OVERHEAD ELECTRICAL LINES NOT AN OPEN AND OBVIOUS CONDITION AND DEFENDANTS OWED A DUTY TO WARN

ZUNIGA, Plaintiff, v. CHERRY AVENUE AUCTION, INC., a California corporation

Opinion partially published March 16, 2021. Issues of damages not part of the published opinion.

JURY AWARDS 12 MILLION DOLLARS, REDUCED TO OVER 9 MILLION DOLLARS FOR EMOTIONAL DISTRESS DAMAGES IN WRONGFUL DEATH ACTIONS – PLUS, OVER $400,000.00 IN CCP 998 AND CIVIL CODE SECTION 3291 INTEREST AND COSTS

An in-depth analysis of the case and issues raised during trial

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FACTS: this wrongful death action was filed after 36-year-old Jose Flores died by electrocution. During the set-up of his vendor space at a swap meet owned and operated by defendants Cherry Avenue Auction Inc. and Kinsman Enterprises L.L.C. on land owned by defendant W.D. & M.S. Mitchell Family Limited Partnership, one of his tent poles with an attached 28-foot advertisement banner struck a power line above him. Flores's wife, 25-year-old Araceli Castellano Zuniga, was present and helping to set up the vendor booth at the time of the incident. She felt electricity in her body and suffered severe burns to her hands and feet, as well as severe emotional distress both directly and as a bystander who witnessed her husband's injury and death.

The plaintiff contended the energized uninsulated power lines above the vendor spaces constituted a dangerous condition, and that the defendants were negligent in their maintenance and use of the property by allowing vendors to use spaces directly under the high-voltage power lines, by allowing the use of advertisement banners which encroached on a 10-foot 'safe zone' under the lines, by failing to block off vendor stalls located below power lines, and by failing to warn about the existence of the lines.

The defendants denied liability and contended the condition of the power lines was open and obvious, and that the plaintiff and the decedent were negligent. The jury assigned 77.5 percent responsibility for the plaintiff's harm to the defendants, 11.5 percent responsibility to Zuniga, and 11.5 percent responsibility to Flores. The plaintiff's award was reduced accordingly. The decedent was survived by his wife.

Based on the jury's findings that Cherry Avenue was 77.5 percent responsible and damages totaled $12.25 million, the trial court entered judgment for plaintiff in the amount of $9,493,750 on September 6, 2018. ***The court also awarded prejudgment interest of $470,785.96 pursuant to Code of Civil Procedure section 998 and Civil Code section 3291***.

The evidence was that these overhead lines have been in place since the 1930's (TT 463:19-26) and Cherry Avenue Auction has never, in the several decades of its existence, had a single event of any injury or damage to persons or property related to these PG&E lines (TT 545:16-546:4). Cherry Avenue Auction had never previously seen any vendor erect a flag or banner as tall as plaintiffs. (TT 479:12-480:9; 545:3-15). Upon learning of this incident, PG&E personnel conducted an inspection of the lines, and determined that there were no conditions with the lines or poles which required any corrective measures. (TT 464:1-21.)

Claimed Injuries: Araceli Castellano Zuniga suffered severe burns to her hands and feet, general emotional distress, witnessing the death of her husband; Jose Mario Flores was electrocuted and died at the scene.

DEFENDANT'S CONTENTIONS ON APPEAL:

1. **NO DUTY TO WARN - REJECTED**: On appeal, defendants contend they owed no duty of care to plaintiff because the danger presented by the overhead power line was open and obvious. We, like the trial court, conclude the evidence presented in this case did not establish as a matter of law that the danger was open and obvious. In particular, it was not obvious that the line was uninsulated, that it was energized, or that the amount of electricity being transmitted was lethal. Thus, a warning would not have been superfluous; it would have provided information that was not obvious.

2. **PRIVETTE BARS THIS ACTION – REJECTED**: Defendants also contend the *Privette* doctrine should be extended to and protect them from liability. (See *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*).) *Privette* established the general rule that the hirer of an independent contractor is not liable to the independent contractor's employees who sustain work-related injuries. The principal rationale for the *Privette* doctrine is that the hirer's liability should not be greater than the liability of a negligent independent contractor who is protected by workers' compensation insurance. Because no workers' compensation insurance covered the injuries to plaintiff and her husband, we conclude the *Privette* doctrine should not be extended to the landlord-tenant relationship that existed in this case. The verdict is affirmed on appeal.

[**NOTE**: This argument based on *Privette* is interesting but it failed, as it should have. *Privette* and its progeny do not apply. The *Privette* shield applies to landowners, lessees, general contractors and any other type of *hirer. Lopez v. University Partners* (1997) 54 CA4th 1117, 1125. Defendants were not *hirers* of Plaintiff and decedent.]

[**NOTE**: In the *unpublished portion* of the case, the Court upheld the award by the jury of several millions of dollars in emotional distress damages. The Court concluded the jury's award to plaintiff of past and future "Bystander Emotional Distress Damages" for being present and witnessing the death of her husband did not duplicate the award of emotional distress damages resulting from the electrocution of plaintiff herself. The categories drew distinctions between (1) past and future distress and (2) direct and bystander emotional distress. The jury unanimously found (1) "Past Direct Injury Emotional Distress Damages" of $1 million; (2) "Future Direct Injury Emotional Distress Damages" of $2 million; (3) "Past Bystander Emotional Distress Damages" of $2 million; and (4) "Future Bystander Emotional Distress Damages" of $4 million.]

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In reviewing this case it is my opinion that the defense counsel made several errors – including not challenging the opinions of Brad Avrit, to not objecting to what the defense counsel described in the appeal as "racist" and improper arguments by Plaintiff's counsel in the closing arguments, and to allowing the Plaintiff to "hijack" the trial [starting from the discovery and depositions of experts in setting the standard as one of whether the average lay person would know whether electrical lines were "active" or not or whether the average lay person would know how much electrical energy is going through the lines] .

IT DEFIES LOGIC AND COMMON SENSE THAT PLAINTIFFS DID NOT KNOW THAT A 28-FOOT OR HIGHER METAL POLE IN THE VICINITY OF POWER LINES WAS HAZARDOUS:

Plaintiff's counsel focused the examination of the multiple experts on whether a lay person could know how much electricity is flowing through wires. For example, a question asked of Cherry Avenue's expert: "The fact is that you agree energized lines can cause electric shock or electrocution, which is death, and is not obvious to the average person, correct?" Crawford responded, "To the extent that I know anything about the average person, I would agree that could be the case." Similarly, during a videotaped deposition that was presented to the jury, Crawford answered "Yes" when asked: "The fact that these energized lines could cause electrical shock or electrocution is not obvious to your average person? [¶] Do you agree?" As described earlier, Neil Burson testified the power line was not obviously dangerous to him.

Avrit also testified most people have little or no understanding of the amount of electricity flowing through the lines and, because lines usually are silent, they cannot tell by looking at them whether the lines are active or inactive.

This line of questioning should not have been allowed. No one knows how much electricity is surging through wire at any time. The issue is not whether one could look at electrical lines and know how much electricity is surging through the lines or whether they are active or not – but whether an average lay person should know that overhead power lines may be hazardous.

[**NOTE**: BRAD AVRIT was Plaintiff's expert. For some reason he was allowed to testify --

Avrit also was asked: "Does the average person need to know that an overhead power line is energized in order to deduce whether or not it's dangerous?" He responded: "The average person needs to be reminded of that, particularly if they're working at ground level and you have power lines that are up above."

Avrit also testified most people have little or no understanding of the amount of electricity flowing through the lines and, because lines usually are silent, they cannot tell by looking at them whether the lines are active or inactive.

Avrit also testified he did not find any fault with Zuniga and her husband under the reasonably prudent person standard, stating:

> "I think they acted as you would expect somebody that's erected this booth many times before, never had an issue with it, and—and in this case, they are concentrated on assembling it, they're down at ground level, and going to tilt it up. I don't find what they did unreasonable under the circumstances. They were -- they were being human. They had noticed other people have big flags, they put up a big flag. That's—that's reasonable and normal behavior."

Avrit also described the "HIGH VOLTAGE" sign that he observed near the top of the pole supporting the power lines, stating the letters were approximately three inches tall. A photograph of the sign was introduced into evidence.

[**NOTE**: Whether a party acted as a "reasonable person" is not a matter for an expert to opine on. It is *peculiarly one for determination by the trier of fact.*" *Burton v. Sanner* (2012) 207 Cal.App.4th 12, 20 [142 Cal.Rptr.3d 782, 788].

The case of *Burton v. Sanner* (2012) 207 Cal.App.4th 12, involved a negligence action, in which the principal issue on appeal was whether the trial court prejudicially abused its discretion by admitting an expert's opinions on the "reasonableness" of defendant's conduct. The Fourth District Court of Appeal reversed the judgment against the defendant, finding: "The test of reasonableness is an objective one for the jury when, as here, it is just as competent as the expert to evaluate the evidence and draw conclusions. The expert's testimony usurped the jury's role." (p. 14)]. The expert in *Burton* reviewed the evidence presented to the jury and depositions of the parties and witnesses. Based on his review of this evidence, he testified that in his opinion, the defendant's conduct "was not a reasonable response," and he testified as to what he thought a better response would have been considering the defendant's past experience in crisis management. (p. 19) .]

[**NOTE**: The multiple opinions of Brad Avrit in his Declaration were never objected to and were allowed to be presented to the jury, once again, unchallenged. I would encourage defense counsel to get a copy of this Declaration and be prepared in a similar case.]

IT DEFIES LOGIC TO ASSUME THAT AN AVERAGE PERSON DOES NOT KNOW OF THE DANGER OF OVERHEAD POWER LINES. THE RISK OF SERIOUS INJURY OR EVEN DEATH INHERENT IN COMING INTO CLOSE CONTACT WITH LIVE POWER LINES IS A RISK KNOWN TO EVERYONE.

Our Supreme Court in *Ramirez v. Nelson* (2008) 44 Cal.4th 908, 912, 919, rejected a wrongful death claim brought by parents of a person trimming trees on the Defendant's property who was electrocuted. The Court held that when an unlicensed tree trimmer is electrocuted, the homeowners cannot be held strictly liable for allowing the worker to use tools or equipment within six feet of a high voltage line, in violation of the Penal Code, because the worker's own negligent acts or omissions proximately caused his fatal injuries. The Court further held that while a homeowner may be liable to an employee for failing to warn of " **'a *concealed*, preexisting hazardous condition on its premises,"** liability does not attach when **"the high voltage power lines in question were openly visible."** (*Id.* at p. 917, fn. 3.)

Persons of ordinary intelligence are presumed to know the dangers attending contact with electrically charged wires. *Chandler v. City of Independence,* 640 S.W.2d 175, 177 (Mo.App. W.D.1982). It is conceded by all that Dority was a person of ordinary intelligence. He had a duty to look for the wires and, in the eyes of the law, is presumed to have known of the existence of the power lines. *Dalby,* 458 S.W.2d at 279. "Under those conditions he is presumed to understand and appreciate the dangers attendant to contact with the wires." *Chandler,* 640 S.W.2d at 177. *Crow v. Kansas City Power & Light Co.* (Mo. Ct. App. 2005) 174 S.W.3d 523, 538.

In *Mark v PG&E* (1972) 7 Cal.3d 170, the court observed:

> "Thus, our courts have often held that one who knowingly touches a high voltage power line or wire may be held contributorily negligent as a matter of law, since the danger of electrical shock from such high voltage lines is "presumed to be familiar to men of average intelligence." (*Andrews v. Valley Ice Co, 167 Cal. 11, 20* [power lines: decedent was a construction worker who "must have known the danger of getting near highly charged wires"]; see *Shade v Bay Counties Power Co., 152 Cal 10, 12* [hanging power lines: decedent was warned not to touch lines and "knew the danger of live wires"]; cf. *Mosley v Arden Farms Co, 26 Cal 2d 213, 217 [157 P 2d 372, 158 A.L R. 872]* [all men are charged with knowledge of "the qualities, characteristics, and capacities of things and forces in so far as they are matters of common knowledge at the time and in the community..."]; *Rest 2d Torts, supra, § 290,* and *illus* 1 [one who grabs high voltage power line is negligent notwithstanding ignorance of danger if danger is matter of common knowledge in community].)" (*Mark v PG&E(1972*) 7 Cal.3d 170, 180-181).

"As far back as 1907, and still applicable today, is our finding in *Johnston v. New Omaha Thomson-Houston Electric Light Co., on rehearing* 78 Neb. 27, 113 N.W. 526 (1907), that a 12-year-old child should possess sufficient knowledge that a wire which carries a current of electricity is capable of causing shock or injury should one come in contact with it. " 'One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.' " *Disney v. Butler County Rural P.P. Dist.,* 183 Neb. 420, 423, 160 N.W.2d 757, 759 (1968). Plaintiff was of sufficient age, intelligence, and experience to understand the risk of climbing to the top of the tree in proximity to overhead powerlines. We are in accord with the trial court judge, and we find that the plaintiff was guilty of contributory negligence. *Suarez By and Through Suarez v. Omaha Public Power Dist.* (1984) 218 Neb. 4, 7–8 [352 N.W.2d 157, 160].

SUMMARY:

Plaintiff's counsel was very effective in distracting the focus from that of a general knowledge that overhead electric wires are generally known to be hazardous to requiring the experts to testify as to whether or not a person would know the unknowable – I.e., whether an average person would know how much electricity is in the lines – a matter that no one could possibly know. In other words, Plaintiff's counsel created a standard that was impossible to meet – can an average lay person know by looking at electrical lines how dangerous they were by how much electricity was surging through the lines. Of course not – but defense counsel never picked this up.

FAILURE TO OBJECT TO IMPROPER ARGUMENTS IN CLOSING:

[NOTE: Interesting that the appellate opinion does not discuss at all the "battle" counsel had in the trial court below in the motion for new trial and other post-trial motions as to the purported improper closing arguments].

Plaintiff counsel's closing arguments were tinged with improper insinuations and references to race and nationality – and statement calling defense counsel "liars" as well as Counsel's comment of holding Defendants accountable that was made in the context of Defendants refusal to accept responsibility for the catastrophic loss that Plaintiff endured.

["Personal attacks on opposing parties and their attorneys, whether outright or by insinuation, constitute misconduct." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1246, citing *Stone v. Foster, supra,* 106 Cal.App.3d at 335.) "Nor may counsel... impugn [opposing] counsel's motives or character." (Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 796, citing *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 143.) "Such behavior only serves to inflame the passion and prejudice of the jury, distracting them from fulfilling their solemn oath to render a verdict based solely on the evidence admitted at trial." (*Las Palmas Associates v. Las Palmas Center Associates*, supra, 235 Cal.App.3d at 1246, citing (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 484-485.) "Lack of civility between counsel, moreover, only breeds public disrespect for the judicial process." (*Ibid.*)].

Then, in closing argument plaintiff's counsel improperly accused Cherry Avenue Auction of "hop[ing] ... to tap into the prejudice, they're [Zuniga and Flores] only Hispanic... their life isn't worth as much money because of how much they make." (TT 620:11-22.)
This "race" angle continued when plaintiff's counsel improperly sought to influence the jury with racial references by alluding to his own name and stating that he's been "lucky enough" to not have dealt with prejudices, but that he doesn't feel it's "okay to kind of go that way" (TT 620:17-21), thus directly implying that Cherry Avenue Auction was "going that way"-i.e., harboring and demonstrating racial prejudices against plaintiff. And to further inflame and incite the jurors, plaintiff's counsel characterized Cherry Avenue Auction as racist by (a) referencing "racism in the world."

Appeals to passion or prejudice: It is improper for counsel to use arguments "that appeal primarily to passion or prejudice" of the jurors. [See *People v. Love* (1961) 56 C2d 720, 730, 16 CR 777, 782 (disapproved on other grounds by *People v. Morse* (1964) 60 C2d 631, 637-638, 36 CR 201, 204-205 & fn. 2)]. Attempts "to appeal to the prejudice, passions or sympathy of the jury are misconduct." [*Stone v. Foster* (1980) 106 CA3d 334, 355, 164 CR 901, 913; *Martinez v. State of Calif., Dept. of Transp.* (2015) 238 CA4th 559, 566, 189 CR3d 325, 331; *Regalado v. Callaghan* (2016) 3 CA5th 582, 598, 207 CR3d 712, 725-726. Such appeals are "not part of the repertoire of the ethical professional man" (or woman). [*Sabella v. Southern Pac. Co.* (1969) 70 C2d 311, 317, 74 CR 534, 537, fn. 4].

It was improper of Plaintiff attorney to inject himself in the case in discussing racial prejudices. *Kolaric v. Kaufman* (1968) 261 Cal.App.2d 20, 27-28 ["It is a universal rule that the ... argument of counsel relative to the race, nationality or religion of a party, when irrelevant to the issues, is improper"]).

It was improper to make a reference that Plaintiffs "aren't worth as much money because of how much money they make…". "Justice is to be accorded to rich and poor alike, and a deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is not relevant to the issues of the case." (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 553-554.) "A deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct *45 where the asserted wealth or poverty is not relevant to the issues of the case." (Id. at 552-553.) "[W]hen an attorney makes reference to a party's financial condition 'in any personal injury case... although an admonition may to some extent reduce the prejudice due to [the] improper reference..., it will not totally eliminate the prejudice."' (*Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 356-357, quoting *Hoffman v. Brandt, supra,* 65 Cal.2d at pp. 553-554.) In fact, at least one court has stated such conduct is "reversible error." (See Love v. Wolf (1964) 226 Cal.App.2d 378, 388.)

It was improper in attempting to place the jurors in plaintiffs' place: Defendant argued that Plaintiff's Counsel violated the "Golden Rule" and the "Reptile Doctrine" by stating to the jury "... if you analyze your existence, everything we do is to keep, maintain, nourish, and respect love" (TT 641:24-26); and "Just imagine you are -- you love your husband to pieces, right? .. You guys are goofballs ... your life is simple, your life is about love and time together, and you enjoy things like going to swap meets ... and it's a beautiful day, and you're dreaming of a beautiful life together with the one man that you found that breaks the mold, that is like such a -- you guys, come on, you all look at those pictures of him ... And on that morning, you know, she has dreams, beginning of her life, beginning of her marriage ... (TT 630:26-631:20).

Plaintiffs closing arguments amounted to efforts to improperly influence the jury and evoke emotional responses by asking them to put themselves in plaintiffs place, to "imagine" themselves as plaintiff Zuniga (TT 630:26-631:20), to "analyze your existence," thereby suggesting to the jurors that they put themselves in plaintiffs circumstances, and to apply to their analysis their own experiences to "keep, maintain, nourish and respect love" (TT 641:24-26). All of this was designed and intended to invoke precisely the type of "golden rule" reaction on the part of jurors which the law forbids. "An attorney's appeal in closing argument to the jurors' self-interest is improper...." (*Cassim v. Allstate Ins. Co., supra,* 33 Cal.4th at 796; see also People v. Pitts (1990) 223 Cal.App.3d 606, 696 [it is improper to urge jurors "to view the case from a personal point of view"].) Such arguments constitute misconduct because they "tend to undermine the jury's impartiality" (Ibid.), and violate "the fundamental concept of an objective trial by an impartial jury" (*People ex rel. Dept. of Public Works v. Graziadio* (1964) 231 Cal.App.2d 525, 534.)

<u>Defense counsel made no objections to any of these arguments during the closing arguments.</u>

It is black letter law repeatedly confirmed by the California Supreme Court that a motion for new trial, based on allegation of attorney misconduct, will be denied if a timely and proper objection is not made at trial, since a party cannot await the outcome of the case and raise the irregularity for the first time on a motion for new trial. *Sabella v. Southern Pac. Co.* (1969) 70 Cal. 2d 311, 319-320; *Horn v. Atchison T. & S.F. Ry. Co.* (1964) 61 Cal. 2d 602, 609-611.
Defendants' reliance on *Collins v. Union Pacific Railroad* (2012) 207 Cal.App.4th 867 is misplaced.

Collins cited to *Seimon v. S. Pac. Transportation Co.* (1977), which stated that where an appeal is from an order granting a new trial for misconduct, the fact that counsel for respondent failed to object should not be considered in determining whether the trial court abused its discretion in granting the motion. *Id.* at 604-605.

As Plaintiff's counsel argued -- As to each and every instance of complained misconduct, Defendants "did not object, did not request a jury admonition, and did not request a mistrial. Instead [defendants] proceeded with jury selection, production of evidence, and the rendition of a verdict. Only after receiving a verdict [defendants] considered inadequate did [they] belatedly complain about [plaintiff] counsel[]...[Defendants'] complaint comes too late." *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1649 (bracketed language added); *Horn, supra,* 61 Cal.2d at 609-610 ("[A] claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished.").

In *Horn,* the Supreme Court found attorney misconduct was waived, reasoning that: "... The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial .... In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice. The motion for a mistrial in the instant case can hardly be deemed a timely objection as the claimed damage could not then be forestalled. Even then defendant did not request that the jury be admonished to disregard the alleged improper statements made by plaintiff's counsel.
...
Defense counsel, by his passive silence, undoubtedly encouraged the repetition of arguments which he now characterizes as so prejudicial that we should overlook his failure to object .... In such circumstances an attack on the instances of misconduct at the onset, together with proper instructions from the court to both the jury and counsel, would not only have removed the effect of the initial improprieties but would also have forestalled the commission of subsequent acts of misconduct. As this is the very reason for the rule requiring timely objections as a prerequisite to the assignment of misconduct on appeal, defendant cannot prevail in its assignment of the instant misconduct. *Id* at 610 - 611.

It was improper to suggest or argue that Defendants would not assume responsibility for the incident: Defense counsel contends that during closing argument Plaintiff's counsel suggested and/or argued that Defendants did not take responsibility for what they did. In fact, as Plaintiffs' counsel stated in Opposition to the Defendant's motion for new trial: "Counsel's comment of holding Defendants accountable was made in the context of Defendants refusal to accept responsibility for the catastrophic loss that Plaintiff endured. (TT 643:3-644:5)".

In fact, in their book, David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (2009), at p. 233, the authors encourage plaintiff attorneys to argue that the defendant should have taken responsibility and suggest that trial is necessary only because the defendant failed to do so. Ball and Keenan encourage this strategy even when the defendant has stipulated to liability.

Arguments by plaintiff's counsel in closing that product liability defendants never admitted guilt or apologized and that they failed to do either during trial "crossed the line into forbidden 'take responsibility' and "apologize' territory," a Florida appellate court recently held.

Cohen v. Philip Morris USA, Inc., 203 So.3d 942, 946-48 (Fla. Ct. App. 2016). These arguments were "egregious and unacceptable," even in a punitive damages case, and were sufficient grounds for a new trial. *Id.* In a vehicle-accident case, a Connecticut trial court granted the defendant driver's motion in limine to prohibit any commentary on the defendant's refusal to take responsibility for the accident or failure to stipulate or admit to liability, then admonished the plaintiff's counsel for violating the court's order during the trial. *Johnson v. Proto*, No. CV136037713S, 2016 Conn. Super. Lexis 11, at *26-29 (Conn. Super. Ct. Jan. 4, 2016). The court called such argument "improper and prejudicial." *Id.* at *29. As the Court held in *Bordenkircher v. Hayes*, 434 U.S. 357, 363: "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort". The closing argument was not intended to encourage a "logical analysis of the evidence in light of the applicable law"; rather it was designed to inflame the jurors' emotions. *See Murphy v. Int'l Robotic Sys., Inc.*, 766 So.2d 1010, 1028 (Fla.2000).

CONCLUSION:

This is a classic case as to how a very good and very sharp Plaintiff's counsel can achieve a very large verdict in an emotional case when he is not met with proper motions in limine, proper and timely objections and when defense counsel allows Plaintiff's counsel to frame the issues in a matter that ignores common sense.

There is no debate that the average lay person is aware of the potential hazard of overhead electrical wires. The dangerous nature of the power lines should be known by people of average intelligence conducting themselves in a reasonable and prudent manner.

It is completely another matter to argue that the average lay person [and experts] cannot know whether the overhead electrical wires are in fact active or how much electricity is traveling through the lines. How can anyone know whether by looking at the overhead wires they are active or have enough electricity to cause electrical shock sufficient to kill someone who touches it with a 28-foot metal pole? The question should not have been how much electricity was in the lines – but whether Plaintiffs assumed the risk knowable by any reasonable person that a 28-fooot metal pole in contact with overhead electrical wires would be hazardous.

This was an emotional case and it is apparent in reviewing the closing argument that Plaintiff's counsel pulled out all the stops and pushed every button to receive a multi-million dollar verdict.

It is especially critical in a case such as this one that is premised on emotional issues and pulling at the heartstrings of the jury that the defense be aware of the potential issues which may arise in such a case – from the very beginning of the case and throughout the trial. Appropriate objections must be made during depositions and during trial – and appropriate motions in limine must be filed to try to harness some of the arguments that could occur and that in this case did occur.

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