

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT

COUNTY OF BERKELEY

Estate of John Fortney, deceased, by his  
duly appointed Personal Representative  
Constance S. Fortney,

Plaintiff,

vs.

Berkeley Electric Cooperative,

Defendant.

John Steven Robinson,

Plaintiff,

vs.

Berkeley Electric Cooperative,

Defendant.

C/A Nos. 14-CP-08-1231, 14-CP-08-1232

**RECEIVED**

MAR 10 2016

SC Court of Appeals

**ORDER OF JUDGMENT**

Civil Action No.14-CP-08-1230

**SUMMARY**

These actions arise out of an accident that occurred on April 23, 2008 when John Fortney and John Steven Robinson, along with Dexter Keyes and Alexander Clayson, moved a tent they had erected into the primary conductor of a high voltage line of Berkeley Electric Cooperative ("BEC"). The accident happened at a farm operated by Healing Farms Ministries ("Healing Farm"). Healing Farm was having tents erected in preparation for a fund raising event. The event was being promoted and coordinated by Beth Donahue and David Richardson, professional event planners from Memorable Meetings. Stage Presence was the company supplying and setting up the tents.

**FILED**  
16 FEB 2016 PM 12:11  
MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY, S.C.

John Fortney and John Steven Robinson were part of a four-man crew from Stage Presence. Alexander Clayson was the Stage Presence crew leader. At the request of and under the direction of Ms. Donahue and Mr. Richardson, the four-man Stage Presence crew picked up the tent and walked it into BEC's power line. Two of the workers for Stage Presence, John Fortney and Dexter Keyes, were electrocuted and died. The other two workers, Alexander Clayson and John Robinson, sustained burns and other physical injuries.

The line was open and obvious. As the crew moved the tent, Mr. Clayson halted work at one point due to his concern about the proximity of the BEC power line and the safety of his crew. Despite this concern, the crew again lifted the tent and, while moving the tent, carried it directly into the line.

### PLEADINGS

The plaintiffs claim that the BEC line did not meet the National Electric Safety Code ("NESC") clearance requirements at the time of the accident.

The Fortney and Robinson complaints allege causes of action for negligence. Their claims are based upon the same factual allegations:

6. The Defendant owed a duty to the public to install its power lines at a minimum safe height as determined by the foreseeable use of the property over which the lines are installed.

7. The Thornhill Farm property over which the Defendant's power line had been installed was cultivated and fallow agricultural land which constitutes "other lands" under the National Electric Safety Code.

8. Upon information and belief, at the time the Defendant installed the power line over the Thornhill Farm property the applicable Code (National Electric Safety Code) promulgated by the Institute of Electrical and Electronics Engineers (IEEE) and adopted by the American National Standards Institute (ANSI) required a minimum safe height of eighteen and one-half (18.5) feet at the power line's lowest point between the adjoining power poles.

9. The Defendant also owed a duty to periodically inspect and to maintain power lines to insure continued compliance with the applicable Code

for minimum safe height of the power line after the power line had been installed.

10. At approximately 4:00 o'clock p.m., the Plaintiff and others were being directed by the event coordinator to move a tent to a different location when the tent pole came into contact with the Defendant's power line.

11. The tent pole would not have come into contact with the Defendant's power line if it had been installed and maintained at the minimum safe height required by the applicable code.

Pl. Compl.

Although not pled, the Plaintiffs further asserted at trial that BEC had failed to maintain the proper records and that BEC lied to the federal government in its preparation and filing of the Rural Utility Service's ("RUS") Form 300s.

BEC alleged the defenses of (1) a general denial; (2) comparative negligence; (3) assumption of the risk; and (4) liability, if any, apportioned pursuant to S.C. Code Ann. Section 25-38-15 (2009 Supp.) In particular, BEC asserts that the line was built to exceed the NESC clearance requirement of 18.5 feet. BEC denies that it caused any clearance defect or that it knew or should have known of the defect prior to the accident but failed to correct it. BEC asserts that even if there was a clearance defect at the time of the accident, such a clearance defect standing alone would not render BEC liable. BEC maintains that it could only be liable if it caused the defect or knew or should have known of the existence of the defect and failed to correct it in a timely fashion. BEC also maintains that it complied with the RUS inspection guidelines as approved by RUS representatives involved in preparing and filing the RUS Form 300, and that any failure to do so did not proximately cause the damages the plaintiffs suffered.

By consent, the actions were tried before this Court without a jury from September 28, 2015 to October 2, 2015. Based upon the evidence presented at trial, this Court finds that the plaintiffs failed to carry their burden of proof that any act or omission on the part of BEC was a

proximate cause of the accident. This Court orders that judgment be entered in favor of defendant BEC based upon the findings of fact and conclusions of law set forth below.

### FINDINGS OF FACT

1. Healing Farms planned to hold a fund raising event on the weekend of April 23, 2008. Volunteers from Memorable Meetings, a local event planning company, were promoting and coordinating the event. Stage Presence was to supply and set up some of the tents for the event.

2. Prior to April 23, 2008, an owner of Stage Presence and Alexander Clayson, who was to be the onsite crew leader for Stage Presence, met at the farm with David Richardson and Beth Donahue, professional event coordinators from Memorable Meetings. At that meeting, the participants noted BEC's line and discussed it and the importance of staying away from the line in erecting the tents.

3. On April 23, 2008, Mr. Clayson returned to the farm with John Fortney, John Robinson and Dexter Keyes, the other tent crew members to set up the tents. The tent involved in the accident was a 20' x 20' High Peak Sierra structure constructed of metal poles covered by fabric. The tent is peaked and has a center spire that extends 17' 9" above the ground. The crew initially set up the tent involved in the accident well away from the BEC line. However, later that afternoon Mr. Richardson asked Mr. Clayson to move the tent and re-position it near the BEC line.

4. The four-man crew did not take the tent down before moving it. Instead, they situated themselves at each corner of the square tent, lifted the supporting poles a few inches off the ground, and then carried the tent in the direction of the BEC line. According to Mr. Clayson, he warned the crew to be careful of the electrical line while moving the tent. Ms. Donahue



corroborated his testimony, testifying that she heard something said about the line immediately prior to the accident.

5. The crew initially walked the tent nearer to the BEC line and then set it down. Mr. Richardson asked them to move the tent again. The crew complied and moved the tent closer to BEC's line. As they did, they walked part of the tent under the line and the tent's center spire contacted the hot (energized) line. Mr. Fortney and Mr. Keyes died. Mr. Clayson and Mr. Robinson suffered burns and other personal injuries.

6. No one involved with the event notified BEC prior to the accident that tents were being erected near the BEC line. No evidence was introduced to establish that BEC had knowledge that the event was taking place or that tents were being moved and placed near the BEC line.

7. BEC is a member owned, non-profit electric cooperative. BEC currently has some 84,000 members and 5,500 miles of electric line. BEC does not generate electricity. It purchases its power from Central Electric, which buys electricity from Santee Cooper, SCE&G, Duke Power, and Southeastern Power Administration. BEC serves members in three counties.

8. BEC built the line involved in the accident in 1993. The line is a high voltage electric distribution line which carries 14,400 volts.

9. BEC constructs its electrical distribution system to exceed the requirements of the National Electric Safety Code ("NESC").

10. The stated purpose of the NESC is:

A: The purpose of these rules is a practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and associated equipment. These rules contain basic provisions that are considered necessary for the safety of employees and the public under the specified conditions. The code is not intended as a design specification or as an instruction manual.

Tr. R. at 183, ln. 13-21.

11. The line in question was designed and built by BEC based upon the guidelines of the Rural Utility Services ("RUS"). RUS, which is part of the Department of Agriculture, is BEC's lender and provides construction guidelines to electric cooperatives in South Carolina and throughout the United States. Power lines such as the line in question which are built to RUS guidelines have a neutral conductor with a clearance of 20 feet mid span above ground and a primary conductor with a clearance of 24 feet mid span.

12. Based upon the evidence produced at trial this Court finds that the 1993 NESC required the primary conductor to be built with a clearance of 18.5 feet.

13. The accident occurred on April 23, 2008. On April 24, 2008, the clearance of the primary conductor at the point of contact was measured to be 18' 2" at the point of contact by John Hall, a BEC employee. On May 9, 2008, the clearance of the primary conductor mid span was measured to be 16' 11", as measured by Joe Jones, a McCall Thomas engineer who is now deceased.

14. The line in question was inspected as part of BEC's pole inspection program in 2002. No clearance defect was noted in that inspection.

15. A component on one of the two poles supporting the line in question was repaired by a BEC lineman, Nick Van Allen, in 2003. No clearance defect in the clearance of the line was noted by Mr. Van Allen.

16. The plaintiffs offered John Dagenhart as their liability expert. Mr. Dagenhart testified that cooperatives such as BEC must construct and maintain its lines, such as the line involved with this accident, at a height of 18.5 feet to prevent injuries to people. He testified that BEC had a duty to inspect its lines to ensure they were at code height to prevent injury to people. He also testified that cooperatives must tell the truth when reporting to the federal government.

Mr. Dagenhart testified that, in his opinion, the BEC line violated the NESC clearance requirement and had the line met code clearance requirement of 18.5 feet, the accident would not have occurred. He opined that BEC had made misrepresentations to the federal government in its RUS Form 300 filings. He testified that BEC had failed to inspect its lines and violated the record keeping requirements.

17. Mr. Dagenhart opined that the line was built improperly in the initial construction and was built with too much sag.

- Q: And do you have an opinion to a reasonable degree of medical (sic) certainty as to whether or not the power line was constructed properly?
- A: You know, I really can't come up with any other conclusion that - other than it was just built wrong to begin with.
- Q: And what was it that was wrong?
- A: It had too much sag in it, and, as a consequence, not enough clearance.
- Q: Meaning they used too much line?
- A: In effect, yes.

Tr. R. at 533, ln. 4-14.

However, this was a new opinion provided some three weeks before trial. When his deposition was initially taken in 2012, he had testified that he did not have any opinion as to when the excessive sag occurred or what caused the excessive sag. He was deposed a week before trial regarding his new opinion and several other new opinions. At trial, Mr. Dagenhart testified as follows:

- Q: Mr. Dagenhart, you gave me one answer two-and-a-half years ago and a completely different answer last week, didn't you, on this point?
- A: I did, yes.

Tr. R. at 600, ln. 7-10.

Mr. Dagenhart changed his testimony regarding whether the line was built properly in the

first place between his first deposition and his deposition a week before trial. He admitted that he had not received any new information that was the basis of his new opinion. In his 2012 deposition testimony, he testified that in all his experience he had never seen a line crew build a line with an improper excessive sag. He said that he stood by that testimony, but he intimated that the BEC crew had done so here. Mr. Dagenhart's new opinion that the line was improperly sagged when it was built was not only contradicted by his earlier sworn testimony but also contradicted by other credible evidence. For instance, defense expert, Eric Jackson, testified that he had never seen a line constructed with excessive sag. Mr. Johnson's testimony further established that the difference between a line with BEC's usual 24' clearance and a line with an approximately 18'2" clearance above ground would be readily apparent to experienced linemen. The BEC crew chief who had built lines for BEC on a daily basis for some 41 years testified that he had never left a line with too much sag and that he and his crew had built the line in question properly. The pole inspection crew did not observe excessive sag in the line in 2002. The BEC lineman, Nick Van Allen, who repaired a fixture, in 2003, on one of the poles for the line in question, did not notice anything unusual or out of the ordinary about the sag of the line.

18. The NESC states that the lines must be inspected but does not spell out how or when inspections are to be done. Inspections are to be done based upon the cooperative's experience. Mr. Dagenhart admitted that the BEC inspection program complied with and satisfied the requirements of the NESC in terms of the intervals for the inspections.

Q: And if the line were built in 1993 and there was an inspection of the line, a pole inspection that included an inspection, things you inspected in September of 2002, would that be a proper interval for inspection? Your answer?

A: Yes.

Q: Now, you say that wouldn't be a proper interval?

A: No.

Q: So you're not changing that testimony?

A: No, I'm not changing that.

Tr. R. at 604, ln. 7-16.

19. BEC's inspection program at the time of the accident provided that all of BEC's systems be inspected on an eight year cycle pursuant to a pole inspection contract. The pole inspector was required to report any dangerous conditions on the system. In addition, BEC employees were instructed to look at BEC lines when going about their normal day's work and to repair, or report and then repair any defects noted. Mr. Jackson also testified that BEC's inspection program was proper and was consistent with what utilities around the country were doing. He testified that while there was a clearance defect on the line in question at the time of the accident, there was no evidence that BEC had been made aware of the clearance defect prior to the accident and that BEC had no obligation under the NESC to repair a defect about which BEC was not knowledgeable.

20. Mr. Jackson opined to a reasonable degree of engineering certainty that the line was constructed properly in the first place and had the proper clearance at the time of construction. He opined that construction of the line using a 35-foot pole was and is a fairly standard construction. He testified that it was easy to obtain proper clearance. Mr. Jackson had also discussed the construction of the line with some members of the crew who built the line and he confirmed they followed a standard construction practice used in building lines such as the line in question. Mr. Jackson emphasized that if the line had been built with excessive sag, such as the sag that existed on the day of the accident, the improper sag would be readily recognizable to the crew and it would not be something any lineman would have left uncorrected. Finally, Mr. Jackson opined that the line had been hit and damaged and that suggested to him that the clearance of the line had been affected and altered by being hit. Mr. Jackson also testified that the so-called safety rules crafted by the plaintiffs' attorney were not consistent with the language in the NESC.

21. Matthew Bryan also testified for BEC. Mr. Bryan is an electrical engineer who worked for McCall Thomas Engineering at the time of the accident. McCall-Thomas Engineering has supported and assisted electric cooperatives, including BEC, in preparing Form 300s which are reporting forms used by the RUS. Mr. Bryan assisted BEC in completing its RUS Form 300s. Mr. Bryan testified that he also assisted 8 to 10 other electric cooperatives in preparing and submitting RUS Form 300s. He explained that field service technicians from McCall-Thomas would go out and inspect the BEC system. Data from those inspections would be compiled and put into a report. He testified that the RUS representative also would typically go and do a visual inspection himself. According to Mr. Bryan, preparation of a Form 300 was a collaborative process and the RUS representative could require change in the rating assigned by BEC. Once BEC and the RUS agreed on the ratings, the RUS Form 300 was completed and submitted by BEC.

22. Mr. Bryan confirmed that the BEC inspection program involved use of pole inspectors who were required to report any dangerous circumstances disclosed in their inspection. BEC also required its linemen and employees to visually inspect lines while they were out working in the day or night. Mr. Bryan was asked about the RUS Bulletin which identified the conditions normally needed to justify a rating of 3, and which included a provision that all overhead lines be patrolled annually, by walking, riding or aurally. Mr. Bryan testified that he was not aware of any cooperative in the state that patrolled its entire system on an annual basis. He testified that he told the RUS representative about BEC's inspection program and that the RUS representative with this information agreed with the rating of a 3 regarding BEC's inspection program. He testified that he and BEC had never misrepresented anything to the RUS representative or the federal government. Mr. Dagenhart admitted that the RUS Form 300 that BEC submitted in 2008 actually explained and described BEC's inspection process.

23. BEC also called Isaiah Ward who was the crew chief of the crew who built the line in question. Mr. Ward testified that he went to work for BEC on April 4, 1973 and that his work had involved line construction every day, five days a week. He testified that he built the line in question in accordance with the RUS guidelines so that the mid span sags would be the neutral at 20 feet and the primary at 24 feet. He testified that was the standard practice for a 35-foot pole. BEC also called Nick Van Allen. Mr. Van Allen had worked for BEC for 22 years. Mr. Van Allen testified regarding BEC's standard practice for construction and for clearances according to the RUS guidelines. He testified that the lines such as the line in question would have the neutral with clearance of around 20 feet and the primary with clearance of around 24 feet. He testified that had the primary been sagging down to 18'2" or so at the time of construction, it would have been easy to recognize that the line was not sagged properly and to correct the sag.

24. Plaintiffs called Ervin Strickland, BEC's former CEO, Tim Mobley, BEC's Vice President of Engineering and Operations, John Villeponteaux, BEC's Manager of Distribution and Operations, and James Elrod, BEC's former Manager of Training and Loss Control. The plaintiffs' attorney sought to have them admit that BEC had made misrepresentations to the federal government in their RUS Form 300 filings. The plaintiffs' attorney premised his questions on Bulletin 1730-1 which contained guidelines related to the electric borrower's operation and maintenance and outlined certain RUS standard practices. Exhibit A to Bulletin 1730-1 is titled "Conditions Normally Needed to Justify a Rating of 3." Page 8, paragraph 3 of Exhibit A provides that "all overhead lines 'including those on private right-of-way' patrolled annually (walking, riding or aerial); more frequently if experience dictates." BEC gave itself a satisfactory rating of 3 on the RUS Form 300 even though BEC did not patrol its entire system annually.

25. The BEC witnesses acknowledged that they had not patrolled all overhead lines annually. However, the BEC witnesses steadfastly denied that they had made any misrepresentations. They testified that their initial ratings were based on the work of an outside engineering firm, and that ratings were then reviewed with the RUS representative who could require BEC to change any of its ratings. These witnesses confirmed that BEC's inspection program, which entailed the pole inspection on an 8-year cycle and patrolling by linemen in their daily work, satisfied the RUS reviewer and that he had no objection to BEC's rating of 3 regarding its inspection program. As indicated above, the testimony of these witnesses was corroborated by the testimony of Matthew Bryant of McCall-Thomas who had assisted BEC in the preparation and submission of the Form 300's.

26. Plaintiffs offered no counter evidence from any fact witness to support its claim that BEC had made misrepresentations to the RUS or the federal government. The plaintiffs did not call any witnesses from the RUS or the federal government to testify that the federal government was misled by BEC's Form 300's. Importantly, there was no testimony or other evidence as to how a different rating on BEC's RUS Form 300s would have prevented the death or injuries in this case. Plaintiffs' liability expert, Mr. Dagenhart, did say that in his opinion BEC had misrepresented its inspection program to the federal government. However, on cross, he admitted that he had no experience with preparing and filing of RUS Form 300's. Mr. Dagenhart was not asked and did not explain how the clearance defect on the line in question would have been discovered by patrolling which could be done by vehicle and aurally. The plaintiffs offered no evidence to establish when annual patrolling should have been done and completed and no evidence to establish whether the clearance defect had developed prior to the inspection date or subsequent thereto. This Court finds that the plaintiffs failed to prove that BEC made misrepresentations to the federal government; however, even if BEC did make

misrepresentations, the plaintiffs failed to prove how the misrepresentations were a proximate cause of the accident.

27. Certain BEC witnesses were questioned regarding the fact that BEC did not record the land use or the NESC clearance requirement on the staking sheet used to construct the line. BEC witnesses were also questioned about the fact that BEC did not measure each line after construction to ensure that the line met the NESC clearance requirement. BEC testified that its lines were constructed to RUS standards and therefore exceeded the NESC clearance requirements. They testified that a line such as the line in question was built using 35 foot poles and because the lines were built pursuant to the RUS guidelines, BEC's lines had a 20-foot mid span clearance for the neutral and a 24-foot mid-span clearance for the primary conductor. Plaintiff's expert, Mr. Dagenhart, admitted that he had constructed lines just the way BEC constructed its lines. He admitted that he had not measured the height of lines after construction and that he, like the BEC crew, checked the clearance by "eyeballing" the line.

28. This Court finds that the Plaintiffs failed to meet their burden of proving BEC had caused the line to have excessive sag. This Court further finds there was no evidence that BEC knew that the vertical clearance was less than 18.5 feet at the time of the accident. Finally, this Court also finds Plaintiffs failed to meet their burden of showing that BEC should have known the vertical clearance was less than 18.5 feet at the time of the accident because its line inspections were not conducted on time frames followed by industry standards.

#### CONCLUSIONS OF LAW

1. "In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages." Moore v. Weinberg, 383 S.C. 583, 558; 681 S.E.2d

875, 878 (2009).

2. “Negligence is not actionable unless it is a proximate cause of the injury.” Bishop v. South Carolina Dept. of Mental Health, 331 S.C. 79, 83; 502 S.E.2d 78, 88 (1998).

3. “Proximate cause is the efficient or direct cause of injury; the thing that brings about the complained of injuries.” McKnight v. South Carolina Dept. of Corrections, 385 S.C. 380, 386; 684 S.E.2d 566, 569 (2009).

4. A defendant is not liable for an injury from an equipment failure about which the defendant had no notice. See Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966).

5. South Carolina does not recognize the doctrine of *res ipsa loquitur*. See also Fletcher v. Medical University of South Carolina, 390 S.C. 458, 463; 702 S.E.2d 372, 374 (2010). (stating that “South Carolina does not recognize the doctrine of *res ipsa loquitur*.”) (citing Snow v. City of Columbia, 305 S.C. 544, 555 n.7, 409 S.E.2d 797, 803 n.7 (Cl. App. 1991) (“In an action for negligence, the plaintiff must prove by direct or circumstantial evidence that the defendant did not exercise reasonable care. South Carolina’s rejection of *res ipsa loquitur* is consistent with its general adherence to fault based liability in tort.)).

6. Plaintiffs failed to produce any credible evidence that BEC constructed the line in violation of RUS guidelines or NESC rules or with too much sag. Plaintiffs’ claim that the line was built with too much sag is not based on credible testimony and is flatly contradicted by credible testimony.

7. The plaintiffs have failed to prove that BEC construction crew caused the line to have too much sag when the line was built. The only evidence that BEC caused the line to have too much sag came from the plaintiffs’ liability expert, Mr. Dagenhart. He testified that BEC built the line with too much sag. However, this Court does not find his testimony to be credible on this issue. Mr. Dagenhart was deposed in 2012. At that time he testified that he had no

opinion as to when or what had caused the line to have too much sag. He also testified that he had never seen a construction crew build a line with too much sag. His new opinion that BEC had built the line with too much sag was in direct contradiction with his 2012 deposition testimony. At trial, he admitted that he had not received any new information that had caused him to change his testimony. Mr. Dagenhart's new opinion that the BEC construction crew had built the line with too much sag was also contradicted by other evidence which this Court finds to be credible. Mr. Jackson testified, as Mr. Dagenhart had, that he had never seen a construction crew leave a line with too much sag in it. Mr. Jackson testified that if the line was to have been constructed with clearances of 20 feet for the neutral and 24 feet for the primary conductor but was sagged as the line was sagging on the day of the accident, the improper sag would have been obvious to any line construction crew and would not have been left in that fashion. The line was inspected in 2002 as part of the program inspection and no clearance defect was noted. A component of one of the two poles for the line in question was repaired by a lineman in 2003 and no clearance defect was noted by the BEC lineman. The crew chief and a member of the crew both testified that they built the line according to the RUS specifications with clearances of 20 feet and 24 feet. This Court declines to give weight to the new opinion expressed by Mr. Dagenhart. This Court finds his testimony that BEC had improperly built the line with too much sag is not credible.

8. BEC is not liable as a result of any alleged failure to inspect the line in question for compliance with the clearance requirements of the National Electric Safety Code. Mr. Dagenhart admitted that the NESC did not provide any specific method or schedule for inspection to be done.

Q: Does the Code of Federal Regulations that you're looking at describe how the inspection is to be done?

A: No.

Tr. R. at 571, ln. 7-9.

Q: Show me the language.

A: It says, lines and equipment shall be inspected at such intervals as experience has shown to be necessary. (Tp.574, lines 16-18).

Q: Name me one electrical co-op in the whole country that is doing something different than what Berkeley says it does in terms of construction of line to exceed code requirement and inspections which are the pole inspections and the patrolling by their employees.

A: I can't give you a particular co-op in that respect.

Tr. R. at 585-86, ln. 23 to ln. 4.

The line was inspected in 2002-2003 as part of a pole inspection program based on an eight-year cycle. The plaintiff's expert, Mr. Dagenhart, testified that an eight-year cycle was reasonable. By contract, the pole inspection contractor was to inspect and report any dangerous circumstances. No report was made of any defect or dangerous circumstances with the line in question. NESC does not state how an inspection should be made. Instead, it states that the lines be inspected as experience dictates. BEC's linemen and employees are instructed to look for hazards as they ride about during the day. The evidence establishes that BEC's inspection program was consistent with what other cooperatives do.

9. This Court finds that BEC's inspection program complied with RUS inspection requirements. No evidence was introduced to support Plaintiffs' contention that BEC's alleged failure, if any, to comply with NESC inspection requirements was a proximate cause of this unfortunate accident.

10. The Plaintiffs questioned one or more of BEC's employees or former employees regarding BEC's alleged failure to maintain records. The BEC employees who were asked about BEC's record retention denied that BEC had failed to keep proper records. However, even if BEC failed to maintain proper records, there is no evidence that the failure to keep records was somehow a proximate cause of the accident.

11. This Court finds that the plaintiffs failed to prove that BEC provided false information to the federal government in its preparation and filing of the RUS Form 300's; however, even if BEC had provided false information, the plaintiffs failed to prove how that was a proximate cause of the accident in this case. The plaintiffs' attorney questioned the BEC witnesses at length, attempting to prove that BEC had provided false information to the federal government in failing to disclose that it did not patrol its entire system annually by walking, riding or aurally. The instructions for completing the RUS Form 300's includes a reference to patrolling the entire system annually, either walking, riding or aurally, the instructions do not mandate that the electrical cooperative patrol its entire system annually. Instead, the instructions state that such patrolling is one of the conditions normally necessary for a rating of 3.

12. Importantly, the plaintiffs offered no evidence from any representative of the RUS or federal government that they had been misled by the manner in which BEC rated itself on the Form 300. Mr. Dagenhart, plaintiff's liability expert offered his opinion that BEC had lied to the government in its Form 300's. However, Mr. Dagenhart admitted that he had no experience with the Form 300 process.

Q: What experience have you had in filing RUS-300s?

A: I have not.

Q: Have you ever met with a co-op and represented them in trying to comply with RUS-300?

A: No.

Q: Have you participated in any meetings with RUS officials regarding RUS form 300s?

A: No.

Tr. R. at 562, ln. 8-15.

BEC offered evidence from Mr. Bryant that BEC had disclosed that it did not patrol its system annually and that the RUS representative had no objection to BEC having given itself a rating of 3. The plaintiffs offered no factual evidence to contradict the testimony of the BEC employees

or former employees regarding the Form 300. The plaintiffs failed to prove that BEC lied or misrepresented to the RUS or any other governmental entity. However, if the plaintiffs had proved that BEC had somehow misrepresented its procedures in completing the RUS Form 300, this would not establish any liability on the part of BEC. The plaintiffs failed to offer any evidence that the accident would have been avoided if BEC had patrolled its entire system annually. Specifically, the plaintiffs offered no evidence that the clearance defect would have existed at the time the line was patrolled or that the clearance defect would most likely exist and have been discovered by patrolling in a vehicle or aurally which are two of the three acceptable methods of patrolling.

13. This Court finds that the plaintiffs have not proved that BEC created, or knew, or should have known of the clearance defect.

14. Since this Court has found that the plaintiffs have failed to prove their case and that judgment should be entered in favor of the defendant, it is unnecessary to address damages or the comparative negligence of the Plaintiffs.<sup>1</sup>

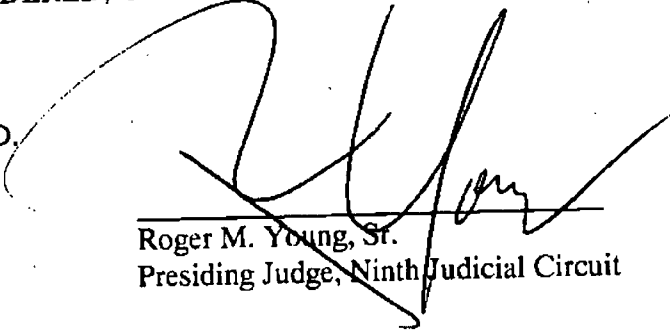
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<sup>1</sup> Recognizing that this Court's decision set forth above may be appealed, and if reversed and remanded, another trial would be lengthy and expensive. Therefore, this Court makes the following alternative findings on the issue of the comparative negligence of the plaintiffs. This Court finds that the plaintiffs' negligence is greater to any negligence on the part of the defendant and therefore the plaintiffs are not entitled to recover. If it is assumed BEC was negligent because the line was built with excessive sag or that BEC should have known of sagging because of a failure to adequately inspect the line in question, this Court finds the negligence of the plaintiffs far outweighs the negligence of the defendant. The line was open and obvious. Most importantly, the hazard was recognized and discussed by the workers during a stop before they continued on through. This was clearly negligence on their part. The clearance at the point of contact was 18.2 feet which was only a few inches less than the 18.5 foot NESC clearance requirement. They stopped because of concerns they were too close to the line, "eye-balled" the height of the line and the height of the tent, and guessed incorrectly they had room to clear underneath the line. In addition, the plaintiffs violated the OSHA ten-foot rule which prohibits untrained workers from coming within ten feet of an overhead line. The plaintiffs, along with the other workers, walked the tent under the line to the point that contact was made between the tent's center spire and the BEC line. There is absolutely no evidence to

*Cont'd next page*

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the defendant.

AND IT IS SO ORDERED.



Roger M. Young, Sr.  
Presiding Judge, Ninth Judicial Circuit

Dated 2/10, 2016  
in Chambers, South Carolina

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show that BEC had any notice that tents were being set up near or under BEC's lines. As a result, only the plaintiffs and the others involved in moving the tent could have avoided the accident. This violation of the OSHA ten-foot rule resulted in the very kind of accident that the OSHA ten-foot rule was designed to prevent occurred. The negligence of the plaintiffs was greater than any negligence on the part of BEC. Therefore, the plaintiffs would still not be entitled to recover against BEC.