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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case Nos. 2014-CP-08-1230, 2014-CP-08-1231 and 2014-CP-08-1232

Estate of John Fortney, Deceased,
By His Duly Appointed Personal
Representative, Constance S. Fortney,..... Appellant,

v.

Berkeley Electric Cooperative,.....Respondent.

AND

John Steven Robinson,.....Appellant,

v.

Berkeley Electric Cooperative,.....Respondent.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

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2. Whether the Trial Court erred in applying an ordinary care standard of care to the Respondent in weighing the respective negligence of each party for purposes of the Respondent's comparative negligence defense.

3. Whether the Trial Court erred in failing to grant Appellants' motion for judgment on the issue of Respondent's liability at the close of the evidence.

STATEMENT OF THE CASE

On June 23, 2009, The Estate of John Fortney, acting through Constance Fortney as the duly appointed Personal Representative of the Estate, filed wrongful death and survival actions against Respondent Berkeley Electric Cooperative, Inc. (hereinafter "BEC"). Contemporaneously with the filing of these two cases, Appellant John Robinson filed a complaint seeking damages for personal injury against Respondent Berkeley Electric. The three complaints arose out of a single event which occurred on April 23, 2008.

The substantive allegations of the Complaints averred that the Respondent had erected an electric line across certain farm land. It was additionally alleged that under the operative version of the National Electric Safety Code, the line erected by the Respondent was required to have a minimum height of 18.5 feet and that the Respondent had a duty to inspect its lines and maintain compliance with the minimum required height. (Complaint, ¶¶ 7-9). On April 23, 2008 the decedent and Appellant John Robinson were engaged in moving a tent on the property under the direction of third parties. (Complaint, ¶ 10). During the process of moving the tent, it came into contact with Respondent's electrical line resulting in a fatal electric shock to John Fortney and serious injury to John Robinson. (Complaint, ¶ 10). It was further alleged that had the line been installed and maintained at the minimum height required by the National Electric Safety Code, the tent would not have made contact with the Respondent's line. (Complaint, ¶ 11). The survival cause of action sought damages for the decedent's pre-death pain and suffering, loss of income, medical and funeral expenses. The wrongful death cause of action sought recovery on behalf of two daughters of Mr. Fortney for the loss of his society, love,

support and affection. Mr. Robinson sought to recover damages for physical and psychological injuries, medical expenses and loss of income.

Respondent's Answers denied generally the substantive allegation of the Complaints. The Answers further asserted that Appellants were negligent in failing to keep a proper lookout to avoid contact with the line, in failing to notify the Respondent of the need to move the tent near the line, and in generally failing to exercise due care for their own safety. (Answers of Respondent, Second Defense.). The Second Defense requested that any recovery obtained by the Plaintiffs be diminished in proportion to the Plaintiffs' comparative negligence, if any.

By Order dated April 18, 2012, the Trial Court consolidated the Fortney and Robinson cases for trial. The parties subsequently agreed to waive the demand for a jury trial and try the case to the Court sitting without a jury. The case was tried before the Honorable Roger M. Young, Sr., Circuit Court Judge, without a jury beginning on September 28, 2015 and concluding on October 2, 2015. At the conclusion of the evidence, Appellants made a motion for directed verdict as to the issue of the Respondent's liability which the Court took under advisement (Transcript, pp 891-893). In a written closing argument, Appellants requested judgment in their favor in the total sum of $7,500,000.00 actual damages and an additional sum as punitive damages as deemed appropriate by the Court.

On February 10, 2016, the Trial Court entered an Order of Judgment which contained Findings of Fact and Conclusions of Law, granting judgment in favor of the Respondent and against the Appellants. Insofar as relevant to this appeal, the specific

factual findings and legal conclusions of the Trial Court will be discussed in the Statement of Facts below. Notice of Appeal to this Court was filed on March 10, 2016.

FACTS

I. Summary of Evidence at Trial

BEC is an electrical distribution company: it distributes electric power generated by other utilities to the consumers which it serves but does not generate electricity itself. (Transcript, P. 114, l. 7-17). BEC distributes electricity though approximately 5000 miles of electric power lines to customers in Berkeley County and portions of Dorchester County and Charleston County. (Transcript, P. 36, l. 4-14, Exhibit 6). In performing these services BEC is governed by the provisions of the National Electric Safety Code ("NESC") and the regulations of the Rural Utility Service. (Transcript, P. 37, l. 11-P. 38, l. 2). Timothy Mobley, the vice president for engineering and operations of BEC testified to the following regarding the NESC standards and the work of BEC:

"Q. The National Electric Safety Code, is it correct to say that would be termed as the bible for the electric utility industry?

A. For safety, yeah."

(Transcript, P. 126, l. 4-7).

In 1993, BEC erected a distribution line across property in Berkeley County that was then known as Bellfield Farms and by 2008 was called Thornhill Farms Healing Ministries. (Transcript P. 281, l. 22-P. 282, l. 1; P. 191, l. 24-25). This was a high voltage line carrying 14,400 volts. (Transcript, P. 133, l. 12-14). Margaret Yergin lived on the property at the time the line was erected. (Transcript P. 281, l. 22-P. 282, l. 1). Ms. Yergin testified that the property was being utilized as a working farm which had on

average around 100 horses. (Transcript, P. 282, l. 23-P. 283, l. 1). They provided stables for horses as well providing lessons in hunters, jumpers, and combined training. (Transcript, P. 284, l. 4-11). Horses would be ridden in the area where BEC erected the distribution line. (Transcript, P. 285, l. 18-23). The farm also grew hay which was used as feed for the horses on the property and sold to the public as well. (Transcript, P. 286, l. 12-23). The equipment that was utilized in the farming operation such as tractors and backhoes would have exceeded 8 feet in height. (Transcript, P. 287, l. 18-20; P. 288, l. 10-18). It would have been apparent to someone driving onto the property in January or February, 1993 when the line was constructed that the land over which the power line crossed was being used as a working farm. (Transcript, P. 288, l. 19-P. 289, l. 6).

The usage of the property that lay beneath the BEC distribution was significant. The required ground clearance – the height of the line – under the NESC was determined by the usage of the property combined with the voltage running through the line (Transcript, P. 130, l. 12-16). Application of those two variables in the present case required the line at its lowest point to 18'6" above ground level. (Transcript, P. 132, l. 1-9; P. 787, l. 3-9).

As part of its obligations in distributing electricity, BEC was required to inspect its lines. This inspection obligation was acknowledged by Timothy Mobley (Transcript, P. 142, l. 14-P. 143, l. 2) and by Eric Jackson, an expert retained by BEC. (Transcript, P. 780, l. 2-6). Mr. Villaponteaux, the manager of operations at BEC, was responsible for the construction, maintenance and operation of power lines. He testified to the following concerning the BEC inspection program:

Q. "And as I understand it, Berkeley Electric's inspection program consists basically of linemen that are riding down the street. They're looking at the power lines.

A. Correct."

Q. When a lineman goes out to work on a power line or a street lamp or something, they're inspecting that power line, right?

A. Correct."

(Transcript, P. 219, l. 1-9).

The only testimony of any such inspection taking place on the line at issue was that a BEC lineman was on the property on December 15, 2003 and did not notice anything out of the ordinary concerning the line. (Transcript, P. 880, l. 13–P.881, l. 7).[1] Additionally, BEC produced evidence that it hired an outside vendor to conduct inspections of its wooden poles. (Plaintiff's Exhibit 5). Inspection of the wooden poles was the primary responsibility of this vendor. (Transcript, P. 150, l. 13-17, P. 158, l. 3-13). The pole inspection contract required the vendor to report any dangerous conditions and presence of oil on or around a pole. (Transcript, P. 184, l. 7-19). A pole inspection for this line was done in 2002. BEC acknowledged that it did not provide the pole inspectors with any information concerning what the required height of the line was under the NESC. (Transcript, P. 201, l. 10-13). On direct exam, Mr. Jackson testified to the following regarding the BEC inspection program:

"Q. If you were to assume that Berkeley's inspection program is pole inspection on an every eight-year cycle, plus having its employees and line personnel look at the lines as they drive around the service area, and you assume that is the inspection program, do you have an opinion to a reasonable degree of engineering certainty as to whether that program complies with the requirements of the National Electric Safety Code?

[1] Given there were no records of any inspection taking place that day, the lineman that testified was doing so purely off memory of one day, 12 years ago.

A. It does, and it's also a very common method of performing those inspections as it relates to other utilities around the country, in my experience."

(Transcript, P. 769, l. 11-21).

The evidence concerning post-2003 implementation of the BEC line inspection program showed that Rico Harrell, the BEC lineman who was responsible for performing maintenance and inspection of the line in question, never inspected the line. (Transcript, P. 263, l. 25-P. 265, l. 15). He was on the Thornhill Farms property on August 20, 2007 and on the pole which held the portion of the line at issue and did not inspect the line. (Transcript, P. 270, l. 17-P. 271, l. 22). He had also been on this property on earlier occasions and never inspected the line on those occasions either. (Transcript, P. 272, l. 1-7). Mr. Jackson testified that in evaluating the adequacy of the BEC inspection program that he was assuming the lineman did in fact inspect the lines as he described and that he was not aware of Mr. Harrell's testimony that he never inspected any lines as part of his job. (Transcript, P. 791, l. 1-P. 793, l. 12).

BEC made the following admission by interrogatory response:

"3. Please state when the power line which is the subject matter of the Plaintiff's Compliant (sic) was last inspected prior to April 23, 2008, for National Electric Safety Code compliance and what items were inspected at that time.

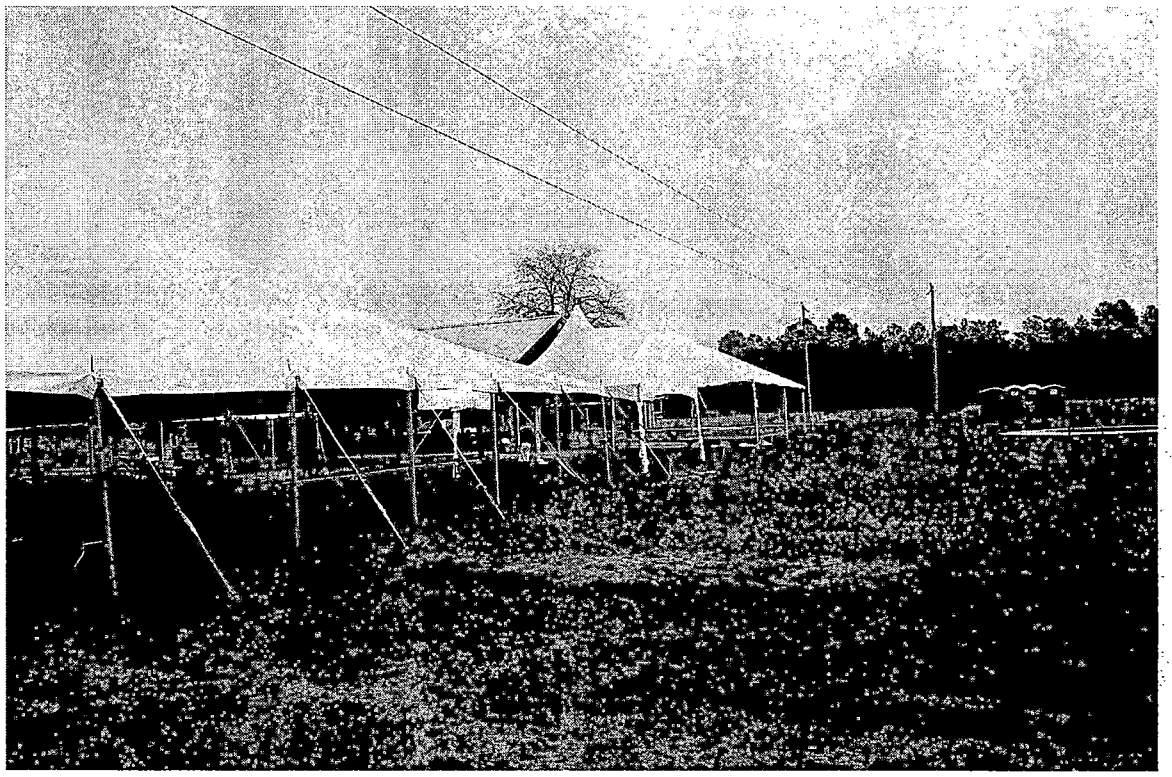
ANSWER: The line in question has never been inspected for NESC compliance. However, it was part of a pole inspection conducted in 2002."

(Plaintiff's Ex. 61, Interrogatory #3 and Answer to the Same; Transcript, P. 209)

Mr. Mobley, the BEC vice-president for engineering and operations, conceded in his trial testimony that the interrogatory response was true, the line in question had never been inspected for NESC compliance. (Transcript, P. 211, l. 6-12). Both he and BEC's expert, Mr. Jackson acknowledged that never inspecting the line was not an option under

the NESC. (Transcript, P. 142, l. 23-P. 143, l. 4; P. 809, l. 1-P. 810, l. 22). Mr. Jackson also agreed that inspections needed to include a height determination to make sure the line complied with the NESC requirements. (Transcript, P. 816, l. 3-7).

On April 23, 2008, John Fortney, John Robinson, and two other men were engaged in preparing for a charity event which was to be held on the Thornhill Farms property. The men were engaged in moving a tent which had 4 legs and a center point which represented its tallest area. (Transcript, P. 325, l. 19-P. 326, l. 1). The center spire of the tent measured 17 feet, 9 inches in height. (Transcript, P. 529, l. 5-7). While moving the tent, 2 additional individuals, Beth Donehue and David Richardson, were acting as spotters stationed on each side of the tent. (Transcript, P. 320, l. 11-22). The men were aware of the presence of the BEC distribution line in the area. (Transcript, P. 327, l. 15-P. 328, l. 7). Mr. Richardson asked that the tent be moved just a little, one last time. (Transcript, P. 328, l. 8-11). The men picked up the tent approximately 4-6 inches off the ground to move it. (Transcript, P. 665, l. 12-18). Ms. Donehue testified that the photographs below admitted as Plaintiff's Exhibits 17 accurately depicted the relationship of the tent and the BEC distribution line as it was being moved this last time. The tent in question is the tent which appears with the barn and single tree in the background. (Plaintiffs' Exhibit No. 17).



Ms. Donehue testified that as the tent was being moved closer to the line, from her perspective it never appeared that the tent was in any danger of making contact with the distribution line, it appeared that the tent "...would have been free and clear with plenty of room left over." (Transcript, P. 322, l. 8-12). Unfortunately, that was not the case. The center spire made contact with the distribution line. John Fortney and another man were killed. John Robinson and the fourth man involved in moving the tent were injured.

BEC conducted an investigation the day following the electrocutions and injuries. It was found that at its low point, the distribution line was 16'11" above the ground rather than the 18'6" required by the NESC. (Transcript, P. 139, l. 14-20). Because the line is intentionally built with some sag, the low point of the line is generally the mid-span of the line, assuming level terrain. (Transcript, P. 139, l. 21-25). At the point where the center spire of the tent made contact with the line, the line was 18'2" above the ground.

(Transcript, P. 608, l. 8-20). Mr. Jackson, the BEC standard of care expert, characterized the failure of the line to meet the minimum height requirements of the NESC a "clearance defect." (Transcript, P. 770, l. 1-14).

Appellants called an expert in the area of visual perception, Dr. Cathleen Moore, to address the visual and spatial difficulties presented by attempting to make judgments about the height of line and clearances between the tent and the distribution line. Dr. Moore explained that vision, particularly making judgments about the relationship between various objects, depends on visual cues. (Transcript, P. 429, l. 19-P. 432, l. 14). She explained there were insufficient "visual cues" to accurately determine distance between the tent and the distribution line because the line had only the backdrop of the sky. (Transcript, P. 446, l. 14-P. 447, l. 18). As the Court summarized in asking Dr. Moore questions concerning her testimony, it sounded like common sense: the more visual cues a person has concerning the relationship between objects, the better judgments they will make. It wasn't that the spotters and the men couldn't see the line, it was that they couldn't make accurate judgments about whether there would be contact between the line and the tent and if so, where that point of contact would be. (Transcript. P. 481, l. 15-P. 483, l. 10).

II. The Trial Court's Findings of Fact and Conclusions of Law:

The Trial Court found the condition of the line was a latent defect of which BEC had no notice. (Conclusion of Law, ¶ 4). From this conclusion, the Court found that the design of the BEC inspection program was reasonable given the admission by Appellant's standard of care expert that other electrical coops utilized similar programs. (Conclusion of Law, ¶¶ 8, 9, 19). The Court thus concluded that the Appellant's evidence

failed to demonstrate "that BEC created, or knew, or should have known of the clearance defect" and that the Appellants had therefore failed to prove their case. In a footnote, the Trial Court further concluded that the Appellants were negligent when they recognized the presence of the line, stopped, ""eye-balled" the height of the line and the height of the tent, and guessed incorrectly they had room to clear underneath the line." The Court then rendered the additional finding that this negligence of the Appellants outweighed any negligence of BEC and BEC was entitled to judgment on this basis as well.

ARGUMENT

I. Introduction:

The Order of Judgment entered by the Trial Court contains a significant omission. It fails to address in any fashion the standard of care to which either the Appellants or the Respondent was held. From the context and the discussion engaged in by the Trial Court, it is clear that an ordinary care standard of care was applied by the Court to both parties. In applying an ordinary care standard of care to BEC, the Trial Court applied an incorrect standard in evaluating the evidence admitted at trial. Unsurprisingly, this fundamental error led the Trial Court astray in its subsequent legal as well as its factual analysis of the evidence and ensuing conclusions. These errors, both individually and cumulatively, require not only reversal of the judgment entered by the Trial Court but more importantly a direction on remand that judgment be entered as to Respondent's liability and that the Trial Court proceed to allocate respective degrees of negligence between the parties and determine the issue of damages.

In making these assertions, Appellants are well aware that their burden before this Court is a heavy one. They acknowledge at the outset that if there is any evidence which

reasonably tends to support the Trial Court's factual findings, those findings must be affirmed. Shepard v. South Carolina Department of Corrections, 299 S.C. 370, 385 S.E.2d 35 (1989). However, the Trial Court's legal conclusions are subject to de novo review. McMillan v. Gold Kist, Inc., 353 S.C. 353, 577 S.E.2d 482 (2003).

An unbroken line of cases stretching back over 100 years uniformly holds that providers of electricity are held to a higher standard of care than ordinary care. This has been phrased in various ways. In Lundy v. Southern Bell Telephone & Telegraph Co., 90 S.C. 25, 72 S.E. 558 (1911), the Supreme Court phrased the standard as "a very high degree of care in their construction, repair, inspection and maintenance, in order to prevent injury to others." In Weeks v. Carolina Power & Light Co., 156 S.C. 158, 153 S.E. 119 (1930), the Court reiterated that those who distribute electricity are held to a very high degree of care in the construction, repair, inspection and maintenance of their lines. Elliott v. Black River Electric Cooperative, 233 S.C. 233, 104 S.E.2d 357 (1958) reiterated this standard stating "The rule is universal that in its use of high-voltage wires a power company is required to exercise a high degree of care to prevent injury to persons rightfully in proximity to them." The Court went on to note that this standard requires more of an electric utility than mere mechanical skill. Foresight with regard to reasonably probable contingencies is also required. Elliott, supra. This standard was again applied in Sherrill v. Southern Bell Telephone and Telegraph Company, 260 S.C. 494, 197 S.E.2d 283 (1973), and in Holmes v. Black River Electric Cooperative, Inc., 274 S.C. 252, 262 S.E.2d 875 (1980).

II. The Trial Court erred in applying a latent defect analysis where the evidence established the existence of a defect which was discoverable by trained personnel upon reasonable inspection.

The Trial Court reached the conclusion that Appellants were not entitled to prevail because in the Court's view they failed to prove that Respondent created, knew or should have known that the high voltage distribution was 19 inches lower than the minimum required height. This conclusion in turns rests upon the finding that this condition of the line represented a latent defect. In support of the conclusion that the low hanging distribution line represented a latent defect, the Trial Court relied upon Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966).

Grier does not support application of a latent defect analysis under the circumstances of this case. The case involved a motor vehicle accident in which the vehicle being operated by the defendant experienced a brake failure. The plaintiff claimed that the brake failure was negligence per se because the lack of operable brakes was a violation of the applicable motor vehicle code. The Supreme Court rejected a construction of the statute which would have made the act of a brake failure in and of itself negligence per se.

In reaching this conclusion, the Grier Court quoted from a decision of the Supreme Court of North Carolina, Stephens v. Southern Oil Company of North Carolina, Inc., 259 N.C. 456, 131 S.E.2d 39 (1963) as follows:

> "Plaintiff has shown the violation of a statute, G.S. § 20-124, mandatory in its language. Notwithstanding this mandatory language, the statute must be given a reasonable interpretation to promote its intended purpose. The Legislature did not intend to make operators of motor vehicles insurers of the adequacy of their brakes. The operator must act with care and diligence to see that his brakes meet the standard prescribed by statute; but if because of some latent defect, unknown to the operator and not reasonably discoverable upon proper inspection, he is not able to control the movement of his car, he is not negligent, and for that reason

not liable for injuries directly resulting from such loss of control. The injuries result from an unavoidable accident." (Emphasis added)

The language defining a latent defect as one which is unknown and not reasonably discoverable upon proper inspection is consistent with other South Carolina cases defining what constitutes a latent defect. Both Callander v. Charleston Doughnut Corporation, 305 S.C. 123, 406 S.E.2d 361 (1991) and Meadows v. Heritage Village Church and Missionary Fellowship, Inc., 305 S.C. 375, 409 S.E.2d 349 (1991) state that to constitute a latent defect the condition must be one which a reasonably careful inspection will not reveal. The evidence in the present case fails to satisfy that requirement.

First, the Respondents *admitted* – through discovery responses which were admitted at trial and in trial testimony by an officer of BEC – that in the 25 years which elapsed between the time the line was erected and the date of these injuries and deaths, BEC never inspected line for compliance with the NESC. This is true despite the requirements of 7 C.F.R. 1730.21 for inspections of power lines for compliance with the height requirements of the NESC along with records of those inspections.

At trial, BEC's own expert, Eric Jackson, admitted the discovery response constitutes a violation of the NESC and the Code of Federal Regulations to conduct inspections that determine whether the power line is at the height required by the NESC. (HT, p. 809, line 1-p. 810, line 22).[2]

[2] The violation of an applicable statute is negligence *per se*. Causative violations of an applicable statute constitutes actionable negligence and is evidence of recklessness, willfulness and wantonness. Field v. Gregory, 230 S.C. 39, 94 S.E.2d 15 (1956).

BEC admitted that the NESC was the "Bible" of the industry in respects to operational safety. (Transcript, P. 126, l. 4-7). Indeed, as a condition of receiving funding from the federal government, BEC was required by regulation to "ensure that its electric system, including all electric distribution, transmission, and generating facilities, is designed, constructed, operated, and maintained in accordance with all applicable provisions of the most current and accepted criteria of the National Electrical Safety Code (NESC) and all applicable and current electrical and safety requirements of any State or local governmental entity." 7 C.F.R. § 1724.50.

BEC maintained throughout trial that a line with too much sag would have been "readily visible" to a trained and experienced observer. (Transcript, P. 778, l. 4-24, P. 802, l. 2-9). Yet, BEC also conceded that it was not possible to accurately judge the height of this particular line, even by an experienced lineman, given that the line had a backdrop of only the sky, providing no cues or frame of reference for making a height judgment. (Transcript, P. 802, l. 10-23). The only way to know how high a line is would be to measure it. (Transcript. P. 802, l. 19-23). Lastly, at the risk of belaboring the obvious, had the line been measured before the day of the event in question, the fact that it was some 19 inches too low would have been obvious to anyone aware of the NESC requirements.

Under this set of facts, the evidence fails to satisfy the requirement that a reasonable inspection would not reveal the condition in order to constitute a latent defect. The admissions that there had never been any inspection of the line for NESC compliance were clearly binding judicial admissions on BEC. Lytle v. Reagan, 256 S.C. 269, 182 S.E.2d 302 (1971). The Court in Lytle explained the requirements as follows:

"The facts of this case do not, in our judgment, require an effort on our part to formulate or apply a general or uniform rule as to the circumstances under which a party is bound and concluded by his own adverse testimony. The decided weight of authority from other jurisdictions, however, clearly supports the proposition that where the testimony of a party, adverse to himself, consists mainly of estimates, opinions and conclusions, rather than actual facts within his knowledge, such is not conclusive upon him when there is other evidence in the record tending to prove that such estimates, opinions and conclusions on his part are not in accord with the true facts."

In order to constitute a binding judicial admission, the subject matter of the admission must be a statement of fact rather than one of opinion. The statement that the line had never inspected for compliance with the NESC clearly meets this requirement. Under the circumstances of the present case, BEC is bound by its admission. Moreover, this admission, together with the other testimony, establishes as a matter of law that the line was not a latent defect.

The Trial Court made the following finding of fact which goes along with its legal conclusion that the condition of the line was a latent defect:

"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."

(Order of Judgment, Findings of Fact, ¶ 19).

From that observation, the Trial Court ultimately reached the conclusion of law "...that the plaintiffs have not proved that BEC created, or knew, or should have known of the clearance defect." (Order of Judgment, Conclusions of Law, ¶ 13).

In engaging in this analysis, Appellants submit that the Court committed a fundamental factual error which was compounded by its application of an incorrect standard of care to BEC. While the inspection policy and procedure may well have been consistent with what other electrical utilities around the country do as found by the Trial

Court, that was not the relevant issue. The relevant issue is what BEC *actually did* in inspecting its lines, not what its program or policy was. The undisputed evidence before the Trial Court was that the BEC employee who was responsible for the area that included this line testified without contradiction that he had never inspected any lines on which he worked. This gentleman had been physically present on one of the poles from which the span in question ran some 7 months before the date of the electrocutions and injuries. He testified unequivocally that he didn't inspect the line at that time. It was clear at least with respect to the line in question, that while the policy itself may have met standard of care, the in the field execution of that policy was entirely fictional over the four plus years leading up the events at issue.

There are several cases which are instructive to the Trial Court's conclusion that BEC neither knew nor should have known of the low hanging line. The first of these is Weeks, supra. The Supreme Court in that case made the following observation:

> "The failure of an electric company to keep its wires insulated, so that a wire strung above them and falling across them becomes charged and causes the death of a pedestrian coming in contact with it, is a breach of duty to the public, without respect to its actual knowledge of the fallen wire or its diligence in discovering it."

The second is Mitchell v. Charleston Light & Power Company, 45 S.C. 146, 22 S.E. 767 (1895) in which the utility appealed a verdict in favor of a person injured after coming into contact with a live wire. Among the claims of error in the case was that the jury should have been instructed in the following language: "..that if the jury find that the wire in question was broken by a storm, or from some cause beyond the control of the defendant, then no blame can attach to the defendant, from the fact that the wire fell and remained lying on the ground in the public thoroughfare, unless it was allowed to remain

there after notice for an unreasonable length of time--that is, for a period of time longer than would furnish a reasonable opportunity for the removal of the wire." The Supreme Court rejected this claim finding that the inclusion of the words "after notice" rendered the requested charge legally incorrect because it failed to allow for the possibility that the Defendant was "negligently ignorant", i.e. that it failed to know what it reasonably should have known.

Similarly the Court also rejected a claim of error based on the failure to give the following instruction: "That the defendant was entitled to a reasonable time after (being informed of) the fall of the wire, in which to repair it or to remove it out of the way of persons using the streets, and if the jury find that the injury to the plaintiff occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action." The Court rejected this claim because it failed to allow for the possibility that the negligence of the Defendant also consisted in failing to have a proper mechanism to discover or receive notice of the defective condition of its lines, again that it was negligently ignorant. The Court summarized what the law required of a utility in this regard as: "The defendant was bound to exercise due diligence to receive information as to the condition of its wires, and its failure to use proper diligence in this respect would constitute negligence."

Lastly, in Hill v. Carolina Power & Light Company, et al., 204 S.C. 83, 28 S.E.2d 545 (1943), the Supreme Court observed: "It is not only the duty of an electric power company to repair its electric lines when it has knowledge of needed repairs, but it is bound to use due diligence to acquire information and knowledge concerning the condition of its electric wires: and failure to do so constitutes negligence."

The record shows without contradiction that BEC failed to follow its own inspection procedures and that had such procedures been followed, according to BEC's own expert, the excessive sag in this line would have been apparent to a trained lineman. What is unknown is for how long this line had failed to comply with the NESC height requirements. The reason that information is unknown is because admittedly at no time after December 15, 2003 did the BEC lineman whose area included this line ever conduct an inspection of the line despite being on the property on multiple occasions during the next 4 plus years. As the Supreme Court observed in Hill, supra that conduct is negligent. BEC should not be allowed to use its own negligence as both a sword and shield in this case to claim that they had no notice of the defect, and the Trial Court erred in accepting such a claim by BEC by engaging in the latent defect analysis BEC suggested. The error is magnified when it is considered that BEC had a heightened standard of care due to the extreme danger posed by its high voltage distribution line.

The record before this Court leads only to the conclusion that BEC was "negligently ignorant" with regard to inspecting this line. Their lineman admits he failed to inspect in accordance with BEC policy. BEC might have become aware of the lineman's failure, but they had a policy of keeping no records of these inspections which were done in connection with their normal service calls (Transcript, P. 83, l. 4-P. 84, l. 5). Had they kept such records, they might have alerted to the fact that in this instance Rico Harrell was failing to inspect as required. As a matter of policy, the risk of loss occasioned by such negligent ignorance should fall upon the party who was negligent, not upon the party who was harmed. This is consistent with the purpose of tort law which seeks to protect safety interests and is based on protecting society as a whole from harm.

Sapp v. Ford Motor Company, 386 S.C. 143, 687 S.E.2d 47 (2009). This policy concern is accentuated when the party who seeks to profit from its own neglect is a party that is also held to a higher standard of care because it is engaged in an intrinsically hazardous activity.

III. The Trial Court erred in applying an ordinary care standard of care to the Respondent in weighing the respective negligence of each party for purposes of the Respondent's comparative negligence defense.

The Trial Court wrote a single paragraph footnote with a comparative negligence analysis of the parties and found that the negligence of the Appellants outweighed any negligence of the Respondent. The facts noted by the Court in reaching this conclusion were as follows:

(a) Appellants were aware of the presence of the line;

(b) The clearance at the point of contact was 18'2" which was only 4" below the required height;

(c) The Appellants "eye-balled" the height of the line and the height of the tent and guessed incorrectly that they had room for the tent to clear the line;

(d) That they violated the OSHA ten foot rule; and

(e) That BEC had no notice that there was going to be the activity of setting up the tents.

In reaching the conclusion that the doctrine of comparative negligence barred recovery, the Trial Court once again failed to consider the respective standards of care applicable to the parties. From the content of the footnote, it is clear that the Trial Court intended and in fact did apply the same standard of ordinary care to both the Appellants and the Respondent. With all the utmost respect for the Trial Court, when the proper standard of a high degree of care is applied to the Respondent, the conclusion that the

negligence of the Appellants exceeded that of the Respondent is not only without evidentiary support, it is wholly illogical.

At the outset, Appellants are not contending that the evidence did not support a factual finding that they were aware of the presence of the line or that they violated in the OSHA ten foot rule. In fact, those elements formed the basis for the acknowledgement made by the Appellants in their written closing argument that the evidence would support an allocation of 10% negligence on their part. The discussion that follows that will primarily focus on the conclusion in item (c) that the Appellants "eye-balled" line and guessed incorrectly concerning the amount of clearance.

Any evaluation of comparative negligence of necessity involves an analysis of the conduct of the parties. Estate of Haley v. Brown, 370 S.C. 240, 634 S.E.2d 62 (2006). Because it is clear that the Trial Court's finding of negligence on the part of the Appellants necessarily rests on their visual inspection of the line and its height, it follows that it is similarly appropriate to look at the conduct of the Respondent, the judgments that it made about the line and its height, and how those judgments were arrived at by the Respondent. Only when you are comparing conduct to conduct is it possible to make a reasoned determination of the respective degrees of negligence of each party.

When the verb "eyeball" was used during the course of trial to describe any party's behavior in making judgments concerning the height of the line, it was used by *Respondent* to describe *its own conduct*. Mr. Jackson, the standard of care expert testified to the following concerning BEC using visual observation to make judgments concerning the height of the line:

(a) "You'll know, and they're, of course, eyeballing it from a bucket truck."

(Transcript, P. 790, l. 2-3)

(b) "Well, that, and I guess the other thing is we know that in terms of anyone being out there, I think this was recently put out as a -- there was some kind of maintenance sheet that was produced to me where on 12/15/2003 that riser conduit had to be repaired, so there was line personnel out there then and would have put eyeballs on the line, and as far as I know, they didn't report it being low at that point in time, so it would suggest it was built properly."

(Transcript, P. 790, l. 6-14)

Isaiah Ward, a former BEC lineman testified on direct exam:

Q. And any measurements that you would have had to do in that process as far as the amount of sag, those would be done by eyeballing?

A. Yes, sir.

(Transcript, P. 876, l. 21-24)

At the risk of redundancy, and as noted in the statement of the evidence at trial, Mr. Jackson testified on direct examination to the following description of the BEC inspection program:

"Q. If you were to assume that Berkeley's inspection program is pole inspection on an every eight-year cycle, **plus having its employees and line personnel look at the lines as they drive around the service area**, and you assume that is the inspection program, do you have an opinion to a reasonable degree of engineering certainty as to whether that program complies with the requirements of the National Electric Safety Code?

A. It does, and it's also a very common method of performing those inspections as it relates to other utilities around the country, in my experience."

(Transcript, P. 769, l. 11-21) (emphasis added).

Similarly, the BEC manager of operations who was responsible for oversight of the inspection program stated:

Q. "And as I understand it, Berkeley Electric's inspection program consists basically of linemen that are riding down the street. They're looking at the power lines.

A. Correct."

(Transcript, P. 219, l. 1-5).

The evidence concerning the implementation of the BEC line inspection program was that the people charged with conducting those inspections did the exact same thing that the Trial Court faulted the Appellants for: they looked at a power line and made a judgment about its height. The only difference between the two was that when the Respondents looked at their power lines and made a judgment concerning their height, they were required to exercise a higher standard of care due the hazards involved in their distribution of electricity while the Appellants were only held to a standard of ordinary care.

The Trial Court's finding that the negligence of the Appellants outweighed that of the Respondents only makes any logical sense if the same standard of care is applied to both parties, i.e., an ordinary care standard of care. But there is no rational basis on which that conclusion can be reached when the parties are engaged in the exact same conduct in endeavoring to make the exact same judgment and the party deemed less negligent has a heightened standard of care as opposed to the party deemed to be more negligent. For this reason, the Trial Court's conclusion fails to satisfy the "any evidence" test of Shepard, supra and must be reversed.

This result becomes stronger when the evidence surrounding several of the other conclusions contained in the footnote is examined more closely. First, the Trial Court found that no notice had been given to BEC concerning the movement of the tents. Respectfully, that is not a relevant issue under the circumstances of this case. BEC was already charged with notice of the general nature of the activity that would take place beneath its lines. It was for that very reason that NESC set a minimum height requirement

of 18'6" for this line. The evidence adduced at trial was again undisputed that had the line complied with the minimum height requirements, the tent would not have made contact with the line.

Similarly, the Trial Court's emphasis that the line was "only a few inches" below code at the point of contact misses the point in several respects. It is entirely possible that those "few inches" made the difference between life and death in this case. But more importantly, the point of contact did not represent the low point of this particular line. The low point or midpoint of the line had a clearance of 16'11", or 19 inches below code requirement. That meant a significant length of this span of line was below code and represented a hazard to any person with proximity to it. It was only fortuitous that the point of contact in this case was just a "few inches" shy of being legal. As acknowledged by the Respondent, the NESC represents the Bible for safety in the electric utility industry. It carried with it the force of law under Rural Utility Service federal regulations applicable to BEC. It is designed to protect the public from the hazards posed by electricity. To say that the line "almost" complied with the code at the point of contact is really to say that the line was "almost" safe. It wasn't.

Lastly, Appellant wishes to devote some discussion to the violation of the OSHA ten foot rule and why that violation merits only a small allocation of negligence to the Appellants themselves, under the evidence submitted by *the Respondents own experts* who testified concerning that subject.

Eric Jackson was BEC's standard of care expert and stated the following on his direct examination:

Q. Were any of those violation regulations violated by the men in moving the tent?

A. Well, yes and no. The way I read the record and OSHA report, the supervisor at first recognized the presence of the line, warned his workers of the line, and then later on failed to track the work away from the line.

(Transcript, P. 757, l. 8-14).

In his direct examination, Ken Keberle who was called by BEC as an expert in the area of event safety, stated:

Q. What should an employer who operates a tent rental business do in terms of workplace safety to avoid an accident like this? What are the steps they should go through?

A. First is understanding and training that there is the ten-foot rule. Again, ten foot is the minimum safe approach distance. Never get within that ten-foot clearance zone, using spotters, training employees of the hazards, and communication on the job site."

(Transcript, P. 839, l. 9-17).

Mr. Keberle amplified on this opinion with the following:

"Q. And if there are hazards such as a low-hanging electric line, what should the tent company do?

A. Well, the steps involved with a site survey generally accepted in industry is: One, they're noted, communicated from whoever does the site survey through a written form to the operations people who then pass that on to the installers.

The installers need to have the site survey with them, understand the site survey, and then the hazards are noted and how they're to be avoided.

Q. Had that been done in this case, do you have an opinion to a reasonable degree of certainty as to whether the accident could have been avoided?

A. The site survey, whether or not it was done, the communication did not occur to let the installers get within the ten-foot exclusion area."

(Transcript, P. 840, l. 5-20).

BEC called Mr. Thomas Markel as an expert to address the violation of the OSHA ten foot rule. Mr. Markel opined:

"Q. What steps should the rental company have taken regarding this work to avoid the accident?

A. Well, it sounds like at the beginning they took the steps. They had done some type of site review, and they had decided where to install the tents, but where this thing failed, it seemed, is that the planner changed his mind as to where he wanted a tent, and he went and picked up this 20-by-20 push up frame tent, push pole frame tent, and walked it -- which is not uncommon. A lot of people do that, move those tents around, but they walked it, and without realizing -- or they actually realized they were kind of close to the power line, but they picked it up and walked it even closer to the power line.

And they basically should have -- you know, situational presence, they should have realized between the planner and the tent rental company personnel that they should have stayed clear of that power line."

(Transcript, P. 848, l. 11-P. 849, l. 3)

Finally, the actual OSHA investigator was deposed and stated, "we did not find the [Plaintiffs] in violation of anything." (Wilks depo, p. 16, lines 6-7). "What we find most of the time if we find the employees had some stake in it, we usually go that employee misconduct route." (Wilks depo, p. 16, lines 7-10). However, Mr. Wilks stated, that none of the men holding the tent were cited because no employee misconduct was found. (Wilks Depo, p. 26, lines 16-21,p. 27, lines 5-9).

The point of the above recitation is to point out to this Court that the evidence that the Respondents themselves produced at trial laid the majority of the blame for the violation of the 10 foot rule not on the Appellants but on Mr. Richardson, Ms. Donehue and Mr. Clayson, the crew leader. While Appellants acknowledge that the evidence at trial supports some allocation of negligence to themselves, when viewed under an appropriate standard of care analysis, the Trial Court's finding that the negligence of the Appellants exceeded that of the Respondent is not supported by any evidence and requires reversal.

IV. The Trial Court erred in failing to grant Appellants' motion for judgment on the issue of Respondent's liability at the close of the evidence.

Appellants will not repeat the argument of the preceding section concerning why the Trial Court's conclusion that their negligence exceeded that of the Respondent was error. However, they do incorporate that argument into this enumeration of error. Not only was there not "any evidence" to support the Trial Court's comparative negligence finding, but when the correct standard of care is applied, the evidence demanded a finding that the Respondent's negligence exceeded that of the Appellants. The Trial Court therefore erred in denying Appellants' Motion for Partial Directed Verdict or Judgment on this issue made at the close of the evidence.

Admittedly, this case presents an unusual set of circumstances that are not likely to arise in the majority of negligence cases that come before this Court. Nevertheless, Appellants submit that when the uncontradicted evidence that was before the Trial Court is viewed under an appropriate standard of care, that evidence demanded verdict and judgment in Appellant's favor on the comparative negligence issue as a matter of law. In Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 33, 491 S.E.2d 571, 575 (1997), the Supreme Court stated the following regarding directing a verdict on the issue of comparative negligence:

> ""Generally, contributory negligence is a question for determination by the jury. But when the evidence admits only one reasonable inference, it becomes a matter of law for the determination of the court." [cite omitted]. A directed verdict is warranted only if the only reasonable inference that may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent."

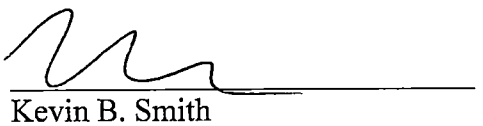
While all the reported South Carolina cases deal the direction of a verdict in favor of the defendant on the issue of comparative negligence, there is no reason that the rule enunciated in Creech, supra is not equally applicable to the direction of a verdict in favor

of the plaintiff, i.e., that "the only reasonable inference which can be drawn from the evidence is that the [defendant's] negligence exceeded fifty percent." This is exactly such a case. That is so because the operative conduct involved by each party is making visual judgments concerning the height of a power line. Where the standard of care for one party making that judgment is higher than the other party, the negligence of the party with the heightened standard of care is per se greater. Thus, the Trial Court was additionally erred when it failed to grant the Appellants' Motion for a directed verdict on the issue of comparative negligence.

CONCLUSION

The Trial Court's failure to analyze the evidence in the context of the proper standard of care applicable to each party led the Court to erroneously conclude that the distribution line represented a latent defect not reasonably discoverable and that no evidence suggested the Respondent knew or should have known of the defect. This failure to engage in a correct standard of care analysis further led the Trial Court to erroneously decide the issue of the parties' comparative negligence. This Court should reverse the Trial Court's judgment, remand the case with direction for entry of judgment in favor of Appellants and against Respondent, and instruct the Trial Court to decide the respective percentages of fault applicable to each party and the issue of the damages to which Appellants are entitled.

Respectfully Submitted



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8th day of June, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY CIRCUIT COURT
Roger M. Young, Sr., Circuit Court Judge

RECEIVED
JUN 10 2016
SC Court of Appeals

Civil Action Nos.: 14-CP-08-1231, 14-CP-08-1232
Appellate Case No.: 2016-000521

Estate of John Fortney, Deceased,
By His Duly Appointed Personal
Representative, Constance S. Fortney,..... Appellant,

v.

Berkeley Electric Cooperative,.....Respondent.

AND

John Steven Robinson,.....Appellant,

v.

Berkeley Electric Cooperative,.....Respondent.

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the Appellant's Initial Brief complies with the requirements of Rule 211 of the South Carolina Appellate Court Rules, and that the Designation of Matter to be Included in the Record on Appeal contains no material which is irrelevant to the appeal.

June 8, 2016

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