

SOUTH CAROLINA LAWYERS WEEKLY

March 28, 2011

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\$4.4 million verdict over power line that stayed live after crash

By **FRED HORLBECK**, Senior Staff Writer
fred.horlbeck@sc.lawyersweekly.com

An Upstate teen who emerged unhurt from a single-vehicle wreck only to suffer electrocution when he touched a downed power line has won a \$4.4 million verdict against Duke Power Co. in a negligence suit.



Foster



A Greenville County jury awarded actual damages to plaintiff Xavier Massey on March 11 in *Massey v. Duke Power Co.*, civil action No. 2009-CP-23-7220. Judge Robin Stilwell pre-sided in the Greenville County Court of Common Pleas.

Massey's lawyers said a key factor in winning the verdict was countering a corporate policy under which Duke claimed evidence from the scene wasn't subject to disclosure.

Under the policy, "once they get notice that a non-employee is injured by line contact, that immediately triggers notice of anticipation of litigation, and they dispatch a claims person to the scene immediately so everything they do is under the umbrella of an attorney," said



This trial exhibit shows downed power lines around the vehicle from which plaintiff Xavier Massey exited unhurt after an auto accident in 2006. He was walking away when he touched a live wire, triggering a surge of voltage through his body. He sued Duke Power Co. for negligence, claiming the company had a duty to ensure all the lines would go dead upon impact.

Photo provided by Walker & Morgan LLC

Robin Foster, a Greenville lawyer who represented Massey along with Billy Walker of Lexington.

"That gives them the claim of protection from having to disclose information because it's in anticipation of litigation," Foster said.

"The problem for them in this case is that, if it's in anticipation of litigation — they said, and their witness said on the stand, that litigation was imminent — then they

had a corresponding duty to preserve the evidence. And they didn't do so in this case," Foster said.

Massey's lawyers said an SUV in which Massey was a passenger struck a roadside utility pole in Greenville County during a rainstorm in 2006. Two of three power lines on the pole shut down, but the third didn't.

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VERDICT

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As Massey, then 13, walked away from the SUV, voltage surged through him, burning 4 percent of his body, burning off parts of both feet and leaving wounds in a hand and an elbow, his lawyers said.

Massey had to have several toes amputated and is expected to undergo as many as five additional surgeries. His medical costs totaled about \$600,000, Walker said, and he faces an estimated \$3 million in life-care costs.

In his complaint, Massey claimed that Duke's safety systems, as required under the National Electrical Safety Code, should have shut down the power line on impact. He said two other lines,

believed to have had 65-amp fuses, went dead as designed, but the third didn't because its fuse was too big.

"We contended that was the only reasonable explanation," Walker said.

However, the company kept neither of the 65-amp fuses and left the other where it was, the lawyers said.

"They left it out there for five years," said Walker. "We come to trial, and they've got little, if any, any record-keeping on when they changed the fuses out and under what circumstances and no documentation of it, and so they're left out there not having preserved the fuses, the cracked pole and the conductor where the boy made contact."

That led Judge Stilwell to give the jury a charge of spoliation under which jurors could infer that

missing evidence would have been unfavorable to Duke unless the defense could "give a good explanation," Walker said.

"And, apparently, the jury found they didn't explain it very well. So that was a pretty good happening for us," he said.

In its answer, the company denied negligence but asserted that, if there were any negligence, Massey was barred from recovery because he was more than 50 percent responsible for proximately causing his injuries.

"The judge charged contributory or comparative negligence on his failure to get around the live wires. That did go to the jury, and the jury found him 0 percent negligent," Walker said.

Mike Smith, a lawyer for the company, did not return a phone call seeking comment prior to deadline.

Verdict Report

Type of action: Personal injury

Injuries alleged: Second-, third- and fourth-degree burns over 4.4 percent of plaintiff's body; permanent scarring and disfigurement

Case name: *Xavier Massey, a minor, by Celeste Massey, his parent and natural guardian v. Duke Power Company, LLC d/b/a Duke Energy Carolinas, LLC*

Case number: 2009-CP-23-7220

Court: Greenville County Court of Common Pleas

Judge: Hon. Robin Stilwell

Verdict or settlement: Verdict

Date: March 11, 2011

Amount: \$4.4 million

Special damages: \$608,000 (past medicals); \$3 million (life-care plan)

Demand: \$1.5 million

Offer: \$200,000

Insurer: Duke Energy, self-insured

Experts: Gregory Booth, Power Services, electrical engineer (Raleigh, N.C.); Shelene Giles, FIG Services, life-care planner (Hendersonville, N.C.); and Dr. Richard Thompson, economist (Clemson)

Plaintiff's attorneys: Billy Walker of Walker & Morgan (Lexington), and Robin Foster, of Foster & Foster (Greenville)

Editor's note: *The information in Lawyers Weekly's verdicts and settlements reports was submitted by the counsel for the prevailing party and represents the attorney's characterization of the case.*