## ARKANSAS GENERAL UTILITIES COMPANY *v.* CULBREATH.

Opinion delivered May 21, 1928.

1. NEGLIGENCE—INSTRUCTION.—In an action for personal injuries sustained by falling into a post-hole dug in a path by a lighting company, an instruction which expressly told the jury that before they could find for plaintiff they must find that plaintiff, at the time of injury, was exercising ordinary care for his own safety, *held* not erroneous as ignoring the defense of contributory negligence.

2. ELECTRICITY—NEGLIGENCE AS "SOLE" CAUSE OF INJURY.—In an action for personal injuries sustained by falling into a post-hole dug in the path by a lighting company, an instruction that plaintiff could not recover unless defendant's negligence was the *sole* cause of the injury was properly modified by striking out the word "sole," since the law does not require that the negligence complained of shall be the sole cause of the injury.
3. ELECTRICITY—INSTRUCTION AS TO NEGLIGENCE IN DIGGING POST-HOLE.—In an action for injuries sustained in falling in a post-hole dug in a path by a lighting company, it was not error to refuse to instruct that the company was bound to use only ordinary care to keep the hole covered and guarded, since it disregarded any negligence in digging the hole in the path.
4. ELECTRICITY—NEGLIGENCE—MODIFICATION OF INSTRUCTION.—In an action for injuries sustained by falling in a post-hole, dug in the path by a lighting company, an instruction that, after defendant dug the hole, it was only bound to see that it was properly covered or guarded, was properly modified by substituting for the word "guarded" the words "or otherwise properly safeguarded."
5. TRIAL—INSTRUCTIONS AS TO DAMAGES.—In an action for injuries sustained by falling into a post-hole dug in a path by a lighting company, where the court properly instructed the jury relative to the measure of damages, refusal to give a requested instruction which limited recovery to "such an amount as you believe from the testimony will compensate him for the actual injury," etc., *held* not error.
6. DAMAGES—REASONABLENESS OF AWARD.—An award of $10,000 to an able-bodied man 51 years of age, in good health, earning about $1,500 a year, for broken ribs and severe injury to left kidney, incapacitating him for further labor, *held* not excessive.

Appeal from Bradley Circuit Court; *Turner Butler*, Judge; affirmed.

STATEMENT OF FACTS.

This appeal is prosecuted from a judgment for damages for personal injuries to R. S. Culbreath, resulting from having fallen into a hole dug by appellant company for putting up an electric light pole on Railroad Avenue, in the town of Warren, Arkansas.

Appellant, a public service corporation, maintaining a light plant in the town of Warren, Arkansas, was reconditioning its lines during the month of October, 1926, and replacing the old light poles with new ones.

Appellee alleged that, on or about October 30, 1926, while walking from his home to town, between sunset and dark, going in a westerly direction on Railroad Avenue, he turned off at the usual and customary place used by pedestrians in getting from one side of this street to the other, and, in so doing, stepped into a hole about eighteen inches in diameter and about five feet deep, directly in the center of the path upon which he was walking; that he was thrown violently against an electric light pole standing adjacent to the hole into which he had stepped, then against the concrete walk, and received severe and serious injuries.

It was alleged that appellant had negligently left the post-hole uncovered and unprotected and unsafe for pedestrians using the street, and further, that the company was negligent in that the light on the pole near the bottom of which the hole was dug was out of order, and not burning at the time of the injury.

Appellant denied all the material allegations of the complaint, and pleaded contributory negligence of the appellee as a bar to any recovery.

It appears from the record that appellee, a farmer and drayman, who lived in the eastern edge of town, on Saturday night, October 30, 1926, his wife being in the hospital at Little Rock, started to visit the home of his brother-in-law, to take supper there. He was accompanied by his brother, Gus Culbreath. While they were walking westward upon the concrete sidewalk along the south side of Railroad Avenue, at about 7 o'clock, he stepped off the sidewalk into the path in the street leading north from Railroad Avenue to the home of his brother-in-law, and into an uncovered post-hole in the path or walkway, and near an electric light pole, striking his breast and side violently against the post, and falling back and striking his back, over the kidneys, against the concrete curb of the sidewalk. Appellant was unable to get up for some little time, but finally did so, with the assistance of his brother, and walked about one-half

a block to his brother-in-law's, and, finding no one at home, called a passing auto and was driven to his own home, where he went to bed. He suffered great pain, mostly in the back, and especially from broken ribs when he coughed. He was treated by a local doctor until November 11, when a hemorrhage from the injured kidney developed, and he came to Little Rock for treatment. The X-ray pictures made showed he had sustained several broken ribs and a severe injury to the left kidney. He continued under the treatment of Dr. McGill, in Little Rock, from the middle of November until the trial, and was still under his treatment at the time of the trial in August, 1927. The hemorrhages from the kidney continued until after the trial, a severe one having been suffered on August 4.

Dr. McGill testified that the impaired condition of the kidney was permanent, and that appellee would never be able to do manual labor again.

Appellee was 51 years of age at the time of the injury, with a life expectancy of 20 years, and his earnings averaged $1,500 a year.

Certain instructions given by the court at appellee's request are complained of as erroneous, as well as the court's refusal to give certain instructions requested by appellant.

The jury returned a verdict for $10,000, and from the judgment thereon this appeal is prosecuted.

*Wooldridge & Woolridge* and *Danaher & Danaher*, for appellant.

*D. A. Bradham, Frank Pace* and *Tom W. Campbell*, for appellee.

KIRBY, J., (after stating the facts). It is first urgently insisted that the court erred in giving appellee's requested instruction No. 1, which, it is claimed, entirely ignores the alleged defense of contributory negligence, and concludes by telling the jury the verdict should be for the plaintiff. The appellant objected to the giving of the instruction, and requested the court to modify it,

which it refused to do, by adding, "unless you further find from the evidence that the plaintiff himself was guilty of contributory negligence which caused or contributed to the injury of which he complains."

It is true this court has held an instruction should be complete in itself when it undertakes to tell the jury when the verdict should be rendered for the plaintiff, and that the trial court should not instruct the jury that it must find for the plaintiff or defendant, as the case may be, upon a partial or incomplete statement of the law applicable to the material facts of the case, and that an instruction is inherently erroneous and therefore prejudicial which leaves out of consideration the plaintiff's contributory negligence or assumption of risk, or leaves to the jury the determination of the defendant's conduct as the sole issue for the jury's verdict, concluding with the phrase, "You will find for the plaintiff, or your verdict should be for the plaintiff," because, under the evidence, the conduct of the plaintiff as well as that of the defendant is essential to a proper verdict. *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676.

There is no question but that appellant did object to the giving of this instruction and ask the modification thereof, already set out, and that, if the objection was well taken, it would have constituted reversible error, but we do not find the instruction open to the objection urged, since it expressly told the jury it must find "and that plaintiff at the time was in the exercise of ordinary care for his own safety," etc., before they could render a verdict for him. If the appellee was in the exercise of ordinary care for his own safety at the time the injury occurred, he could not, of course, have been guilty of contributory negligence, which only means the failure to exercise such care in the circumstances of the case.

Neither do we find that the court erred in modifying the second instruction requested by appellant by striking out the word "sole" in the connection, "and that such negligence of the defendant was the sole cause of plain-

tiff's injuries." The instruction as given told the jury that the basis or ground of plaintiff's suit was negligence, which could not be presumed from the fact that plaintiff fell into the hole dug by the defendant on Railroad Avenue, and was thereby injured, "but such alleged negligence on the part of the defendant must be shown by a preponderance of the evidence, and that such negligence of the defendant was the cause of plaintiff's injuries." The law does not require that the negligence complained of shall be the sole cause of the injury to entitle a recovery therefor by the injured party.

In *Bennett* v. *Bell,* 176 Ark. 690, 3 S. W. (2d) 996, the court said: "It is well settled that negligence, in order to render a person liable, need not be the sole cause of the injury, and that one is liable if his negligence concurred with an inanimate cause producing it. The negligent act or omission must be the cause which produces the injury, but it need not be the sole cause, nor the last or nearest one." See also *Helena Gas Co.* v. *Rogers,* 104 Ark. 59, 147 S. W. 473; *Cahill* v. *Bradford,* 172 Ark. 69, 287 S. W. 595; *Coleman* v. *Gulf Refining Co.,* 172 Ark. 428, 289 S. W. 2.

No error was committed in the refusal to give appellant's requested instruction No. 9, telling the jury that, after it had dug the hole, it was only bound to the exercise of ordinary care to keep it covered and guarded for the protection and safety of those who might be traveling along the said walk or highway, and that if the jury found, in the maintenance of said hole, it exercised such care, it could not be held liable for the plaintiff's injury, since this utterly disregarded any negligence of said company in the digging of the hole in the path or walkway across the traveled street. Then, too, the court told the jury, in appellant's requested instruction No. 1, and appellee's instructions 3, 10 and 11, that the appellant was only bound to the exercise of ordinary care in the construction and maintenance of its line and the making

of holes for the placing of new poles, and the protection of the public against danger of injury therefrom.

The objection to the modification of instruction No. 10 by striking out the word "guarded" in the connection, "maintained a reasonable inspection of said hole to see that it was properly covered or guarded," and inserting the words "or otherwise properly safeguarded," could not have been prejudicial in any event, since it appears to have been more favorable to the position of the defendant as given than in the form in which it was presented, the jury being allowed to find that its duty was discharged if the hole was covered, guarded, well lighted, or inclosed. It is not susceptible to the construction urged by appellant, that the jury would have understood from the words of the amendment that appellant was bound to make the place safe for the users of the highway.

The court having properly instructed the jury relative to the measure of damages in its instruction No. 3, no error was committed in refusing to give appellant's requested instruction No. 12, which limited the recovery of appellee to "such an amount as you believe from the testimony will compensate him for the actual injury, if any, sustained by him, as a result of falling into the hole," etc. The instruction given, after properly telling the jury what elements should be considered in awarding damages, expressly told them that if they should find, after careful consideration of the evidence, appellee was entitled to damages, "you should award him such an amount of damages as will fully compensate him for the injury sustained by him, if any," etc.

Neither do we think the amount of damages excessive. Appellee was an able-bodied man, 51 years of age, in good health, and earning about $1,500 a year at the time of the injury, which the jury might have found totally incapacitated him from doing manual labor, and

he had suffered much pain from the injury, which physicians thought would continue to be painful indefinitely.

We find no prejudicial error in the record, and the judgment is affirmed.