

36
evidence of complainant's surveyors furnished
a proper basis for the finding that the
alleged encroachments did exist, the complain-
ant respectfully contends that the decrees made
and entered in the Court of Chancery in this
cause be affirmed.

Respectfully submitted,

CUREN & KLEIN,
Solicitors for and of Counsel
with Complainant Respondent.

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NOTICE OF APPEAL AND GROUNDS.

ATLANTIC COUNTY CIRCUIT COURT.

(Filed December 24, 1926.)

VINCENZO FERRO,

Plaintiff,

v.

ATLANTIC CITY ELECTRIC
COMPANY, a corporation
of New Jersey,

Defendant.

10

Action at Law.
Notice of Appeal and
Grounds.

To Thompson & Hanstein, attorneys for defendant,
or to whom it may concern: 20

Sirs:

Please take notice that the plaintiff in the above
entitled cause appeals to the Court of Errors and
Appeals in the last resort in all causes of New Jer-
sey from the whole of the judgment entered in this
cause on the following grounds; to wit.

1. Because the Court granted the defendants' mo- 30
tion for a non-suit upon the plaintiff's opening to the
jury.

Dated, December 20, A. D. 1926.

Respectfully yours,

BURTON A. GASKILL,

Attorney for Plaintiff.

2 *Notice of Amended Complaint*

Service of the within notice of appeal and grounds is hereby acknowledged this 20th day of December, A. D. 1926.

THOMPSON & HANSTEIN,
Attorneys for Defendant.

Filed December 24, 1926.

10 NOTICE OF AMENDED COMPLAINT.
ATLANTIC COUNTY CIRCUIT COURT.

VINCENZO FERRO, *Plaintiff,*
v.
20 ATLANTIC CITY ELECTRIC COMPANY, a corporation of New Jersey, *Defendant.*
Action at Law.
Notice of Amended Complaint.

To Thompson & Hanstein, Attorneys for Defendant:

30 Please take notice that at the trial of the above entitled cause I shall move to amend the complaint filed in this action by substituting the attached complaint.

Respectfully yours,
BURTON A. GASKILL,
Attorney for Plaintiff.

AMENDED COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

VINCENZO FERRO, *Plaintiff,*
v.
ATLANTIC CITY ELECTRIC COMPANY, a corporation of New Jersey, *Defendant.*
Action at Law.
Amended Complaint. 10

Plaintiff residing in the City of Atlantic City, County of Atlantic and State of New Jersey, says: 20

FIRST COUNT.

1. On or about October 17, 1924, at Atlantic City, New Jersey, in the County of Atlantic, aforesaid, the said defendant was the owner and possessor and had the control, management and use of a certain electric light wire used in transmitting dangerous and deadly currents of electricity in the conduct of said defendant's business, and which said wire said defendant fastened or caused to be fastened and attached to certain poles and to be extended along Iowa Avenue and crossing Fairmount Avenue, both public streets of said city. 30

4. On the said date plaintiff was lawfully and carefully crossing Iowa Avenue from the westerly side to the easterly side thereof and as he was stepping from the street to the sidewalk over the said wire, the wire was struck by an automobile moving on Fairmount Avenue and by reason of the contact between the automobile and said wire, the wire was thrown against plaintiff's body and he was forcibly hurled to the street.

10

5. Paragraph six of the first count is hereby made paragraph five of this count.

Plaintiff demands as damages \$15,000.00 and cost of suit on this count.

THIRD COUNT.

20

1. Paragraph one of the first count is hereby made paragraph one of this count.

2. Paragraph two of the first count is hereby made paragraph two of this count.

3. On said day the said wire was broken and fell to the street and along Iowa Avenue and crossing Fairmount Avenue, both public highways in the said city.

30

4. The defendant was notified of its wire lying on the street and sent its servants, agents and employes to the scene of said break. The said servants, agents and employes of the defendant negligently and carelessly tied the broken wire to a pole standing along the said public highway so near to the

ground that an automobile passing along said highway struck the said wire which was lying on the street.

5. On the said date plaintiff was lawfully and carefully crossing Iowa Avenue from the westerly side to the easterly side thereof and as he was stepping from the street to the sidewalk over the said wire lying on the ground, the wire attached to said pole was struck by an automobile moving on Fairmount Avenue. By reason of the contact between the automobile and the said wire which had been left by the agents, servants and employes of the defendant in a negligent manner, it was thrown against plaintiff's body and he was forcibly hurled to the street.

10

6. Paragraph six of the first count is hereby made paragraph six of this count.

Plaintiff demands \$15,000.00 and cost of suit on 20 this count.

Plaintiff demands as damages \$15,000.00 and cost of suit on the first count. Plaintiff demands as damages \$15,000.00 and cost of suit on the second count. Plaintiff demands as damages \$15,000.00 and cost of suit on the third count.

BURTON A. GASKILL,
Attorney for Plaintiff.

30

ANSWER TO AMENDED COMPLAINT.
ATLANTIC COUNTY CIRCUIT COURT.

10	VINCENZO FERRO,	}	Action at Law. Answer to Amended Complaint.
	v.		
ATLANTIC Co.,	CITY ELECTRIC Co.,		
		} Defendant.	

Defendant, Atlantic City Electric Co., answering plaintiff's amended complaint says that:

20 1. Defendant denies all the allegations of plaintiff's complaint.

AFFIRMATIVE DEFENSES.

Defendant further answering says that:

30 1. That the wire was erected by the defendant securely and in the manner generally used for that purpose.

2. That any breaking of the wire was caused without any negligence on the part of the defendant.

3. That any breaking of the wire was caused through the act of the employes of the City of At-

lantic City who were engaged in trimming trees along the line of the wire.

4. That the wire after it was broken in falling to the street was struck by an automobile over which the defendant had no control, and struck the plaintiff, causing him whatever injury he suffered.

5. That defendant had no knowledge of the broken wire nor was said wire broken long enough for the repairman to have been apprised of its having been broken; nor long enough for the defendant to have fixed the same. 10

6. That defendant was injured through his own contributory negligence.

7. That the accident was caused through an intervening agency over which the defendant had no control. 20

8. That defendant was in no way connected with either the remote or proximate cause of the plaintiff's injury.

THOMPSON & HANSTEIN,
Attorneys of Defendant.

REPLY.

ATLANTIC COUNTY CIRCUIT COURT.

10 VINCENZO FERRO, *Plaintiff,*)
 v.) Action at Law.
 ATLANTIC CITY ELECTRIC) Reply.
 Co.,)
Defendant.)

Plaintiff replying to defendant's affirmative defenses denies defenses one, two, three, four, five, six, seven and eight and joins issue.

BURTON A. GASKILL,
Attorney for Plaintiff.

RULE FOR JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

VINCENZO FERRO, *Plaintiff,*)
 v.) Action at Law. 10
 ATLANTIC CITY ELECTRIC) Rule for Judgment.
 Co.,)
Defendant.)

This cause came regularly on for trial on November 9th, 1926, before Honorable William H. Smathers with a jury:

The plaintiff opened his case to the jury whereupon the defendant moved for a non-suit on said opening, which, upon consideration of the Court, was granted. 20

It is therefore ordered that a judgment of non-suit be entered against the plaintiff and in favor of the defendant, with defendant's costs to be taxed at the sum of \$47.78.

WM. H. SMATHERS,
Judge. 30

Filed and entered November 13, 1926, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

October Term, 1926.

10	VINCENZO FERRO,	}	Action at Law. Non-Suit.
	<i>Plaintiff,</i>		
	v.		
	ATLANTIC CITY ELECTRIC Co.,	}	Thompson & Han- stein, Attys.
	<i>Defendant.</i>		

Judgment entered November 13, 1926, at 9 A. M.
20 Costs \$47.78.

This cause came regularly on for trial on November 9th, 1926, before Hon. Wm. H. Smathers, with a jury:

The plaintiff opened his case to the jury, whereupon the defendant moved for a non-suit on said opening, which, upon consideration of the Court was granted.

Whereupon it is ordered that the defendant, Atlantic City Electric Co., recover of the plaintiff, Vincenzo Ferro, the sum of forty-seven dollars and
30 seventy-eight cents, costs of suit.

WM. A. BLAIR,
Clerk.

County Circuit Judgment Book No. 14 page 514.

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

VINCENZO FERRO,	}	Action at Law.	10
<i>Plaintiff,</i>			
v.			
ATLANTIC CITY ELECTRIC Co.,	}	Action at Law.	
<i>Defendant.</i>			

APPEARANCES:

BURTON A. GASKILL, Esq., for plaintiff.
MESSRS. THOMPSON & HANSTEIN, for defendants. 20

The above entitled case was tried November 9, 1926, before HON. WILLIAM H. SMATHERS, Judge and a jury.

Mr. Gaskill: I have given notice to the attorney
of the defendant of an amended complaint. 30

Mr. Hanstein: I have had the amended complaint long enough so that I do not feel I want to object to it on the ground that I am surprised. There is no answer filed to it yet. In respect to it, however,

I want to make a motion as part of our answer to strike it on the ground that it fails to set up a cause of action.

10 Mr. Gaskill: Of course, your Honor appreciates the difficulty I am in. I had no notice that there would be any motion to strike this complaint and, of course, that is not fair to me nor fair to my plaintiff—to come here without any notice of a motion to strike the complaint; and I feel that your Honor won't really require me to answer at this time for that reason.

20 Mr. Hanstein: I set it all up in our answer to the original complaint. As a matter of fact, he is not entitled to any notice of a motion here. When he gets through making an opening to the jury I could get up and make this motion. So far as the law is concerned, I would like to submit two cases which are in point, both Court of Errors and Appeals cases. (Citing 88 Law, 653, 35 Law, 17.)

Mr. Gaskill: On a motion to strike my complaint I think I am entitled to notice.

The Court: I think you are right. I will hold the motion at this time and let you put your case in.

30 Mr. Hanstein: I would like to put on the record my answer.

The Court: It may be stipulated on the record that you enter a general denial to each one of those allegations.

Mr. Hanstein: Yes, and I want to set up some

special pleas here: That the wire was erected by the defendant securely and in the manner generally used for that purpose; that any breaking of the wire was caused without any negligence on the part of the defendant; that any breaking of the wire was caused through the act of the employes of the City of Atlantic City who were engaged in trimming trees along the line of the wire; that the wire after it was broken in falling to the street was struck by an automobile over which the defendant had no control, and 10 struck the plaintiff, causing him whatever injury he suffered; that defendant had no knowledge of the broken wire nor was said wire broken long enough for the repairman to have been apprised of its having been broken; nor long enough for the defendant to have fixed the same; that plaintiff (defendant) was injured through his own contributory negligence; that the accident was caused through an intervening agency over which the defendant had no control; that defendant was in no way connected with either 20 the remote or proximate cause of the plaintiff's injury.

Mr. Gaskill: My reply is that I deny each one of the defenses and join issue.

PLAINTIFF'S OPENING TO THE JURY.

Mr. Gaskill: If your Honor please, and ladies and gentlemen of the jury: This case, as has already been indicated to you by the motion to strike the complaint, is an accident case, brought by a man by the name of Vincenzo Ferro, a man who was at the time of the accident seventy years of age. He lives down at the corner of Iowa and Fairmount Avenues in Atlantic City. On the seventeenth of October, 1924, over two years ago, he went home to his lunch and he saw an electric light wire in the street. He finished his lunch and he went to visit some friends in the neighborhood and coming back about a quarter of two as he was stepping over the wire a part of the wire was struck by an automobile passing along Fairmount Avenue, a public highway in Atlantic City; in other words, our testimony will show you that through some reason an electric light wire carrying about 2200 volts of electricity had fallen to the ground along Iowa Avenue, and as he was stepping from the street over to the curb a part of the wire that was over Fairmount Avenue, a public highway, was struck by this automobile. A flash of flame came out and the wire was thrown against this man's body and he was pitched head first to the street.

We will show you that this wire of the electric light company fell before twelve o'clock in the morning. We will show you that they had notice of it immediately; that the wire with electricity in it was down in the public highway of Atlantic City, and we will show you that they paid no attention to it and at 12.30 they were again notified that their wire

was hanging in the street, and a menace to life in said community, and they still paid no attention to it and they didn't get there until about two o'clock after this man had been severely hurt.

He was a man seventy years old, but up to that time he had been working steadily as a carpenter. There are two grounds of negligence which we are claiming against this defendant. It has been held in this State that a public service corporation such as this defendant is, which transmit a deadly current of electricity through the streets, must use extra care to see that passers-by are not hurt, and we are going to show that the line of this company was improperly constructed. We are going to show you by experts, men whom I think you will believe and credit with knowing about electricity, that a wire of that kind should be protected by a guard wire running parallel with it, and our Court of Errors and Appeals has approved that. They say whenever a company such as this company is transmitting this thing, of a high enough voltage to kill people—twenty-two hundred volts is enough to kill a person—they say this line should be so protected that there shall be a wire above the one charged with electricity, so that in the case of the falling of a limb the guard wire will catch it and so prevent the breaking of the wire, and we say this company did not do that.

Now, this man was injured, and has had a concussion of the brain. He has not worked a day since then. It has been over two years ago and he has not been able to do a thing since that time. We will show you by medical testimony that he is suffering from vertigo and extreme nervousness, probably from this electric shock, and continuous headaches. If we show you all these things, ladies and gentlemen of the jury, we shall expect a verdict in our favor.

Mr. Hanstein: May it please your Honor, at this stage of the case Mr. Gaskill is not entitled to any notice under any circumstances, and I, therefore, move for a non-suit on his opening. His statement is that this man saw the wire; that when he came back later he saw it again, and as he was taking a step an automobile hit it, and that certainly was the proximate cause of that accident. I fail to see how we can be held liable where this accident was caused
 10 by no other thing than the fact that the wire was struck by an automobile. The wire was lying on the ground according to the opening, and he could have stepped over it, and if it had not been for the fact that an automobile hit it, there would have been no accident, which, therefore, establishes the automobile as the proximate cause.

The Court: I will permit you to go ahead and put your case in, and Mr. Hanstein have an exception.
 20

(Mr. Hanstein opened the defendant's case to the jury.

VINCENZO FERRO, the plaintiff, called as a witness in his own behalf, being sworn through an interpreter, was examined and testified as follows:
 30

Mr. Hanstein: What is all this business of your getting in this?

The Court: He is the court interpreter.

Mr. Hanstein: Does this man need an interpreter?

Mr. Gaskill: I have not been able to speak to him myself yet. Maybe you can.

Mr. Hanstein: I just thought I was entitled to know if he needed an interpreter.

The Interpreter: (Mr. Romano). I was asked to come in.

Mr. Hanstein: I understand that you are not doing anything out of the way, but I wondered what it was all about. Doesn't the plaintiff speak any English?
 03

Mr. Gaskill: I have not been able to converse with him. Do you want to try him?

Mr. Hanstein: No. If Mr. Romano says he does not speak English that is enough.
 02

The Interpreter: I don't know, sir.

Mr. Hanstein: You don't know if he speaks English?

The Interpreter: I don't know, sir. I was talking to him in Italian downstairs. The only thing I know is that he speaks Italian. I don't know anything about his English.
 01

Mr. Hanstein: Let us find out.

Mr. Gaskill: I have not been able to talk to him.

Mr. Hanstein: There is nothing on the record to show this man cannot speak English.

The Interpreter: Mr. Gaskill requested me yesterday to be here for the purpose of translating for him.

The Court: How old are you, Cap?

The Witness: Seventy-three. (In English.)

The Court: Seventy-three?

10 The Witness: Seventy-two or seventy-three. (In English.)

The Court: How long have you lived in Atlantic City?

The Witness: I live about nine years. (In English.)

20 The Court: Nine years. Where did you come from?

The Witness: Philadelphia. (In English.)

The Court: He is all right.

Direct examination.

By Mr. Gaskill: (In English).

30 Q. Where do you live?
A. I can't spell everything.
Q. Where do you live?
A. 133 Fairmount and Iowa.
Q. In what city do you live?
A. Well, I can't understand much.

Q. Well, you answer that.

A. I can't spell everything.

Q. What city do you live in?

A. Atlantic City.

Q. Atlantic City. And how long have you lived in Atlantic City?

A. Nine years.

Q. And with whom have you lived during that time?

A. Well, Charles Ferretti.

Q. Now, directing your attention to October 17, 1924, did you meet with an accident? Did you meet with an accident? 10

A. I can't understand.

Q. Well, that certainly is plain English and I want an answer to that question.

Mr. Gaskill: If your Honor please, that is just as plain as I can ask a question, and he says he does not understand it. 20

The Court: Did you get hurt last October?

The Witness: Yes.

The Court: How did you get hurt?

The Witness: My head.

The Court: Your head? What caused it? 30

The Witness: Well, I —

The Court: You better go ahead with the interpreter.

(Examination by Mr. Gaskill resumed through the interpreter, Mr. Romano.)

Q. Now, directing your attention to October 17, 1924, did you meet with an accident? Did you meet with an accident?

A. It happened I was passing through the street and I found myself on the ground, and after I came to I found myself surrounded by doctors, in a pool of blood.

10 Q. Where did this accident happen?

A. Iowa and Fairmount, in front of the house.

Q. Now, after the accident you found yourself

Mr. Gaskill: Withdraw that.

Q. When you found yourself surrounded by doctors what was your feeling then?

A. I felt that all my bones were broken and my
20 neck was sore and my throat. I couldn't even speak.

Q. What doctor did you have?

A. Dr. Poland.

Q. Of Atlantic City?

A. Yes, sir.

Q. How long did Dr. Poland treat you?

A. About a week, and then I went to Philadelphia with a machine and I went under the care of another doctor in Philadelphia.

Q. What was the name of that doctor?

30 A. Dr. "Werness."

Q. How long did he continue to treat you?

A. For eight months.

Q. During the time that Dr. Werness treated you in Philadelphia, what aches or pains did you have?

A. In my head.

Q. Is that all?

A. Yes, only in my head, and I couldn't take no trolley cars, and I always had to have an escort in order to go anywheres.

Mr. Hanstein: I ask that be stricken as not responsive.

The Court: It may be stricken.

Q. Did the doctor in Philadelphia come to see you
or did you go to see the doctor in Philadelphia? 10

A. He was coming to my home.

Q. Did you ever go to his office?

A. Yes. My daughter-in-law, she used to take me there.

Q. Did you ever go alone to his office?

A. No, sir.

Q. Now, did you pay the doctor in Philadelphia?

A. My daughter-in-law paid.

Q. How much? 20

Mr. Hanstein: I object to that.

Mr. Gaskill: I withdraw the question.

Q. Now, Mr. Ferro, since the time of the accident until the present time, I want you to describe to the jury your physical feelings.

A. I always feel that I have to lean against some-
thing and I cannot stand up, and I always feel for
support somewheres. 30

Q. Did you have any other pain?

A. In my head.

Q. In your head? I see. Now, what pains do you have today, if any?

The Interpreter: What was that question?

Q. What pains do you have today, if any?

A. Yes. Today and it has been for three weeks that my head hurts me.

Q. What was your occupation before the accident?

A. I was working as a carpenter.

Q. How long had you been working as a carpenter prior to this accident?

A. For about ten to fifteen years I worked as a carpenter.

Q. Had you been working steadily?

A. Yes, because I had to have my living. I always worked as a carpenter.

Q. How much did you make as a carpenter?

Mr. Hanstein: I object to that. There is no allegation of loss of ability to earn a living in a way that would permit him to prove it.

The Court: I will permit it.

Mr. Hanstein: Exception.

Q. How much did you make as a carpenter?

A. I always had been a contractor for myself, and I have earned a minimum of five dollars and a maximum of fifteen dollars per day.

Q. Just immediately prior to this accident for whom were you working?

Mr. Hanstein: I ask that that "minimum of five dollars and a maximum of fifteen" be stricken. It is not anything upon which damages can be based; in other words, the jury has no right to guess. This

man says he was a contractor and he ought to prove what he made.

The Court: We will leave it there as a preliminary. The next question is —

Mr. Gaskill: I am going to follow that up, your Honor. I will withdraw that.

Q. For whom were you working immediately prior to this accident?

A. With Charles Ferretti, my brother-in-law.

Q. And how long had you been working for him?

A. About seven years, while the work was on. When it was not on I went to Philadelphia.

Q. What I mean is prior to the date of this accident how many months had you been working for Mr. Ferretti?

A. About three months that I was working for him, and I was taking ten dollars per week and board.

Mr. Hanstein: I ask that that be stricken.

Mr. Gaskill: I consent that it be stricken.

The Court: It may be stricken.

Q. How much were you making per week?

Mr. Hanstein: I object to this, may it please your Honor, and the impropriety of it is this; a man may be working a week before an accident and making a hundred dollars, which is by no means his average.

The Court: I will permit it. You may cross-examine him on the question.

Mr. Hanstein: Exception.

Q. How much were you making per week?

A. Ten dollars a week, and my board and clothes, and now that I am not working —

Q. That is the answer. Prior to the date of the accident how long was it that you had had any sickness?

A. About six or seven years ago I was sick for a week. Prior to the accident.

10 Q. Then you had no illness between six and seven years prior to the accident until the day of the accident?

A. No, sir.

Q. Did you have a doctor attend you at any time during that period?

A. It was not necessary to have him.

Q. Did you work steadily?

A. Yes, always steadily.

20 Q. Since the time of the accident have you worked?

A. I have not, sir.

Q. Have you tried to work?

A. Yes. I tried but I can't work.

Q. Well, why can't you work?

A. I always fall down.

Q. Always fall down.

Mr. Gaskill: Cross-examine.

30 Cross-examination.

By Mr. Hanstein:

Q. Who is Charles Ferretti? What is his relationship?

A. My son-in-law.

Q. What did you do with this money that you say he paid you?

Mr. Gaskill: I object to that as not proper cross-examination.

Mr. Hanstein: I have a right to test the credibility of this witness. I think we are entitled to know what he did with it. Maybe we will find out from an examination that he never got it.

The Court: I will permit it.

Mr. Gaskill: All right.

A. I spent it.

Q. Do you still live with Charles Ferretti?

A. Yes, sir.

Q. Prior to this accident where did you do your work?

A. With Charles Ferretti.

Q. Where did you work?

A. Within Atlantic City.

Q. What place within Atlantic City?

A. When I got hurt I was working at 111 California; some operation in regard to roof.

Q. How long had you been working at that particular job?

A. We were working there about one week because he had more than one house to be fixed, which we did.

Q. Whose house was it?

A. Charles Ferretti.

Q. Charles Ferretti's own house?

A. Yes, sir.

Q. Were there other carpenters working on this job?

A. Yes, when they were in need; but when they didn't need any I used to do the work myself.

Q. What was the job before this last one that you worked on?

A. I am compelled to answer that question, because at times my memory functions me perfectly, and at times I forget so quickly, and the only thing I can think about prior to this job I was working down in the lower part of Atlantic City.

10 Q. How long did you work at that job?

A. About a month.

Q. Whose house was that?

A. Charles Ferretti.

Q. Did you live at Mr. Ferretti's house?

Mr. Gaskill: He testified that he did.

A. Yes, sir.

Q. Do you still live there?

20 A. Yes, sir.

Q. Do you still do work for Ferretti?

A. I cannot work now.

Q. Don't you ever do any work?

A. No, I don't do any work. He takes me around with a car when he goes to a job and I sit around there and stay there.

Q. What day of the week did Ferretti pay you?

A. Every Saturday, I think.

Q. Does he still pay you?

30 A. No, he does not pay me any more. He feeds me and he cannot pay me.

Q. Did you ever work for anybody besides Ferretti in the last two or three years?

A. Only him.

Q. Ferretti is the only one you worked for?

A. For twenty years.

Q. What?

A. For twenty years I worked for him.

Q. Where did you live in Philadelphia when you went up there?

A. 713 Morris Street.

Q. Morris Street?

The Interpreter: Morris, as I understand it.

Q. Morris Street?

10

A. Yes, sir.

Q. Whom did you stay with up there?

A. With my daughter-in-law.

Q. Is that where you stayed when you left Atlantic City after the accident?

A. Yes, sir. Charlie Ferretti took me there to the same place.

Q. When was the last time prior to that that you had been to that address?

A. I was there for eight months in the past year. 20

The Court: Assuming you prove everything you allege in this complaint, I take it to be the duty of the Court to direct a verdict against you; so there is no use putting the proof in. Do you claim that the leaving of this wire remaining in the street was the proximate or direct and the immediate cause of this injury?

Mr. Gaskill: I do, sir.

30

The Court: Well, why do you allege that an automobile struck the wire?

Mr. Gaskill: I was pleading truthfully.

The Court: If the automobile had not struck the wire would the accident have happened?

Mr. Gaskill: It might have happened; it might have happened.

The Court: The motion for a non-suit made by the defendant against the plaintiff is granted upon the ruling of the Court that the act of the automobile striking the wire, throwing it against the defendant, was an intervening agency; therefore, the negligence of the defendant in leaving the wire down, if it were negligent, would not be the proximate and direct cause of the injury (Citing the Cuff case.)

Mr. Gaskill: To which ruling your Honor will allow me an exception.

The Court: Yes.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

VINCENZO FERRO,
Plaintiff-Appellant,

v.

ATLANTIC CITY ELECTRIC LIGHT COMPANY,
a corporation of New Jersey,
Defendant-Respondent.

ON APPEAL.

BRIEF IN BEHALF OF PLAINTIFF-
APPELLANT.

STATEMENT.

Appellant in his opening (State of the case, pages 16 and 17) presented for the consideration of the Court and jury substantially this situation; that the plaintiff, a man of seventy years of age, on October 17, 1924, lived at the corner of Iowa and Fairmount Avenues, in Atlantic City, Atlantic County, New Jersey. That on the said day on going home to his lunch about 12 o'clock noon he saw an electric light wire lying in the street. That about 1.45 P. M. after he had visited friends and was returning to

his home, in stepping from the public highway to the sidewalk and over the electric light wire, the wire, which was obstructing Fairmount Avenue, a public highway in Atlantic City, was struck by an automobile. A flash of flame came from the wire and the wire was thrown against plaintiff's body and he was pitched head first into the street. The appellant offered to prove that the electric light wire fell to the street before 12 o'clock in the forenoon and that the respondent had notice that the wire was down in the streets of both Iowa Avenue and Fairmount Avenue immediately after the wire fell. That the respondent did not repair the wire and was again notified at 12.30 P. M. that the wire was hanging in the street and that they still paid no attention to the dangerous condition of the wire that was obstructing both Iowa and Fairmount Avenues and that the defendant-respondent did not attempt to make any repairs until 2 P. M. after the plaintiff had been severely injured. Appellant also stated that he would prove that the respondent, while transmitting a deadly current of electricity above the streets of Atlantic City had been negligent in that they had improperly constructed their line for the reason that the respondent had failed to protect the wire carrying 2200 volts of electricity by a guard wire above and running parallel with it, it having been stated in the opening that the particular wire that fell was running along the street from which there were trees and from which a limb fell upon the charged wire.

At the conclusion of appellant's opening respondent moved for a non-suit (State of the case, page 18) on the opening for the reason that appellant saw the wire and stepped over it and as he did so an automobile struck the wire and that the act of the

automobile in striking was the proximate cause of appellant's injury. The Court below (State of the case, page 30) granted the motion for a non-suit made by the respondent against the appellant upon the ruling of the Court that the act of the automobile striking the wire and throwing it against the plaintiff was an intervening agency and that therefore the negligence of the respondent in leaving the wire down, if it were negligent, was not the proximate and direct cause of the injury, to which ruling appellant asked for and was granted an exception.

ARGUMENT.

The appeal challenges the correctness of the courts ruling in granting the respondent's motion for a non-suit against the appellant.

The Court below (State of the case, page 30) relied in making its decision on the case of *Cuff, administrator v. Newark and New York Railroad Company, et al.*, 35 N. J. L. page 17, etc., which case was affirmed by the Court of Errors and Appeals in 35 N. J. L. page 574. The facts in this case were not similar to the facts in the present case and the Court in deciding the case at page 30 held that the intervening and efficient cause was the wrongful act of the third party.

In the present case the respondent was charged with negligence on two grounds, first, that it allowed its wire charged with a deadly current of electricity to remain down in the public highway of Atlantic City for a period of an hour and forty-five minutes after having been notified of the dangerous condition of its wires, and secondly, that it had failed to

properly construct its line in that it had neglected to provide a guard wire over and running parallel with the wire charged with a high voltage of electricity (*Spires v. Electric Co.*, 70 N. J. L. page 355). The opening to the jury by the appellant discloses the fact that the wire lying on Fairmount Avenue, a public and a heavily travelled street in Atlantic City was struck by an automobile proceeding along said Fairmount Avenue. The Court below in granting the respondent's motion for a non-suit decided that the automobile travelling along Fairmount Avenue and striking the wire was an intervening agency and that the defendant's negligence was not the proximate and direct cause of the injury.

This Court held in the case of *Durant v. Palmer*, 29 N. J. L. page 544, etc., at page 547, "The street and every part of it, by force of the common law is so far dedicated to the public that any act of obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance."

"The travelling public have a right to suppose that there is no dangerous implement or pitfall in any part of it without a light placed to give warning of it or a suitable railing to protect from it." From this statement of the law in New Jersey it is reasonable to conclude that a person driving an automobile along a public highway would not be under a duty to anticipate that the respondent would leave an unguarded wire across the public highway and it seems reasonable to further conclude that from this principle of law that the respondent should have anticipated that if its wire was negligently left in the street that an automobile passing along the said street might strike the wire and cause it to be thrown against a pedestrian lawfully using the highway.

From the facts as set out in the opening of appellant, having applied the principle of law that the presumption exists that the automobile had a right to assume that the highway was cleared of obstruction, it certainly presented a question for the jury as to whether or not the automobile driver was negligent and was the intervening and efficient cause of appellant's injury. *It would seem that the conduct of the intervener, the automobile driver was innocent, then his non-tortious intervention which was foreseeable by the respondent, would not absolve the respondent, who was on the facts the only wrong doer in the chain of antecedents. Innocent and foreseeable human intervention does not necessarily break the causal connection between the respondent's tort and appellant's injury.*

The facts as presented in the appellant's opening seem to be in point with the facts as appeared in the case of *McKeown, et al v. King, et al.*, Court of Errors and Appeals, 99 N. J. L. page 251, in which case an iron covering placed over a drain and extending across the sidewalk, by reason of its defective condition due to the neglect of the tenant and owner of the building, was extending out into the public highway and as the plaintiff was walking on the sidewalk, a part of the cover in the highway was struck by an automobile truck passing along the public highway, throwing the drain cover against the plaintiff. At page 254 this Court held in deciding on the question of whether or not a verdict should have been directed against the plaintiff "if the drain cover was loose and slipped over the sidewalk, the question of proximate cause was for the jury as the proximate cause might be determined by the neglect of the McCrory Company, the tenants, in failing to make repairs to the drain and

cover, which would prevent the cover from slipping toward and over the gutter, rather than the act of the driver of the truck in negligently striking the cover." Certainly the facts in the foregoing case are the facts in the instant case. In both cases the defendants had notice of the defective condition and in both cases they failed to make repairs. In both cases an obstruction in the street was run into by an automobile and in both cases a pedestrian lawfully using the highway was injured. This Court held in the one case that a direction for a verdict was properly denied and it seems to follow that a motion to non-suit in the present case was improperly allowed.

In the case of *Geise v. Mercer Bottling Company and Mercer County Traction Corporation*, Court of Errors and Appeals, 87 N. J. L. page 224, is another case in which similar facts are involved as in the present case. In the case just cited and in which a non-suit was granted the facts briefly were that an automobile truck driven by one of the defendants ran into a deep rut next to a switch of defendants traction company, which rut, as the jury might have found, was due to the continued impact of wagon wheels thrown from the switch to the pavement by reason of the character of the switch. The truck then became unmanageable and swerved and ran around the corner and over plaintiff who was crossing the intervening street. This Court held that these facts presented a case for the jury as to both defendants.

In appellant's opening to the jury in the case at hand he set forth the negligence of the respondent in negligently allowing its wire to remain in a public highway. This negligence compares with the negligence of the traction company in the cited case,

and even though the defendant truck driver might too be held negligent for the operation of its truck, still where a pedestrian crossing the street is injured by the apparent concurring negligence of both defendants, this Court held that a non-suit had been improperly granted. It would seem from the law decided by this Court that even though the automobile driver was negligent, and there is no presumption as to this, that the respondent's negligence should be at least passed upon by a jury.

Since it was its duty to guard the public against a dangerous condition in the highway, of which it was informed and which it knew that if such care be not used an accident might result, the respondent is therefore *prima facie* liable.

The cases in New Jersey seem to uphold the view of appellant that a non-suit was improperly granted and the appellant therefore only cites one case of another jurisdiction in which the facts appear to be similar to the present case. In *Lundeem v. Livingston Electric Light Company*, 17 Mont. 32, 41, p. 995, the Court held "Where a horse being ridden along the street ran against a guy wire stretched across the street and attached to a post about four or five feet from the corner, breaking the wire so that it recoiled and caused injury to another person, the negligent construction obstructing the street was the proximate cause of the injury."

Appellant respectfully submits that the judgment of the Court below should be reversed to the end that a *venire de novo* be awarded.

BURTON A. GASKILL,
Attorney for Appellant.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

VINCENZO FERRO,
Plaintiff-Appellant,

v.

ATLANTIC CITY ELECTRIC COMPANY, a Corporation of
New Jersey,
Defendant-Respondent.

ON APPEAL.

BRIEF OF DEFENDANT-RESPONDENT.

The plaintiff's complaint and opening both disclose that while certain employes of the City of Atlantic City were cutting trees a limb from one of the trees fell, carrying down with it a wire belonging to the defendant company.

The plaintiff had knowledge that the wire was in the street. Its position in street was such that, according to the plaintiff's opening, he was able to pass over it once without any contact. A short time later, while stepping over the wire, it was struck by an automobile, not owned by the defendant company,

which caused the wire to strike the plaintiff, causing him to fall.

The fact that the wire was charged with electricity is of no moment in this case. There is no allegation in the complaint that the plaintiff suffered from any electric shock, and so the case can be considered as though it was a dead wire, or even a rope. The wire as it lay in the street was harmless to the plaintiff. He could not have been injured had it not been for the act of some third party.

The plaintiff's offer was to prove that an automobile striking the wire, swung it against the plaintiff.

It is difficult to see how there could be any liability on the part of the defendant based upon that showing.

Cuff, administratrix v. Newark and New York Railroad Company, et al., 35 New Jersey Law 17, at page 30 holds:

"The law cannot undertake to trace back the chain of causes indefinitely, for it is obvious that this would lead to inquiries far beyond human power and wisdom—in fact, infinite in their scope. It, therefore, stops at the first link in the chain of causation, and looks only to the person who is the proximate cause of the injury. *Shearman & Redfield on negligence*, par. 9. The general rule is, that the damage to be recovered must be the natural and proximate consequence of the act complained of. 2 *Greenl. Ev.*, par. 256. 'It is not enough if it be the natural consequence; it must be both natural and proximate.' *Per Byles, J., in Richardson v. Dunn*, 8 C. B., N. S. 665. To maintain an action for special damages, they must be the legal and natural consequences

arising from the tort, and not from the wrongful act of a third party remotely induced thereby. *Crain v. Petree*, 6 Hill 522. It is true that where the injury results from the negligence of several persons, differing only in degree, each will be held responsible for the entire damages resulting therefrom; but where the injury immediately results from the act of one of the parties, the other, though blamable, cannot be held liable for it, unless his conduct is so connected with the act of the former, that it may be said to have been the cause of it. Cases may be stated where the wrongful conduct of one person affords the opportunity or occasion for the illegal act of another, or for an injury from other causes. In such cases the inquiry is too remote to sustain an action for the recovery of damages. Thus the proprietors of a railroad, who negligently delay the transportation of goods delivered to them, as common carriers, and then transport them safely to their destination, are not responsible for injuries to the goods by a flood, while in their depot at that place, although the goods would not have been exposed to such injury but for the delay. *Denny v. The N. Y. Cent. R. R. Co.*, 13 Gray 481; *Morrison v. Davis*, 20 Penn. 171; *Railroad Co. v. Reeves*, 10 Wall. 176."

This case has been frequently cited with approval in this State, and when applied to the facts in this case relieves the defendant of liability.

In *Davenport v. McClellan*, 88 New Jersey Law 653, it is held:

"An intervening cause is the act of an independent agency which destroys the causal connection between the negligent act of the defen-

dant and the wrongful injury, the independent act being the immediate cause, in which case damages are not recoverable because the original wrongful act is not the proximate cause. Cuff, Administratrix v. Newark and New York Railroad Co., 35 N. J. Law 17; Claypool v. Wigmore, 71, E. Rep. 509."

It should be noted that there is no allegation in the complaint that the act of the defendant constituted a nuisance.

It should also be noted that the plaintiff had knowledge of the fact that the wire was lying in the street, and, therefore, his getting close to it, if it was so obvious a source of danger, constituted contributory negligence on his own part. This alone was sufficient grounds for non-suiting the plaintiff, and although it was not assigned as a reason, if the action of the Court was proper it will be sustained even though it was based upon an incorrect reason.

It is, therefore, respectfully submitted that the judgment of non-suit was proper and should be sustained.

THOMPSON & HANSTEIN,
Attorneys for Defendant-Respondent.

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