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or had reason to know that people would come in contact with them, notwithstanding compliance with the code. Trimyer v. Norfolk Tallow Co., 192 Va. 776, 784 (1951).

The line had been constructed twenty-one years before Kelly's accident. Other workers had worked many times before on and around the same building Kelly was painting. In fact, he testified that there were several layers of paint already on the building. There was no evidence of prior contact with these lines, nor of any notice to Virginia Power that the location of the lines presented any unusual threat because of activity at or near these apartments.

While Dr. Masur testified that the lines should have been located beyond the code requirements, that does not present a jury question, as it gives no basis for a jury to find that Virginia Power knew or should have known of some peculiar danger at this site which would have required locating the lines beyond the distances permitted by the code.

The court is unable to find authority supporting a finding of power company negligence where power lines are constructed and maintained in accordance with code requirements in the absence of circumstances requiring variance.

Plaintiff is also barred by his own negligence. While not an expert in electricity, plaintiff is charged with knowledge possessed by persons of average intelligence that power lines are dangerous and can cause serious harm, even death. See Danville Streetcar Company v. Watkins, 97 Va. 713 (1908). Kelly testified that he knew he could be seriously injured if an aluminum ladder came in contact with a power line and that he saw the lines in question and knew he had to avoid contact with them. He also said that a nonconducting fiberglass ladder was available for his use and he would have used it if he knew that these were high voltage power lines. He chose not to use the fiberglass ladder because he thought the lines were telephone lines. Unfortunately, plaintiff testified he had never been told how to distinguish between telephone and power lines.

Notwithstanding his lack of ability to accurately distinguish between power lines and other less dangerous lines, plaintiff chose to work around the lines without taking

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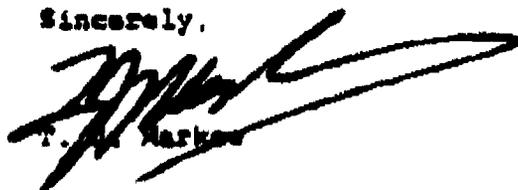
any special precautions such as using a nonconductive ladder, lowering the ladder before moving it (admittedly cumbersome and slow, but sure to avoid line contact), or making inquiry to determine the type of lines involved before proceeding in a manner commensurate with the risk. Due care demands that a person operating around lines which might be dangerous to either determine that they are not dangerous, or treat the line as if it is dangerous. It is not enough for the plaintiff to say he didn't know what the lines were or that he thought them to be telephone lines when he really had no basis for making such a determination. See Smith v. Vopeq, 204 Va. 128 (1963).

On these facts, reasonable people could not conclude that Kelly used due care for his own safety.

The court cannot conclude that as a matter of law the defense of assumption of risk is applicable here. Assumption of risk requires a risk voluntarily incurred, the nature and extent of which is fully appreciated. The only evidence here is that Kelly did not know these were power lines. Accordingly, the jury could have found that he could not have fully appreciated the risk.

For the reasons cited, the verdict will be set aside and judgment for the defendant will be entered.

Sincerely,



T. S. Kerns

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