THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr.

Trial Court Case Nos.: 2014CP0801230, 2014CP0801231, 2014CP0801232
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.

BRIEF OF RESPONDENT BERKELEY ELECTRIC COOPERATIVE

Pope D. Johnson, III #3048
1230 Richland Street
Columbia, SC 29201
(803) 799-9791
pope@popejohnsonlaw.com
29461

John B. Williams #6133
J. Jay Hulst #71667
Williams & Hulst, LLC
P.O. Box 1288
Moncks Corner, SC

(843) 761-8232
jbw@williamsandhulst.com
jjh@williamsandhulst.com

Attorneys for the Respondent, Berkeley Electric Cooperative

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

MISCELLANEOUS

STATEMENT OF THE CASE

On June 23, 2009, John Robinson commenced a personal injury action against Berkeley Electric Cooperative, Inc. ("BEC") for injuries arising out of an electrical contact accident that occurred on April 28, 2008. On that same date, Constance S. Fortney, as Personal Representative of the Estate of John Fortney, commenced actions against BEC for wrongful death and for conscious pain and suffering arising out of the same accident. The material allegations related to liability were the same in all three actions. The appellants alleged:

> 5. On April 23, 2008 the decedent was hired as a day laborer to assist in setting up tents to be used in a charitable event to be held on April 26, 2008, on the property of Thornhill Farms.
> 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 Thornhill Farm property, the applicable (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 decedent 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.

(R. pp. 24-25; pp. 27-28; pp. 38-39.) BEC filed a timely answer asserting a general

denial and comparative negligence. At the time of trial, BEC had asserted 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. §25-38-15 (2009 Supp.). (R. pp. 29-31; pp. 34-35; pp. 41-43.)

On April 6, 2012, the Fortney and Robinson actions were consolidated for trial. By an order dated November 4, 2013, the actions were removed from the active trial roster pursuant to SCRCP Rule 40(j). Appellants subsequently refiled and restored the actions to the active trial roster under the case numbers associated with this appeal. By order executed on April 24, 2015, the trial was set for a date certain on September 28, 2015, before the Honorable Judge Roger M. Young. The actions were tried to the court without a jury from September 28, 2015 to October 2, 2015. By order dated February 10, 2016, the trial court granted judgment in favor of BEC. (R. pp. 1-19.) Appellants did not file Rule 59 SCRCP motions or any other post-trial motion. The appellants filed a timely Notice of Appeal of the trial court's Order of Judgment.

STANDARD OF REVIEW

On appeal from a case tried by a judge in an action at law, "the jurisdiction of this Court extends merely to the correction of errors of law" and "the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773, 775 (1976). The judge's findings are treated in the same manner as a jury's findings in an action at law tried before a jury. *Id., see also Moseley v. All Things Possible, Inc.,* 395 S.C. 492, 719 S.E.2d 656 (2011). Under settled principles, if there was any evidence to sustain the jury's finding as to liability and the amount of

damages, the judgment must be sustained. *Buzhardt v. Cromer*, 249 S.E.2d 898, 272 S.C. 159 (1978). It is equally well settled that, in determining these issues, the evidence and all reasonable inferences arising therefrom must be viewed in the light most favorable to the respondent. *Id.* In a law case, the credibility and weight to be accorded evidence is solely for the fact finder to determine." *Hanna v. Palmetto Homes, Inc.*, 300 S.C. 535, 537, 389 S.E.2d 164, 165 (Ct. App. 1990); *see Parsons v. Georgetown Steel*, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995) (stating the credibility and weight of testimony is for the trier of fact).

ARGUMENT

Appellants have provided a lengthy recitation of their view of the facts. However, they have failed to identify any factual finding in the trial court's nineteen-page Order of Judgment that is not supported by the record. Instead, appellants simply argue that their selective view of the evidence supports a different result. That argument provides no basis for reversing the trial court. The trial court's factual findings are binding and its ruling must be affirmed.

I. APPELLANTS FAIL TO ESTABLISH THAT THE TRIAL COURT APPLIED AN IMPROPER STANDARD OF CARE TO BEC.

Appellants preface their arguments with the contention that the trial court applied the wrong standard of care to BEC and that this "fundamental error led the trial court astray in its subsequent legal analysis of the evidence ensuing conclusions." Appellants' Brief, p. 11. According to appellants, "an unbroken line of cases uniformly holds that providers of electricity are held to a higher standard of care than ordinary care." Appellants' Brief, p. 12. Appellants are unable to point to anything specific in the trial

court's order to prove their contention. Instead, appellants speculate that the wrong standard of care was applied "from the context and discussion engaged in by the trial court." Appellants' Brief, p. 11. Speculation and conjecture provide no basis for overturning the trial court's decision in this matter.

A. APPELLANTS FAILED TO OBJECT THAT THE TRIAL COURT APPLIED AN IMPROPER STANDARD OF CARE IN REACHING ITS DECISION.

The reason appellants are forced to speculate that the trial court misapplied the standard of care is because they never raised any objection to the trial court's factual findings and conclusions of law. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues and thus provide the appellate court with a platform for meaningful appellate review." *Herron v. Century BMW,* 409 S.C. 563, 762 S.E.2d 693, 695 (2014). Further, it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007).

The parties submitted proposed orders to the trial court via email on December 14, 2015. (R. pp. 77-112; pp. 1425-1447.) BEC submitted a revised order and rebuttal to

Appellants' proposed order on December 29, 2015. (R. pp. 1448-1473; pp. 160-196.) Appellants then emailed a request for a conference with the trial court, asking that it refrain from reviewing the orders until they could be heard on BEC's submission. (R. p. 1474.) The trial court replied that appellants should address their concerns and/or opposition in writing for the trial court's consideration. (R. p. 1476.) In response, appellants argued that BEC's revised order was improper, that it contained references to inadmissible materials, and that it misstated the evidence. (R. p. 1478.) Appellants suggested that the trial court review the parties' proposed orders "without rebuttals" and further observed that "we probably need to file a string of motions at this point" but that this would "only delay a ruling even further and open the door to more of this back and forth." (R. p. 1478.) Appellants concluded by stating that they trusted that the trial court would ignore any inadmissible evidence. (R. p. 1478.)

On February 10, 2016, the trial court issued its judgment in favor of BEC. (R. pp. 1-19.) Appellants' only response was to file notice of this appeal. Appellants failed to move for a new trial or rehearing under SCRCP 59(a). Appellants failed to move to alter or amend the judgment under SCRCP Rule 59(e). Appellants never raised *any* objection regarding *any* of the trial court's factual findings or legal conclusions, much less challenge the standard of care applied by the court. Appellants had a duty to bring this perceived error to the attention of the trial court. *Parks v. Morris Homes Corp., supra,* 245 S.C. at 471, 141 S.E.2d at 134. Appellants' failure to do so amounts to a waiver of the alleged error. *Id.,* 134. Because appellants failed to raise this issue, the trial court never had a fair opportunity to consider its alleged error and, if necessary, effect a cure. *See Herron v. Century BMW, supra,* 409 S.C. 563, 762 S.E.2d 693, 695. Appellants'

claim that the trial court misapplied the ordinary standard of care to BEC has not been preserved for review by this Court.

B. APPELLANTS MISAPPREHEND THE APPLICABLE STANDARD OF ORDINARY CARE.

Appellants misconstrue the law in arguing that BEC is subject to a different standard of care than ordinary care. In *Eargle v. Sumter Lighting Co.*, the South Carolina Supreme Court held:

> In this connection, it may not be amiss to call attention to an error into which appellant's attorneys have fallen with respect to certain language found in some of our opinions with regard to the degree of care to be exercised in handling electricity. They say: The law, as established by the decisions of this court, is that it requires a very high degree of care, *and not simply ordinary care."* (Italics ours.) This court has not held that the degree of care required is more than ordinary care. 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—that a very high degree of danger calls for a very high degree of care; and if the quotations cited by appellant from the opinions of this court in *Parsons v. Electric Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800, and *Lundy v. Telephone Co.*, 90 S. C. 25, 72 S. E. 558, be attentively considered, it will be seen that they do not warrant the construction put upon them by appellant.

Eargle v. Sumter Lighting Co., 110 S.C. 560, 96 S.E 909, 911. (1918). Forty years later, in *Elliot v. Black River Electric Cooperative,* 233 S.C. 233, 104 S.E.2d 357 (1958), the Court reiterated its holding in *Eargle*:

> A high-tension transmission wire is one of the most dangerous things known to man. Therefore, one who attempts to make use of such appliances is bound to see that no injury comes to persons rightfully in proximity to them and who are themselves guilty of no wrong. This duty is stated in various terms, which in final analysis may perhaps convey merely one idea. 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.

Id., 367. Likewise, in *Sherrill v. Southern Bell,* 260 S.C. 494, 197 S.E.2d 283 (1973) (another case cited by appellants) the Court held:

> 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.

Id., 286.

Based on appellants' own authorities, the applicable standard of care is clear: BEC must act with ordinary care—the ordinary care required under the circumstances. *See Elliot v. Black River Electric Cooperative, supra.* BEC must exercise care commensurate with the hazard to assure that no injury comes to persons rightfully in proximity to their power lines and who are guilty of no wrong. *See Sherrill v. Southern Bell, supra.* Because power lines are dangerous, BEC must, as a practical matter, exercise a relatively high degree of ordinary care in construction, repair, maintenance and inspection of its lines. However, that sliding-scale standard of ordinary care applies to appellants as well. Appellants knew exactly where the power lines were located, knew that the lines were dangerous, and were obliged to exercise due care under the circumstances—a degree of care that was commensurate with the obvious danger that the power lines presented. *See, i.e., Eargle v. Sumter Lighting Co., supra,* at 911. Appellants violated the OSHA ten-foot rule and were not rightfully in proximity to the power lines. *Sherrill, supra.* The trial court's order granting judgment to BEC should be affirmed.

C. HAD THE ISSUE BEEN PRESERVED, APPELLANTS FAIL TO ESTABLISH HOW COMPLIANCE WITH SOME HIGHER STANDARD OF CARE WOULD HAVE PREVENTED THE ACCIDENT.

The Appellants fail to articulate what comprises the applicable higher standard of care and how compliance with that higher standard would have prevented the accident. Appellants never produced any credible evidence to establish when the clearance defect came into existence. Appellants' expert, John Dagenhart, opined that the line had been originally built with excessive sag. However, as observed by the trial court, this was a new opinion provided three weeks before trial. (R. p. 7, para. 17.) The trial court found that "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." (R. p. 8, para. 17.) Appellants persist nevertheless, arguing that "BEC failed to follow its own inspection procedures" and that had such procedures been observed, "the excessive sag in this line would have been apparent to a trained lineman." Appellants' Brief, p. 19. However, appellants concede that it is unknown "how long the line had failed to comply with NESC height requirements." Appellants' Brief, p. 19. Appellants speculate that BEC *might have* become aware of their linemen's alleged failure to inspect the line, but had a policy of keeping no records of inspections done in connection with normal service calls.[1] Appellants' Brief, p. 19.

Appellants failed to establish how the reporting of alleged failures to inspect would have prevented this accident. There is absolutely no credible evidence when the clearance defect came into existence. There is no evidence that anybody from BEC

[1] Appellants misstate the evidence. BEC witnesses testified that if a defect is found and fixed at that time, no record is made of the inspection; if the defect is to be corrected later, a record is created. (R. p. 83, line 4-p. 84, line 5.)

visited Thornhill Farms in any capacity between its last service call on August 20, 2007, and the accident on April 21, 2008. The clearance defect could have developed at any time during that eight month period. Pursuant to BEC's inspection program, its lines were inspected on an 8-year cycle, and that interval was deemed reasonable by appellants' expert. (R. p. 8, para. 18; p. 800, lines 7-16.) "Might have" fails to meet the standard that BEC's negligence was "most probably" the cause of appellants' injuries. *See Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537, 5543 (1990). Verdicts may not be permitted to rest on surmise, conjecture, or speculation. *O.W. Gosnell v. SCDOT*, 282 S.C. 526, 320 S.E.2d 454, 457 (1984).

II. APPELLANTS FAIL TO ESTABLISH THAT THE TRIAL COURT APPLIED A LATENT DEFECT ANALYSIS IN GRANTING JUDGMENT TO BEC.

Appellants' contend that the trial judge erred in concluding that the condition of the line represented a latent defect. Appellants failed to object to any supposed latent defect finding or analysis and, further, the trial court never made such a finding.

A. APPELLANTS FAILED TO OBJECT TO THE TRIAL COURT'S SUPPOSED LATENT DEFECT ANALYSIS AND THE ISSUE HAS NOT BEEN PRESERVED.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the appellate court with a platform for meaningful appellate review." *Herron v. Century BMW,* 409 S.C. 563, 762 S.E.2d 693, 695 (2014). Further, it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965). "It is axiomatic that an issue cannot be

raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

On February 10, 2016, the trial court issued its judgment in favor of BEC. (R. p. 19.) Appellants' response was to file notice of this appeal. Appellants failed to move for a new trial or rehearing under SCRCP 59(a) or to move to alter or amend pursuant to SCRCP Rule 59(e). Appellants never challenged the supposed "latent defect" analysis or finding until now. As such, the trial court never had a fair opportunity to consider its alleged error and, if necessary, effect a cure. *See Herron v. Century BMW, supra,* 409 S.C. 563, 762 S.E.2d 693, at 695. Appellants' claim that the trial court erred in applying a latent defect analysis has not been preserved for review by this Court. *Parks v. Morris Homes Corp., supra*, 245 S.C. at 471, 141 S.E.2d at 134.

B. THE TRIAL COURT DID NOT FIND THAT THE CLEARANCE DEFECT WAS A LATENT DEFECT.

The trial court concluded that appellants failed to prove that BEC created, or knew or should have known that the power line was below minimum height. (R. p. 18, para. 13.) Appellants argue that "this conclusion in turn rests upon the finding that this condition of the line represented a latent defect." Appellants' Brief, p. 13. No such finding is stated anywhere in the trial court's Order of Judgment. (R. pp. 1-19.) The term "latent" does not appear anywhere in the order. (R. pp. 1-19.) A latent defect is one which is unknown and one which a reasonably careful inspection will not reveal. *Callander v. Charleston Doughnut Corporation,* 305 S.C. 123, 406 S.E.2d 361 (1991); *Meadows v. Heritage Village Church and Missionary Fellowship, Inc.,* 305 S.C. 375, 409

S.E.2d 349 (1991). Here, BEC acknowledged that the sagging line was open and obvious and the trial court so found. (R. p. 18, fn. 1.)

Appellants contend that "in support of the conclusion that the low hanging line represented a latent defect, the trial court relied upon *Grier v. Cornelius*, 247 S.C. 521, 148 S.E.2d 338 (1966)." The case of *Grier v. Cornelius* has nothing to do with a latent defect analysis. Instead, it is cited for the following principle of law:

> 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).

(R. p. 14, para. 4.) *Grier* involved a claim for damages arising out of the injuries a passenger sustained in an automobile accident when the vehicle's brakes failed. *See Grier v. Cornelius,* 247 S.C. 521, 148 S.E.2d 338, at 340. The plaintiff there argued that the brake failure violated South Carolina law that motor vehicles be equipped with adequate brakes. *Id.,* 342. Plaintiff further argued that such a violation constituted negligence *per se*, and that to be relieved of the violation defendants must establish that the brake failure was caused by latent defects. *Id.*

The Court in *Grier* observed:

> We have never adopted such a strict position that would make the owner or operator of a motor vehicle an insurer against any and all defects in the vehicle's equipment. We do not think that the Legislature intended the equipment statute to impose liability without fault or make the owner or operator of an automobile an absolute insurer of his brakes. In view of our decisions, a violation of the brake statute is negligence as a matter of law. However, the mere failure of brakes is not a violation of the brake statute as a matter of law.

Id. The Court continued:

> We think that is was a question of fact, in the first instance, whether or not the statue had been violated. And, where the evidence is conflicting or susceptible to more than one inference, the issue of compliance with the brake statute is for the jury.

Id., 343.

The *Grier* Court focused on the proper application of negligence *per se*, not latent defect analysis.[2] According to *Grier,* proof that equipment fails to comply with the requirements of a statute does not necessarily prove a statutory violation; rather, plaintiffs must first establish, to the satisfaction of the trier of fact, that any statutory non-compliance was due to the fault of the defendants. *See id.*, 342-343.

Likewise, the trial court here rejected appellants' claim that BEC was negligent merely because its line was below regulation height. The court, as the trier of fact in this case, determines whether the clearance defect was a violation of NESC requirements. The court determines whether BEC's inspections complied with NESC requirements. The court determines whether appellants met their burden of showing that the clearance defect was BEC's fault. The court found plaintiffs failed to prove that BEC created, or knew, or should have known of the clearance defect. BEC is not the absolute insurer of the safety of its equipment. *See Grier v. Cornelius,* 247 S.C. 521, 148 S.E.2d 338, at 342.

C. THE SUPPOSED LATENT DEFECT FINDING IS MERELY A PRETEXT TO ARGUE ABOUT THE TRIAL COURT'S FACTUAL FINDINGS.

Relying on the non-existent latent defect finding, appellants attack the trial court's factual findings. Appellants argue that they proved that BEC should have known about

[2] BEC was unable to locate any South Carolina cases citing *Grier* as authority for the existence of a latent defect.

the line because it "admitted" in its discovery responses that it never inspected the line for compliance with the NESC. This is the full interrogatory and BEC's response:

> 1. Please state when the power line which is the subject matter of Plaintiff's Complaint 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.

(R. p. 47.) Any matter admitted in response to a request for admission "is conclusively established." Rule 36(b), SCRCP. For interrogatories, the answers are not admissions but "may be used to the extent permitted by the rules of evidence." Rule 33(d), SCRCP. This was a response to an interrogatory, not a response to a request for an admission. It was for the trial court to determine what meaning and weight to give this evidence.

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. (R. p. 5, para. 9; p. 6, para. 11.) The line was inspected by BEC for compliance with RUS specifications. (R. p. 6, para.14-15.)

Appellants claim that BEC's expert, Eric Jackson, admitted that "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." Appellants' Brief, p. 14 (emphasis in original.) Not so. Mr. Jackson merely acknowledged that if BEC's response was taken verbatim—and he was instructed to take it that way by appellants' counsel— "there is a problem with that." (R. p. 1006, lines 19-22.) That response hardly amounts to the ringing admission claimed by appellants.

Appellants assert that "BEC maintained throughout the trial that too much sag would have been 'readily visible' to a trained and experienced observer." Appellants' Brief, p. 15. Appellants argue that BEC also "conceded that it was not possible to accurately judge the height of this particular line" given that it "had a backdrop of only sky, providing no cues or frame of reference for making a height judgment." Appellants Brief, p. 15. Mr. Jackson testified that when there is excessive sag, as in this particular case, it would have been readily visible to an experienced lineman. (R. p. 974, lines 13-17.) Mr. Jackson also agreed that it is difficult for somebody to just look at a line and provide an accurate measure of its height: "I don't think anybody can look at a line and say that line is 19 feet six inches above grade." (R. p. 998, line 7-8.) BEC has never maintained that its linemen can determine the exact height of a line simply by looking at it. That determination is different in kind than the ability to determine whether a line has excessive sag.

Citing *Lytle v. Reagan,* 256 S.C. 269, 182 S.E.2d 302 (1971), appellants argue that BEC's "admissions"—i.e., its interrogatory response, and Mr. Jackson's comment on the response—"were clearly binding judicial admissions." Appellants' Brief, p. 15. Judicial admissions are those made in a pleading or in court by a person's attorney as a substitute for regular legal evidence. *See Black Law Dictionary,* 44-45, (Fifth Edition, 1979). BEC's interrogatory response therefore does not qualify as a judicial admission. The *Lytle* case actually involved whether a party is bound and concluded by his own adverse testimony. *Id.,* 304-305. Based on *Lytle,* appellants argue that the interrogatory response was a statement of fact rather than an opinion and "BEC is bound by its

admission" that it did not inspect its lines for NESC compliance. Appellants' Brief, p. 16. The trial court disagreed.

Ultimately, appellants' claim that the trial court erred in finding a latent defect boils down to their disagreement with the trial court's finding that BEC's inspection policy and procedure was consistent with those of other utilities around the country. Appellants contend 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. Appellants' Brief, p. 17. Not true. The employee, Mr. Ricco Harrell, testified as follow:

> Q: Are your responsible for inspecting power lines?
> A: Well, what we do is we check for a hazardous condition. If we see something, we repair it.
> Q: Is that something you do because you choose to do it or is that part of your job?
> A: That is part of our job riding down the lines. If we see something, we fix it.

(R. p. 455, line 21-p. 260, line 2.) Mr. Harrell testified that he can determine from looking at the line whether it is high enough. (R. p. 462, line 14-p. 463, line 8.) He further testified that BEC builds its lines in excess of NESC minimum height requirements:

> Q: When you're constructing a power line, you don't know exactly how high it is, true?
> A: We don't know the exact measurement, but we know it's higher than the minimum.
> Q: But you don't know what the minimum is, according to the National Electric Safety Code, is that true?
> A: Yeah, we know what the minimum is.
> Q: You know when you're constructing a power line—is it your testimony that you know what the National Electric Safety Code requires the height of that power line to be?
> A: It's 18 and a half.

Q: All power lines have to be 18 and a half, some of them have to be 18 and a half?
A: We go over the minimum. Our power line is 20-24.

(R. p. 457, lines 6-20.)

Appellants assert that Mr. Harrell "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." Again, that is not true:

Q: And as part of your job when you go out for service calls is to inspect the power line, right?
A: Let me explain that. When I was out there for a service call, I went out there to fix underground service that was in front of the property, close to Highway 17, so I didn't see no line back there. Didn't look at the line back there.
Q: You have also been out there and repaired lights on the poles, haven't you?
A: Yes, I did.
Q: And one of those lights was actually on one of the poles involved in this case; isn't that true?
A: No.
Q: No? You didn't inspect pole number 005 out there?
A: What is that?
Q: It's one of the poles that was holding the power line in this case.
A: Where I fixed the light was on Highway 17.

(R. p. 459, line 25-p. 460, line 17; *see also* p. 470, line 21-p. 473, line 7.) The best appellants can do is to get Mr. Harrell to concede that it was a long time ago and that he does not remember working on the pole. (R. p. 476, lines 4-9.) That is not the same as an admission that he worked on the pole. Also, according to Mr. Harrell, it is possible that somebody else might have worked on the pole. (R. p. 476, lines 16-19.)

Contrary to appellants' claim, Mr. Harrell's testimony is hardly "uncontradicted" and certainly not "unequivocal" on whether he failed to inspect the lines at Thornhill

Farms. Appellants apparently rely on this confused exchange to establish BEC's failure to practice its policies and procedures:

> Q: Have you ever been asked to measure the height of the power lines out at Thornhill Farms?
> A: No.
> Q No, no.
> Q: True or false?
> A: False. I didn't inspect no line.
> Q: Okay. You agree with that. You have never inspected the lines out at Thornhill farms to make sure they are in compliance; is that true?
> A: True.

(R. p. 461, lines 4-15.) As indicated above, Mr. Harrell denied that, as far as he could recall, ever working in an area where he could see the line to inspect it. Furthermore, the compliance to which appellants are referring is *compliance with NESC minimum height requirements*. As previously discussed, and as confirmed by Mr. Harrell, BEC does not build its lines to NESC minimums. His testimony makes this point clear:

> Q: And all the times you've been out there, you have never inspected the line to see if it was in compliance with the National Electric Safety Code, true?
> A: True.

(R. p. 468, lines 4-7.)

> Q: Mr. Harrell, this is something that we've admitted into evidence already. This is a pleading in the case filed by the lawyers for Berkeley Electric, and we asked about inspections with the National Electric Safety Code, and the answer we got is: The line in question has never been inspected for National Electric Safety Code compliance. Does that surprise you?
> A: No.

(R. p. 470, lines 7-16.)

Mr. Harrell would not have inspected the power lines at the farm for compliance with NESC requirements because BEC builds its lines to RUS specifications which exceed the NESC requirements. Further, he would not have inspected the subject line for compliance with NESC or RUS requirements because his service calls were to a different area of the farm than where the line was located. Mr. Harrell testified that he did not work on or near the line, and he clearly does not remember working on one of the poles supporting the line. However, had he worked on or near the line, Mr. Harrell was unequivocal about this:

> Q: Had you done an inspection and noticed it was low, you would have fixed it, right?
> A: Right.

(R. p. 467, lines 23-25.)

Appellants assert that at no time after December of 2003 did Mr. Harrell "ever conduct an inspection of the line despite being on the property multiple occasions during the next four plus years." There is nothing in BEC's policies or procedures, the National Electric Safety Code, RUS specifications, or the standards or practices in the industry, requiring BEC personnel to locate and inspect all of the power lines throughout a property for height compliance whenever some form of service is provided to a customer. The trial court heard Mr. Harrell's testimony plus the testimony of nineteen other witnesses who testified during the week-long trial. The trial court, as trier of fact, has the task of assessing the credibility, persuasiveness, and weight of the evidence presented. *Jones v. Leagan*, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (Ct. App. 2009). The trial court heard this testimony and rejected appellants' view of the evidence.

Appellants cite *Weeks v. Carolina Power & Light,* 156 S.C. 158, 153 S.E. 119 (1930), *Mitchell v. Charleston Light & Power Co.,* 45 S.C. 146, 22 S.E. 767 (1895), and *Hill v. Carolina Power & Light, Co,* 204 S.C. 83, 28 S.E. 2d 545 (1943) as "instructive" to whether BEC knew or should have known of the low hanging line. All of these cases involve appeals of jury verdicts and there was evidence in each case that the power company had notice of the dangerous condition. The quote cited by appellants from *Weeks v. Carolina Power & Light* actually comes from *Parsons v. Charleston Consol. Ry, Gas & Electric Co.,* 69 S.C. 305, 48 S.E. 284 (1904):

> Having held that a good cause of action is stated against appellant, without regard to its actual knowledge of the fallen wire or its diligence in discovering it, it follows that a demurer cannot be sustained.

Id., 285. The ruling in *Parsons* was that the case could go to trial. *Id.* Neither *Parsons* nor *Weeks* stands for appellants' proposition that knowledge is irrelevant to whether a power company has breached its duty of care. *See id.; Weeks, supra,* at 153 S.E. 122-123. *Hill* merely states the obvious—that a power company must effect repairs when it has knowledge of needed repairs and that a power company is bound to use due diligence to acquire information concerning the condition of its electric wires. *Hill v. Carolina Power & Light, supra,* at 550-551. Appellants failed to convince the trial court that BEC had knowledge of the clearance defect or that BEC was negligent in acquiring information or knowledge regarding the condition of its lines. (R. pp. 15-18.)

Nothing in the Order of Judgment supports appellants' claim that the trial court found the clearance defect to be latent. There is no latent defect "analysis" in the order. Appellants fail to establish that the trial court misapplied the proper standard of care to BEC. Appellants have failed to show that there is no evidence in the record that

reasonably supports the trial court's factual findings in this case. *See, Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773, 775 (1976). The trial court's judgment in favor of BEC should be affirmed.

III. APPELLANTS FAIL TO ESTABLISH THAT THE TRIAL COURT ERRED IN HOLDING THAT APPELLANTS' NEGLIGENCE EXCEEDED ANY NEGLIGENCE OF BEC.

Appellants next contend that the trial court misapplied the standard of care to BEC and erred in its alternative ruling that appellants' claims were barred under the principles of comparative negligence. In issuing judgment in favor of BEC, the trial court ruled that the plaintiffs had failed to prove their case. (R. p. 18.) However, in an extended footnote, the trial court made an alternative finding that appellants were also precluded from recovery because their negligence was greater than any negligence on the part of BEC:

> .... 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 that they were too close to the line, "eye-balled" the height of the line and the height of the tent, and guessed incorrectly that they had room to clear underneath the line. In addition, 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 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 [*sic*].

(R. pp. 18-19, fn. 1.)

A. APPELLANTS FAILED TO RAISE ANY OBJECTION TO THE TRIAL COURT'S ALTERNATIVE RULING ON THE ISSUE OF COMPARATIVE NEGLIGENCE.

Appellants never raised any kind of objection whatsoever to the trial court's alternative holding. As discussed above, appellants dispensed with any post-judgment motions and simply filed their notice of appeal. Appellants never raised any objection whatsoever to the trial court's alternative holding on comparative negligence. Appellants had a duty to first bring this claim of error to the attention of the trial court and their failure to do so amounts to a waiver of the alleged error. *Parks v. Morris Homes Corp., supra*, at 134. Because appellants failed to raise this issue, the trial court never had a fair opportunity to consider its alleged error and, if necessary, effect a cure. *See Herron, supra,* at 695. Appellants' claim that the trial court misapplied the ordinary standard of care to BEC in its analysis of comparative negligence was neither raised to nor ruled on by the trial court and it has not been preserved for review by this Court.

B. APPELLANTS MISAPPREHEND THE STANDARD OF CARE AND ITS APPLICATION IN EVALUATING COMPARATIVE FAULT.

Offering their own highly-abbreviated summary of the court's findings, appellants argue that 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 appellants and BEC. Appellants' Brief, p. 20. According to appellants, the trial court's finding that appellants' comparative negligence exceeded that of BEC "is not only without evidentiary support, it is wholly illogical." Appellants' Brief, p. 21.

Even if we assume significant differential between BEC's duty of care and appellants' duty of care, appellants fail to cite any authority for the proposition that a

party with a higher standard of care is necessarily "more negligent" than a party that breaches his duty to exercise ordinary care. A higher standard of care means that it would be easier to establish a lack of due care—a minor act or omission under the higher standard of care could still amount to negligence. Comparison of a plaintiff's negligence with that of the defendant is a question of fact for the jury to decide. *Creech v. S.C. Wildlife and Marine Resources Dept.,* 328 S.C. 24, 491 S.E.2d 571, 575 (1997). The determination of respective degrees of negligence attributable to the plaintiff and defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn. *Berberich v. Jack,* 392 S.C. 278, 709 S.E.2d 607, at 611 (2011).

In the *Berberich* case, the Supreme Court considered the application of comparative negligence to findings of recklessness, willfulness, and wantonness. The Court rejected the plaintiff's contention that the jury should have been instructed that any negligence on his part could not be raised by the defendant as a defense to his reckless conduct. *Id.,* 616. Instead, the Court ruled that a jury may compare all forms of negligence as part of its assessment of fault. *Id.* The Court continued:

> We likewise reject [plaintiff's] alternative argument that the jury should have been instructed that heightened degrees of wrongdoing should be accorded greater weight than ordinary negligence. The relative significance of each party's conduct and its overall contribution to the plaintiff's injury are accounted for in the offsets inherent in our comparative negligence system.

Id. Appellants' argument that because BEC was subject to a high standard of care it was necessarily more negligent has already been rejected by our Supreme Court. The trial court's ruling should be affirmed.

C. APPELLANTS' ARGUMENTS OVER THEIR VIEW OF THE EVIDENCE FAIL TO ESTABLISH THAT NO EVIDENCE REASONABLY SUPPORTS THE TRIAL COURT'S FINDINGS.

Appellants' arguments on this issue consist of further attacks on the trial courts factual findings. Appellants grumble that appellants were faulted for looking at the power line and making a judgment about its height when BEC did the same thing in conducting its inspections. Appellants' Brief, p. 23. BEC's "fault" in the footnote is theoretical. As previously mentioned, the trial court could have determined that BEC's fault, if any, was very slight. In contrast, the trial court was clearly troubled by its factual findings that appellants "eyeballed" the line and then, after discussing the hazard, picked up the tent and walked directly toward it. (R. p. 18, fn. 1.) While both parties might have looked at the line, only appellants knowingly approached the hazard.

Appellants next argue that the trial court's finding that BEC had no notice that the tents were being erected near or under its lines "is not a relevant issue under the circumstances of this case." Appellants' Brief, p. 23. The trial court disagreed. Had BEC been given notice that metal framed tents were being erected and paraded around and within its utility easement, BEC might have been able to undertake preventive action. It is up to the court to determine what weight to give such evidence and how it applies to the issue of comparative fault.

Appellants object to the trial court's observation that "the clearance point of contact was 18.2 feet which was only a few inches less than the 18.5 foot NESC clearance requirement." Appellants' Brief, p. 24. In appellants' view, the court's comment "is the same as saying the line was almost safe." Appellants' Brief, p. 24. The statement is sandwiched between the trial court's finding that appellants were "clearly

negligent" for continuing toward the line after recognizing and discussing the hazard and its finding that appellants "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 that they had room to clear underneath the line." (R. p. 18, fn. 1.) Based on that context, and given that the clearance at the point of contact was in fact only a few inches below the NESC minimum, the trial court appears to be emphasizing how foolhardy it was for appellants to, after recognizing the danger, continue carrying an unwieldy tent with a metal center spire toward the power line, all in violation of the OSHA ten foot rule. Even if the line had been at the NESC minimum height of 18.5 feet it was still too close to safely attempt.

Finally, appellants argue that the evidence "laid the majority of the blame for the violation of the [OSHA 10-foot] rule not on appellants but on Mr. Richardson, Ms. Donahue, [the event planners] and Mr. Clayson, the crew leader." Appellants' Brief, p. 26. Acknowledging that the evidence "supports some allocation of negligence to themselves," appellants neatly conclude that "when viewed under an appropriate standard of care analysis, the trial court's finding that the negligence of the appellants exceeded that of respondent is not supported by any evidence and requires reversal." Appellants' Brief, p. 26. Appellants admit to some allocation of negligence, so there is *some evidence* to support the trial court's ruling on this issue. Moreover, as previously discussed, the trial court did not misapply the ordinary standard of care in this case. *Berberich v. Jack, supra,* at 611. Also, as previously discussed, the Court has already rejected appellants' contention that any wrongdoing by BEC must be accorded greater weight. *Id.* Accordingly, the Court should affirm the trial court's ruling on this issue.

IV. APPELLANTS FAILED TO OBTAIN A RULING ON THEIR INCOMPLETE MOTION FOR A DIRECTED VERDICT AND THE ISSUE WAS NOT PRESERVED FOR APPEAL

Appellants assert that the trial court "erred in denying Appellants' Motion for Partial Directed Verdict or Judgment" on their claim that BEC's negligence exceeded that of appellants. Appellants' Brief, p. 27. Directed verdict motions are only appropriate in jury trials. *Hinton v. Designer Ensembles, Inc.*, 335 S.C. 305, 318 n. 3, 516 S.E.2d 665, 671 n. 3 (Ct.App.1999), *rev'd on other grounds*, 343 S.C. 236, 540 S.E.2d 94 (2000); *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110, 118 n. 1, (Ct. App. 2007). Accordingly, appellants' appeal on this issue must be denied.

Appellants initially made an oral motion for a directed verdict after they rested in their case-in-chief, arguing that the evidence was susceptible to only one reasonable inference—that BEC was negligent and that such negligence was the sole proximate cause of appellants' injuries. (R. p 946, line 23-p. 947, line 7.) The trial court denied the motion, ruling that even if it somehow assumed that BEC deviated from the standard of care, other questions of material fact remained to be determined. (R. p. 947, lines 11-21.) At the close of all evidence, appellants again moved for a directed verdict. (R. p. 1085, lines 18-22.) Appellants argued that because the power line was found to be below the required height after the accident, BEC's negligence had been established in that "they were unreasonable in letting the line get where it is." (R. p. 1086, lines 1-10.) Appellants conceded that they had violated the 10-foot rule—the OSHA rule that requires all workers to stay at least 10 feet away from power lines—but argued that the violation was not a proximate cause of their injuries because the central metal spire of the tent would not have made contact with the power line if it had been at the correct height. (R. p.

1086, line 11-p. 1087, line 15.) According to appellants, "that's where comparative negligence dries out." (R. p. 1087, lines 14-15.) The trial court and appellants' counsel engaged in the following colloquy:

> The Court: Do I have to ignore the fact that they were inside of ten feet?
> Mr. Keenan: What harm did that cause?
> The Court: They got electrocuted.
> Mr. Keenan: Only because of the negligence of Berkeley.
> The Court: If they would have stayed outside of ten feet, it wouldn't have mattered how high that line is.
> Mr. Keenan: I just wanted to give Your Honor a preview, okay, but we will have the case law. We'll have the analysis.
> The Court: I thought you were making an argument, not a preview of an argument.
> Mr. Keenan: I'm making the argument, but I'm asking the court to delay it until we brief it for you, and you get to look at the analysis.
> The Court: I didn't understand what you were saying. You're just giving me the Reader's Digest condensed version?
> Mr. Keenan: That's it. And I feel, frankly, we owe it to Pope to do that so at least he doesn't get broadsided.

(R. p. 1087, lines 16-p. 1088, line 14.)

Based on the foregoing, appellants did not complete their motion for a directed verdict. Appellants merely provided a preview to the trial court. Appellants asked the trial court to delay its decision until they had briefed the matter. (R. p. 1088, lines 5-8.) Appellants promised that case law and analysis in support of their motion would be provided. (R. p. 1087, line 25-p. 1088, line 8.) Appellants never followed through. After the trial, appellants submitted a "Proposed Order" and a document entitled "Closing Argument." Neither submission sought a ruling on appellants' motion for directed verdict. (R. pp. 77-112.) The trial court never ruled on the incomplete motion.

After the trial court granted judgment to BEC, appellants proceeded directly with their notice of appeal. Appellants had a duty to bring the alleged error in failing to grant them a directed verdict to the attention of the trial court with specificity and to make sure that they obtained a ruling. Appellants' failure to obtain a ruling on their motion for a directed verdict amounts to a waiver of the alleged error. *Parks v. Morris Homes Corp., supra*, at 134. Because appellants' motion for a directed verdict was incomplete, the trial court never made a ruling. Because appellants failed to obtain a ruling by the trial court, issues raised in their motion for a directed verdict were not properly preserved for review in this appeal.

CONCLUSION

For the reasons stated, BEC respectfully requests that the Court reject appellants' claims in this appeal and affirm the trial court's factual findings and conclusions of law as set forth in the Order of Judgment dated February 10, 2016. Alternatively, pursuant to Rule 220(c), SCACR, BEC asks that the Court affirm the trial court's ruling on any other ground appearing on the record.

J. Jay Hulst #71668
Williams & Hulst, LLC
P.O. Box 1288
Moncks Corner, SC 29461
(843) 761-8232
jjh@williamsandhulst.com
Attorneys for Respondent

Moncks Corner, South Carolina
January 23, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr.

Trial Court Case Nos.: 2014CP0801230, 2014CP0801231, 2014CP0801232
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

The undersigned certifies that this Brief of Respondent complies with Rule 211 (b), SCACR.

J. Jay Hulst #71668
Williams & Hulst, LLC
P.O. Box 1288
Moncks Corner, SC 29461
(843) 761-8232
jjh@williamsandhulst.com
Attorneys for Respondent

January 23, 2017