THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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.

FINAL REPLY BRIEF OF APPELLANTS

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Avenue
N. Charleston, SC 29406
(843) 769-7077
(843)769-4567 (facsimile)
ksmith@hoffmanlaw.net

Don C. Keenan
Andrew Gould
The Keenan Law Firm
148 Nassau Street, N.W.
Atlanta, GA 30303
(404) 523-2200
(404) 524-1662 (facsimile)
dkeenan@keenanlawfirm.com
agould@keenanlawfirm.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. Introduction:

The Respondent attempts to persuade this Court that this appeal is nothing more than a re-weighing of the evidence adduced at trial by a spurned litigant. That characterization, while understandable, is incorrect. The Trial Court's Order in this case, when read fairly and as a whole, demonstrates that it failed to grasp controlling legal principles and apply those principles to the factual findings that it made. Appellants were entitled to a decision of the case utilizing correct legal standards. The failure of the Trial Court to do so amounts to error requiring reversal.

II. Appellants preserved their claims of error for appeal.

For each error enumerated, Respondent claims Appellants failed to assert the claim in Trial Court, i.e., they failed to advocate a standard of care position, they failed to advocate a lack of diligence position militating against a latent defect finding and they failed to adequately move for judgment in their favor as to liability at the conclusion of the evidence. The Respondent is incorrect in each of these assertions.

Respondent's basic premise is that as a condition precedent to prosecute an appeal from a bench trial, a party is required to seek relief under SCRCP 59(a) or 59(e) (See Initial Brief pp. 5, 9). The Respondent cites no authority for this peculiar proposition and Appellants find none. The cases cited by Respondent fail to stand for this proposition. Parks v. Morris Homes Corporation, 245 S.C. 461, 141 S.E.2d 129 (1965) holds that when the trial court during the course of trial makes an allegedly prejudicial remark in the presence of the jury, in order to preserve a claim of error, the aggrieved party must raise an objection contemporaneously to the remark. Wilder Corporation v.

Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) not only fails to support the proposition advanced by Respondent, it affirmatively rejects it. The Court stated: "As such, Buyer contends that the above issues were not preserved for review because Seller failed to make a Rule 59(e) motion. We disagree. Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." South Carolina Department of Transportation v. First Carolina Corporation, 372 S.C. 295, 641 S.E.2d 903 (2007) stands for the proposition that a party urging error on appeal must have advocated its position before the Trial Court with sufficient specificity to allow the Trial Court to address it.

The record before this Court demonstrates that Appellants fulfilled their obligations to advocate their positions with respect to the issues raised in this appeal. With respect to the standard of care issue, Appellants told the Court in their opening statement: "The law says, first of all, the power companies must use the highest degree of care in constructing, maintaining and inspecting their power lines. That's the legal standard in this case, the highest degree of care." (R. p. 215, lines 11-14). That position was continually reiterated throughout the trial. This brief does not allow for a complete recitation of all the occasions where Appellant's standard of care position was enunciated to the Trial Court, however several additional examples include the following:

(a) "We submit to Your Honor, did Berkeley Electric exercise the highest degree of care and act in accordance with the danger?" (R. p. 222, line 25-p. 223, line 2);

(b) "These, Your Honor, in general are what we would submit are evidence of negligence that you might use in making your

determination, so we are not contending this creates a private cause of action, but it does give relevant evidence to you in your consideration as to whether or not they met their standard of the highest degree of care." (R. p. 241, lines 17-23);

(c) "It's our position that represents the standard of care in this case, the highest degree of care, and that's not being done." (R. p. 434, lines 14-16).

Similarly, the Appellants continually advocated to the Trial Court the position that the condition of the power line was one which would have been revealed by a reasonably careful inspection. For example, counsel stated to the Court the following: "I think at the end of the case we're going to make a case to Your Honor that the inspection program is faulty in and of itself, that Berkeley Electric has the highest degree of care in the construction and maintenance of power lines, and if they are required by federal law to do inspections and they're required to write down those inspections are done and they're not just makes it really hard to do inspections, especially to the highest degree of care, and, ultimately, we'll contend, that's why this happened." (R. p. 416, lines 11-20). Indeed, that was the entire point of tendering the interrogatory response where the Respondent admitted that the line had never been inspected for compliance with NESC clearance requirements and the soliciting of the admission from the Respondents Vice-President Timothy Mobley that in the 25 years since the line had been erected, it had never been inspected for NESC compliance. (R. p. 407, lines 6-12).

Lastly, Respondent suggests the Appellants waived the claim regarding their request for judgment as a matter of law concerning Respondent's liability because after

counsel stated they would submit a brief, only proposed findings of fact and conclusion of law were submitted. As the cases cited by Respondent hold, the obligation of the complaining party is to raise its position to the Trial Court with sufficient specificity to allow the Trial Court to rule. South Carolina Department of Transportation v. First Carolina Corporation, 372 S.C. 295, 641 S.E.2d 903 (2007). This was certainly done. Respondent's additional claim regarding the terminology placed on the motion, i.e., "directed verdict" clearly exalts form over substance. The point here is that Appellants clearly and unambiguously informed the Court of their position. The correct standard of care was advocated at length in the Appellants' proposed order. The Trial Court considered this position of law and rejected it. The Court ruled in each instance, the ruling is the Order and Judgment appealed from.

III. Irrespective of the phrasing, the Respondent is held to a higher degree of care than Appellant.

Respondent cites Eargle v. Sumter Lighting Co., 110 S.C. 560, 96 S.E. 909 (1918), Elliott v. Black River Electric Cooperative, 233 S.C. 233, 104 S.E.2d 357 (1958) and Sherrill v. Southern Bell Telephone and Telegraph Company, 260 S.C. 494, 197 S.E.2d 283 (1973) as authority for the proposition that the standard of care required of it was a simple ordinary care standard. Respondent chose to include selected quotations from those three cases in its initial brief. The quoted material demonstrates the correctness of proposition that is advanced by Appellants and the error of the Trial Court: where a party is engaged in a hazardous activity, as Respondent admittedly is, that party is held to a heightened standard of care that is commensurate with the danger involved.

Thus, Eargle holds: "What we have held is that, in dealing with an agency known to be so dangerous and deadly, a very high degree of care is required; but that is nothing

more than a different way of expressing what is axiomatic in the law; that the degree of care to be exercised in every case should be commensurate with the danger-the greater the danger, the greater the care required..." The Elliott Court states the standard as "To state that the highest care must be used to prevent injury and that ordinary care must be used in view of all the circumstances to prevent injury sounds different in statement, but, when analyzed, the meaning is not far different, for the ordinary care required under the circumstances is relatively a high degree of care when put into practice." The Sherrill Court states "Our courts have established a high degree of care for the utility companies in maintaining wire lines. When utility companies maintain wire lines on or over private premises, they are required to use care commensurate with the danger to see that no injury comes to persons rightfully in proximity to them and who are guilty of no wrong."

In each quote, the plain language employed by the Court emphasizes that the degree of care required of one who is engaged in a hazardous activity is a degree of care commensurate with the danger. That undisputed standard, applied to the circumstances of this case, demonstrates the error committed by the Trial Court. The Trial Court found that the act of Appellants in looking at the power line and making a judgment that the tent could be safely moved beneath the line was negligent. As acknowledged by Appellants in their initial brief, that finding by the Trial Court is reviewed by this Court under an any evidence standard. Because of that, Appellants have not and do not challenge that finding in this appeal.

That said, crediting the evidence submitted by the Respondents at trial in the light most favorable to judgment of the Court, the evidence unequivocally demonstrated that Respondent engaged in precisely the same conduct in conducting whatever inspections it

may have done of this particular power line during the 15 year period between the erection of the line and the electrocution of John Fortney and the injury to John Robinson. Respondent would have this Court hold that in executing the public franchise granted to it by the State and while engaged in an activity universally recognized as extremely hazardous that they are held to the same standard of care in dealing with high voltage power lines as a group of day laborers moving a tent. Appellants don't make the characterization of themselves as day laborers to denigrate themselves, they were men who were performing an honest day's labor for an honest day's pay. Rather, it demonstrates the absurdity of the position taken by the Respondent, a party who professes to have the necessary expertise to engage in a hazardous activity within legally required safety standards.

When assessed under the correct legal standard, the Trial Court's judgment lacks logical consistency and demonstrates plain legal error requiring reversal.

IV. The Trial Court did use a latent defect analysis in rendering its decision.

The Respondent disputes that the Trial Court utilized a latent defect analysis asserting that Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966) "has nothing to do with latent defect analysis." (Initial Brief, p. 10). This is a curious assertion given the opinion states:

> 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.

In Grier, it is only the fact that the defect in the Defendant's vehicle is latent which excuses him from being held liable for a collision which occurred because his vehicle had non-functioning brakes. Were the holding to have been otherwise, the brake failure in and of itself would have been conclusive of the negligence on the part of the Defendant, which was the position advocated by the Plaintiff.

The situation is identical in the present case. On the date in question, the power line failed to meet minimum clearance requirements set by law. And, had the line been at code height, the tent never would have made contact. These central facts in the case are curiously never acknowledged by the Respondent. Moreover, it is undisputed that Respondent never inspected this line for compliance for minimum clearance requirements set by the NESC despite specific statutory obligations to inspect and admissions of this requirement by the Respondent itself.[1] Respondent quibbles in its initial brief of whether the interrogatory response admitting this fact or the testimony of its expert constitute a binding judicial admission of this fact. (Initial Brief, pp. 12-13). However, they completely gloss over the admission at trial by Respondent's Vice President for engineering and operations that the line had never been inspected for compliance with clearance requirements. (R. p. 407, lines 6-12).

Ultimately, Respondent's protests concerning whether there was a judicial admission are much ado about nothing because it again admits the line was never

[1] 7 CFR 1730.21 requires: (1) inspections of power lines for compliance with the height requirements of the NESC; (2) records of the inspections; (3) all deficiencies must be recorded; and (4) the records of deficiencies must be kept long enough to identify long-term trends. The Respondents Vice President of engineering and operations conceded this point and testified that they are required to inspect their lines, that part of that inspection must be to determine if they are at code height, and the reason for those inspections is to protect people from being electrocuted. (R. p. 340, line 17-p. 341, line 16).

inspected in its brief to this Court. Specifically, Respondent states: "BEC's interrogatory response is true, BEC does not inspect its lines for NESC compliance because it builds its lines to RUS specifications which exceed NESC requirements." (Initial Brief p. 12). Respondent's position begs the question.

Whatever standards the line was built to in 1993 have nothing to do with the question of what the clearance of the line was on April 23, 2008. Clearly, at some point between 1993 and 2008, the line came out of compliance with NESC clearance standards. Respondent admits it is held to compliance with those standards. Respondent admits it never in the 15 year history of the line checked to see if the line complied with those standards. Respondent's position is akin to the Defendant in Grier saying "I never needed to inspect my brakes because they worked when the car left the factory."

Respondent is required to dispute the Trial Court's use of a latent defect analysis because it acknowledges that a reasonable inspection of the line would have revealed the lack of code compliance. Thus, it cannot as a matter of law constitute a latent defect so as to excuse Respondent's failure to have the line meet code requirements. The Trial Court erred in ruling otherwise.

CONCLUSION

The errors enumerated were preserved for review and the claim that post-judgment motions practice was required in order to preserve those claims is legally unsupportable. The correct reading of the case law included in the Respondent's brief demonstrates that it is held to a heightened standard care. Finally, the authority cited by Trial Court requires a finding of a latent defect analysis and by Respondent's own admission, the evidence affirmatively fails to support such a conclusion.

January 18, 2017

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Avenue
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

Don C. Keenan
Andrew Gould
Keenan Law Firm
148 Nassau Street, N.W.
Atlanta, GA 30303-2010
(800) 677-2025
dkeenan@keenanlawfirm.com

Attorneys for Appellants

Other Counsel of Record:

Pope D. Johnson, III, Esquire
1230 Richland Street
Columbia SC 29201
(803) 730-1078
pope@popejohnsonlaw.com

John B. Williams, Esquire
Williams & Hults, LLC
P.O. Box 1288
Moncks Corner SC 29461
(843) 761-8232
jbw@williamsandhulst.com

Attorneys for Respondent

RECEIVED

JAN 25 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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 COMPLIANCE

The undersigned certifies that this Final Reply Brief of Appellants complies with Rule 211(b) SCACR. The undersigned further certifies that the Final Reply Brief of Appellants complies with the South Carolina Supreme Court's August 13, 2007 Order regarding Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Findings.

January 18, 2017

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Avenue
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net

Don C. Keenan
Andrew Gould
Keenan Law Firm
148 Nassau Street, N.W.
Atlanta, GA 30303-2010
Don C. Keenan, Esq.
The Keenan Law Firm
148 Nassau Street, N.W.
Atlanta GA 30303-2010
(800) 677-2025
dkeenan@keenanlawfirm.com

Attorneys for Appellants

Other Counsel of Record:
Pope D. Johnson, III, Esquire
1230 Richland Street
Columbia SC 29201
(803) 730-1078
pope@popejohnsonlaw.com

John B. Williams, Esquire
Williams & Hults, LLC
P.O. Box 1288
Moncks Corner SC 29461
(843) 761-8232
jbw@williamsandhulst.com

Attorneys for Respondent