the east end of the wire holding it down (T 37). The plaintiff picked up a 2 x 4 that was about 6 feet long. He stood on the wire and within a foot of the north edge. (See Ex 1 and the words written in pencil "Position of Mr. Elmer when standing on wire" T 97). The plaintiff was standing on the wire and was holding the east end down with the 2 x 4 because he anticipated that the wire might catch on the truck (T 103, 116).

After plaintiff stepped on the wire on the north edge thereof and after placing his 6 foot 2 x 4 on the southeast portion of the wire, he said to Poulsen, "Okay, come over it slow." Poulsen then proceeded to drive out of the building. There is a conflict in the testimony as to what happened at this point. The plaintiff's witnesses testified that Poulsen revved his engine and gunned the truck out of the building. Poulsen denied this and said that he just eased forward until he got to the point where his truck was going out of the building and that he then just accelerated slightly to get over the foundation wall, which was sticking above the dirt ramp, and to get through the mud puddle that was outside the building (T 239). The wire caught on the left

rear fender of the truck. This pulled plaintiff's feet from under him, causing him to land on his back and resulting in injuries that ultimately required the fusion of the lumbosacral portion of his spine.

The plaintiff claimed total medical expenses at the time of trial of \$2,473.50 (T 65) and loss of earnings as of the time of trial of \$10,550.00 (T 64).

Plaintiff introduced evidence that indicated he was earning \$7,000 per year for the three years prior to the accident (T 65, Ex 7) and that after he finally returned to work, he was only able to earn the sum of \$4,800 per year. The plaintiff's evidence stated most favorably to the plaintiff was to the effect that he suffered a 30 per cent loss of bodily function, that his condition was permanent, and that he would probably not be able to do any carpentry work again in the future. He was 53 years of age at the time of trial. There was a conflict in the medical testimony as to the amount of disability and as to whether the plaintiff could do carpentry work in the future.

Plaintiff admitted that he could have gotten a longer stick with which to hold the wire down and would not have had to stand on it at all (T 106). Plaintiff readily admitted that the wire could have been rolled out in such a position so that it would not have been in the entrance way at all (T 90, 91). He also admitted that he could have told his men to

pull the wire to the west where it would have been completely out of the entrance way before the truck drove out (T 93). The wire had been in the entrance way about 30 to 45 minutes before the accident (T 53).

The case was tried to a jury on March 13, 14 and 15, 1967. The jury returned a verdict in the following form:

General Damages	\$12,500
Special Damages	2,500
Loss of Earnings	30,000

Judgment on the verdict was entered March 16, 1967 (R 73, 74). Defendant filed a Motion for New Trial and a Motion to Alter and Amend (R 75, 77). The Order denying the Motions for New Trial and to Alter and Amend the judgment was entered April 19, 1967 (R 84).

ARGUMENT

POINT I.

THE COURT'S INSTRUCTIONS TO THE JURY PERTAINING TO CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF WERE PREJUDICIALLY ERRONEOUS IN THAT:

(A) THE INSTRUCTIONS (PARTICULARLY INSTRUCTION NO. 11) DEPRIVED DEFENDANT OF RELYING ON THE FACT THAT PLAINTIFF STOOD ON THE WIRE WHILE THE TRUCK WAS DRIVEN OVER IT AS A GROUND OF NEGLIGENCE; AND,

(B) THE (b) PART OF INSTRUCTION NO. 11 REQUIRES THAT THE JURY FIND IN THE

CONJUNCTIVE BOTH FAILURE TO MAINTAIN A PROPER LOOKOUT AND A FAILURE TO EXERCISE DUE CARE, WHEREAS THE JURY SHOULD HAVE BEEN TOLD THAT EITHER IMPROPER LOOKOUT OR LACK OF DUE CARE WAS SUFFICIENT.

The pre-trial order provides as follows: (R 15)

2. The specific acts of contributory negligence which the defendant claims the plaintiff committed in proximately contributing to or causing the accident are as follows:

- a. In failing to remove the wire from the entrance of the building.
- b. In failing to maintain proper lookout.
- c. In standing upon the wire as the truck was driven over it.
- d. In failing to exercise due care.

The court's Instruction No. 2 in general tells the jury what the parties' respective claims are. Instruction No. 2 (R 39) as it pertains to the claim of defendant reads:

The defendant denies that his employee drove the truck negligently, and claims that the injuries, if any, suffered by plaintiff, were caused by his own negligence in failing to remove the reinforcing wire from the entrance to the building, in failing to maintain a proper lookout, and in failing to exercise due care for his own safety in that he stood on the wire while the truck passed over it.

Instruction No. 3 (R 40) refers to Instruction No. 2, and states,

The preceding instruction is not to be considered by you as a statement upon the part of the court as to what facts are, or are not, proved in this case, but such instruction is a mere recital and statement to you as to what the respective parties in the case claim to be the facts.

Instruction No. 10 (R 43) tells the jury the grounds of negligence claimed by the plaintiff. Instruction No. 11 (R 44 and the one under attack) tells the jury the grounds of contributory negligence relied upon by the defendant. Instruction No. 11 reads in part as follows:

Before contributory negligence would preclude plaintiff's recovery, you must find from a preponderance of the evidence that each of the two following propositions are true:

Proposition No. 1: That the plaintiff was negligent in one or more of the following particulars:

- (a) In that he failed to remove the reinforcing wire from the entrance to the building before allowing the truck driven by Douglas Dwayne Poulsen to proceed.
- (b) In that he failed to maintain a proper lookout and exercise due care for his own safety.

Proposition No. 2: That the said negligence of the plaintiff, if any, was a proximate and contributing cause of the occurrence.

Defendant's requested Instruction No. 10 requested that the court instruct the jury relative to plaintiff's claimed grounds of negligence on the part

of defendant and it further provided that in order for plaintiff to recover, that the jury must find that plaintiff was free from contributory negligence. Defendant's requested Instructions No. 11 and 12, further amplified the claims of negligence and of contributory negligence.

The court, in Instruction No. 2, in effect, tells the jury that defendant is claiming plaintiff was contributorily negligent because he stood on the wire while the truck was driven over it. Instruction No. 11 restricts defendant to two grounds of contributory negligence and in effect tells the jury that standing on the wire while the truck was driven over it, as a matter of law, would not be sufficient evidence from which the jury could find that plaintiff was contributorily negligent. The vice of this instruction is that it removed completely from the consideration of the jury one of the principal grounds of defense relied upon by defendant. All the way through the trial of the case, defendant was constantly attempting to point up to the jury that plaintiff did not act reasonably in standing on the wire when the truck was driven over it. For the court to then tell the jury in effect that standing on the wire while the truck was driven over it could not be considered by the jury as negligence on the part of plaintiff was to deprive defendant of one of the main grounds of defense and was to deprive defendant of a fair trial.

Trial courts will frequently instruct the jury

in general terms on the defense of contributory negligence which then leaves the defendant in position to argue any and all of the grounds of contributory negligence that are supported by the evidence. Such a method of instructing on the issue of contributory negligence is an accepted one and is commonly used. When the court, however, undertakes to spell out in detail the various grounds of contributory negligence relied upon by defendant, it has a duty to instruct fully on all of the grounds urged by the defendant that find reasonable support in the evidence. In other words, each party is entitled to have his case submitted to the jury on any and all theories justified by the admissible evidence. To deprive either party of a full presentation of his claims, is to deprive that party of his day in court.

The Utah Supreme Court has dealt on numerous occasions with the principle that each party is entitled to have his theory of the case fully presented to the jury and that anything less is prejudicial error.

In *Morrison vs. Perry*, 140 P. 2d 772, 104 Ut. 151, the court dealt with a situation where the decedent was driving north and the defendant south. As the two vehicles approached, the decedent drove on the left side of the highway or on defendant's side. The defendant then pulled to the left of center of the highway and applied his brakes. At about the same time the decedent turned back to the right

and the collision occurred on the decedent's side of the roadway.

The court failed to instruct the jury in accordance with the defendant's theory of the deceased's contributory negligence, which was supported by the evidence. On appeal, the court held that this was error and in so doing said:

Defendant's theory, which was supported by evidence was that deceased, by driving on his left-hand side of the highway and his failure to turn to his right side in time to avoid creating an emergency, did create an emergency, which confronted defendant, through no fault of his. The court failed to properly separate the theories of the parties, but instead gave general instructions treating the rights and duties of each driver as being mutual, without regard to defendant's theory as to deceased's negligence in first being on his wrong side of the highway. Defendant is entitled to have his case submitted to the jury on any theory justified by proper evidence.

Each party is entitled to have his theory of the case presented in such a way as to aid the jury and not confuse it.

In applying the rule of this case to the case now before this court, the defendant, Mortensen, was entitled to have the jury consider, among other things, the fact that plaintiff did stand on the wire while the truck was being driven over it as a ground of contributory negligence. The defense was completely taken away from the jury and the jury was in effect told that although defendant claims the fact

of standing on the wire while the truck was driven over it was negligence, this could not be considered by the jury as sufficient ground on which to find negligence on the part of plaintiff.

In *Beckstrom vs. Williams*, 282 P 2d 309, 3 Ut. 2d 210, the Utah court held it was prejudicial error for the trial court to refuse to submit the case to the jury on plaintiff's theory of last clear chance where the evidence would support such a theory. The court, in so holding, reaffirmed the general rule, that either party has a right to have his theory of the case submitted to the jury if evidence would justify reasonable men in following that theory. To the same effect, see *Lund vs. Phillips Petroleum Company*, 351 P 2d 952, 10 Ut. 2d 276. See also *Startin vs. Madsen*, 237 P 2d 834, 120 Ut. 631, where the Supreme Court held that the trial court has a duty to cover the theories of both parties in its instructions; *McDonald vs. Union Pacific Railroad Company*, 167 P 2d 685, 109 Ut. 493. In *Webb vs. Snow*, 132 P 2d 114, 102 Ut. 435, the court was dealing with an action for assault and battery arising out of an altercation with persons operating a "giant racer" at a recreational resort, where evidence with regard to commencement of the altercation was conflicting. The trial court, which had given instructions assuming that facts were as testified to by plaintiff's witnesses, erred in refusing instructions presenting defendant's theory of the case. The court reaffirmed the rule that a party is entitled to have his theory

submitted to the jury, when there is evidence to sustain it.

In *Hooper vs. General Motors Corporation*, 260 P 2d 549, 123 Ut. 515, the Supreme Court again had the opportunity of dealing with an erroneous instruction. In this case, the plaintiff was driving a Chevrolet truck. The truck overturned injuring plaintiff. After the accident, the rim was separated from the spider, the spider being the spokes and inside of the wheel that bolts to the axle. It was claimed by the plaintiff that the wheel was defective at the time of manufacture. There were worn spots on the underside of the rim indicating that there had been looseness for some time prior to the ultimate failure of the wheel. There were also other facts and circumstances tending to show that the wheel was defective at the time it was put on the truck. The court instructed the jury as follows:

You are instructed that the fact that the rim and spider were found in a separated condition after the accident is no evidence of the fact that they were defective, unsound, or unsafe when assembled and sold by defendant, General Motors Corporation, nor is it evidence of the fact that the separating of the rim and spider caused the truck to go out of control and overturn.

The court reversed and granted a new trial. In so doing, the Supreme Court in effect held that the trial court, by giving the above instruction, singled out one of plaintiff's pieces of evidence that when

considered with other evidence, tended to show defective manufacture, and the instruction told the jury that this piece of evidence; namely, the fact of spider-rim separation, was no evidence at all of either defective manufacture or that the failure of the wheel caused the accident. In holding the instruction erroneous, the Supreme Court said:

It is not enough to say, that though the instruction be incorrect, the fact of rim-spider separation was so implicit in all of the evidence, that no prejudice resulted to the plaintiff. The instruction as given, withdrew from the jury a fact which was some evidence of two requisite elements of the plaintiff's cause. It would be pure conjecture to say that the jury ignored the instruction.

Applying the ruling of the Hooper case to the case now before this court, the effect of the trial court's instruction was to take completely from the jury defendant's claim that plaintiff was negligent in standing on the wire while the truck was driven over it. Had the jury been permitted to consider that claim as negligence on the part of plaintiff, the result of this lawsuit would very probably have been different.

For numerous other cases announcing the rule that the trial court has the duty to fully instruct the jury upon every reasonable theory of the parties which finds support in the pleadings and evidence, see *Cook vs. Saltzer*, 257 P 2d 228, 74 Ida. 97; *Wurm vs. Pulice*, 353 P 2d 1071, 82 Ida. 359; *Lem-*

man vs. McManus, 233 P 2d 410, 71 Ida. 467. In *Phillips vs. G. L. Truman Excavation Company*, 362 P 2d 33, 55 Cal. 2d 801, the trial court submitted the case to the jury on the question of defendant's negligence only, but refused to submit it on the question of the contributory negligence of the plaintiff. On appeal, the Supreme Court of California reversed, holding that there was some evidence of contributory negligence and hence the defendant was entitled to have his theory of the case submitted to the jury. In so holding, the court said:

It is hornbook law that each party to a lawsuit is entitled to have the jury instructed on all of his theories of the case that are supported by the pleadings and the evidence. It is incumbent upon the trial court to instruct on all vital issues involved ***. A trial court, where there is evidence to support such a defense, may not, by refusing to instruct on it, deprive a party of this defense. If it does, the error in refusing to instruct on it is obviously prejudicial in any case where the evidence admitted in support of the defense, if believed, would support a verdict in favor of the complaining party.

In *Daniels vs. City and County of San Francisco*, 255 P. 785, (Cal.) the trial court did not instruct the jury on the theory of last clear chance. The Supreme Court held the evidence would support a finding in favor of the plaintiff on that theory and the failure of the trial court to so instruct was prejudicial error.

The general rule is stated in 88 CJS Section 301, Page 18 as follows:

Where a case or a defense is based on more than one theory, the jury should be instructed on all of them, * * *.

The Oklahoma Supreme Court in *Taylor vs. Hays*, 261 P 2d 599, dealt with the same problem where it held that a trial court owes the duty on its own motion, to instruct the jury on all fundamental issues. To the same effect, see *Atchison, Topeka and Santa Fe Railroad Company vs. Hicks*, 258 P 2d 208, (Oklahoma) where the court held that it is the duty of the trial court on its own motion to properly instruct the jury upon decisive issues made there by the pleadings and evidence introduced at trial and failure to do so constitutes fundamental error.

Rivisto vs. Heller, 2 N. Y. Supp. 2d 288, involved an auto-pedestrian accident. The pedestrian-plaintiff claimed the defendant was guilty of speeding and failure to sound his horn. From a judgment in favor of the defendant, the plaintiff appealed claiming that the charge of the trial court to the jury that if "the defendant did what a reasonable prudent person would do when he saw the plaintiff step out of a stopped car to avoid the accident, the verdict must be for the defendant," was error. The appellate court held this instruction was prejudicially erroneous because it had the effect of eliminating all alleged acts of negligence prior to the time

the defendant saw the plaintiff, including the grounds of speeding and failure to warn.

Camilla Cotton Company vs. Cawley, 183 SW 134, 52 Ga. App. 268 involved a case where the defendant claimed the plaintiff was negligent because of (1) speeding and (2) improper passing. On appeal from a judgment in favor of plaintiff, it was held that the trial judge's failure to instruct on the issue of improper passing was prejudicial error, even though the judge did allude to this issue in his review of the claims of the defendant. The court in reversing the trial court said:

It is the duty of the court to give in the charge to the jury the law applicable to the issues made by the pleadings and the evidence, and his failure to do so when injurious to the losing party is reversible error * * *. It is not enough for the court to give in the charge the contentions of the parties, but he must also give the law applicable * * *.

In *Chandler vs. Kraner*, 73 NE 2d 490, 117 Ind. App. 538 the defendant's car became disabled at night on a highway. The plaintiff received injuries when he ran into the rear of the disabled vehicle. He claimed the defendant was guilty of negligence in (1) stopping his automobile on the main traveled portion of the roadway and (2) in failing to set out proper warning devices around his disabled vehicle. The trial court instructed the jury only on the second ground and in effect eliminated the first

ground as a basis for recovery. The verdict was in favor of the defendant. On appeal, the court held the failure of the trial court to instruct the jury on the issues presented by the pleadings and evidence whether requested to do so or not, and a failure to do so constitutes prejudicial error. The court said "We believe the trial court committed prejudicial error in failing to instruct the jury on the issue of speed, which was pleaded in the plaintiff's amended petition. No other instructions given by the trial court properly cover this issue."

Abercrombie vs. Roof, 64 Ohio App. 365 involves a malpractice case where the doctor allegedly injected alcohol instead of an anesthetic prior to the operation and then followed that with several acts of negligence resulting in the decomposition of the plaintiff's flesh and a subsequent long hospitalization. Three distinct issues of negligence were presented to the jury by the pleadings and evidence: (1) negligence in the pre-operative technique in the administration of the local anesthetic; (2) negligence during the operation in failing to heed the protestations of the plaintiff that he was suffering undue pain; and (3) negligence in post-operative treatment. In its charge to the jury the court in effect read the pleadings, or at least summarized them, but when instructing on the specific grounds of negligence, he only covered the first one dealing with the pre-operative injection of alcohol instead of anesthetic. On appeal from a judgment in favor

of the defendant, the court held this was prejudicial error in spite of the fact that the plaintiff at no time requested the charge on the other two grounds of negligence. The court in this case in reversing the trial court said:

The defendant claims that all this charge does is to require a preponderance of the evidence in proving alcohol was injected into the plaintiff. This is not the limit of the natural and logical inference from the language used nor did the jury undoubtedly so consider it. It is a mandate upon the plaintiff. The natural inference, though not expressed in terms, is that if the plaintiff fails to comply with this mandate, he fails in his case. Of course, the charge as far as it goes states a correct proposition of law, but it is inapplicable to the facts in the case and is misleading especially in view of the failure of the court to properly charge upon all the issues in the case.

In *Sewell vs. Macre*, 323 P 2d 236, 52 Wash. 2d 103 the court said:

One of the appellant's theories upon which he based his right to recovery was that the respondent's violation of the above quoted portion of the ordinance was the proximate cause of his injury. The law in this regard is not covered by any other instruction. It is reversible error to fail to instruct the jury properly upon an issue which is pleaded and supported by the evidence.

In *Riser vs. Herr*, 102 P 2d 178, 187 Okl. 211, the court said:

Upon the foregoing considerations we conclude that the trial court erred in failing to instruct the jury as to which of the two vehicles had the right of way if they found that one of them entered the intersection before the other * * *. It is the duty of the court without a request and upon its own initiative to instruct the jury upon all the vital factors of the tenable legal theories of both litigants concerning the issues of fact.

See also *Roadway Express vs. Baty*, 144 P 2d 935, 189 Okl; *Clay vs. Texas Arizona Motor Freight*, 159 P 2d 317, 49 New Mex. 157; *Harrinton vs. Fortman*, 8 NW 2d 713, 233 Ia. 92; *Meschini vs. Guy F. Atkinson Company*, 325 P 2d 213, 160 Cal. App. 2d 609.

In the case now before this court, not only did the court on its own motion give an instruction, the effect of which was to take from the jury the question of whether the plaintiff was negligent because he stood on the wire when the truck was driven over it, but the instruction went further and informed the jury that a failure on the part of the plaintiff to maintain a proper lookout in and of itself would not be sufficient on which to predicate a finding of contributory negligence. This is clearly erroneous. Failure to maintain a proper lookout on the part of the plaintiff was clearly sufficient in and of itself as a basis for finding the plaintiff negligent without requiring the jury to in addition to improper lookout find that the plaintiff was guilty of a lack of due care. Instruction No. 11 tells the jury it must

find that the plaintiff was guilty of failure to maintain a proper lookout, as well as doing something in addition, which would constitute a failure to exercise due care for his own safety. The instruction as given leaves with the jury as a basis for finding contributory negligence, a failure to remove the wire completely from the entrance to the building, or improper lookout plus failure to exercise due care. It takes away completely from the jury the standing on the wire while the truck was driven over it and it requires improper lookout plus lack of due care instead of permitting each; i.e., standing on the wire, improper lookout, or lack of due care to be a sufficient basis for finding negligence on the part of the plaintiff. This seriously prejudiced defendant.

A reading of the record will demonstrate that defendant relied heavily, during the trial of the case, on his claim that the plaintiff was not acting reasonably when he stood on the wire while the truck was driven over it. To be deprived of relying on this defense was to effectively deprive the defendant of a fair trial.

POINT II.

A. LOSS OF EARNINGS FROM THE TIME OF ACCIDENT TO THE TIME OF TRIAL IS AN ITEM OF GENERAL DAMAGE AND WAS INCLUDED BY THE JURY IN THE AWARD FOR GENERAL DAMAGES.

B. IN THE EVENT, THE COURT TAKES THE POSITION THAT LOSS OF EARNINGS FROM THE TIME OF ACCIDENT TO THE TIME OF

TRIAL IS AN ITEM OF SPECIAL DAMAGES, LOSS OF FUTURE EARNINGS OR IMPAIRMENT OF EARNING CAPACITY CLEARLY ARE PART OF THE GENERAL DAMAGE AWARD AND TO PERMIT THE JURY TO MAKE AN AWARD FOR GENERAL DAMAGES AS WELL AS FOR LOSS OF FUTURE EARNINGS IS TO PERMIT A DOUBLE RECOVERY FOR THE SAME ITEM OF DAMAGE

The jury after finding the issues in favor of the plaintiff assessed plaintiff's damages as follows:

General damages	\$12,500
Special damages	2,500
Loss of earnings	30,000

Plaintiff claimed medical expenses at the time of pre-trial and at the time of trial of \$2,473.50 (T 65) and loss of earnings from date of accident to time of trial of \$10,550.00.

There is a difference of opinion among the trial bench and bar of this state as to whether loss of earnings from date of accident to date of trial is an item of special damages or to be included in the general damage award. Some of the judges treat loss of earnings down to the time of trial as an item **of special damage** and permit the jury to find specially as to that item. Others treat loss of earnings to the date of trial as general damages and require the jury to include that loss as part of the general damage award. None of the trial judges in this state, in this writer's experience, treat loss of future earnings or impairment of earning capacity as an item of special damage, but all of them require that the

jury include loss of future earnings or impairment of earning capacity in the general damage award. There seems to be no dispute or difference of opinion at all as to this either among the trial bench or the bar.

It would be most helpful to the trial courts and the bar of this state if this court would settle once and for all the question of whether or not loss of earnings to the date of trial is an item of special damage or whether it is to be included and deemed a part of the general damage award. It would also be helpful to the trial bench and bar if this court would affirm the uniform practice that has been in effect in this state for many years of treating loss of future earnings or impairment of earning capacity as general damages and requiring the jury to include the same in the general damage award.

This court has had occasion in the past to deal with the question of whether loss of earnings to the time of trial was an item of special damage or to be included in the general damage award. There does not seem to be a clear-cut ruling by our court on this question.

In *Littledike vs. Wood*, 255 P 172, 69 Ut. 323, the question was involved as to whether loss of earnings past and future, could be recovered without specially pleading these items. The court, dealing with this question said:

On the question of damages, the court

charged the jury that they had the right, and should take into consideration among other things, "the time lost and that he will probably hereafter lose, if any, as may appear from the evidence, by reason of and as the result of said injury." The point made is that there were no allegations or proof of loss of time or of earnings or of any impairment of earning capacity. It is claimed that such element is special damage and hence is required to be specially pleaded, which was not done; and if not special not recoverable, under the description of the injury and the general ad damnum clause, that there was no evidence upon which to base a finding of any damage or loss in such regard. The matter was not specially pleaded. The injury, in the complaint, is described as follows: That the appellant struck the plaintiff in the mouth with his fist and knocked two of his front teeth out and loosened a great many more, cut his lower lip and knocked him down, struck him over the eye, kicked or struck him in the side and broke three ribs, which punctured the left lung, and that as a result of the beating, the respondent was forced to go to the hospital and remain there several weeks, and was greatly damaged in body and in mind and suffered pain, etec., and that he was permanently injured.

The Supreme Court then said:

If loss of time or of earnings or impairment or earning capacity naturally and necessarily results from the injuries which are described and of the act complained of, evidence can be given of such loss without specially pleading it.

The court then refers to the description of the injury contained in the complaint and said:

Such a description of injury shows some loss of time as a natural and necessary result of the injury as alleged. Hence to entitle respondent to recover for loss of time, it was not essential that such loss be further or specially pleaded.

The court seems to hold in this case that loss of earnings, both past and future are general damages and may be recovered without specially pleading them if the description of the injury is such that it may be inferred as a natural consequence, that there would be some loss of time.

In *Clawson vs. Walgreen Drug Company*, 162 P 2d 759, 108 Ut. 577, the Supreme Court again had the problem before it as to whether or not loss of earnings was an item of special or general damages. In dealing with this question, the court said:

It is objected that loss of time should have been specifically pleaded before evidence on it was admissible. This assignment involves the same basic problem as that raised by the assignment that the court improperly permitted the jury to consider "loss of time" and "impairment of earning capacity" as elements of damage. The assignments may be discussed together. At the outset, it should be noted that a distinction is made between loss of earnings and impairment of earning capacity. The former relates to the loss of wages which might have been earned had the plaintiff not been injured. The latter relates

to the diminution of earning capacity. The measure of damages for the former may in general terms be stated as the amount the injured person might reasonably have earned in pursuit of his ordinary occupation. The measure of damages for the latter in general terms is the difference between the amount which plaintiff was capable of earning before his injury and that which he was capable of earning thereafter. Some jurisdictions hold that before recovery can be had for loss of wages, the loss must be specifically pleaded.

The court then goes on to discuss the holding in the Littledike case and said:

Under the holding of the Littledike case, *supra*, this is a sufficient allegation, when taken with the allegations concerning the nature of his injuries, to warrant the introduction of evidence relative to impairment of earning capacity. In the absence of special demurrer, it is also probably sufficient to permit evidence as to loss of earnings, although it would have been better if specifically pleaded.

In *Pauly vs. McCarthy*, 184 P 2d 123, 109 Ut. 431, the Supreme Court again had occasion to discuss the Littledike case and the Clawson case. In this case, annuity and mortality tables were admitted in evidence over the objection of the defendant. The court then said:

The basis of defendant's objection is that there was no allegation or claim of permanent injuries, and therefore the table in this case was incompetent, irrelevant, and immaterial,

and would tend to mislead and confuse the jury.

The court then talks about the cases and observes that they are in conflict on the question of whether the permanence of injury must be alleged in order to allow recovery therefor. The court goes on to say:

The cases in which the problem has been presented fall into three groups: (1) Apparently, the majority rule is that damages for the permanency of the injury are recoverable under a general allegation for damages, without specifically alleging the fact of permanency. In many of the cases, this rule is expressly stated; and other cases have allowed recovery of damages for permanent injuries in the absence of any specific allegation that the injuries complained of were permanent.

(2) Other cases take the view that damages for permanent injuries may not be recovered under a general allegation of damages, without specifically pleading the fact of permanency. These cases go on the theory that damages for such injuries are in the nature of special damages, which must be specifically pleaded to allow recovery therefor. However, under this view, the word "permanent" need not be used in alleging the permanency of the damages. Any equivalent expressions are sufficient. Thus, an allegation that the plaintiff will be disabled for the rest of his life has been held a sufficient allegation of permanence. *Lakeshore Railroad Company vs. Ward*, 135 Ill. 511, 26 NE 520. Nor is it necessary that permanency be positively pleaded as a determined and ascertained fact. It is

sufficient to say that the plaintiff, "believes" his injuries are permanent, or that they "may be" permanent or that they "probably" will be permanent.

(3) A third line of authorities holds that unless facts from which the permanency of the injury will necessarily be implied, are alleged, there must be a special averment that the injuries are permanent, in order to let in proof to that effect. This is really a qualification of the second rule. Under this rule, the fact that permanency may possibly or even probably follow from the nature of the injury is not sufficient to allow recovery therefor in the absence of a specific allegation of permanency.

The question as to which of the above three rules should be adopted in this jurisdiction seems never to have been decided by this court. However, in the case of *Littledike vs. Wood*,, 69 Utah 323, 255 P 172, we said: "If loss of time or of earnings or impairment of earning capacity naturally and necessarily results from the injuries which are described and of the act complained of, evidence can be given of such loss without specially pleading it."

This rule was laid down in *Atwood vs. Utah Light and Railroad Company*, 44 Utah 366, 140 P 137 and was followed in *Clawson vs. Walgreen Drug Company*, 108 Utah 577, 162 P 2d 759. If we were to follow the reasoning of these cases, Utah would probably follow the third rule. However, we do not think it is necessary to determine that question, at this time. We believe that the plaintiff's com-

plaint sufficiently alleged the permanance of the injury.

The court then goes on to say :

As pointed out supra, the purpose of requiring the plaintiff to allege the permanence of his injuries (in those jurisdictions which require such an averment) is to give notice to the defendant of the nature and extent of the claim, so that he may properly prepare his defense and not be taken by surprise. Therefore, any language which puts the defendant on notice that plaintiff claims damages for the permanence of his injuries is sufficient.

The court held that the complaint adequately put defendant on notice that the injuries claimed were permanent and therefore held that it was proper to admit the mortality and annuity tables.

The Clawson case, as well as the Pauly case, cite Littledike with approval. Littledike, in effect, held that if the description of the injuries in the complaint would indicate that loss of time or of earnings or impairment of earning capacity would naturally result from those injuries, evidence could be given of the loss without specially pleading. It would seem that the Utah court, while not coming out specifically and saying so, has in effect held that loss of earnings sustained from the time of accident to the time of trial, as well as future loss of earnings or impairment of earning capacity, are items of general damage and not special damage and

therefore would be included in the general damage award.

Oregon has had occasion to deal with the question of whether loss of earnings to the time of trial is special or general and as to whether or not loss of earnings or impairment of earning capacity are to be considered part of the general damages. In *Shaw vs. Pacific Supply Cooperative*, 113 P 2d 627, 166 Ore. 508, in dealing with this question, the Oregon Supreme Court said:

Impaired earning capacity differs from loss of earnings. The latter looks to the past, must be specially pleaded and the amount of the loss ordinarily is capable of fairly definite ascertainment. The former is a direct and natural consequence of a disabling injury and therefore, comes under the head of general damages which need not be specially alleged. It is concerned with "what a man would be able to earn in the future and his capacity to make good."

In *Moe vs. Alsop*, 216 P 2d 686, 189 Ore. 59, the Supreme Court of Oregon again made a distinction between loss of earnings from time of accident to time of trial and for loss of earnings or impairment of earning capacity in the future. In dealing with this question, the court observed that the plaintiff had demanded, besides general damages for permanent injuries, special damage of \$532.00 for loss of earnings. The defendant moved to strike the demand for these special damages and the motion was denied. The court then said.

It is true that recovery may not be had for both loss of earnings and diminished earning capacity covering the same period of time. The special damages claimed in this connection, however, covered only loss of time for a period of seven weeks prior to the commencement of the action. This was a proper claim, and was not included within the claim for general damages.

Oregon again dealt with this problem in the case of *Lehr vs. Gresham Berry Growers*, 372 P 2d 488, 231 Ore. 202. The court in dealing with the problem of loss of earnings and impairment of earning capacity, said:

Loss of earnings and profit must be pleaded and must be proven by evidence from which this loss may, within reasonable limits, be ascertained. Loss of future earnings, on the other hand, is a natural consequence of a disabling injury and therefore comes under the head of general damages.

The Oregon Supreme Court, again in the case of *Fields vs. Fields*, 326 P 2d 451, 213 Ore. 522, dealt with the problem of loss of earnings in the past as distinguished from impaired earning capacity in the future. The court said:

As pointed out in *Shaw vs. Pacific Supply Co-op*, 113 P 2d 627, 166 Ore. 508, there is a well defined difference between impaired earning capacity and loss of earnings. Impaired earning capacity is a direct and natural consequence of a disabling injury of a permanent or lasting nature. *It is an element*

of general damages and need not be specially pleaded. On the other hand, loss of earnings generally looks to the past and is an element of special damages, must be specially pleaded and ordinarily may be ascertained with reasonable certainty.

It would be improper to permit recovery for loss of earnings and for impaired earning capacity covering the same period of time. See *Moe vs. Alsop* 216 P 2d 686, 189 Ore. 59. Loss of earnings ordinarily compensates for loss sustained during the period from the injury to the commencement or trial of the action. If recovery is sought for both loss of earnings and impaired earning capacity, then the latter should be assessed prospectively from the time of trial. See McCormick on Damages, Hornbook Edition, Section 86.

The court in *Gersick vs. Schilling*, 218 P 2d 583, 97 Cal. App. 2d 641, said:

The claim for loss of earnings, no matter how pleaded, is an item of general damages.

Swanson vs. Bogatin, 308 P 2d 918, 149 Cal. 2d 755 was a personal injury action in which the court instructed the jury that it could return special damages consisting of (1) medical expenses; and (2) loss of wages to the time of trial. It also instructed the jury that it could return a verdict for general damages.

The jury returned a verdict in favor of the plaintiff for the sum of \$15,000 general damages and \$5,170.45 special damages. The special damage

award included some \$3,000 for loss of wages. On appeal, the defendant claimed it was error to permit loss of wages to be considered as a special item of damage. The court, on appeal, held that permitting the jury to find specially for lost wages down to the time of trial was all right. In so doing, the court said:

They say that no part of a loss of wages could be considered as special damages. Again, we think they are in error. Impairment of earning capacity, which is an element of general damages, is not the same as actual, proved, loss of wages, between the occurrence of the injury and the trial; if loss of wages during that period is alleged and can be proved with reasonable certainty, the damages can be recovered as special damages.

In *Wilson vs. Sorge*, 97 NW 2d 477, 256 Minn. 125, the court held that recovery for loss of or diminution of power to earn in the future is general damages.

Kentucky has dealt with the problem of double recovery in the case of *McCellan vs. Trelkeld*, 129 SW 2d 977, 279 Ky. 144. In dealing with this problem the court said:

Instruction No. 3 also authorized the jury to find for the plaintiff a sum which reasonably and fairly represents loss of time for three months not to exceed \$400 per month or a total of not more than \$1,200 in addition to his loss of power to earn money.

The Instruction as a whole authorized

the jury to find for the plaintiff both for permanent impairment of his power to earn money and for the loss of time for the same period, to the extent of the lost time thereby authorizing a duplication for the period of the lost time. This was error. The recovery for loss of power to earn money begins when the loss of time ends. Upon another trial of the case if a similar instruction be given, it should be so framed so as to avoid the duplication we have indicated.

In *Singles vs. Union Pacific Railroad Company*, 112 NW 2d 752, 173 Neb. 91, the plaintiff recovered a verdict of \$100,000. The defendant on appeal claimed there was a double recovery allowed for loss of earnings and for loss of earning capacity covering the same period of time. The Supreme Court of Nebraska in reversing the lower court for permitting a double recovery said:

It is the contention of the defendant that the cited portion of the instruction permits a recovery for the impairment of the capacity of the plaintiff to earn money in the future and for the loss of time in the future and thereby authorizes the jury to allow a double recovery.

The foregoing paragraph of Instruction No. 9 permits a recovery for the following items of damage: (1) pain and suffering sustained to the time of trial, (2) impairment of capacity to earn in the future, (3) reasonable value of time lost to time of trial, (4) future pain and suffering, and (5) loss of time in the future. It seems clear to us that a litigant may not recover for the impairment of earn-

ing capacity and time lost in the future for the same period of time. It permits the jury to allow a double recovery.

The controlling rule is stated in 14 Am. Jur., Damages, Section 89, Page 55 as follows:

“It has been held that a recovery cannot be had both for loss of time and for diminished earning capacity during the same period and that an allowance for permanent impairment of earning capacity should run only from the expiration of the period covered by an allowance to damages for lost time.”

We point out that the instruction under consideration as to future loss of time was in addition to any allowance for damages for the impairment of plaintiff's capacity to earn money in the future as indicated by the words of the instruction you should also allow him reasonable compensation for the future loss of time.

The Nebraska Supreme Court then said:

It is the duty of the trial court, without request, to instruct the jury as to the proper measure of damages in a personal injury case. If the instruction on the measure of damages is erroneous, a litigant is not precluded from asserting error because of a failure to tender a proper instruction. Where instructions are so framed as to mislead the jury into a duplication of an element of recovery or into an award of damages twice for the same loss, such instruction is prejudicially erroneous.

In the case now before this court, the trial court

in Instruction No. 16 (R 48) permitted the jury to make an award for loss of earnings and it also permitted the jury to make an award for loss of future earnings. The instruction states:

You may also consider the matter of *loss of future earnings and award him the present value of such loss*, if any, as you believe from a preponderance of the evidence he is reasonably certain to suffer in the future as a result of the injury in question.

Instruction 16 then goes on to say:

In awarding such damages you may consider the nature and extent of the injuries sustained by him, the degree and character of his suffering, both mental and physical, its probable duration and severity, and the extent to which he has been prevented from pursuing the ordinary affairs of life as heretofore enjoyed by him and disability or *loss of earning capacity resulting from such injury*.

Inasmuch as the total loss of earnings claimed to the time of trial amounted to the sum of \$10,550 (T 62), it is clear-cut that of the \$30,000 loss of earnings awarded by the jury \$19,450 of that amount of necessity had to be for future loss of earnings. In addition there was a \$12,500 award for general damages which under the court's instructions would include an award for permanent loss of earning capacity. In effect the jury made a double award. It made an award for loss of future earnings and also made an award for impairment of earning capacity. This double recovery is prohibited under

the law and has been struck down by the Supreme Court of every state having occasion to deal with the problem.

The Supreme Court of Wisconsin in the case of *Ready vs. Hafeman*, 300 NW 480, 239 Wis. 1 refused to permit a jury verdict to stand that included a double recovery for future loss of earnings and impairment of earning capacity.

Under all of the cases cited above, loss of future earnings or impairment of earning capacity are items that go to make up the general damage award. To permit the jury in this case to make an award of \$12,500 general damages and also to make an admitted award of at least \$19,450 for future loss of earnings is certainly to permit a duplication and a double recovery.

In dealing with the problem the Texas court had the following to say in *International GNR Company vs. Startz*, 82 SW 1071, 37 C 51:

We do not hold that it was improper for the court to instruct the jury that they might consider the items of damages referred to or any other items of damage disclosed by the testimony and award damages therefore: *but when a general measure of damages is stated, it is improper to so frame a charge as to authorize an additional recovery for particular items of damage that are included in and covered by the general measure of damages.*

The Texas court again had occasion to deal with the double damage problem in the case of *In-*

ternational Great Northern Railroad Company vs. King, 41 SW 2d 234. The trial court allowed the jury to give separate compensation for five items of damage. In its verdict the jury awarded separate damages for these items as follows: (1) \$20,000 for bodily injury, (2) \$2,000 for mental anguish, (3) \$2,500 for loss of earnings, (4) \$12,000 for loss of earning capacity after trial, and (5) \$2,000 for medical expenses, totaling \$38,500. The appellate court in reversing the lower court said:

The rule is well recognized in this state that it is improper to authorize a jury to assess double damages for the same loss or injury and an issue or an instruction is erroneous if it authorizes or permits a double recovery.

It is equally well settled that if an issue or instruction submitted is calculated to confuse or mislead the jury into assessing double damages by inducing them to consider separately things which properly constitute but one element of recovery, it is erroneous.

After reueiwing the many authorities on double recovery, the court continued:

Furthermore, the items submitted separately as was done, undoubtedly was calculated to confuse and mislead the jury and caused them to render different sums than they would have rendered if only one item was to be answered.

The court in conclusion said:

The issue submitted was erroneous in

that it permitted the jury to make answer to each item submitted which permitted the plaintiff to recover double damages. It was a positive erroneous issue in that it was clearly misleading and confusing to the jury by inducing them to consider separately items which properly constituted but one element of recovery.

The Texas appellate court in *Brown Cracker and Candy Company vs. Castle*, 26 W 2d 435 reversed a trial court for permitting a double recovery and in so doing said:

The following portion of said charge, "Together with loss of time, if any, up to the present, together with loss of time, if any, in the future, together with the destruction, if any, and reduction, if any, of his capacity to labor and earn money, so resulting directly and proximately," while not requiring the jury to find a double measure of recovery was permissive for that purpose, in that, in addition to taking in account any loss of time, the charge permitted the jury to take into account, as part of the damages that would be suffered in the future, the destruction, if any, or reduction, if any, of appellee's capacity to labor and earn money, which would be included within the element of recovery allowed for the loss of time in the future. The giving of such charge was correctly condemned by the Supreme Court in the case of *Missouri K and T Railroad Company of Texas vs. Beesley*, 106 Tex. 160, 155 SW 183, 160 SW 471.

There are numerous California cases holding that loss of earnings are to be considered items of

general damage. See *Edminster vs. Thorpe*, 226 P 2d 373, 101 C. A. 2d 756; *Gersick vs. Shilling*, 218 P 2d 583, 97 C. A. 2d 218.

The Utah cases seem to pretty clearly indicate that loss of earnings from the time of the accident to the time of trial is to be considered as part of the general damage award. It is obvious from a reading of the Oregon cases and the California cases, that those two jurisdictions have adopted a different rule and treat loss of wages from the time of the accident to the time of trial as special damages, whereas, loss of future earnings or impairment of earning capacity are considered items of general damages. We have found no case in any jurisdiction that permits treating the loss of future earnings or impairment of earning capacity as a special item of damage and that permits the jury to fix future loss of earnings specifically.

If the Littledike and Clawson cases are followed to their logical conclusions, then loss of earnings from time of accident to time of trial, as well as future loss of earnings or impairment of earning capacity are to be treated as general damages. This being so, the jury did make an award for general damages and the court should strike from the judgment the entire loss of earnings award in the amount of \$30,000.

Even if the court takes the position that loss of earnings from time of accident to time of trial is to be treated as a special item of damage, it is clear

from all the authorities that future loss of earnings or impairment of earning capacity constitutes general damages and are included in the general damage award. All appellate courts having occasion to deal with the problem take the definite position that future loss of earnings or impairment of earning capacity must be treated as items of general damage. Under the evidence in the case now before this court, the total amount of lost wages claimed from time of accident until the time of trial was the sum of \$10,550. The balance of the award for loss of earnings of necessity is for future loss of earnings or future impairment of earning capacity and would be included in the award for general damages. It is improper to permit recovery for loss of earnings and for impaired earning capacity covering the same period of time. The Oregon Supreme Court has stated this in no uncertain terms in *Fields vs. Fields*, supra, where it said:

It would be improper to permit recovery for loss of earnings and for impaired earning capacity covering the same period of time.

The court in *Moe vs. Alsop*, supra, said:

It is true that recovery may not be had for both loss of earnings and diminished earning capacity covering the same period of time.

To permit the judgment to stand in this case is to permit the jury to make a double award for the future loss of earnings and impairment of earning capacity. This the jury may not do, and it is respect-

fully submitted that the court, if it refuses to strike the entire award for loss of earnings made by the jury from the judgment, the least it should do is strike the amount of the loss of earnings award from the judgment that has to do with loss of earnings for the future. In other words, the least amount that should be stricken is the sum of \$19,450.

POINT III

IT WAS ERROR TO INSTRUCT THE JURY TO REDUCE FUTURE DAMAGES TO PRESENT WORTH WITHOUT STATING A FORMULA OR RULE BY WHICH THE JURY COULD MAKE THE COMPUTATION.

The court, in Instruction No. 16, informed the jury that it could consider the matter of loss of future earnings and could award the plaintiff the present value of such loss but the court did not, in any instruction, go further and advise the jury as to how it could make the computation or could compute the present value. Instruction No. 90.34 and 90.35 in JIFU spells out the formula by which future damages may be reduced to present worth. The plaintiff further failed to introduce any evidence from which such a computation could be made.

In *Hays vs. New York Central Railroad Company*, 67 NE 2d 215, 328 Ill. Appeals 631, it was held error to instruct the jury to reduce prospective damages to present worth without stating a formula or rule by which the jury could make the computation.

In *Wentz vs. T. E. Connally, Inc.* 273 P 2d 485, 45 Wash. 2d 127, it was held that it was reversible error for the trial court, before whom the case was tried, without the intervention of a jury, to fail to reduce an award for impaired earning capacity to its present worth.

CONCLUSIONS

Defendant should be granted a new trial because under the court's instructions on contributory negligence, defendant was deprived of having his theories of defense submitted to the jury. To, in effect, tell the jury that it may not consider the fact that plaintiff stood on the wire while the truck was being driven over it, as a basis for finding plaintiff guilty of negligence, was to deprive defendant of one of his basic defenses in the case.

Instruction No. 11 as given by the court further combines improper lookout and failure to exercise due care in the conjunctive. This, in substance, tells the jury that failure to maintain a proper lookout in and of itself would not be sufficient on which to predicate a finding of contributory negligence. This is clearly erroneous. Failure to maintain a proper lookout was clearly sufficient in and of itself as a basis for finding the plaintiff negligent without requiring the jury to also find lack of due care. The instruction further tells the jury it must find that the plaintiff was guilty of failure to maintain a proper lookout as well as doing something, in

addition, which would constitute a failure to exercise due care for his own safety. We submit that this is an erroneous statement of the law and clearly prejudiced the defendant. The instruction as given leaves with the jury as a basis for finding contributory negligence, the failure to remove the wire completely from the entrance to the building, or improper lookout plus failure to exercise due care. It takes away completely standing on the wire while the truck was driven over it and it requires improper lookout plus lack of due care instead of permitting each; i.e., standing on the wire, improper lookout, or lack of due care, to be a sufficient basis for finding negligence on the part of the plaintiff.

The defendant's motion for a new trial should be granted because the damages are excessive and appear to have been given as a result of passion or prejudice.

If the court refuses to give a new trial, then defendant urges the court to grant his motion to alter and amend the judgment by striking from it the \$30,000 award for loss of earnings on the grounds that loss of earnings, both past and future, are items of general damage and would be included in the general damage award made by the jury. If the court refuses to treat loss of earnings both past and future, as general damages, then defendant urges that the court treat the loss of wages from the time of accident to time of trial as special damages and all future loss of wages as general damages and

that the court strike from the judgment the sum of \$19.450, which represents the minimum amount awarded by the jury for future loss of earnings.

The special damages claimed to have been incurred to the date of trial for medical expenses amounted to the sum of \$2,473.50 and the court should alter and amend the judgment by reducing it to the actual amount of special damages claimed.

Respectfully submitted,

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