THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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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.

RECORD ON APPEAL
Volume 1 of 4

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	
	)	
Estate of John Fortney, deceased, by his duly appointed Personal Representative Constance S. Fortney,	)	C/A Nos. 14-CP-08-1231, 14-CP-08-1232
Plaintiff,	)	
vs.	)	**ORDER OF JUDGMENT**
Berkeley Electric Cooperative,	)	
Defendant.	)	
John Steven Robinson,	)	Civil Action No.14-CP-08-1230
Plaintiff,	)	
vs.	)	
Berkeley Electric Cooperative,	)	
Defendant.	)	

SUMMARY

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

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

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

PLEADINGS

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

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

> 6. The Defendant owed a duty to the public to install its power lines at a minimum safe height as determined by the foreseeable use of the property over which the lines are installed.
>
> 7. The Thornhill Farm property over which the Defendant's power line had been installed was cultivated and fallow agricultural land which constitutes "other lands" under the National Electric Safety Code.
>
> 8. Upon information and belief, at the time the Defendant installed the power line over the Thornhill Farm property the applicable Code (National Electric Safety Code) promulgated by the Institute of Electrical and Electronics Engineers (IEEE) and adopted by the American National Standards Institute (ANSI) required a minimum safe height of eighteen and one-half (18.5) feet at the power line's lowest point between the adjoining power poles.
>
> 9. The Defendant also owed a duty to periodically inspect and to maintain power lines to insure continued compliance with the applicable Code

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

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

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

Pl. Compl.

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

10. The stated purpose of the NESC is:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q: And if the line were built in 1993 and there was an inspection of the line, a pole inspection that included an inspection, things you inspected in September of 2002, would that be a proper interval for inspection? Your answer?
A: Yes.
Q: Now, you say that wouldn't be a proper interval?
A: No.
Q: So you're not changing that testimony?
A: No, I'm not changing that.

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

875, 878 (2009).

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

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

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

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

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

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

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

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

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

A: No.

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

Q: Show me the language.
A: It says, lines and equipment shall be inspected at such intervals as experience has shown to be necessary. (Tp.574, lines 16-18).
Q: Name me one electrical co-op in the whole country that is doing something different than what Berkeley says it does in terms of construction of line to exceed code requirement and inspections which are the pole inspections and the patrolling by their employees.
A: I can't give you a particular co-op in that respect.

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

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

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

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

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

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

Q: What experience have you had in filing RUS-300s?
A: I have not.
Q: Have you ever met with a co-op and represented them in trying to comply with RUS-300?
A: No.
Q: Have you participated in any meetings with RUS officials regarding RUS form 300s?
A: No.

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

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

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

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

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

---

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

Cont'd next page

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

AND IT IS SO ORDERED.

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

Dated: 2/10, 2016
Jn Charleston, South Carolina

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

STATE OF SOUTH CAROLINA) COUNTY OF BERKELEY)	IN THE PROBATE COURT 2008 ES 08-264
IN THE MATTER OF:) JOHN WILLIAM FORTNEY, JR.,) Deceased.)	CONSENT ORDER

RECEIVED
AUG 0 6 2008
Law Offices of
Michael David Wood

Date of Hearing:	June 30, 2008
Presiding Judge:	Keith W. Komahrens
Attorney for Petitioner:	Grover C. Seaton, III and Sandye Teague Hayes
Attorney for Respondent:	Michael David Wood
Guardian Ad Litem:	G. Edward Hawkins, III, (for minor Emma Fortney in related Family Court Action)

This matter is before the Court on Petitioners' Sandy Teague Hayes and Grover C. Seaton, III, Petition For Removal of the estate's interim Personal Representative, Constance Fortney in the within matter. The Petitioners were present along with their client, Julie Winterroth. Also present was the Respondent, Constance Fortney, with her attorney Michael D. Wood and the Guardian Ad Litem, in a related Family Court action styled Cowart v. Fortney, G. Edward Hawkins, III.

An *in camera* meeting with the parties was held and the parties reached an agreement to resolve the issue before the Court. The agreement is as follows:

1. It is acknowledged that the sole heirs of the decedent are Gina Fortney and Emma Fortney, who are minor children and they are issue of different biological mothers.

2. The biological mother of Emma Fortney, Kimala Louise Lewis, is deceased and the matter of her permanent custody is currently pending in Berkeley County Family Court (2008 DR 08 764).

3. On June 4, 2008, the Honorable Paul W. Garfinkel, Judge, Berkeley County Family Court, issued a Temporary Order in the above referenced matter. Among other things addressed in the Order, the parties were prohibited from entering into any contract on behalf of the minor child, Emma Ann Fortney, until

KWK

Certified True and Correct Copy
of Original Record
Keith W. Komahrens
Keith W. Komahrens, Judge of Probate

EXHIBIT 4

further Order by the Court and any previously entered contracts were declared null and void.

4. The biological mother and legal custodian of minor child, Gina Fortney, is Julie Winterroth.

5. On April 30, 2007, the petitioner, Julie Winterroth, entered into a contract with the Steinberg Law Firm, on behalf of minor child Gina Fortney, for the purpose of pursuing a workers' compensation claim and/or third party cause of action, related to the death of John W. Fortney, Jr. All parties agree that the contractual relationship and terms thereof previously entered into by Julie Winterroth with the Steinberg Law Firm shall remain in full force and effect. The parties further agree that it is in the best interest of the estate and both minor children not to disrupt the legal and investigatory services which have been implemented as a result of this contractual agreement.

6. It is further agreed that it is in the best interest of the minor children for the Steinberg Law Firm to pursue any claims on behalf of the two (2) minor children and the estate. It is agreed that they will petition the Family Court for an Order granting permission for the personal representative and/or Guardian ad Litem or legal custodian of the minor child, Emma Fortney, to execute any additional documentation and/or contracts required by the Steinberg Law Firm to include the said minor in their representation of the estate and/or heirs.

7. It is further agreed upon receipt of permission from the Berkeley County Family Court, as stated above, the personal representative of the estate and/or guardian ad litem or legal custodian of the minor child, Emma Fortney, shall execute such additional documents and/or contracts required to allow Steinberg Law Firm to continue representing the estate and the heirs of decedent.

8. The Personal Representative of the estate shall continue to use the legal services of Steinberg Law Firm and fully cooperate in all aspects with said firm in representing the estate and heirs in said workers' compensation and/or third party actions related to the death of decedent.

9. The Petitioner withdraws its Petition for Removal of the Personal Representative of decedent's estate and Constance Fortney shall be granted full executory powers as Personal Representative of the estate, as may be necessary to fully discharge and probate the estate through its conclusion.

IT IS THEREFORE,

ORDERED, that the parties' agreement as set forth herein shall be and hereby is the Order of the Court.

IT IS SO ORDERED.

August 6, 2008
Moncks Corner, SC

Keith W. Kornahrens
Judge of Probate

Certified True and Correct Copy
of Original Record

Keith W. Kornahrens, Judge of Probate
Berkeley County, SC

3

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2014-CP-08-1231
ESTATE OF JOHN FORTNEY, deceased, by his duly appointed Personal Representative, **CONSTANCE S. FORTNEY**, Plaintiff(s), vs. **BERKELEY ELECTRIC COOPERATIVE, INC.**, Defendant(s).	**COMPLAINT** Wrongful Death Action (Jury Trial Requested)

FILED
2014 MAY 27 PM 3:
MARY B BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

The Plaintiff, **ESTATE OF JOHN FORTNEY**, by its duly appointed Personal Representative, **CONSTANCE S. FORTNEY**, and her undersigned attorney, alleges in this Complaint against the Defendant, **BERKELEY ELECTRIC COOPERATIVE, INC.**, and would respectfully show unto this Honorable Court:

PARTIES, JURISDICTION, AND VENUE

1. The Plaintiff, **CONSTANCE S. FORTNEY**, is the duly appointed Personal Representative of the **ESTATE OF JOHN FORTNEY**, who died intestate in the County of Charleston, State of South Carolina, on April 28, 2008, and who brings this survival and wrongful death action on behalf of his Estate and his two children and statutory beneficiaries, Gina Fortney and Emma Courtney, pursuant to § 15-5-90 and §15-51-10, S.C. Code of Laws, 1976.
2. The Defendant is an electric cooperative organized under the laws of the State of South Carolina which has its principal place of business located in the County of Berkeley, State of South Carolina.

3. The Defendant is engaged in the business of providing electrical power to customers in Berkeley and Charleston Counties including Thornhill Farms located at 10882 Highway 17 North, in the town of McClellanville, County of Charleston, State of South Carolina.
4. This Honorable Court has jurisdiction of the parties and subject matter of this action and venue is proper in Berkeley County by reason of the Defendant's principal place of business being located in the County of Berkeley, State of South Carolina.

FACTUAL ALLEGATIONS

5. On April 23, 2008, the Plaintiff 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 Electrical Safety Code.
8. Upon information and belief, at the time the Defendant installed the power line over the Thornhill Farm property, the applicable Code (National Electric Safety Code) promulgated by the Institute of Electrical and Electronics Engineers (IEEE) and adopted by the American National Standards Institute (ANSI) required a minimum safe height of eighteen and one-half (18.5') feet at the power line's lowest point between the adjoining power poles.
9. The Defendant also owed a duty to periodically inspect and to maintain power lines to insure continued compliance with the applicable Code for minimum safe height of the power line after the power line had been installed.

10. At approximately 4:00 o'clock p.m., the 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.

WRONGFUL DEATH CAUSE OF ACTION

12. As a direct and proximate result of the aforesaid wrongful conduct on the part of the Defendant, the Decedent met an untimely death depriving his statutory beneficiaries of the Decedent's society, love, support, and affection all to their damage in such amount of actual and punitive damages exceeding the sum of Ten Thousand ($10,000.00) Dollars as determined by the Trier of Fact.

WHEREFORE, pursuant to the Wrongful Death Cause of Action the Plaintiff on behalf of the Decedent's statutory beneficiaries prays for judgment against the Defendant for such amount of actual and punitive damages exceeding the sum of Ten Thousand ($10,000.00) Dollars as determined by the Trier of Fact; for the costs of this action; and for such further relief as may be just and proper.

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
Attorney for the Plaintiff

North Charleston, South Carolina

May 23, 2014

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2014-CP-08-1232
ESTATE OF JOHN FORTNEY, deceased, by his duly appointed Personal Representative, **CONSTANCE S. FORTNEY**, Plaintiff(s), vs. **BERKELEY ELECTRIC COOPERATIVE, INC.**, Defendant(s).	**COMPLAINT** Survival Action (Jury Trial Requested)

FILED
2014 MAY 27 PM 3:17
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

The Plaintiff, **ESTATE OF JOHN FORTNEY**, by its duly appointed Personal Representative, **CONSTANCE S. FORTNEY**, and her undersigned attorney, alleges in this Complaint against the Defendant, **BERKELEY ELECTRIC COOPERATIVE, INC.**, and would respectfully show unto this Honorable Court:

PARTIES, JURISDICTION, AND VENUE

1. The Plaintiff, **CONSTANCE S. FORTNEY**, is the duly appointed Personal Representative of the **ESTATE OF JOHN FORTNEY**, who died intestate in the County of Charleston, State of South Carolina, on April 28, 2008, and who brings this survival and wrongful death action on behalf of his Estate and his two children and statutory beneficiaries, Gina Fortney and Emma Courtney, pursuant to § 15-5-90 and §15-51-10, S.C. Code of Laws, 1976.
2. The Defendant is an electric cooperative organized under the laws of the State of South Carolina which has its principal place of business located in the County of Berkeley, State of South Carolina.

3. The Defendant is engaged in the business of providing electrical power to customers in Berkeley and Charleston Counties including Thornhill Farms located at 10882 Highway 17 North, in the town of McClellanville, County of Charleston, State of South Carolina.
4. This Honorable Court has jurisdiction of the parties and subject matter of this action and venue is proper in Berkeley County by reason of the Defendant's principal place of business being located in the County of Berkeley, State of South Carolina.

FACTUAL ALLEGATIONS

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 Electrical Safety Code.
8. Upon information and belief, at the time the Defendant installed the power line over the Thornhill Farm property, the applicable Code (National Electric Safety Code) promulgated by the Institute of Electrical and Electronics Engineers (IEEE) and adopted by the American National Standards Institute (ANSI) required a minimum safe height of eighteen and one-half (18.5') feet at the power line's lowest point between the adjoining power poles.
9. The Defendant also owed a duty to periodically inspect and to maintain power lines to insure continued compliance with the applicable Code for minimum safe height of the power line after the power line had been installed.

10. At approximately 4:00 o'clock p.m., the 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.

SURVIVAL CAUSE OF ACTION

12. As a direct and proximate result of the aforesaid wrongful conduct on the part of the Defendant, the Decedent sustained an electrical shock injury, suffered conscious pain and suffering, incurred medical bills, and incurred funeral expenses all to his Estate's damage in such amount of actual and punitive damages exceeding the sum of Ten Thousand ($10,000.00) Dollars as determined by the Trier of Fact.

WHEREFORE, pursuant to the Survival Cause of Action the Plaintiff on behalf of the Decedent's Estate prays for judgment against the Defendant for such amount of actual and punitive damages exceeding the sum of Ten Thousand ($10,000.00) Dollars as determined by the Trier of Fact; for the costs of this action; and for such further relief as may be just and proper.

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
Attorney for the Plaintiff

North Charleston, South Carolina

May 13, 2014

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS
Estate of John Fortney, deceased, by his duly appointed Personal Representative Constance S. Fortney, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	Civil Action No. 2014-CP-08-1231 **ANSWER TO COMPLAINT**

The defendant, Berkeley Electric Cooperative, Inc., answers the Complaint herein as follows:

FOR A FIRST DEFENSE

1. The defendant denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. That the defendant denies the allegations of paragraph 1 of the Complaint and demands strict proof thereof.
3. That in response to the allegations of paragraph 2, the defendant admits only that it is a member owned non-profit electrical cooperative organized and existing under the laws of the State of South Carolina with its principal place of business located in Berkeley County, South Carolina.
4. That, in response to the allegations of paragraph 3, the defendant admits only that it is a member owned non-profit electrical company that provides electricity to its members in Berkeley and Charleston Counties.

5. That the allegations of paragraph 4 are admitted upon information and belief.

6. That the allegations of paragraphs 5 and 6 are denied and strict proof thereof is demanded.

7. The allegations of paragraphs 7, 8, 9, 10, 11 and 12 and the remaining allegations of the Complaint are denied.

FOR A SECOND DEFENSE

8. That, if the Plaintiff's decedent sustained the injuries and damages in the manner set forth in the complaint, which is specifically denied, then the Defendant is informed and believes that such injuries and damages were due to and proximately caused by the negligence and recklessness of the Plaintiff's decedent in failing to keep a proper lookout and avoid contact with Defendant's line which was open and obvious, in failing to see, observe and/or in failing to avoid contact with the Defendant's line after notice of the line and the hazard it presented, in failing to comply with the OSHA "10 foot rule", and voluntarily assisting in the movement of a tent pole in a manner that would cause it to come into contact with the Defendant's line, and failing to notify the Defendant of the need to move the tent in an area where the tent pole might come in contact with the Defendant's line, and in failing to exercise and use due care for his own protection and as a result thereof, the Defendant is not liable to the Plaintiff for any amount and/or the Plaintiff's recovery should be reduced in proportion to the negligence and recklessness of the Plaintiff's decedent.

OR A THIRD DEFENSE

9. That, for the reasons set forth above, the decedent assumed the risk of any injury and defendant pleads the defense of assumption of the risk as a bar and defense to this action.

FOR A FOURTH DEFENSE

10. That upon information and belief, the indivisible damages, if any, suffered by the plaintiff were caused by more than one joint tortfeasor and the joint and several liability of this defendant is less than 50% of the total fault for the indivisible damages as compared with the total of the fault of all of the joint tortfeasors and the fault (comparative negligence) of plaintiff's decedent and as a result thereof, this defendant should be liable for only that percentage of the indivisible damages determined by the jury or the trier of fact pursuant to S.C. Code Ann. §15-38-15 (2009 Supp.).

WHEREFORE, having answered, the defendant demands that the Complaint against it be dismissed and for such other and further relief as may be just and proper.

Pope D. Johnson, III
Attorney at Law
1230 Richland Street
Columbia, SC 29201
803-799-9791
803-253-6084 (Fax)
pope@popejohnsonlaw.com

AND

John B. Williams, Esquire
Williams & Hulst, LLC
209 East Main Street
Moncks Corner, SC 29461

3 #3

Attorneys for the Defendant

Columbia, South Carolina
June 16, 2014

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS
Estate of John Fortney, deceased, by his duly appointed Personal Representative Constance S. Fortney, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	Civil Action No. 2014-CP-08-1231 **CERTIFICATE OF SERVICE**

I, Sherry W. Wise, of Pope D. Johnson, III, Attorney at Law, hereby certify that I have served Kevin B. Smith, attorney for the Plaintiff, with the foregoing pleading(s) by mailing a copy of same, postage prepaid and return address clearly indicated, to him at the following address on the 16th day of June, 2014.

COUNSEL SERVED:
Kevin B. Smith, Esquire
Hoffman Law Firm
7087 Rivers Avenue
North Charleston, SC 29406

PLEADINGS:
Answer to Complaint

Sherry W. Wise

1

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS
Estate of John Fortney, deceased, by his duly appointed Personal Representative Constance S. Fortney, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	Civil Action No. 2014-CP-08-1232 **ANSWER TO COMPLAINT (Survival Action)**

The defendant, Berkeley Electric Cooperative, Inc., answers the First Amended Complaint herein as follows:

FOR A FIRST DEFENSE

1. The defendant denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. That the defendant denies the allegations of paragraph 1 of the Complaint and demands strict proof thereof.
3. That in response to the allegations of paragraph 2, the defendant admits only that it is a member owned non-profit electrical cooperative organized and existing under the laws of the State of South Carolina with its principal place of business located in Berkeley County, South Carolina.
4. That, in response to the allegations of paragraph 3, the defendant admits only that it is a member owned non-profit electrical company that provides electricity to its members in Berkeley and Charleston Counties.

5. That the allegations of paragraph 4 are admitted upon information and belief.

6. That the allegations of paragraphs 5 and 6 are denied and strict proof thereof is demanded.

7. The allegations of paragraphs 7, 8, 9, 10, 11 and 12 and the remaining allegations of the Complaint are denied.

FOR A SECOND DEFENSE

8. That, if the Plaintiff sustained the injuries and damages in the manner set forth in the complaint, which is specifically denied, then the Defendant is informed and believes that such injuries and damages were due to and proximately caused by the negligence and recklessness of the Plaintiff's decedent in failing to keep a proper lookout and avoid contact with Defendant's line which was open and obvious, in failing to see, observe and/or in failing to avoid contact with the Defendant's line after notice of the line and the hazard it presented, in failing to comply with the OSHA "10 foot rule", and voluntarily assisting in the movement of a tent pole in a manner that would cause it to come into contact with the Defendant's line, and failing to notify the Defendant of the need to move the tent in an area where the tent pole might come in contact with the Defendant's line, and in failing to exercise and use due care for his own protection and as a result thereof, the Defendant is not liable to the Plaintiff for any amount and/or the Plaintiff's recovery should be reduced in proportion to the negligence and recklessness of the Plaintiff's decedent.

FOR A THIRD DEFENSE

#2

9. That, for the reasons set forth above, the decedent assumed the risk of any injury and defendant pleads the defense of assumption of the risk as a bar and defense to this action.

FOR A FOURTH DEFENSE

10. That upon information and belief, the indivisible damages, if any, suffered by the plaintiff were caused by more than one joint tortfeasor and the joint and several liability of this defendant is less than 50% of the total fault for the indivisible damages as compared with the total of the fault of all of the joint tortfeasors and the fault (comparative negligence) of plaintiff's decedent and as a result thereof, this defendant should be liable for only that percentage of the indivisible damages determined by the jury or the trier of fact pursuant to S.C. Code Ann. §15-38-15 (2009 Supp.).

WHEREFORE, having answered, the defendant demands that the Complaint against it be dismissed and for such other and further relief as may be just and proper.

Pope D. Johnson, III
Attorney at Law
1230 Richland Street
Columbia, SC 29201
803-799-9791
803-253-6084 (Fax)
pope@popejohnsonlaw.com
AND
John B. Williams, Esquire
Williams & Hulst, LLC
209 East Main Street
Moncks Corner, SC 29461
Attorneys for the Defendant

Columbia, South Carolina
June 16, 2014

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS
Estate of John Fortney, deceased, by his duly appointed Personal Representative Constance S. Fortney, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	Civil Action No. 09-CP-08-2146 09-CP-08-2148 **CERTIFICATE OF SERVICE**

I, Sherry W. Wise, of Pope D. Johnson, III, Attorney at Law, hereby certify that I have served Kevin B. Smith, attorney for the Plaintiff, with the foregoing pleading(s) by mailing a copy of same, postage prepaid and return address clearly indicated, to him at the following address on the 16th day of June, 2014.

COUNSEL SERVED:
Kevin B. Smith, Esquire
Hoffman Law Firm
7087 Rivers Avenue
North Charleston, SC 29406

PLEADINGS:
Answer to Complaint

Sherry W. Wise

1

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT

CASE NO: 2014-CP-08-1230

JOHN STEPHEN ROBINSON,

Plaintiff(s),

vs.

BERKELEY ELECTRIC COOPERATIVE, INC.,

Defendant(s).

COMPLAINT

FILED
2014 MAY 27 PM 3:13
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

The Plaintiff, **JOHN STEPHEN ROBINSON,** by his undersigned attorneys, alleges in his Complaint against the Defendant, **BERKELEY ELECTRIC COOPERATIVE, INC.**, and would respectfully show unto this Honorable Court:

1. The Plaintiff is a resident of the County of Charleston, State of South Carolina.
2. The Defendant is an electric cooperative organized under the laws of the State of South Carolina which has its principal place of business located in the County of Berkeley, State of South Carolina.
3. The Defendant is engaged in the business of providing electrical power to customers in Berkeley and Charleston Counties including Thornhill Farms located at 10882 Highway 17 North, in the town of McClellanville, County of Charleston, State of South Carolina.
4. This Honorable Court has jurisdiction of the parties and subject matter of this action and venue is proper in Berkeley County by reason of the Defendant's principal place of business being located in the County of Berkeley, State of South Carolina.
5. On April 23, 2008, the Plaintiff 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 Electrical Safety Code.
8. Upon information and belief, at the time the Defendant installed the power line over the Thornhill Farm property, the applicable Code (National Electric Safety Code) promulgated by the Institute of Electrical and Electronics Engineers (IEEE) and adopted by the American National Standards Institute (ANSI) required a minimum safe height of eighteen and one-half (18.5') feet at the power line's lowest point between the adjoining power poles.
9. The Defendant also owed a duty to periodically inspect and to maintain power lines to insure continued compliance with the applicable Code for minimum safe height of the power line after the power line had been installed.
10. At approximately 4:00 o'clock p.m., the Plaintiff and others were being directed by the event coordinator to move a tent to a different location when the tent pole came into contact with the Defendant's power line.
11. The tent pole would not have come into contact with the Defendant's power line if it had been installed and maintained at the minimum safe height required by the applicable Code.
12. As a direct and proximate result of the Defendant's failure to install, inspect, and maintain its power line at the minimum safe height required by the Code, the Plaintiff sustained an electrical shock and burn injury to his chest, arms, and feet, was helicoptered to Medical University of South Carolina for medical treatment, incurred substantial

medical bills, suffered post traumatic psychological injuries, has been left with permanent scars, was unable to work or attend to his usual activities of daily living for a prolonged period of time, and suffered pain and discomfort all to his damage in such amount of actual and punitive damages exceeding the sum of Ten Thousand ($10,000.00) Dollars as determined by the Trier of Fact.

WHEREFORE, the Plaintiff prays for judgment against the Defendant for such amount of actual and punitive damages exceeding the sum of Ten Thousand ($10,000.00) Dollars as determined by the Trier of Fact; for the costs of this action; and for such further relief as may be just and proper.

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
Attorney for the Plaintiff

North Charleston, South Carolina

May 23, 2014

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS
John Steven Robinson, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	Civil Action No. 2014-CP-08-1230 **ANSWER TO COMPLAINT**

The defendant, Berkeley Electric Cooperative, Inc., answers the Complaint herein as follows:

FOR A FIRST DEFENSE

1. The defendant denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. That the defendant denies the allegations of paragraph 1 of the Complaint and demands strict proof thereof.
3. That in response to the allegations of paragraph 2, the defendant admits only that it is a member owned non-profit electrical cooperative organized and existing under the laws of the State of South Carolina with its principal place of business located in Berkeley County, South Carolina.
4. That, in response to paragraph 3, the defendant admits only that it is a member owned non-profit electrical company that provides electricity to its members in Berkeley and Charleston Counties.

#1

5. That the allegations of paragraph 4 are admitted upon information and belief.

6. That the allegations of paragraphs 5 and 6 are denied and strict proof thereof is demanded.

7. That the allegations of paragraphs 7, 8, 9, 10, 11 and 12 and the remaining allegations of the Complaint are denied.

FOR A SECOND DEFENSE

8. That, if the Plaintiff sustained the injuries and damages in the manner set forth in the complaint, which is specifically denied, then the Defendant is informed and believes that such injuries and damages were due to and proximately caused by the negligence and recklessness of the Plaintiff in failing to keep a proper lookout and avoid contact with Defendant's line which was open and obvious, in failing to see, observe and/or in failing to avoid contact with the Defendant's line after notice of the line and the hazard it presented, in failing to comply with the OSHA "10 foot rule", and voluntarily assisting in the movement of a tent pole in a manner that would cause it to come into contact with the Defendant's line, and failing to notify the Defendant of the need to move the tent in an area where the tent pole might come in contact with the Defendant's line, and in failing to exercise and use due care for his own protection and as a result thereof, the Defendant is not liable to the Plaintiff for any amount and/or the Plaintiff's recovery should be reduced in proportion to the negligence and recklessness of the Plaintiff.

#2

FOR A THIRD DEFENSE

9. That, for the reasons set forth above, the decedent assumed the risk of any injury and defendant pleads the defense of assumption of the risk as a bar and defense to this action.

FOR A FOURTH DEFENSE

10. That upon information and belief, the indivisible damages, if any, suffered by the plaintiff were caused by more than one joint tortfeasor and the joint and several liability of this defendant is less than 50% of the total fault for the indivisible damages as compared with the total of the fault of all of the joint tortfeasors and the fault (comparative negligence) of plaintiff and as a result thereof, this defendant should be liable for only that percentage of the indivisible damages determined by the jury or the trier of fact pursuant to S.C. Code Ann. §15-38-15 (2009 Supp.).

WHEREFORE, having answered, the defendant demands that the Complaint against it be dismissed and for such other and further relief as may be just and proper.

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Columbia, South Carolina
June 16, 2014

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
John Steven Robinson,	)	Civil Action No. 09-CP-08-2150
Plaintiff,	)	
vs.	)	
Berkeley Electric Cooperative,	)	
Defendant.	)	**CERTIFICATE OF SERVICE**

I, Sherry W. Wise, of Pope D. Johnson, III, Attorney at Law, hereby certify that I have served Kevin B. Smith, attorney for the Plaintiff, with the foregoing pleading(s) by mailing a copy of same, postage prepaid and return address clearly indicated, to him at the following address on the 16th day of June, 2014.

COUNSEL SERVED:
Kevin B. Smith, Esquire
Hoffman Law Firm
7087 Rivers Avenue
North Charleston, SC 29406

PLEADINGS:
Answer to Complaint

Sherry W. Wise

1

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS
Estate of Dexter Keyes, deceased, by his duly appointed Personal Representative Devante Alston, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	Civil Action No. 09-CP-09-2147 **DEFENDANT BERKELEY ELECTRIC COOPERATIVE'S ANSWERS TO FIRST SUPPLEMENTAL SET OF INTERROGATORIES**

TO: THE PLAINTIFF:

Defendant Berkeley Electric Cooperative answers Plaintiff Estate of Dexter Keyes, deceased by his duly appointed Personal Representative, Devante Alston's First Set of Supplemental Interrogatories dated July 16, 2009 as follows:

In setting forth these responses, the Defendant does not waive the attorney-client, work-product, or other privilege or immunity from disclosure which may attach the information called for in, or responsive to, the interrogatories. Defendant does not concede the relevance or materiality of the interrogatories, or the subject to which the interrogatories refer.

These responses are submitted by the Defendant subject to, and without in any way waiving or intending to waive, but on the contrary in tending to reserve and reserving:

A. All questions as to competency, relevancy, materiality, privilege and admissibility as evidence for any purpose of any of the documents referred to or answers given, or the subject matter thereof, in any subsequent proceedings, or in the trial of this action or any other action or proceeding;

B. The right to object to other discovery procedures involving or relating to the subject matter of the interrogatories herein responded to; and

C. The right of any time to revise, correct, add to, or clarify any of the answers set forth herein or documents referred to herein.

GENERAL OBJECTIONS

1. Defendant objects to the interrogatories to the extent that the interrogatories seek discovery of information regarding communications between the Defendant and its legal counsel on the ground that such communication is privileged and is not subject to the discovery. Defendant further objects to the Plaintiff's interrogatories to the extent that they seek information regarding material prepared by or for the Defendant or its representatives in anticipation of litigation or for trial, on the ground that the Plaintiff is not entitled to discover such work product materials under Rule 26(b)(3) of the S.C. Rules of Civil Procedure. Any production or revelation of information within the attorney-client privilege or attorney work-product doctrine shall not constitute or be deemed evidence of a general waiver of the privilege or claim of immunity.

2. In responding to the Plaintiff's interrogatories, Defendant is conducting a search of those sections of its records where relevant responsive documents and information are most likely located to the extent that the Plaintiff's interrogatories or any portion thereof seek to require Defendant to take actions other than those numerated above such as reviewing "all documents" concerning subject of the request, no matter how remotely connected Defendant objects to the interrogatory on the ground that it is unduly burdensome and oppressive.

SPECIFIC OBJECTIONS AND RESPONSES

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

ANSWER: 1993.

2. Please state what Edition of the National Electrical Safe Code you contend applies to the power line which is the subject matter of the Plaintiff's Complaint.

ANSWER: 1993 Edition.

3. Please state when the power line which is the subject matter of the Plaintiff's Compliant 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.

#2

4. Please describe in detail your inspection program for the power line which is the subject matter of the Plaintiff's Complaint.

ANSWER: The line in question was part of a pole inspection conducted in 2002.

5. Please state the conductor size and type, together with the stranding detail, for the primary and primary neutral conductor in the span relating to the power line which is the subject matter of the Plaintiff's Complaint.

ANSWER: See staking sheet which is being produced.

6. Please state the National Electric Safety Code name for the primary and primary neutral conductors in the span relating to the power line which is the subject matter of the Plaintiff's Complaint.

ANSWER: The primary is the open supply conductor and the neutral is the neutral conductor.

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Attorneys for the Defendant

Columbia, South Carolina
September 16, 2009

#3

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BERKELEY)	C/A No.: 09-CP-09-2147
)	
Estate of Dexter Keyes, deceased, by his duly appointed Personal Representative, Devante Alston,)	**CERTIFICATE OF SERVICE**
)	
Plaintiff,)	
)	
vs.)	
)	
Berkeley Electric Cooperative, Inc.,)	
)	
Defendant.)	

I, Kathryn B. Beighley, of Johnson & Barnette, LLP, hereby certify that I have served Malcolm M. Crosland, Jr., attorney for the Plaintiff, with the foregoing, **Defendant's Answers to Plaintiff's First Supplemental Set of Interrogatories**, by mailing a copy of same, postage prepaid and return address clearly indicated, to him at the following address on the 16th day of September, 2009.

COUNSEL SERVED:
Malcolm M. Crosland, Jr., Esquire
The Steinberg Law Firm, LLP
P.O. Box 9
Charleston, SC 29402-0009

Kathryn B. Beighley

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#4

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS
Estate of Dexter Keyes, deceased, by his duly appointed Personal Representative Devante Alston, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	Civil Action No. 09-CP-09-2147 **DEFENDANT'S ANSWERS TO PLAINTIFF'S FOURTH SUPPLEMENTAL INTERROGATORIES**

Defendant Berkeley Electric Cooperative answers the Plaintiff's Fourth Supplemental Interrogatories dated February 14, 2011 as follows:

1. Based upon the National Electrical Safety Code, 1993 Edition, what height should the power lines that energized the tent pole carried by the Plaintiff on April 23, 2008 have been at its lower point in relation to the ground.

ANSWER: Basic clearance – 14' 5" as per Table 232-1 of the National Electric Safety Code, 1993 Edition.

2. Identify the specific National Electrical Safety Code Section and Edition the Defendant contends is applicable to the vertical height above ground of the power line which energized the tent pole being carried by the Plaintiff on April 23, 2008.

ANSWER: National Electric Safety Code, 1993 Edition, Section 232

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Attorneys for the Defendant

Columbia, South Carolina
March 8, 2011

2 #2

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 09-CP-08-2146
ESTATE OF JOHN FORTNEY, deceased by his duly appointed Personal Representative CONSTANCE S. FORTNEY and JOHN ROBINSON, Plaintiffs, vs. BERKELEY ELECTRIC COOPERATIVE, INC., Defendant.	**PLAINTIFFS' PRETRIAL BRIEF**

1. STATEMENT OF THE FACTS:

Berkeley Electric admits they are required to inspect their power lines to make sure they are at the height required by law. The reason they must do this is because Berkeley Electric admits it is foreseeable that people will get too close to their power lines and not ask that they be de-energized. Berkeley Electric has told the federal government repeatedly over the last 23 years that they are inspecting all of their overhead power lines to make sure they are at the height required by law each and every year. Berkeley Electric has told the federal government repeatedly over the last 23 years that all of their overhead power lines are at the height required by law. Berkeley Electric admits they have never inspected all of their overhead power lines in any given year. Berkeley Electric admits the power line that killed John Fortney and injured John Robinson has never been inspected to make sure it is at the height required by law. Berkeley Electric has refused to produce a single witness that can even tell the Court how high the law required this power line to be. Had the power line been at the height required by law, the tent these men were moving would have cleared it and never made contact.

2. FACTS IN CONTROVERSY:

None. Since Berkeley Electric refuses to take a position on what the law requires, the Plaintiffs' expert will be the only person to answer this important question for the Court.

3. LEGAL ISSUES INVOLVED:

a. Standard of Care:

Berkeley Electric is required to exercise "the highest degree of care" in their construction, repair, inspection and maintenance of power lines to prevent injury to others. Lundy v. Southern Bell Telephone & Telegraph Co., 90 S. C. 25, 72 S. E. 558; Weeks v. Carolina Power & Light Co. et al., 156 S. C. 158, 153 S. E. 119, 122; Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163, 166; Hart v. Union Mfg. & Power Co., 157 S.C. 174, 154 S.E. 118, 127 (1930).

b. Foreseeability:

Where the injured party brings suit against one tortfeasor, the fact that another party's negligence contributed to the injury does not relieve the party sued of liability. Indemnity Insurance Company of North America, 116 S.E.2d 22, 26 (SC 1960).

A third party's acts of negligence do not break the chain if the acts are foreseeable, and that for an intervening cause to break the chain and relieve an actor of liability, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated. Small v. Pioneer Machinery, Inc., 494 S.E.2d 835, 844 (SC Ct. App. 1997).

c. Other Sources:

When the defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, the Court may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages. Caldwell v. K-Mart Corp., 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct.App.1991)

d. Punitive Damages:

A conscious failure to observe due care has been repeatedly held by our courts to warrant not only actual damages, but punitive damages as well. When a person with the thought that his negligent act may produce an injury to another proceeds to do the act or omission, such circumstances evidence a conscious failure to observe due care. Wannamaker v. Traywick, 136 S. C. 21, 134 S. E. 234, 235.

4. EXHIBITS:

The parties have agreed to exchange exhibits prior to trial.

5. UNUSUAL PROBLEMS:

Berkeley Electric will attempt to trash the Plaintiffs in an effort to misdirect the Court and disguise their own liability.

6. UNUSUAL QUESTIONS:

Upon learning Berkeley Electric planned to contest the paternity of one of Fortney's children, a DNA test was performed confirming to a 99.99% certainty that Gina Fortney is the daughter of John Fortney. When asked if Berkeley Electric still plans to contest paternity, counsel responded, "Yes."

7. SETTLEMENT NEGOTIATIONS:

This case will not be settled within the current parameters of Berkeley Electric's authority.

Respectfully submitted by:

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Don C. Keenan, Esquire
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Attorneys for the Plaintiffs

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS
Estate of John Fortney, deceased, by his duly appointed Personal Representative Constance S. Fortney, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	Civil Action No. 09-CP-08-2146 09-CP-08-2148 **DEFENDANT'S PRE-TRIAL BRIEF**
John Steven Robinson, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	Civil Action No. 09-CP-08-2150

1. A concise, non-argumentative statement of the facts of the case.

BACKGROUND

These actions arise out of an accident that occurred on April 23, 2008 when four (4) men were moving a tent of Stage Presence and contacted a high voltage line of Berkeley Electric Cooperative ("BEC"). The accident happened at a farm occupied by Healing Farms Ministries ("Healing Farm"). Healing Farm was having tents erected in preparation

for a social event. John Fortney and John Steven Robinson, both day laborers, were part of a four man crew from Stage Presence. The Stage Presence crew leader was Alexander Clayson. They were moving the tent at the request of and under the direction of two event planners, Beth Donahue and David Richardson. Two (2) workers, John Fortney and Dexter Keyes, were electrocuted. Clayson and John Robinson were injured. The Clayson and Keyes cases have been settled, and the Fortney and Robinson cases remain for trial.

PLEADINGS

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

> "6. The Defendant owed a duty to the public to install its power lines at a minimum safe height as determined by the foreseeable use of the property over which the lines are installed.
>
> 7. The Thornhill Farm property over which the Defendant's power line had been installed was cultivated and fallow agricultural land which constitutes 'other lands' under the National Electric Safety Code.
>
> 8. Upon information and belief, at the time the Defendant installed the power line over the Thornhill Farm property the applicable Code (National Electric Safety Code) promulgated by the Institute of Electrical and Electronics Engineers (IEEE) and adopted by the American National Standards Institute (ANSI) required a minimum safe height of eighteen and one-half (18.5') feet at the power line's lowest point between the adjoining power poles.
>
> 9. The Defendant also owed a duty to periodically inspect and to maintain power lines to insure continued compliance with the applicable Code for minimum safe height of the power line after the power line had been installed.
>
> 10. At approximately 4:00 o'clock p.m., the Plaintiff and others were being directed by the event coordinator to move a tent to a different location when the tent pole came into contact with the Defendant's power line.
>
> 11. The tent pole would not have come into contact with the Defendant's power line if it had been installed and maintained at the minimum safe height required by the applicable Code."

The plaintiffs claim that the BEC line did not meet the NESC clearance requirements at the time of the accident. The plaintiffs claim that the 1993 NESC required the primary

conductor be built with a clearance of 18.5 feet. After the accident, the clearance of the primary conductor at the point of contact was measured to be 16' 11", as measured by Joe Jones, an engineer. The plaintiffs alleged that the BEC line had a clearance defect at the time of the accident which is denied by BEC. BEC will offer testimony that the NESC was inapplicable since the area where the accident occurred was a construction area with tents being constructed and erected. However, even if there was a clearance defect at the time of the accident, that standing alone would not render BEC liable. BEC can be liable only if it caused the defect or knew or should have known of the existence of the defect and failed to correct it. BEC will offer evidence that the line was built to exceed 18.5 feet. BEC denies that it caused the alleged defect or that it knew or should have known of the defect and should have corrected it.

BEC's answers in both cases allege the following defenses:

1. a general denial;
2. comparative negligence;
3. assumption of the risk;
4. liability, if any, apportioned pursuant to S.C. Code Ann. Section 25-38-15 (2009 Supp.)

THE LINE

The BEC line was constructed in 1993. It is located in an open field toward the back side of the farm of Healing Farm. The 1993 National Electric Safety Code sets forth the clearance requirements. A dispute exists as to whether the clearance requirement for the primary conductor was 18.5 feet or 14.5 feet. There is a dispute as to whether NESC applied to the line when the accident occurred.

The BEC crew that constructed the line was led by Isaiah Ward, an experienced crew leader. BEC will offer evidence that the line was constructed, according to BEC's standard practices, with the primary conductor and the neutral conductor were both attached to the poles at a proper height to allow the conductors to have the proper sag and exceed 18.5 feet of clearance, the alleged clearance requirement.

BEC will offer evidence of its inspection program and evidence that the line was inspected and no clearance defect was reported. The 1993 National Electric Safety Code does not mandate or require a specific inspection cycle. Instead, it requires that lines and systems be inspected "at such intervals as experience has shown to be necessary". The line was inspected by Tomberline Pole Treatment Company, an independent contractor, as part of a pole inspection program in 2002. Although the pole inspection process focuses primarily on inspection of the poles, the contractor, by the contract, is required to report "any dangerous circumstances". The pole inspector inspected the BEC line in question and did not report a clearance defect or any problem with the line.

It is undisputed that BEC had no actual knowledge of the clearance defect in the line prior to the accident.

CIRCUMSTANCES OF THE ACCIDENT

The events leading up to the accident and the circumstances of the accident are largely undisputed. Healing Farm planned a social event at the farm. Stage Presence agreed to provide some of the tents for the event. Prior to taking the tents out to the farm, Gregg Walker, one of the owners of Stage Presence, and Alexander Clayson, the crew leader, went to the farm and surveyed the area. They met with David Richardson and Beth Donahue, the event planners. Clayson has testified that they saw the electrical line in

question, discussed the risk of an accident and injury if there was contact with the electrical lines, and agreed that they should not put a tent in an area that was close enough to contact the electrical line.

Clayson has testified that Dexter Keyes, John Fortney, John Robinson and he initially erected the tent in an area well away from the electrical line. He testified that Mr. Richardson requested that the tent in question be moved and told him the location to where he wanted the tent placed. See Clayson deposition p.54, line 15 through p.55, line 8. According to Clayson, Mr. Richardson wanted the tent moved in the direction of the electrical line and that Mr. Clayson agreed to have his crew move it. See Clayson deposition p.56, line 17 through p.58, line 5. Rather than dismantle the tent, the crew lifted its four (4) covered poles and moved it as assembled.

According to Clayson, the crew moved the tent to within 6 to 8 feet of the electrical line initially. Prior to moving the tent to that location, Clayson warned the crew to watch out for the line and move away from the line as far to the right as possible. See Clayson deposition p.65, line 7 through p.69, line 14.

According to Clayson, the crew put the tent down after moving it close to the BEC line. The crew, at Mr. Richardson's request, lifted the tent again and moved it toward the electrical line at the direction of Mr. Richardson who was standing either under the electrical line or on the other side of the electrical line. According to Clayson, that is when the accident occurred. See Clayson deposition p.69, line 15 to p.73, line 15.

The proper procedure for installation of tents is to do a site survey to identify underground, overhead and other potential hazards to the safe installation of the tent and then avoid any such hazards. The electrical line was seen and identified as a hazard to be

avoided. However, the crew, the crew leader and the event planners moved the tent and contacted the very hazard that they had seen and identified as a hazard to be avoided.

NO EVIDENCE THAT BEC CAUSED THE CLEARANCE DEFECT

There is no evidence that BEC caused the defect. The line was constructed by an experienced crew. The crew's normal procedure was to check the clearance using a measuring stick. Sometimes they would check the clearance by a visual inspection. The crew leader and crew members are expected to testify that whether they checked the clearances visually or with a measuring stick, the line was properly constructed and that the clearance exceeded 18.5 feet.

The plaintiff's expert, John Dagenhart, confirmed that clearances are often if not usually checked visually. On deposition, he testified as follows:

"Q: Now have you ever seen a line ... well, let me ask you. Did you ever become involved in constructing a line like we're dealing with? Have you ever been a ... worked on a crew or supervised a crew that actually built a line, or were you the guy in the office?
A: I've done both.
Q: How many ... of this line, this type of line have you ever built?
A: Probably less than a handful. I've done so as a crew member when I was a young engineer. But they put us on line crews to go out and work on crews, and I remember doing some.
Q: And how many miles of line did you think you've built, worked on?
A: It wasn't miles. It was hundreds of feet at ... at the most.
Q: Okay. And less than a handful of times?
A: Yes.
Q: Now, when you built ... when you were on the crews that built the line, tell me how ... walk me through it. Did you have a staking sheet like what we're dealing with here?
A: We had what would be considered to be a version of that. We had forms that had drawings on them and that's what we went by.
Q: All right. And then you had a crew leader.
A: Yes.
Q: Were you a worker or were you a crew leader or were you observing?
A: I was a grunt. I was a ...

Q: Helper.
A: A helper.
Q: Helper. And this was after you were an engineer?
A: Yes, sir.
Q: And this was just so you could get your hands dirty and see how it happened in the field? Just a taste of it?
A: I believe that's what the intent was.
Q: Okay. So you've got these drawings that are similar to a staking sheet and you go out there and the crew leader puts the crew to working building the line. So, I guess, first they construct the poles. What's the first thing they do?
A: Typically, that would be what you would do. You can't hang wire on something that's not there.
Q: All right. So, you'd erect the poles. Then what would the crew do?
A: Well, the ones I'm thinking about, one particular one that I worked on, we put the hardware on the poles, such as the crossarms, the braces, the insulators and dug the hole and put the poles in the ground. Then, if we needed guide wires, we'd put guides in. And then we strung the wire between the poles, brought them up to tension, tied them in or dead-ended them, and that was basically it. Ands then it was energized.
Q: Okay. And did the crew when they ... put the lines up and brought them to tension, did they measure the lines with clearance with a stick or did they, because it was a job they did every day, did they eyeball it?
A: They didn't measure it with a stick.
Q: Okay. And let me ask you this. Have you ever seen a line that was built by a crew initially that was supposed to be of a particular clearance where the crew didn't built it to the clearance requirement?
A: I don't think so.
Q: And you've got pretty vast experience in this industry, don't you?
A: I believe I do."

LIABILITY FOR FAILURE TO INSPECT AND CORRECT THE DEFECT

The NESC only requires a cooperative to inspect its lines "at such intervals as experience has shown to be necessary". At the time of the accident of April 23, 2008, BEC was inspecting its system lines on a set cycle. Like other cooperatives, BEC used an outside contractor and a pole inspection contract to satisfy its obligation to inspect. No clearance defect was reported when the line and poles in question were inspected in 2002.

Failure to inspect an electrical line and failure to identify a clearance defect can be evidence of negligence and proximate cause. However, one must know two things. First, one must be able to offer evidence to establish when the inspection should have taken place but did not occur. Second, one must be able to offer evidence to establish that the defect in the line existed at the time of inspection should have been performed and could have been discovered. These cannot be left for speculation or surmise. If the inspection should have taken place in 2002 and the clearance problem did not occur until 2007, there could be no liability for failure to inspect. In this case, there is no factual evidence or expert opinion evidence of when the inspection should have taken place or when the defect occurred, and thus there is no basis for a claim for failure to inspect.

Based upon the manner in which the plaintiffs' attorney deposed the BEC employees, BEC expects counsel to take one or more of the following positions:

(1) BEC had a safety manual which required management to train and supervise its employees and insure that safe work practices were followed and failed to follow its manual;

(2) Rico Harrell, a lineman, was on the farm on August 20, 2007 to repair an underground service and should have found the clearance defect;

(3) BEC represented to the public on its webpage that it was accountable but BEC was not accountable; and

(4) BEC had "lied" about its inspection program on the RUS Form 300's.

While BEC disputes the accusations, they are irrelevant and inadmissible unless the plaintiffs first introduce evidence of when the inspection should have taken place and when the clearance defect occurred. For example, if annual inspections should have been done on January 1 of each year, if the clearance defect occurred for the first time on January 2, 2008, an inspection on January 1, 2008 would not have discovered the clearance defect

since it did not exist on January 1, 2008. By the same token, if the defect occurred after Rico Harrell's visit to the farm, he could not have discovered it. Plaintiffs must also offer evidence that the accident would most likely not have occurred but for items 1-4 referenced above. Until such evidence is offered, these are nothing more than red herrings and are irrelevant and inadmissible under Rules 401 and 402, SCRE.

FACTS RELATED TO COMPARATIVE NEGLIGENCE

Should the Court find that BEC was somehow negligent, the Court must consider the comparative negligence of Mr. Fortney and Mr. Robinson and whether they assumed the risk of the accident and injuries.

The BEC line was open and obvious. As a matter of law, the men were charged with the knowledge that contact with a wire charged with electric current is attendant with danger. *Priest v. Brown,* 302 S.C. 405, 396 S.E.2d 630 (1990). They were warned to stay away from the line but failed to do so. The two men violated the OSHA regulation ten (10) foot rule which requires non-experienced personnel not work within ten (10) feet of an energized electrical line. But for their disregard of that which was open and obvious and their violation of the OSHA regulation ten (10) foot rule, the accident would not have occurred.

NEGLIGENCE OF THIRD PARTIES

BEC will offer evidence that Stage Presence, the employer of the two men, contributed to the accident by failing to teach its employees proper safety methods for tent erection and the OSHA regulation ten (10) foot rule, which if taught and followed would have prevented the accident. The employer failed to notify BEC of the work around its line.

BEC will also offer evidence that the event coordinators, Ms. Donahue and Mr. Richardson, contributed to the accident.

S.C. CODE ANN. SECTION 15-38-15

If the Court determines that BEC's liability is less than 50% of the total fault, BEC will ask that findings be made pursuant to S.C. Code Ann. Section 15-38-15.

STATUTORY BENEFICIARES OF JOHN FORTNEY

John Fortney was born on August 21, 1962 and died on April 23, 2008. He was working as a day laborer at the time of the accident. He had a long history of drug and alcohol abuse and had drifted from job to job and place to place throughout his adult life. At the time of his death, he was facing serious criminal charges. He was charged with criminal domestic violence of a high and aggravated nature, after beating and injuring Julie Winterroth, the mother of his alleged daughter, Gina Fortney.

John Fortney was unmarried at the time of his death. He purportedly fathered three daughters who survived him. They are Bailey Brunnmeier (DOB: 6/6/87), Gina Fortney (DOB: 7/21/91) and Emma Ann Fortney (DOB: 4/10/97).

Bailey Brunnmeier is the daughter of John Fortney and Teri Renee Brunnmeier, who were married on November 10, 1980 and divorced on October 3, 1984. Mr. Fortney's parental rights to Bailey were terminated on May 10, 1995. The personal representative, upon information and belief, does not identify her as a statutory beneficiary.

Gina Fortney claims to be the daughter of John Fortney and Julie Winterroth. Upon information and belief, John Fortney is not shown as her father on her birth certificate. Upon information and belief, no paternity testing was ever done. BEC disputes Gina Fortney is a statutory beneficiary. If Gina is the daughter of John Fortney, she had a

limited and conflicted relationship with him. However, she never knew or had any contact with John Fortney until less than a year before his death and only resided with him for a month or two. She never saw him again after he beat up her mother, Julie Winterroth, but she claims to have spoken to him on the phone and texted him several times.

Emma Ann Fortney is the daughter of John Fortney and Kimela Lewis. Her mother predeceased John Fortney. She has moved around a lot. She went to four or five different elementary schools. She never lived with John Fortney after he beat Julie Winterroth. Since his death, she had lived with various family and/or friends.

BEC will offer testimony from Teri Renee Brunnmeier, who was married to John Fortney, had contact with him from time to time after their divorce and had communications with Gina Fortney and Emma Ann Fortney. Mrs. Brunnmeier is expected to testify:

1. Fortney's alcohol and drug abuse problems;
2. His violent temper and violence directed towards women and others;
3. His failure to support his first child financially or emotionally or otherwise; and
4. His beating of Julie Winterroth and Gina's and Emma Ann's reaction.

CRIMINAL CHARGE

On October 17, 2007, John Fortney was charged with criminal domestic violence of a high and aggravated nature pursuant to S.C. Code Ann. Section 16-25-65 as a result of his having beaten Gina's mother, Julie Winterroth, on August 17, 2007. This statute carries a minimum one (1) year and maximum ten (10) year sentence.

2. An objective statement of the facts in controversy. See above.

3. **The legal issues involved. This includes the law applicable to the cause of action and the defense.** Negligence, comparative negligence, S.C. Code Ann. Section 15-38-15, statutory beneficiaries, damages.

4. **A listing of exhibits, indicating those to which there is disagreement and a listing of witnesses who may be called and, if available, their addresses and phone number.** Defendant has proposed that exhibits and a witness list and order of witnesses be exchanged at a mutually agreeable time.

5. **Any unusual problems relating to evidence to be introduced, such as "Business Records as Evidence Act," hearsay, use of depositions, etc.** Defendant will submit a separate memorandum regarding unusual problems relating to evidence.

6. **Any unusual question or matter which should be brought to the attention of the court.** Defendant needs to take a deposition of Michael Tharpe, an employee of the tent manufacturer to be used at trial. This witness will be unavailable during the week of November 4, 2013. The witness is scheduled to go to a national trade convention where he is to receive a national award.

7. **A statement that settlement negotiations were attempted before the date of the pre-trial hearing and the status of settlement negotiations.** The cases have been mediated twice. Updated settlement demands have been requested.

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October 21, 2013

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NOS: 2014-CP-08-1231, 2014-CP-08-1232, 2014-CP-08-1230
ESTATE OF JOHN FORTNEY, deceased by his duly appointed Personal Representative CONSTANCE S. FORTNEY and JOHN ROBINSON, Plaintiffs, vs. BERKELEY ELECTRIC COOPERATIVE, INC., Defendant.	**PLAINTIFFS' MEMORANDUM ON APPORTIONMENT**

I. BEC HAS NO RIGHT TO APPORTIONMENT OF DAMAGES TO NON-PARTIES.

A. Introduction

In a single sentence, BEC makes the suggestion that the negligence of non-parties and S.C. Code Ann. § 15-38-15 have some applicability to the trial of this case. BEC devotes no discussion or analysis to this issue. Instead BEC proceeds on the unfounded assumption it is entitled to claim apportionment of fault to non-parties and receive a corresponding diminution in the extent of its monetary liability for damages under S.C. Code Ann. § 15-38-15. BEC's assumption is incorrect as matter of law and potentially incorrect as a matter of fact depending upon the Court's view of the evidence at the conclusion of the bench trial.

B. S.C. Code Ann. § 15-38-15(A)-(C) limits apportionment of liability to named defendants

S.C. Code Ann. § 15-38-15 was enacted in 2005 as a part of overall revision of the tort law system. It limits in certain circumstances the application of a default rule of joint and several

liability among defendants in a tort action seeking recovery for an indivisible injury. S.C. Code Ann. § 15-38-15 states:

> (A) In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.
>
> (B) Apportionment of percentages of fault among defendants is to be determined as specified in subsection (C).
>
> (C) The jury, or the court if there is no jury, shall:
>
> (1) specify the amount of damages;
>
> (2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning "comparative negligence"; and
>
> (3) upon a motion by at least one defendant, where there is a verdict under items (1) and (2) above for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict under the procedures described at subitem (b) below the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct, as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property. In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item (2) above, will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent. In calculating the percentage of fault attributable to each defendant, inclusion of any percentage of fault of the plaintiff (as determined in item (2) above) shall not reduce the amount of plaintiff's recoverable damages (as determined under item (2) above).
>
> (a) For this purpose, the court may determine that two or more persons are to be treated as a single party. Such treatment must be used where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously responsible for the conduct of another defendant.
>
> (b) After the initial verdict awarding damages is entered and before the special verdict on percentages of liability is rendered, the parties shall be allowed oral

argument, with the length of such argument subject to the discretion of the trial judge, on the determination of the percentage attributable to each defendant. However, no additional evidence shall be allowed.

(D) A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

(E) Notwithstanding the application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability as determined pursuant to subsection (C).

(F) This section does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 608 S.E.2d 425, 427 (2005); University of Southern California v. Moran, 365 S.C. 270, 617 S.E.2d 135 (2005). That intent is determined from the plain language used in the statute. Moran, supra. "The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction." Enos v. Doe, 380 S.C. 295; 669 S.E.2d 619 (2008). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Moran, supra.

Viewing the statute as a whole and reviewing the individual subsections as well as the legislative history of the statute, it is clear that other than the limited applicability of subsection (D) which is discussed below, the statute has no application to the trial of this particular case.

Subsection (A) addresses the issue of joint and several liability for an indivisible injury in a multiple "defendant" tort case and provides that a "defendant" who is determined to be less fifty percent at fault for the indivisible damages as compared with the fault of all defendants and the comparative fault of the plaintiff shall not be jointly and severally liable for the entirety of the damages sustained by the plaintiff. That defendant's liability for damages is limited to its pro-rata share as determined by its applicable percentage of fault. Subsection (C) establishes the

procedure (per the directive of subsection (B)) for the allocation of fault to be made by the trier of fact. It expressly directs that the fault attributable to all of the parties to the action "must be one hundred percent". Subsection (D) makes clear that defendants "retain" whatever rights they previously held to assert that a non-party "tortfeasor"... "contributed to the alleged injury or damages and/or may be liable for any or all of the damages...." Subsection (E) addresses how amounts recovered by a plaintiff from any pre-trial settlements are to be treated. Lastly, subsection (F) provides that a defendant who might otherwise be entitled to apportionment of damages will nevertheless be held to be jointly and severally liable for the entirety of the plaintiff's damages where the conduct was either willful, wanton, reckless, grossly negligent (the punitive damages situation), intentional, or involved alcohol or drugs.

Thus, by the express terms of the statute itself, the allocation of fault by the trier of fact is expressly limited to the existing parties to the case and the percentages of fault allocated among the defendants and the plaintiff must equal one hundred percent. At the risk of belaboring the obvious, the concept of apportionment of fault under the express terms of the statute only applies when there are multiple defendants in the case. This is clear from the language of subsection (A) that speaks only to the fault of the "defendants" and the plaintiff; from the language of subsection (B) stating "Apportionment of percentages of fault **among defendants** is to be determined as specified in subsection (C)" (emphasis added); and the directive of subsection (C) that the total of the percentages of fault assessed by the trier of fact among the plaintiff and defendants must equal 100 percent. There is simply no room in this statutory scheme for a defendant like BEC in a single defendant case to request an apportionment of fault to a person or entity who is not a party to the litigation. BEC might argue that such a result as a matter of policy might be desirable, but that is not the rule that was established by the legislature.

In fact, the rule that BEC wants this Court to utilize at trial was in fact considered and expressly rejected by the legislature during the drafting S.C. Code Ann. § 15-38-15. A commentary in the South Carolina Law Review addressing the history and potential application S.C. Code Ann. § 15-38-15 notes that "the December 8, 2004 version of House Bill 3008 proposed the following language: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged injury ... regardless of whether the person was, or could have been, named as a party to the suit." The proposed section continued by providing how the defendant was to assert the nonparty defense, which included a notice requirement and an extra statement of the basis for believing the nonparty was at fault." Joshua D. Shaw, Note, *Limited Joint and Several Liability Under Section 15-38-15: Application of the Rule and the Special Problem Posed By Nonparty Fault,* 58 S.C. L. Rev. 627, 634-635 (Spring 2007). Thus the legislature was clearly aware of the potential that some cases could involve a claim of non-party fault and expressly chose not provide an opportunity or a procedure for the assertion of such a claim by a defendant such as BEC. To the extent there was any ambiguity in the language used in Subsections (A)-(C), the express rejection by the legislature of language allowing the assertion of non-party fault as means for a defendant to potentially diminish its monetary liability removes all doubt that the legislature intended to allow assertion of the claim advocated by BEC in its Pretrial Brief.

C. S.C. Code Ann. § 15-38-15(D) does not provide for either a right or a procedure for apportionment of damages liability to non-parties.

Subsection (D) provides "A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." BEC apparently argues that this subsection allows it to assert non-party fault and if such non-party fault is proven by them and

they are found by this Court to be less than fifty percent liable for the Plaintiffs' injuries that they are receive a reduction in their monetary liability. The plain language of the subsection does not support this assertion.

As noted above, the legislature rejected language that would have established a right and procedure for the assertion by defendant of a right of apportionment based on the degree of fault attributable to non-parties. That legislative rejection is outcome determinative on the defendants attempt to bootstrap the procedure provided in subsections (A) through (C) into subsection (D) and clearly shows that no such right as asserted by BEC was intended.

Additionally, the language chosen by the legislature in subsection (D) is instructive. The language "retain" obviously speaks to a right previously or already held by a party. Websters defines the word retain, as used in the subsection as "To keep; to continue; to remain". Thus, in the abstract, what the legislature has provided is that a defendant has the same rights that it previously held before the effective date of the statute to assert as a defense to its liability that the conduct of a "tortfeasor", even if a non-party, was responsible for the damages sustained by a plaintiff. Two different scenarios potentially come into play under this subsection. First, a defendant denies that its conduct was negligent and additionally defends by alleging that the plaintiffs injury was caused the conduct of some third party. Second, the defendant asserts that even if its conduct was negligent, that the conduct of some third party was additionally negligent and such third party negligence was the intervening cause of the injury to the plaintiff.

If the defendant desires to assert the latter claim of intervening causation, the case law is clear that "the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged. The superseding act must so intervene as to exclude the negligence of the defendant as one of the proximate causes of the injury." Matthews v. Porter, 239 S.C. 620; 124 S.E.2d 321 (1962); Gause v. Smithers, 403 S.C. 140; 742

S.E.2d 644 (2013). If the character of the intervening act was such that its probable or natural consequences could reasonably have been anticipated or foreseen by the defendant, the causal connection is not broken and the defendant remains liable for all the consequences resulting from the intervening act. Matthews, supra.

So long as the person or entity against whom the defendant desires to make such an assertion as a matter of defense to the plaintiffs allegations can be termed to be a "tortfeasor", subsection (D) makes clear that the defendant "retains" the right to assert such a defense. Inasmuch as South Carolina law prior to the enactment of S.C. Code Ann. § 15-38-15 did not allow a defendant to make a claim that another person or entity was partially at fault in causing the injury to the plaintiff (see Fernanders v. Marks Construction of South Carolina, Inc., 330 S.C. 470; 499 S.E.2d 509 (1998) there is simply no retained right on the part of the defendant to raise such a defense under subsection (D).

What subsection (D) does not do is to provide the mechanism that BEC desires the Court to impose in this case-to engraft the procedure provided in subsection (C) for the allocation of causal negligence among those already parties into subsection (D) and then add in the phrase "potential tortfeasor's" in addition to the defendants and the plaintiff onto the mathematical calculation that subsection (C) mandates to be conducted by the trier of fact. Clearly the legislature knew how to provide for a procedural mechanism for the allocation of fault. The fact that they both failed to provide for a mechanism to make an allocation of fault among non-parties and expressly rejected inclusion of such procedure in drafting S.C. Code Ann. § 15-38-15 is the strongest possible evidence the result advocated by BEC was within the legislative intent of the statute. Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language. Enos, supra. That is precisely

what BEC is asking this Court to do in seeking to allocate fault to non-parties with a corresponding reduction in its monetary liability.

D. S.C. Code Ann. § 15-38-15(D) has no application to either an employer or a statutory employer of the plaintiff.

It is clear from both BEC's prior motion for summary judgment and its pretrial brief that the persons or entities whom BEC seeks to allocate fault were either the employer or statutory employer of the plaintiffs. Plaintiffs have previously briefed this issue in a motion to strike the Third Defense of BEC's answer on the basis that under Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 608 S.E.2d 425, 427 (2005), those entities could not as a matter of law be a "tortfeasor" so as to come within the ambit of subsection (D). In responding to that motion, BEC did not dispute this legal principle, but instead argued that there was no evidence in the record showing that employment relationship and that without such a factual predicate, a motion to strike could not be granted.

In Gordon, the plaintiff received an on the job injury for which he received workers compensation benefits. He then filed a negligence suit against Philips. Phillips then sought a set-off for the amount of Gordon's benefits and crossmotions for partial summary judgment were filed. The trial judge granted Gordon's motion for partial summary judgment on Phillips' set-off claim, noting that "[the] employer . . . could not be liable to its employee in tort because the workers' compensation laws exclude all other rights and remedies and thus [the third-party defendant] did not have any right of contribution from [the employer]." Gordon, 362 S.C. at 406, 608 S.E.2d at 426--427. The Supreme Court affirmed, noting that the employer "could not be liable to [the employee] in tort, [such that} there can be no right of contribution under the Act .... " Gordon, 362 S.C. at 407, 608 S.E.2d at 427-428. Most significantly for present purposes, the

Supreme Court noted that "[t]he third-party defendant and the employer **are not joint tortfeasors**...." Id. (emphasis added).

Just as the right of contribution is derived from a plaintiffs right to recover against an alleged joint tortfeasor, the right of apportionment that BEC claims, albeit erroneously, under subsection (D) is dependent upon the party against whom fault is sought to be imposed being a joint tortfeasor who was susceptible to suit by the plaintiff. The evidence which will be submitted at trial will clearly demonstrate that every person or entity against whom BEC makes a claim of non-party negligence will be either the employer or statutory employer of the plaintiffs. Because the plaintiffs' employer or statutory employer under the Workers Compensation Act cannot as a matter of law be a joint tortfeasor, BEC's claim for apportionment fails under subsection (D) even if it were otherwise proper.

E. Apportionment of fault is not appropriate because BEC bears more than 50% of the total fault and its conduct was willful, wanton, reckless or grossly negligent.

The foregoing legal arguments become moot and apportionment of fault unavailable to CEC if the Court finds at the conclusion of the trial either (a) that BEC bears more than 50% of the total fault or (b) that BEC conduct was willful, wanton, reckless or grossly negligent. Plaintiffs submit that both findings will be amply supported by the evidence. BEC concedes in its pretrial brief that if there is a factual finding that it is more than 50% at fault, it has no claim for apportionment of fault among non-parties so no additional discussion is required on that point.

S.C. Code Ann. § 15-38-15(F) provides that the "section does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent ..." In Keeter v. Alpine Towers International, Inc., 399 S.C. 179; 730 S.E.2d 890 (2012) the jury returned a verdict against the defendant for actual and punitive damages. On appeal, the defendant made the

claim that the Trial Court had erred in failing to submit to the jury the issue of fault against a non-party with whom the plaintiff had achieved a pre-suit settlement. The Court of Appeals declined to reach the issue of whether the Trial Court had ruled correctly in refusing to allow the Defendant to argue that it was entitled to apportionment of fault to a non-party because of the punitive damages award. Specifically, the Court held "However, our ruling affirming the jury's award of punitive damages makes it unnecessary to address this issue as the apportionment statute "does not apply to a defendant whose conduct is determined to be . . . reckless." § 15-38-15(F)." Similarly, the evidence in the present case will show that BEC's conduct was willful, wanton, reckless or grossly negligent. As such, it has no claim to apportion negligence to any third party and obtain thereby a corresponding reduction in its monetary liability to the plaintiffs.

Respectfully submitted by:

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STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 14-CP-08-1231 and 1232
ESTATE OF JOHN FORTNEY, deceased by his duly appointed Personal Representative CONSTANCE S. FORTNEY and JOHN ROBINSON, Plaintiffs, vs. BERKELEY ELECTRIC COOPERATIVE, INC., Defendant.	**ORDER**

TRIAL DATE:	OCTOBER 28, 2015 – NOVEMBER 2, 2015
TRIAL LOCATION:	BERKELEY COUNTY COURTHOUSE
ATTORNEYS:	*Attorneys for the Plaintiffs:* Kevin B. Smith Hoffman Law Firm 7087 Rivers Avenue N. Charleston, SC 29406 Don C. Keenan Andrew Gould Keenan Law Firm 148 Nassau Street, N.W. Atlanta, GA 30303 *Attorneys for the Defendant:* Pope D. Johnson, III 1230 Richland Street Columbia, SC 29201 John B. Williams Williams & Hulst, LLC P.O. Box 1288 Moncks Corner, SC 29461
PRESIDING JUDGE:	The Honorable Roger M. Young, Sr.
ORDER DATE:	December ____, 2015

STATEMENT OF THE CASE:

The Plaintiffs allege negligence, gross negligence and recklessness against the Defendant for violating Federal, State, Local and industry safety rules regarding the construction, maintenance, and inspection of its overhead power lines. The Plaintiffs allege the Defendant misrepresented its inspection and safety program for nearly twenty (20) years to the United States Department of Agriculture, who oversees the operation of electrical cooperatives and provides funding based upon assurances of compliance.

The Plaintiffs were laborers hired to move tents. On April 23, 2008, John Fortney was killed and John Robinson was injured after a tent they were moving came into contact with one of the Defendant's low-hanging, overhead power lines. The Plaintiffs allege the power line violated the height requirements of the National Electrical Safety Code (NESC or "Code") and that had the line been in compliance, the tent they were moving never would have made contact.

The Defendants contend the power line was above Code height and that they never misrepresented anything. They contend the reason for the electrocution was the negligence of the Plaintiffs and other Third Parties present at the scene.

STANDARD OF CARE:

The highest degree of care is required in the distribution, maintenance and inspection of overhead power lines. Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163, 166. Power companies and their employees, even more than all other people, ought to know the great danger of electricity. They ought to take care to see that their wires, which convey electric current, are properly guarded, so as to prevent injuries to persons and property. This duty is incumbent upon them under the law of this state. Weeks v. Carolina Power & Light Co. et al., 156 S. C. 158, 153 S. E. 119, 122. It is not only the duty of a power company to repair its electric lines when it has knowledge of needed repair, but is bound to use due diligence to

acquire information and knowledge concerning the condition of its electric wires, and the failure to do so constitutes negligence. Mitchell v. Charleston Light & Power Company, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577. (SC 1931).

Based upon the record, testimony and evidence presented at trial, and argument of counsel, this Court hereby rules in favor of the Plaintiffs and makes findings of fact and conclusions of law as outlined below.

FINDINGS OF FACT:

I. NEGLIGENCE – RECKLESS VIOLATIONS OF SAFETY RULES.

A. Testimony of John Dagenhart – Expert in the NESC and the construction, maintenance and inspection of power lines.

The NESC protects people from the hazard represented by power lines through isolation by elevation. Mr. Dagenhart testified that it is common knowledge or foreseeable in the electrical distribution industry that people will get too close to power lines. The most important way the NESC protects the community is through strict adherence with the height requirements for overhead power lines. (HT, pp. 500-506).

General Electrical Safety Rules That Apply To This Case.

a. A power company must construct and maintain its power lines at least 18.5 feet high above farms or lands with animals to prevent injury to people or death by electrocution.

b. A power company must inspect their power lines to ensure they're at Code height to prevent injury to people or death by electrocution.

c. A power company must tell the truth about its compliance with electrical safety laws to prevent injury to people or death by electrocution. (HT, pp. 499-500).

1. Specific Electrical Safety Rule Violations Discovered In This Case.

The Court concludes that Berkeley Electric violated general electrical safety rules which proximately caused Mr. Fortney's death and the injuries to John Robinson. The following discussion and information summarizes Mr. Dagenhart's testimony which the Court adopts as factually correct.

a. Berkeley Electric is subject to the requirements of 7 CFR 1730.21, "Inspections and Tests," which addresses the inspection requirements for their overhead power lines.

b. 7 CFR 1730.21 requires: (1) inspections of power lines for compliance with 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. Berkeley Electric violated each of these requirements. Berkeley Electric conceded these violations in their pretrial interrogatory responses: "The line in question has never been inspected for National Electric Safety Code compliance." (Plaintiffs' Exhibit No. 61). This response clearly shows Berkeley Electric violated the safety rule dealing with inspections for compliance with the height requirements of the NESC. (HT, pp. 542-546).

In addition, based upon the testimony of Berkeley Electric's employees who stated they are not keeping records of the inspections they are doing, the Berkeley Electric violated the requirement to keep records of inspections. Based upon the testimony of Berkeley Electric's employees who stated no one is making sure the lines comply with the NESC, Mr. Dagenhart concluded Berkeley Electric violated the requirement that inspections must include a determination as to whether the line complies with the NESC. Based upon the testimony of Berkeley Electric's employees who stated they don't record all deficiencies found, Mr. Dagenhart concluded Berkeley Electric violated the requirement to record all deficiencies. Finally, Mr. Dagenhart concluded that if they aren't keeping the necessary records, it would be impossible to keep those records long enough to identify long-term trends. Mr. Dagenhart

testified these are not minor violations at all. These are violations of specific safety rules designed to protect people and save lives. Based upon the foregoing, Mr. Dagenhart testified Berkeley Electric violated General Electrical Safety Rule 2 above, requiring all power companies to inspect their power lines to ensure they're at Code height to prevent injury to people or death by electrocution. (HT, pp. 545-550).

c. The NESC, Section 232, Table 232-1 governs the minimum height requirements for overhead power lines which includes the power line at issue in this case. (Plaintiffs' Exhibit No. 7). The table takes into account conditions that cause lines to sag. The NESC requires all power lines to be at the specified heights even under those circumstances. Section 232(a)(1) of the NESC provides for additional clearance requirements so that the lines stay at the proper height even under the worst conditions that cause lines to sag. (HT, pp. 508-512).

d. The power line at issue was required to be at least 18.5 feet high at all times. Table 232-1 sets the required height by looking at two (2) categories, voltage and land use. (voltage + land use = required height). The voltage for the power line in this case is 14,400. Since the land was used as a farm, category four (4) applies and provides 18.5 feet is the required height. (HT, pp. 282-289). Section 232(a)(1) of the NESC requires that there be additional clearance needed to account for the worst case sag conditions. In this case, that adds an additional one (1) foot one (1) inch. Therefore, the total height for the line at issue was required to be nineteen feet seven inches (19'7") based upon specific temperature readings the day the men were electrocuted. All height requirements are for the midspan, or the lowest part of the line. (HT, pp. 512-527).

e. Berkeley Electric violated Section 232 by having a dangerously low-hanging power line. The line was measured by Berkeley Electric's employees to be seventeen feet three inches (17'3") on the day of the electrocution at the midspan. (Plaintiffs' Exhibits Nos. 8 & 9). Mr. Dagenhart testified the line was too low and in direct violation of the NESC. Berkeley Electric

violated General Electrical Safety Rule No. 1 requiring power companies to construct and maintain their power lines at least 18.5 feet high above farms or lands with animals to prevent injury to people or death by electrocution. (HT, pp. 507, 526-531, 537).

f. The line was constructed improperly from the start in 1993. There are only two (2) things can cause a line to sag as far as this one did, too much line was used or the poles are leaning. Mr. Dagenhart visited the scene, personally observed the poles, and testified they looked straight and not causing the line to sag. The Court finds that Berkeley Electric's crew simply used too much line when it was constructed. The theory that something must have hit the line and caused it to sag below Code is unrealistic. Mr. Dagenhart explained nothing is going to stretch a line like this (reinforced steel) and cause it to sag this much. In the unlikely event that this did happen, evidence would be clearly visible on the line, and nothing of the sort was found. (HT, pp. 531-534).

g. Had the line been Code compliant, the tent would have safely passed under without any contact. The measurements taken by Berkeley Electric's employees show the exact point of contact, one hundred nineteen feet (119') from the closest pole. If the midspan was at Code height, that would have made the height at the point of contact twenty feet (20'). The tent was measured to be seventeen feet nine inches (17'9"). The highest estimate given of how high the men lifted the tent was six inches (6"). Therefore, the total height of the tent as it was being lifted off the ground was a maximum of eighteen feet three inches (18'3"). This means if the line complied with the NESC, there would have been one foot nine inches (1'9") of clearance between the tent and the energized line.[1] (HT, pp. 537-541).

[1] Arching is when electricity is transferred without contact. Arching at this voltage can only happen when there is less than an inch between the tent and the energized line. Arching would not have taken place with 1'9" of clearance. (HT, pp. 540-541).

h. As a receiver of federal tax dollars from the Rural Utility Service (RUS), Berkeley Electric is required to complete forms and assign performance ratings representing their compliance with electrical safety laws. These forms are called RUS 300 Forms. (Plaintiffs' Exhibit No. 1). The RUS issues Bulletins that explain what the performance ratings represent is being done. (Plaintiffs' Exhibit No. 2). The scores range from zero (0) to three (3), with three (3) being the highest mark. One of the topics is Inspection Program and Records. The records reflect that from 1990-2005, Berkeley Electric has given themselves a perfect score of three (3) under this section. The Bulletin explains that a score of three (3) means, "All overhead lines patrolled annually." (*Internal parentheses omitted*). In giving themselves a three (3), Berkeley Electric is representing they are patrolling all of their overhead power lines each year. Berkeley Electric's employees and their own NESC expert agree they are not patrolling all of their overhead power lines annually. (HT, pp. 551-554).

Under the section Compliance with Safety Codes: Clearances, the RUS records reflect that from 1990-2008, Berkeley Electric gave themselves a perfect score of three (3) under this section. The Bulletin explains that a score of three (3) means "line patrols identify changed conditions requiring greater clearances." Berkeley Electric's lineman, Rico Harrell, stated when he is working on power lines he is not looking to see if the use of the land has changed, that he doesn't know what the original use of the land was when the lines were constructed, and that no one has ever told him he is supposed to be looking for changes in land use. Furthermore, no one records the original use of the land for any power line. Mr. Dagenhart concluded a score of three (3) is a misrepresentation. This would also be a violation of General Electrical Safety Rule No. 3 requiring power companies to tell the truth about their compliance with electrical safety laws to prevent injury to people or death by electrocution. (HT, pp. 554-557).

These are not minor violations. (HT, p. 558, lines 7-9). Mr. Dagenhart testified that the inspection and record keeping practices of Berkeley Electric were not representative of the operation of other electric cooperatives. (HT, pp. 557-561).

B. Testimony of Defense Expert Eric Jackson.

Mr. Jackson admitted that the required height of the line was 18.5 feet and that it was below that height on the date of injury. (HT, p. 786, lines 17-21). He categorizes this as a "defect" rather than as a lack of code compliance. (HT, p. 786, lines 17-21). He additionally acknowledged that "All overhead power lines patrolled annually" means that some form of an inspection is happening to all lines on an annual basis. (HT, p. 810, line 23 – p. 811, line 8). He conceded that Berkeley Electric is not performing some sort of an inspection on all lines on an annual basis. (HT, p. 811, lines 16-19).

Lastly, he acknowledged that Berkeley Electric violated the NESC in failing to inspect the power line in this case. Mr. Jackson agreed that inspections of power lines must include a determination as to whether or not they comply with the height requirements of the NESC. (HT, p. 807, line 20-p. 808, line 25). He was asked to read the Defendant's discovery response stating, "The line in question has never been inspected by NESC compliance." Mr. Jackson admitted this is a violation of the NESC and the Code of Federal Regulations. (HT, p. 809, line 1-p. 810, line 22).

C. Testimony of Ervin Strickland.

Mr. Strickland was employed as the CEO for Berkeley Electric for thirty-two (32) years. This included the time of the electrocution. Currently, Berkeley Electric has over five thousand (5,000) miles of power lines covering most of Berkeley County and parts of Charleston and Dorchester Counties as well. Berkeley Electric has a monopoly in those areas. (HT, pp. 35-37).

Mr. Strickland agreed telling the truth in regulatory reporting is a mandatory requirement for Berkeley Electric. One of the ways Berkeley Electric reports its compliance is by the completion of RUS 300 Forms. (HT, pp. 38-41). Mr. Strickland signed these forms and certified the performance ratings as accurate and truthful for thirty-two (32) years. Mr. Strickland has signed off on these forms every time as either the rater or the reviewer. (HT, pp. 41-44). Mr. Strickland testified the federal government uses the RUS reports submitted by Berkeley "to protect their investment...." (HT, p. 109).

When Mr. Strickland certified the performance ratings were accurate, he did not know if those ratings were truthful. Mr. Strickland admitted that, although he signed off as being the person that came up with the ratings or signed off as having reviewed them, he never participated in the process. (HT, p. 95, line 14-22). He could not remember if he actually knew what the individual performance ratings even meant. (HT, pp. 96, line 22-p. 97, line 7). Mr. Strickland was asked, "if Berkeley Electric is representing to the federal government that they're patrolling all overhead lines annually, should Berkeley Electric be patrolling all overhead lines annually?" His answer was "I'm not sure." (HT, p. 117, lines 2-7).

Bulletin 1730-1 explains that a score of three (3) for Inspection Program and Records means "All overhead lines (including those on private right-of-way) patrolled annually (walking, riding, or aerial); more frequently if experience dictates." A score of three (3) also means that records of line patrols are being kept. A review of the RUS 300 Forms from 1990-2005 shows Berkeley Electric has given themselves a three (3) every time. Mr. Strickland testified that linemen do line patrols as they are riding down the highways looking at the power lines, but no records are kept of that. (HT, pp. 54-58).

Bulletin 1730-1 explains that a perfect score of three (3) for Compliance with Safety Codes: Clearances means that the line patrols are identifying changed conditions requiring

greater clearances. A review of the RUS 300 Forms from 1990-2008 shows Berkeley Electric has given themselves a three (3) every time. Mr. Strickland testified a score of three (3) means linemen are required to be looking to see if the use of the land has changed underneath their power lines, but that he has never known whether they kept any records at all showing the use of the land underneath their power lines, including the initial use when the power line is constructed. People doing the pole inspections are not told what the original use of the land is either. (HT, pp. 58-62).

D. Testimony of Timothy Mobley.

Mr. Mobley is Berkeley Electric's Vice President of Engineering and Operations, the second in command. He has worked for Berkeley Electric for thirty (30) years. Mr. Mobley holds an electrical engineering degree. He conceded that the National Electric Safety Code (NESC) governs the work they do along with the RUS regulations. Mr. Mobley testified that the NESC is "the Bible" for safety issues within the electric utility industry. (HT, pp. 124-127).

Mr. Mobley admitted that when he was deposed in 2012, four (4) years after the injuries and fatalities, he did not know how high the NESC required this power line to be. Shortly after the event, Berkeley Electric management visited the scene. Included in this group was John Hall, their staking engineer[2] and Junior Elrod, the Director of Training and Loss Control. Berkeley Electric hired a NESC expert, Eric Jackson, who visited the scene as well. More engineers from the engineering firm they use, McCall-Thomas, also visited the scene. Mr. Mobley testified that even with the involvement of all of these people, they were unable to determine how high the NESC required this line to be. (HT, pp. 127-130). Ultimately Mr. Mobley conceded that the minimum required height for the line in question was eighteen and a half (18.5) feet at its lowest point.

[2] A staking engineer is the person who designs power lines and determines how high it will be.

Mr. Mobley agrees a power company must inspect their power lines to ensure that they are high enough to prevent injury to people or death by electrocution. (General Electrical Safety Rule No. 2). Mr. Mobley 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. (HT, pp. 140-145).

He also acknowledged the inspectors contracted by Berkeley Electric to perform inspections of the poles holding up the lines are not inspecting overhead lines for proper height under the NESC. Plaintiffs Exhibit 5 specifies the pole inspectors' duties under the contract as "the inspection, evaluation, ground line treatment, and internal treatment of BEC *wood poles*." There is a single mention of power lines stating the pole inspectors are to also look for frayed conductors in addition to the poles. (HT, pp. 158-163).

Mr. Mobley testified that the federal government expects them to tell the truth. This includes their response and performance ratings on the RUS 300 Forms. (HT, pp. 163-170). When he signed off on the RUS 300 Forms, he did not know if what he was certifying was the truth. On the 2008 RUS 300 Form, Berkeley Electric gave themselves a perfect score of three (3) under the section "Compliance with safety codes: clearances. He also admitted that he did not know what a perfect score of three (3) really meant when he signed off and certified that the score was true and accurate. He admitted they had the RUS Bulletin that explained what the performance scores were representing, but he thought their score just meant they were doing line patrols as much as they can. (HT, pp. 170-182).

Although the NESC sets the minimum required heights for power lines, Berkeley Electric does not use the NESC in designing their lines. Mr. Mobley testified that when the lines are designed, the staking engineer doesn't use the NESC to determine the height. (HT, p. 202, lines 6-12). Finally, Mr. Mobley acknowledged that Berkeley Electric does not inspect their power

lines for proper Code height despite inspections being important for public safety. Mr. Mobley admitted the power line in this case was never inspected for NESC compliance and that they aren't really focusing on the Code in any inspection they do. (HT, p. 200, lines 6-12).

E. Testimony of Matthew Bryan.

Matthew Bryan has a BS in electrical engineering from Clemson. He began working for the engineering firm, McCall-Thomas, right out of college where he assisted Berkeley Electric and other cooperatives in the RUS-300 process. (HT, p. 852, line 1 – p. 853, line 8). He examined Berkeley Electric's 2008 RUS 300 Form and testified that he signed off on it and participated in the rating process. (HT, pp. 853, lines 13-21) (Plaintiff's Exhibit No. 1). The term "all overhead lines patrolled annually" means that there is some form of inspection happening on all lines on an annual basis. Mr. Bryan testified he has experience with the completion of the RUS 300 Forms and interpreting the Bulletins issued by the RUS. (HT, p. 865, line 10 – p. 866, line 17). Berkeley Electric has never done some form of an inspection on all lines on an annual basis. (HT, p. 867, lines 2-13).

F. Testimony of John Villeponteaux.

Mr. Villeponteaux has worked for Berkeley Electric for thirty-one (31) years. He is the manager of distribution operations. His job includes the construction, maintenance, and operation of power lines. Mr. Villeponteaux described the power line at issue in this case as a high voltage power line. These high voltage power lines are found near schools, churches, shopping malls, and down the highways. Berkeley Electric has high voltage power lines nearly everywhere people are in Berkeley County and in parts of Charleston and Dorchester Counties as well. (HT, pp. 214-217).

Berkeley Electric's inspection program of overhead power lines consists of linemen looking at power lines as they are riding past them from the street and linemen looking at the

power lines they work on. Mr. Villeponteaux testified that he knows what the inspection program is, and that he is responsible for making sure the linemen in his department are doing what is required of them. (HT, p. 217, lines 15-22, p. 219, lines 1-9). There are no records kept of their inspection of overhead power lines. Management has no way of knowing if any of the lines are actually being inspected because no one is making records of inspections. (HT, p. 221, lines 16-20).

G. Testimony of James Elrod.

Mr. Elrod has worked for Berkeley Electric for thirty-seven (37) years and is the manager of job training and loss control. (HT, p. 233, lines 14-22). He acknowledged and the Court accepts it is foreseeable to Berkeley Electric that people will work around power lines without calling to have them shut off. (HT, p. 224, lines 18-21). He agreed Berkeley Electric does not keep records of the inspections of overhead power lines (HT, p. 235, line 18-p. 236, line 7) and that linemen are not looking to see if the lines comply with NESC height requirements. (HT, p. 243, lines 13-p. 244, line 12).

A full investigation was not done in this case, contrary to the provisions of Berkeley Electric's policy and procedure manual. Mr. Elrod conceded it was part of his job as the manager of loss control to find out what happened. In all the time since 2008, with all of the engineers and experts they sent to the scene, no one has ever written down or determined how high the law required this power line to be. (HT, p. 241, line 12-p. 242, line 2).

Lastly, Mr. Elrod reviewed the 2008 RUS 300 Form. (Plaintiffs Exhibit No. 1). He read the comments concerning their inspection program, "employees are trained to visually inspect lines in their daily operations." He testified that information did not come from him, the manager of job training. (HT, p. 252, line 11-p. 254, line 2). He also testified that no one ever

asked him whether or not employees are being trained to visually inspect lines in their daily operations. (HT, p. 254, lines 3-6).

H. Testimony of Rico Harrell.

Mr. Harrell has worked for Berkeley Electric for nineteen (19) years and his job is a lineman foreman. His job is to construct, maintain and inspect power lines. In 2008, he was a lineman in the district of Thornhill Farms, where the electrocutions occurred. (HT, p. 258, line 24-p. 260, line 2). Once a power line is constructed, he does not measure the line for proper height. (HT, p. 260, lines 6-9). He would need a measuring stick to do that, but linemen aren't given a measuring stick. (HT, p. 260, line 10-p. 261, line 3).

Maintenance records show Mr. Harrell was at Thornhill Farms on February 16, 2007 and August 20, 2007. (Plaintiffs' Exhibit No. 12). On February 16, 2007, Mr. Harrell performed work on one of the poles holding up the power line in this case. He returned to Thornhill Farms for service again on August 20, 2007. He has never inspected the lines at Thornhill Farms to make sure they are at the height required by the NESC. (HT, p. 263, line 23-p. 265, line 15, p. 272, lines 4-7).

I. Testimony of Margaret Yergin.

Ms. Yergin owned the property at the time the power line was constructed. At the time of construction, the land surrounding the power line in this case was traversed by vehicles exceeding eight (8) feet in height and used for cultivation, grazing, and riders on horseback. Ms. Yergin testified there were between one hundred (100) and one hundred sixty-five (165) horses on the property. The largest was a Belgian Shire Cross, who was over eight (8) feet tall. People rode horses and she gave riding lessons. There was a dressage area for riding and jumping beside the hay barn that measured twenty (20) by sixty (60) meters. There was a defined entrance/exit that riders on horseback would use and took them directly underneath the power

line at issue. (HT, pp. 281-285). Ms. Yergin additionally testified the property was actively farmed at the time of construction. She did fish farming in the pond and grew hay in the fields for her horses and to sell. She also grew hay in the area surrounding the power line. The hay was harvested by tractors that exceeded eight (8) feet in height. Ms. Yergin testified that the tractors were driven directly under the power line. (HT, pp. 282-288).

J. Testimony of Beth Donehue.

The Plaintiffs offered the testimony of Beth Donehue. Ms. Donehue works for Memorable Meetings, an event and promotional company. Ms. Donehue was present and working the day the men were electrocuted and injured. She was part of the team that put the charity event at Thornhill Farms together. (HT, pp. 304-305). Her testimony established Mr. Fortney and Mr. Robinson were lent employees.

On April 23, 2008, Thornhill Farms continued to be a place for cultivation and livestock, and still encountered vehicles exceeding eight (8) feet in height in the area of the power line. Ms. Donehue testified that Thornhill Farms Healing Ministries is an event space that works with disabled children where they also grow crops and had livestock. Large trucks exceeding eight (8) feet in height delivered equipment and drove up next to the barn and power line. Nothing about the configuration of the land prevented trucks from driving in the area of the power line. Similar events have been held on the property prior to this event, and similar sized vehicles were needed. (HT, pp. 305-311).

Just before the tent hit the power line, Mr. Fortney, Mr. Robinson and two (2) others were moving the tent at her direction. (HT, p. 318). From where Ms. Donehue was standing, it appeared there was plenty of room between the tent and the energized power line. Ms. Donehue identified a picture representing her point of view and that of her co-worker, David Richardson. (Plaintiffs' Exhibit No. 18). Ms. Donehue has worked with tents this size before around power

lines, and she thought there was plenty of room. She didn't know how high the power line was, but assumed it was at the height required by law. She did not feel they were in danger of hitting the power line. (HT, pp. 320-324).

K. Testimony of Dr. Cathleen Moore – Expert in visual perception

The Plaintiffs offered the expert testimony of Dr. Cathleen Moore in the field of visual perception. Dr. Moore teaches visual perception and does research in visual perception and brain sciences at the University of Iowa. She is a doctor of psychology. Dr. Moore described vision as an "understanding [of] how the brain in particular processes the information that you have available at the eye to make sense of the world around you, to establish a representation of the external world through visual mechanisms in the brain." Dr. Moore has published forty (40) to fifty (50) peer reviewed articles on issues related to visual perception. (HT, pp. 393-403).

The following summarizes Dr. Moore's opinions in this case:

Dr. Moore provided multiple examples of cues our brains use to determine depth or distance of an object. "The fewer reference points or cues means you have a less strong sense and knowledge of depth....So without the cues, you essentially lose the representation of depth relative to you and depth, importantly, relative between objects, so where is one object relative to another?" (HT, p. 440, lines 2-13). Dr. Moore also testified how our eyes only see in 2D, despite the world around us being in 3D. She testified that the dimension we lose is distance to the viewer. Therefore, she testified that because we lose that third dimension in our vision, "you literally don't have in the imagine information about depth, and therefore if we want to represent something about depth, we need to rely on these cues that exist in the two dimensional image." (HT, p. 450, lines 7-12). According to Dr. Moore, this is important since the ultimate question is whether a person could reliably predict that the tent pole would come in contact with the overhead wire. As she testified, "in order to be able to do that, you have to be able to be able to

represent reliably where they are relative to each other and you in depth, and that's what we need these cues for, because that's exactly what's lost" when we lose the third dimension. (HT, p. 450, line 19 – pp. 451, line 1).

This manifested in the conditions on the ground on April 23, 2008, during the moving of the tent because "There's no linear perspective, no relative image size, no occlusion and no texture gradient." (HT, p. 443, lines 11-18). From where the photo was taken, Dr. Moore testified there were virtually no cues to use in determining whether the pole would hit the power line. Due to these lack of cues, Dr. Moore opined that "it's a very difficult and certainly unreliable task to try to judge the height of the power lines from below, based on vision alone, that there just isn't enough information at the front end of the visual system to assess height of those power lines." (HT, p. 446, lines 18-23). As for the men below the tent, Dr. Moore testified had the men been holding the tent and looked up the tent would have occluded, or blocked their view of the wire above. Dr. Moore therefore opined, because of the insufficiency in cues, an ordinary prudent person could not look up and determine the height of the power line from where any of the people were standing that day. (HT, pp. 447, lines 1-8).

II. DAMAGES:

A. The Estate of John Fortney Wrongful Death Claim:

John Fortney was forty-five (45) years old at the time of his death. He was survived by his two (2) children who are the statutory beneficiaries in this case, Gina and Emma Fortney.

1. Testimony of Gina Fortney

Gina Fortney testified that she was born in Las Vegas. She did not know her father when she was young. She moved around a lot, staying with family. She had a t-shirt with circus animals she wore repeatedly until she was five (5). Her mother had told her it was a gift from her father when she was born. She testified she probably grew out of it by the time she was four

(4), but she kept it because it was so special to her. Growing up, she always hoped she would meet her dad some day. She knew she had a sister too, but they had not met either.

In June of 2007, when she was fifteen (15) years old, she met her father for the first time. She worked up the courage to get in touch with one of her father's sisters who told her he was living in Florida. She got his telephone number, but waited about a week to call. They spoke for a while and arranged to meet face-to-face. She was living in Ladson, SC at the time and her father was in Jacksonville, FL. They met for the first time on Father's Day weekend, 2007. Her meeting "was everything that I had wanted." (HT, p. 707).

It was less than a year later that her father was killed. During that time, her father moved from Florida to Ladson. John, Gina and his other daughter, Emma, lived together. They went to the park together, played football, threw Frisbees. Sometimes they would just stay home and play video games. He never raised his voice at her, never spanked her and never really disciplined her in any way. Gina recalled her sixteenth birthday. She smiled as she described her dad pushing cake in her face.

Gina testified she was still sixteen (16) when she got the call that her father had been killed. Gina now has two (2) children, Riley and Ryder. "I really think my dad would have made a great granddad. I think that he would really adore my son because he never had any, and I think that he would really enjoy my daughter because she's so smart. I really think he would enjoy those things." She texted with her dad frequently. The last text she got from him was right before his death. "Your dumb dad loves you, kid." (HT, 710-715).

Gina acknowledged an incident of domestic violence with her mother. She testified she never excused her father for the altercation with her mom. She was asked why she still wanted him in her family's life after what happened with her mom. She responded, "Because people do really stupid things and people make bad choices, but my dad didn't hurt me the same way my

mother never hurt me, and I still love my mother. That doesn't mean that his actions were acceptable. It doesn't mean that what he did was okay, but what he did wasn't unforgivable." (HT, pp. 719-720).

2. Testimony of Emma Fortney

Emma Fortney was eighteen (18) years old at the time of trial. She too was born in Las Vegas where she lived with her dad and mother, Kim. Her mother battled breast cancer for about four (4) years. They all lived together and her father tried to help as best he could. Emma described her dad as her mother's caretaker. Although she had a period of remission, her mother died in 2006. She and her dad moved to Florida a couple of months later. Emma was nine (9) years old at the time. Just over a year later her dad was killed.

Emma testified that she loved her dad and he loved her. She described him as a "promise keeper." "I mean, if my dad told me that we were going to get slushies after school, we were going to then. If he was going to take my friends and me somewhere, then we would – I mean, that's what happened. It wasn't just something he told me. I could count on him to do that." Just before his death, John made a final promise to her. "That he was—that we were going to be a family again. That we would be living together again soon."

After her dad's death, Emma moved in with her Aunt Karen. She eventually moved down to Jacksonville to live with his sister, Aunt Linda. She graduated high school and is in her first year of college.

Just before her dad's death, Emma was ten (10) years old and used her aunt's phone to text with her dad while he was at work. The last text she sent him was, "Dad, I love you. I can't talk to you. You're dead. I miss you. I don't think you are, but it's true. I miss you." "Don't think I was mad at you. My phone would not go on. I know you are dead, but I can't get over it. I miss you so." Emma texted with her dad daily before his death. He often referred to her as

"his treasure." He texted her in the mornings and constantly told her how much he loved her. Images of the text messages were admitted into evidence as the Plaintiffs' Exhibits Nos. 35-60. Emma testified that today, she sometimes feels guilty when she's happy. She wishes her dad could be here with her and enjoy her successes.

Survival Action

1. Testimony of Dr. Kimberly Collins –Expert in forensic pathology

The Plaintiffs offered the expert testimony of Dr. Kimberly Collins in the field in forensic pathology. She is medical doctor and practices forensic pathology. Part of her job is to determine manner of death. She performed the autopsy on John Fortney. She described how electricity can damage internal organs and even break bones. The point of contact with the electricity on Mr. Fortney was through his left hand and the electricity exited through his feet. Her report was identified and admitted into evidence as the Plaintiffs' Exhibit No. 28.

When Mr. Fortney was first approached by medical personnel, he was in a state of ventricular fibrillation, an abnormal heartbeat. She testified that people who have been electrocuted can feel the pain as the electricity enters and exits their body. She described a sharp pain at first. In this case, the electricity went through Mr. Fortney's liver which would have produced pain as well. The EMS records show Mr. Fortney's heart was beating and he was alive for over an hour after he was shocked. Dr. Collins stated death was not instantaneous.

B. John Robinson

Mr. Robinson is fifty (50) years old, forty-three (43) at the time of the electrocution. He completed the tenth grade. His first memory after being shocked was laying on the ground seeing white. He was put on a gurney and transported by helicopter to the emergency room at MUSC. While in the helicopter, he remembers feeling like he was burning on his chest and left foot. On a scale of one (1) to ten (10), he stated the pain was a ten (10). At the emergency room, his heart

felt like it was racing and many people were trying to help him. He was admitted for several days. He still has pain in his left foot. "It feels like a pin is sticking you." (HT, pp. 668-676).

Mr. Robinson testified his life has changed. He cries and gets sad any time he sees a tent. There are times he cries for no reason at all. He gets anxious any time he sees a power line. He gets scared. He gets depressed. Sometimes when he is at work, he starts crying for no reason at all. He usually goes to the bathroom and waits for it to pass (about 10-15 minutes) before going back to work. Before being shocked, he rarely cried. In fact, he did not even cry at his own father's funeral. He has been married for approximately six (6) years. His wife holds him when he cries. When asked how this makes him feel, Mr. Robinson responded, "Like a baby. I feel like I'm the man of the house. I don't need to be up in my wife's arm, crying like a baby." Even as of the date of trial, these crying spells continue. "This is what I have to deal with." (HT, pp. 676-681).

Dr. Collins also testified regarding John Robinson. She testified, "Electrocution, as I mentioned earlier, is painful. We know – it's used as an element of torture. It produces heat and causes necrosis of tissues. It can break bones, blisters the skin, can cause chronic problems, chronic scarring and complications. It affects the nerves." (HT, p. 378, line 24 – p. 379, line 5). Dr. Collins testified that it is not uncommon for entrance and exit wounds to still be painful many years after being electrocuted. (HT, pp. 380-382).

CONCLUSIONS OF LAW:

I. NEGLIGENCE

The Plaintiffs allege negligence, gross negligence and recklessness against the Defendant for violating Federal, State and industry safety rules regarding the construction, maintenance, and inspection of its overhead power lines. "To prevail in an action for negligence, the plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2)

defendant's breach of that duty by a negligent act or omission; and (3) damages to plaintiff proximately resulting from the breach of duty." Trivclas v. SC Dep't of Tranp., 384 S.C. 125, 133, 558 S.E.2d 275 (Ct.App. 2001).

The duty and standard of care that apply to this case can be traced back to the beginnings of electricity itself. Even as our country began to realize the great benefits of electricity, the danger was apparent as well.

> The rattlesnake warns its victim, but not so with this subtle, invisible, and death-producing power. It is a matter of common knowledge that this wonderful force is of untold benefit to our industrial life. Electric power is an industry producing agency, and the hydroelectric development has been one of the greatest factors in the state's progress and especially its industrial expansion. Every legitimate encouragement should be given to its manufacture and distribution for use by public utility corporations, manufacturing plants, homes, and elsewhere. On the other hand, the highest degree of care should be required in the manufacturing and distribution of this deadly energy and in the maintenance and inspection of the instrumentalities and appliances used in transmitting this invisible and subtle power. Hart v. Union Mfg. & Power Co., 157 S.C. 174, 154 S.E. 118, 127 (1930) (quoting Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163, 166).

Recognition of both the danger and what should be required prompted continued belief that nothing but the highest degree of care will keep the community safe. The highest degree of care is required in the distribution, maintenance and inspection of overhead power lines. Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163, 166. Power companies and their employees, even more than all other people, ought to know the great danger of electricity. They ought to take care to see that their wires, which convey electric current, are properly guarded, so as to prevent injuries to persons and property. This duty is incumbent upon them under the law of this state. Weeks v. Carolina Power & Light Co. et al., 156 S. C. 158, 153 S. E. 119, 122. It is not only the duty of a power company to repair its electric lines when it has knowledge of needed

repair, but is bound to use due diligence to acquire information and knowledge concerning the condition of its electric wires, and the failure to do so constitutes negligence. Mitchell v. Charleston Light & Power Company, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577. (SC 1931).

The factfinder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case. The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006). Relevant rules of a defendant are admissible in evidence in a personal injury action regardless of whether rules were intended primarily for employee guidance, public safety, or both, because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury. Tidwell v. Columbia Ry., Gas & Elec. Co., 109 S.C. 34, 95 S.E. 109 (1918). When defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages. Caldwell v. K-Mart Corp., 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct.App.1991). Plaintiffs may establish legal cause by establishing foreseeability. Young v. Tide Craft, Inc., 242 S.E.2d 671 (SC 1978).

The violation of an applicable statute or regulation is negligence per se, and whether or not such breach contributed as a proximate cause to the plaintiff's injury is ordinarily a question for the fact finder. Causative violations of an applicable statute or regulation constitutes actionable negligence and is evidence of recklessness, willfulness and wantonness. Field v. Gregory, 230 S.C. 39, 94 S.E.2d 15 (1956), Fairchild v. South Carolina Department of Transportation, 398 S.C. 90; 727 S.E.2d 407 (2012).

Here, evidence of the standard of care can be found in the NESC, the United States Code of Federal Regulations, the rules imposed by the RUS, as well as in Berkeley Electric's own Safety Manual. Berkeley Electric violated their duties of care in the distribution, maintenance and inspection of their overhead power lines which proximately caused Mr. Fortney's death and the injuries to Mr. Robinson.

A. The Height of the Line

The NESC governs the height of the line at issue and requires a clearance of 18.5 feet at the lowest point, even under the worst possible sag conditions. The testimony of Margaret Yergin laid the factual predicate for the height requirement and Berkeley Electric's vice president of engineering and operations, and Berkeley Electric's retained expert witness agreed that the NESC required a minimum 18.5 foot height. Berkeley Electric violated the NESC in allowing the line for hang below 18.5 feet at the lowest point. The measurements done by Berkeley Electric show the power line was 17 feet 3 inches at the lowest point in the line on the day the men were electrocuted. Had the line complied with the Code, the tent these men were moving could not have made contact, therefore the negligence of Berkeley Electric in failing to comply with applicable minimum height requirements was the proximate cause of the damages in this case.

B. Inspections

Pursuant to 7 CFR 1730.21, "Inspections and tests," the following are required of Berkeley Electric: (1) inspections of power lines for compliance with 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 evidence is uncontroverted that Berkeley Electric, through the testimony of its own employees and expert witness, Eric Jackson, violated the provisions of 7 CFR 1730.21.

Inspections of overhead power lines must not only take place, but those inspections must include a determination as to whether the line meets the height requirements of the NESC. Mr. Jackson admitted that Berkeley Electric never inspected the line in this case for NESC compliance. Furthermore, based on the testimony of Berkeley Electric's employees, they are not determining compliance with the Code in any inspection of any overhead power line. In fact, the evidence shows Berkeley Electric doesn't design power lines using the Code, doesn't write down what the Code requires, and doesn't tell the people doing the inspections what the Code requires. Had Berkeley Electric inspected the line for proper clearance under the NESC, they should have discovered the existence of the dangerous condition posed by the low-hanging line and raised the line and this tragic accident would not have occurred. The failure to do inspections is evidence of the violation of the standard of care and a proximate cause of the damages in this case.

C. Record Keeping

Records of inspections are required. Berkeley Electric's employees freely admitted they do not keep records of the inspections of overhead power lines. In addition, they do not record all deficiencies found in any inspection they are doing. And, if they aren't keeping full records in the first place, it would be impossible to keep them long enough to identify long-term trends. The failure to keep the required records is evidence of the violation of the standard of care and a proximate cause of the damages in this case.

The Court finds that Berkeley Electric's negligent conduct represents 90% of the cause of the damages sustained by the Plaintiffs.

II. COMPARATIVE NEGLIGENCE

"A plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in

proportion to the amount of his or her negligence." Nelson v. Concrete Supply Co.. 303 S.C. 243, 399 S.E.2d 783 (1991).

The defense contends the plaintiffs violated a regulation of the Occupational Safety and Health Administration ("OSHA") requiring cranes and derricks to maintain a minimum distance of 10 feet from overhead lines (up to 50kV); this is known as the "Ten Foot Rule." 29 C.F.R. § 1926.1408, Table A. Plaintiffs were admittedly within the ten foot zone of the power line and therefore bear some degree of negligence and responsibility for their injuries and damages. However, the negligence of the plaintiffs pales in comparison to that of the Defendant.

The negligence of the plaintiffs was a momentary lapse-they came too close to a line which they could not perceive as representing a clear and immediate danger because of perceptual difficulties. The negligence of Berkeley Electric was continual and multifaceted over a period of 15 years. Berkeley Electric held the necessary expertise to appreciate the particular danger posed by this power line. Berkeley Electric alone possessed the ability to alleviate the danger posed by the power line but failed to do so. Berkeley Electric derived income from the distribution of electricity, and it is after all their responsibility to provide electricity in a safe manner given the monopoly they have been granted. Finally, the Court recognizes that Berkeley Electric, as opposed to the Plaintiffs in this case, is to be held to the highest degree of care in the "distribution of this deadly energy and in the maintenance and inspection of the instrumentalities and appliances used in transmitting this invisible and subtle power." Hart v. Union Mfg. & Power Co., 157 S.C. 174, 154 S.E. 118, 127 (1930) (quoting Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163, 166).

The Court finds that the Plaintiffs' negligent conduct represents 10% of the cause of the damages sustained by them.

III. NEGLIGENCE OF THIRD PARTIES

The intervening negligence of a third person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care. Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998). The Plaintiff need not prove the defendant should have contemplated the particular event which occurred. Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990).

S.C. Code Ann. § 15-38-15 governs apportionment of liability to third parties. Pursuant to S.C. Code Ann. § 15-38-15(F), there can be no apportionment to third parties when the defendant is determined to either bear more than 50% of the total fault, or to have acted willful, wanton, reckless, or grossly negligent. Keeter v. Alpine Towers International, Inc., 399 S.C. 179; 730 S.E.2d 890 (2012). Because this Court finds Berkeley Electric was more than 50% at fault and willful, wanton, reckless, and grossly negligent in the performance of their duties, there can be no apportionment to any third party. However, even without this finding, the record establishes that any acts or omissions of third parties (i.e. getting too close to energized power lines) was foreseeable to Berkeley Electric, thereby precluding a ruling of negligence as to third parties. Furthermore, the record establishes it was foreseeable to Berkeley Electric that low-hanging power lines are dangerous and increase the chances of people being injured or killed. The most disturbing aspect of this case is that, even with this knowledge, they still neglected to ensure lines were constructed at Code height and stayed that way. And, when reporting to the federal government on issues such as the height of the lines and inspections, Berkeley Electric knowingly misrepresented what they were doing, thereby preventing others from stepping in and rectifying the violations before Mr. Fortney was killed and Mr. Robinson was injured. This is what it means to act with a conscious disregard of the rights and safety of the members of our community.

IV. DAMAGES

Where a case comes before the Court for a bench trial, "[t]he trial judge has considerable discretion regarding the amount of damages, both actual and punitive." Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310, 594 E.E.2d 867, 873 (Ct.App. 2004)

The Estate of John Fortney

Wrongful Death

Under S.C.Code Ann. § 15-51-20 (Supp.1993), a personal representative may bring a wrongful death action for the benefit of statutory beneficiaries, including the parents of the deceased where there is no surviving spouse or child as in this case. Ballard v. Ballard, 314 S.C. 40, 41, 443 S.E.2d 802, 802 (1994). Damages recoverable for wrongful death are the damages sustained by the statutory beneficiaries resulting from the death of the decedent, including pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship. Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993); Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972); Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640 (1969).

Mr. Fortney left behind two children. Although defense counsel argues their relationship with their father wasn't the norm, few relationships are. The damages in a wrongful death claim look to measure the mental shock, suffering, wounded feelings, grief, sorrow, and loss of society and companionship from their point of view.

Gina Fortney looked forward to the day she would meet her father for nearly 15 years. Even as a young child, she cherished what little she knew of him or had to know him by. When they finally did meet, it was everything she had wanted for all those years. Unfortunately, their time together would be taken away less than a year later. Gina loved her father and misses him all the time. Gina will never see her father again and her children will never have the opportunity to even know him. The grief and sorrow she has suffered and will most likely continue to suffer is immense.

Emma Fortney, on the other hand, spent her entire life with her father. Emma, John and her mother, Kim, lived together and were by all accounts a family. Emma's loss is compounded and made worse by the fact that just about a year before her father was killed, her mother died following a long battle with cancer. At the time of her father's death, Emma was 10 years old and now without either of her parents. Both Gina and Emma were in constant communication with their father. They enjoyed texting back and forth on a regular basis. These text messages reviewed in court show they loved their father and thought of him often.

Much argument was received from defense counsel concerning the alleged bad acts of John Fortney. In determining the amount of the damages to be awarded in an action under the statute for wrongful death, the question is not one of the value of the human life, but is rather the damages sustained by the beneficiaries from the death of the deceased. Bennett v. Spartanburg Ry., Gas & Electric Co., 97 S.C. 27, 81 S.E. 189. In the end, both Gina and Emma proved to the Court that although they didn't approve of everything their father did, they still loved him and miss him dearly.

Survival Action

Damages in a survival action include recovery for the deceased's conscious pain and suffering and medical expenses. Baker v. Sanders, 301 S.C. 170, 391 S.E.2d 229 (1990). Dr. Collins was qualified as an expert and has experience with victims of electrocutions. Her testimony establishes that Mr. Fortney suffered conscious pain and suffering from the electrical shock. She described how the electricity burns its way through the body, causing pain at each location along the way to where the electricity exits the body. Mr. Fortney's heart was still beating and he was alive for over an hour after he was electrocuted.

A. John Robinson

Actual Damages

"Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was prior to the damages received insofar as this is monetarily possible." Austin, 358 S.C. at 311, 594 S.E.2d at 874. "The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred." Id.

Plaintiff is also entitled to damages for "loss of enjoyment of life" and "pain and suffering." Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001). These are two separately compensable elements of damages. See id. "Pain and suffering compensates the plaintiff for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself." Id. at 501-02, 541 S.E.2d at 244.

Further, "[s]eparate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence." Boan, 343 S.C. at 5012, 541 S.E.2d at 244 (citing Turner v. ABC Jalousie Co. of North Carolina, Inc., 251 S.C. 92, 160 S.E.2d 528 (1968)).

Damages for loss of enjoyment of life, on the other hand, "compensate for the limitations resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations." Boan, 343 S.C. at 502, 541 S.E.2d at 244.

1. **John Robinson's Past Mental Anguish, Pain and Suffering and Loss of Enjoyment of Life.**

It has been over seven (7) years since Mr. Robinson suffered the electrical injury. 14,400 volts entered through his chest, surged through his body, and exited his foot. He was taken by helicopter to MUSC where he was admitted for two (2) days over concerns with his heart. He

received care for the wounds and counseling to help deal with the memories of this horrible event and the dead coworkers left behind. Mr. Robinson has suffered physical pain and mental anguish for the past seven (7) years proximately caused by the negligence of Berkeley Electric.

2. John Robinson's Future Mental Anguish, Pain and Suffering, and Loss of Enjoyment of Life.

John Robinson is fifty (50) years old, and according to the life expectancy table codified at S.C. Code Ann § 19-1-150, he is expected to live to the age of 79 - an additional 29.18 years after trial. He will most likely suffer from the physical pain in his foot for the remainder of his life.

In addition to the physical pain, Mr. Robinson will most likely suffer from mental anguish for the rest of his life. These events have reduced his relationship with his wife from that of equal partners to a feeling that he is a child and she is the parent. Although they have what was described as a loving relationship, Mr. Robinson desires to be the man of the house and is distraught about the reality of their interactions. He has and will most likely have in the future anxiety and fear any time he sees a power line. He has and will most likely have in the future frequent crying spells and depression related to what he went through, the anxiety he suffers, and the memories of his dead coworkers.

B. Punitive Damages

"Punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. Moreover, they serve "as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated." Gamble v. Stevenson, 305 S.C. 104; 406 S.E.2d 350 (1991). A conscious failure to observe due care has been repeatedly held to warrant a jury in giving not only actual damages, but punitive damages as well. When a person with the

thought that his negligent act may produce an injury to another proceeds to do the act or omission, such circumstances evidence a conscious failure to observe due care. Wannamaker v. Traywick, 136 S. C. 21, 134 S. E. 234, 235. Punitive damages may be appropriately imposed when the conduct of the defendant which causes injury is negligence per se because the violation the applicable statute or regulation is evidence of willfulness or recklessness. Fairchild v. South Carolina Department of Transportation, 398 S.C. 90; 727 S.E.2d 407 (2012). The plaintiff has the burden of proving entitlement to punitive damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135. The Court concludes the Plaintiffs have met this burden.

The Supreme Court in Gamble, supra, mandated that where punitive damages were awarded by a jury as the trier of fact that the Trial Court conduct a post-trial review of the verdict in which the following factors may be considered: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) other factors deemed appropriate. In sitting as the trier of fact in this case, the Court deems review of these same factors helpful in rendering a decision on the request for punitive damages. After consideration of the evidence, the Court has determined that a judgment for punitive damages in the amount of $5,000,000.00 is appropriate and to be divided by the two plaintiffs proportionally to the judgment for their actual damages. Discussion of the Gamble factors follows.

(1) **The defendant's degree of culpability**: The Court finds that this factor weighs in favor of a significant award of punitive damages. Berkeley Electric holds a public franchise and is charged with providing electricity to citizens of the community on a safe and reliable basis. The evidence recited above shows that for years Berkeley Electric failed to fulfill the public trust

in this regard. Despite the regulatory requirement for an inspection program that specifically required inspection for compliance with the NESC and with great regularity representing to the federal government that all power lines were inspected for such compliance on an annual basis, the truth of the matter was that Berkeley Electric, if inspecting their lines at all did so on an extremely haphazard manner. The best that can be said for Berkeley Electric's inspection program is that it consisted of some workmen who were untrained in the specifics of inspection driving down the road and potentially eyeballing high voltage electrical lines for compliance with some unknown requirements.

Berkeley Electric was required to know the law that was applicable to their operations. Even if they lacked such knowledge, their regular completion of the RUS 300 forms in which they continually made representations that they were conducting annual inspections for NESC compliance should have alerted them to the necessity that more was required of them. Moreover they were required to know the NESC mandated an 18.5 foot clearance for the line in question given the undisputed use of the property in question. Berkeley Electric's own expert acknowledges that the line failed to meet code requirements. The Court accepts and believes the testimony of Mr. Dagenhart that the line was initially strung too low, resulting in its failure to comply with the NESC minimum height requirements from February 1993 all the way up until the date that it produced injury. The Court further credits Berkeley Electric's admission that the line in question had never been inspected for NESC code compliance over a fifteen year period. The Court, as a matter of fact and as a conclusion of law, finds that such conduct by Berkeley Electric carries a strong degree of culpability.

(2) **The duration of the conduct**: As noted above, the conduct of Berkeley Electric was long standing, extending over a period of fifteen years. It represented a potential hazard to

every person coming onto the property for that entire period of time. The longevity of this conduct weighs heavily in favor of a significant judgment for punitive damages.

(3) **The defendant's awareness or concealment**: While the Court does not believe that Berkeley Electric attempted to conceal their lack of safety compliance, the Court does find that Berkeley Electric made a conscious decision not to conduct the annual safety inspections or to keep the safety records that they represented to the federal government was being done. This factor weighs in favor of a significant judgment for punitive damages.

(4) **The existence of similar past conduct**: The former manager of safety and training of Berkeley Electric acknowledged that there were other lines in the Berkeley Electric system which had probably never been measured for NESC clearance compliance. (HT, pp. 251-252). While there was no evidence that either the line in question or any other line had ever produced injury to any other person, Mr. Elrod's testimony shows that the systemic issues with the line in question were not an isolated incident but rather were representative of Berkeley Electric's pattern and practice of neglecting their regulatory safety responsibilities.

(5) **Likelihood the award will deter the defendant or others from like conduct**: Business entities, even not for profit business entities such as Berkeley Electric, must maintain practices of fiscal responsibility or they will fail to survive as ongoing operations. The goal of the Court is not to punish Berkeley Electric into bankruptcy and indeed that would be constitutionally impermissible. On the other hand, a significant penalty is appropriate considering the deterrent function of punitive damages. The ratio determined by the Court is less than 1:1 in reference to the total actual damages determined to represent fair and reasonable compensation for the actual damages sustained by the Plaintiffs. The ratio is low only because the degree of harm inflicted by Berkeley Electric was so large.

(6) **Whether the award is reasonably related to the harm likely to result from such conduct**: The conduct of Berkeley Electric in this case cost the lives of two men and severely injured two others. Berkeley Electric created an exceptionally dangerous condition. That condition existed for a long period of time because of Berkeley Electric's continuing neglect. During some portion of that time, the area in question was open to the public for use in events, much like the charity event being prepared for at time of the events of April 23, 2008. Thus, the conduct of Berkeley Electric represented a potential hazard to the public at large.

(7) **Defendant's ability to pay**: No evidence was introduced of net worth of Berkeley Electric.

(8) **Other factors**: The Court has not considered any additional factors in this regard.

CONCLUSION

Based on the above findings of fact and conclusions of law, this Court finds that the Plaintiffs have incurred the following damages:

As to the Estate of John Fortney:

Wrongful Death	$5,000,000.00
Survival Action	$1,000,000.00
SUBTOTAL	**$6,000,000.00**

As to John Robinson:

Intangible damages (pain and Suffering, mental anguish, and Loss of enjoyment of life)	$1,500,000.00
SUBTOTAL	**$1,500,000.00**
COMBINED SUBTOTALS	**$7,500,000.00**
PUNITIVE DAMAGES	**$5,000,000.00**

TOTAL DAMAGES	**$12,500,000.00**
LESS: 10% COMPARITIVE NEGLIGENCE	**$1,250,000.00**
FINAL AWARD	**$11,250,000.00**

Accordingly, IT IS HEREBY ORDERED that judgment be entered in favor the Plaintiffs against the Defendant for a total judgment of Eleven Million Two Hundred Fifty Thousand ($11,250,000.00) Dollars representing the total damages of $12,500,000.00 found by the Court less a deduction in the amount of 10% representing the degree of comparative negligence assessed against the Plaintiffs.

_____
The Honorable Roger M. Young, Sr.
Presiding Judge, Ninth Judicial Circuit

_____, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE Nos. 14-CP-08-1231, 14-CP-08-1232
Estate of John Fortney, deceased, by his duly appointed Personal Representative Constance S. Fortney, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	**ORDER**
John Steven Robinson, Plaintiff, vs. Berkeley Electric Cooperative, Defendant.	)	Civil Action No.14-CP-08-1230

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

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

The line was open and obvious. The presence of the line and the dangers it presented were discussed. As the crew moved the tent, Mr. Clayson actually halted work due to his concern about the proximity of the line and the safety of his crew. Despite this, the crew lifted the tent and, at the direction of Ms. Donahue and Mr. Richardson, carried it directly into the line.

PLEADINGS

The plaintiffs claim that the BEC line did not meet the NESC clearance requirements at the time of the accident. The plaintiffs claim that the 1993 NESC required the primary conductor be built with a clearance of 18.5 feet. On April 24, 2008, the clearance of the primary conductor mid span was measured to be 17' 3" by John Hall, a BEC employee. On May 9, 2008, the clearance of the primary conductor mid span was measured to be 16' 11", as measured by Joe Jones, a McCall Thomas engineer who is now deceased. The plaintiffs alleged that the BEC line had a clearance defect at the time of the accident which was the proximate cause of the accident.

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

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

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

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

9. The Defendant also owed a duty to periodically inspect and to maintain power lines to insure continued compliance with the applicable Code for minimum safe height of the power line after the power line had been installed.

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

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

Although not pled, the Plaintiffs further asserted that BEC had failed to maintain the proper records and that BEC lied to the federal government in its preparation and filing of the RUS Form 300's.

BEC alleged the defenses of (1) a general denial; (2) comparative negligence; (3) assumption of the risk; and (4) liability, if any, apportioned pursuant to S.C. Code Ann. Section 25-38-15 (2009 Supp.) In particular, BEC asserted that its lines were constructed according to the guidelines established by its lender the Rural Utilities Services ("RUS"), an agency of the Department of Agriculture with a mid-span clearance of 20 feet for the neutral and 24 feet for the primary conductor. BEC asserted that even if there was a clearance defect at the time of the accident, such a clearance defect standing alone would not render BEC liable. BEC maintained that it could only be liable if it caused the defect or knew or should have known of the existence

of the defect and failed to correct it in a timely fashion. BEC asserted that the line was built to exceed the NESC clearance requirement of 18.5 feet. BEC denied that it caused the alleged clearance defect or that it knew or should have known of the defect prior to the accident but failed to correct it. BEC maintained that it complied with the RUS inspection guidelines as approved by RUS representatives involved in preparing and filing the RUS Form 300.

By consent, the actions were tried before me without a jury from September 28, 2015 to October 2, 2015. I find that the actual and proximate cause of the accident was the failure of the plaintiffs and the others involved in moving the tent to comply with the OSHA ten foot rule which requires non-qualified persons (those not qualified to work around high voltage lines) not to work within ten feet of a high voltage line. I find that the plaintiffs have failed to carry their burden of proof that BEC was negligent. I order that judgment be entered in favor of defendant BEC based upon the findings of fact and conclusions of law set forth below.

FINDINGS OF FACT

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

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

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

4. The line in question was designed and built by BEC based upon the guidelines of the Rural Utility Services ("RUS"). RUS, which is part of the Department of Agriculture, is

BEC's lender and provides construction guidelines to electric cooperatives in South Carolina and throughout the United States. Power lines such as the line in question built to RUS guidelines have a neutral conductor with a clearance of 20 feet mid span above ground and a primary conductor with a clearance of 24 feet mid span.

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

6. A component on one of the two poles supporting the line in question was repaired by a BEC lineman in 2003. No clearance defect in the clearance of the line was noted by BEC's lineman.

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

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

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

10. The four-man crew did not take the tent down before moving it. Instead, they situated themselves at each corner of the square tent, lifted the supporting poles three to twelve inches off the ground, and then carried the tent in the direction of the BEC line. According to Mr. Clayson, he warned the crew to be careful of the electrical line while moving the tent. Ms. Donahue corroborated his testimony, testifying that she heard something said about the line immediately prior to the accident.

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

12. Mr. Clayson, the crew leader, admitted that he bore some responsibility for the accident and death of Mr. Fortney and the injury to Mr. Robinson.

13. No one involved with the event had notified BEC prior to the accident that tents were being erected near the BEC line.

14. No evidence was introduced to establish that BEC had knowledge that the event was taking place or that tents were being moved and placed near the BEC line.

15. No credible evidence was introduced that BEC had caused the line to have excessive sag. There was no evidence that BEC knew or should have known that the vertical clearance was less than 18.5 feet at the time of the accident.

16. After the accident, the line was measured by John Hall, a BEC employee, to be 17' 3" above ground at mid span. The line was measured to be 18' 2" above ground at the point of contact.

17. The accident was investigated by the South Carolina Department of Labor. Mr. Wilkes testified that the OSHA act is a federal law the purpose of which is to provide workers with a safe and healthful working environment. South Carolina administers the OSHA program. Mr. Wilkes testified regarding the OSHA investigation of the April 25, 2008 accident. The following citations were issued to Stage Presence:

1. SCRR Chapter 71, 1-1910.332(b)(2): Failed to have employees who are covered by paragraph (a) of this section but who are not qualified persons trained in and familiar with any electrically related safety practices not specifically addressed by 1910.331 through 1910.335 but which are necessary for their safety, as follows:

   A. Employees, who were not specifically qualified to work around electrical hazards, were not trained in, and familiar with any electrically related safety practices at the Thorn Hill Farms barn area

2. SCRR Chapter 71, 1-1910.335(b): Failed to ensure the following altering techniques are used to warn and protect employees from hazards which could cause injury due to electric shock, burns, or failure of electric equipment parts: (1) safety signs and tag. Safety signs, safety symbols, or accident prevention tags shall be used where necessary to warn employees about electrical hazards which may endanger them, as required by 1910.45. (2) Barricades. Barricades shall be used in conjunction with safety signs where it is necessary to prevent or limit employee access to work areas exposing employees to uninsulated energized conductors or circuit parts. Conductive barricades may not be used where they might cause an electrical contract hazard. (3) Attendants. If signs and barricades do not provide sufficient warning and protection from electrical hazards, an attendant shall be stationed to warn and protect employees as follows;

   A. Altering techniques such as signs, warning tag, barricades, or attendants were not provided to warn four employees of electrical hazards associated with overhead energized power lines, at the Thorn Hill Farm barn area.

3a. SCRR Chapter 71, 11-1910.333(c)(3): Failed to deenergize and ground overhead lines or provide other protective measures before work is started if work is to be performed near lines. If the lines are to be deenergized, arrangements shall be made with the person or organization that operates or controls the electric circuits involved to deenergize and ground them. If protective measures, such as guarding, isolating, or insulating are provided, these precautions shall prevent employees from contacting such lines directly with any part of their body or indirectly through conductive materials, tools, or equipment.

NOTE: The work practices used by qualified persons installing insulating devices on overhead power transmission or distribution lines are covered by 1910.2269 of this Part, not by 1910.332 through 1910.335 of this Part. Under paragraph (c)(2) of this section, unqualified persons are prohibited from performing this type of work, as follows:

A. Employees working in vicinity of energized overhead power lines had no protective measures, such as de-energized or insulated lines, provided before work started at the Thorn Hill Farms barn area.

3b. SCRR Chapter 71, 1-1910.333(c)(3)(1)(b): Failed to ensure when an unqualified person is working on the ground in the vicinity of overhead lines, the person may not bring any conductive object closer to unguarded, energized overhead lines than the distances given in paragraph (c)(3)(i)(A) of this section, as follows: NOTE: For voltages normally encountered with overhead power line, objects which do not have an insulating rating for the voltage involved are considered to be conductive.

A. Employees working on the ground within a 10 foot vicinity of unguarded energized overhead power line with conductive metal tent pole at the Thorn Hill Farms barn area."

18. There was evidence that the line had been hit and damaged at some point in time prior to the accident which could have caused the excess sag in the power line. There was evidence of "penciling" or thinning of the line caused by stretching. There was also evidence that one of the poles had been struck at some point in time.

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

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

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

> Q: And do you have an opinion to a reasonable degree of medical certainty as to whether or not the power line was constructed properly?
> A: You know, I really can't come up with any other conclusion that – other than it was just built wrong to begin with.
> Q: And what was it that was wrong?
> A: It had too much sag in it, and, as a consequence, not enough clearance.
> Q: Meaning they used too much line?
> A: In effect, yes." (Transcript p.533, lines 4-14)

However, this was a new opinion provided some three weeks before trial. When his deposition was initially taken in 2012, he had testified that he did not have any opinion as to when the excessive sag occurred or what caused the excessive sag. He was deposed a week before trial regarding his new opinion and several other new opinions. At trial, Mr. Dagenhart admitted that his new opinion that BEC built the line with too much sag was completely different than the opinion he had expressed in his initial deposition in 2012.

At trial, Mr. Dagenhart admitted that his new opinion was completely different from his opinions expressed in his 2012 deposition. Mr. Dagenhart testified as follows:

> Q: Mr. Dagenhart, you gave me one answer two-and-a-half years ago and a completely different answer last week, didn't you, on this point?
> A: I did, yes." (Transcript p.600, lines 7-10)

Mr. Dagenhart changed his testimony regarding whether the line was built properly in the first place between his first deposition and his deposition a week before trial. He admitted that

he had not received any new information that was the basis of his new opinion. In his 2012 deposition testimony, he testified that in all his experience he had never seen a line crew build a line with an improper excessive sag. He said that he stood by that testimony. Mr. Dagenhart's new opinion that the line was improperly sagged when it was built was not only contradicted by his prior sworn testimony but was also contradicted by other credible evidence. Defense expert, Eric Jackson, testified that he had never seen a line constructed with excessive sag. His testimony further established that the difference between a line with BEC's usual 24' clearance and a line with an approximately 17'3" clearance above ground would be readily apparent to experienced linemen. The BEC foreman who had built lines for BEC on a daily basis for some 41 years testified that he had never left a line with too much sag and that he and his crew had built the line properly. The pole inspection crew did not observe excessive sag in the line in 2002. The BEC lineman, Nick Van Allen, who repaired a fixture on one of the poles for the line in 2003 did not report any excessive sag.

21. Mr. Dagenhart was questioned about the OSHA 10 foot rule. He acknowledged that the rule required non-qualified persons (those untrained to work around high voltage) to stay 10 feet away from high voltage lines. Mr. Dagenhart testified that all who were involved in moving the tent had violated the OSHA 10 foot rule and had contributed to the cause of the accident. Mr. Dagenhart also admitted that he had testified in other contact cases that the OSHA rule was a complete defense.

22. Defense expert Eric Jackson is an electrical engineer with expertise in the interpretation of the NESC. He is knowledgeable regarding the maintenance of electric utility systems. Mr. Jackson testified that in his opinion, the proximate cause of the accident was the carelessness of the individuals moving the tent and their failure to comply with the OSHA ten

foot rule. He testified that if the men moving the tent had simply complied with the OSHA ten foot rule, there would have been no accident. He confirmed that the workers and the event coordinators violated the OSHA ten foot rule with respect to the accident. Mr. Jackson also testified that the clearance requirements of the NESC were not even applicable to this accident, because the area where the tents were being erected would be considered a construction zone. He relied upon a prior interpretation of the NESC in forming this opinion. According to Mr. Jackson, the interpretation provided that in a construction zone, the OSHA requirements for work place safety controlled, not the clearance requirements of NESC. Mr. Jackson also relied upon excerpts from the NESC Handbook, Fifth Edition, by Allen Clapp, Mr. Dagenhart's former boss. In his book, Mr. Clapp wrote that operators or erectors of apparatus which have the capability of contacting power lines, have the responsibility to take special care to avoid damaging or otherwise interrupting the service of utility installations. According to Mr. Clapp, employees must be told where lines are located, whether disclosed or concealed, how to avoid the lines, and the consequences of not avoiding lines.

23. In addition thereto, Mr. Jackson testified that the BEC inspection program complied with the requirements of the NESC and RUS guidelines. BEC's inspection program at the time of the accident provided that all of BEC's systems be inspected on an eight year cycle pursuant to a pole inspection contract. The pole inspector was required to report any dangerous conditions on the system. In addition, BEC employees were instructed to look at the BEC lines when going about their normal day's work and to repair or report and then repair any defects noted. Mr. Jackson testified that BEC's inspection program was proper and was consistent with what utilities around the country were doing. He testified that while there was a clearance defect on the line in question at the time of the accident, there was no evidence that BEC had been

made aware of the clearance defect prior to the accident and that BEC had no obligation under the NESC to repair a defect about which the cooperative is not knowledgeable.

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

25. The defense also called two experts in tent safety, Ken Keberle and Thomas Markel. Both witnesses have had lengthy careers involving special event tents and tent safety issues. Both were knowledgeable of the OSHA regulations that related to tent safety or work place safety. Both witnesses testified that in their opinion, the proximate cause of the accident in this case was the violation of the OSHA ten foot rule by the workers, the crew foreman and the event planners, all of whom were involved in moving the tent and contacting the line.

26. Matthew Bryan also testified for the defense. Mr. Bryan is an electrical engineer who worked for McCall Thomas Engineering at the time of the accident. McCall-Thomas

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

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

28. BEC also called Isaiah Ward who was the crew chief of the crew who built the

line in question. Mr. Ward testified that he went to work for BEC on April 4, 1973 and that his work had involved line construction every day, five days a week. He testified that he built the line in question in accordance with the RUS guidelines so that the mid span sags would be the neutral at 20 feet and the primary at 24 feet. He testified that was the standard practice for a 35 foot pole. BEC also called Nick Van Allen. Mr. Van Allen had worked for BEC for 22 years. He testified regarding BEC's standard practice for construction and for clearances according to the RUS guidelines. He testified that the lines such as the line in question would have the neutral with clearance of around 20 feet and the primary with clearance of around 24 feet. He testified that had the primary been sagging down to 17 feet or so at the time of construction, it would have been easy to recognize that the line was not sagged properly and correct the sag.

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

30. The BEC witnesses acknowledged that they had not patrolled all overhead lines

annually. However, the BEC witnesses steadfastly denied that they had made any misrepresentations. They testified that their initial ratings were based on the work of an outside engineering firm, and that ratings were then reviewed with the RUS representative who could require BEC to change any of its ratings. These witnesses confirmed that BEC's inspection program, which entailed the pole inspection on an 8 year cycle and patrolling by linemen in their daily work, satisfied the RUS reviewer and that he had no objection to BEC's rating of 3 regarding its inspection program. As indicated above, the testimony of these witnesses was corroborated by the testimony of Matthew Bryant of McCall-Thomas who had assisted BEC in the preparation and submission of the Form 300's.

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

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

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

CONCLUSIONS OF LAW

1. In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. *Moore v. Weinberg*, 681 S.E.2d 875, 383 S.C. 583 (2001).

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

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

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

5. South Carolina does not recognize the doctrine of *res ipsa loquitur*. See also *Fletcher v. Medical University of South Carolina*, 390 S.C. 458, 702 S.E.2d 372 (2012) (However, South Carolina does not recognize the doctrine of *res ipsa loquitur*. *Snow v. City of Columbia*, 305 S.C. 544, 555 n.7, 409 S.E.2d 797, 803 n.7 (Ct. App. 1991) ("In an action for negligence, the plaintiff must prove by direct or circumstantial evidence that the defendant did not exercise reasonable care. South Carolina's rejection of *res ipsa loquitur* is consistent with its general adherence to fault based liability in tort.))

6. John Fortney and John Robinson are as a matter of law charged with the knowledge that contact with a wire charged with electric current is attendant with danger. *Priest v. Brown*, 302 S.C. 4405, 396 S.E.2d 638 (1990). John Fortney and John Robinson are presumed to know the law and are therefore charged with knowledge of the OSHA ten foot rule. *Ahrens v. The State of South Carolina*, 392 S.C. 340, 709 S.E.2d 54 (2011).

7. Mr. Fortney and Mr. Robinson violated the OSHA ten (10) foot rule as did Mr. Clayson, the crew chief, and as did Mr. Richardson and Ms. Donahue. The OSHA ten (10) foot rule is found in 29 CFR 1910.333(c).

8. The direct and efficient cause of the accident was Mr. Fortney and Mr. Robinson's failure to stay clear of the power line by at least 10 feet. The line presented an open and obvious danger. Ignoring this clear risk, they lifted a tent off the ground and walked that unwieldy metal framework directly into the high voltage power line.

9. The negligence of Alex Clayson, the crew leader for Stage Presence, was also a proximate cause of the accident. Indeed, Mr. Clayson admitted that he bears responsibility for the accident. He had noted and discussed the danger presented by line with party planners and the crew prior to the accident. He knew that they were close to the line and actually halted the move briefly because he was worried about the line, and then inexplicably the crew proceeded through the 10 foot danger zone and towards the obvious hazard with disastrous results.

10. The negligence of David Richardson and Beth Donahue was also a cause of this accident. They were aware of the danger presented by the powerline and Mr. Richardson had previously discussed that danger with Mr. Clayson, but inexplicably directed the crew to move the tent directly into the 10 foot danger zone and into the power line.

11. The fact that the power line was found to be hanging 5- 7 inches below the 18' 6'' NESC mandated height does not excuse the violations of the 10 foot rule by the Plaintiffs and the other responsible individuals. The accident would have been avoided if they had simply complied with the OSHA ten foot rule.

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

13. The plaintiffs have failed to prove that BEC construction crew caused the line to

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

14. BEC is not liable as a result of its alleged failure to inspect the line in question for compliance with the clearance requirements of the National Electric Safety Code. The line was

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

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

16. The plaintiffs did not offer any credible evidence of how, when or what caused the line to be out clearance. While failure to inspect an electrical line can be evidence of negligence, there must still be evidence to establish that the negligence was the proximate cause of the accident and injuries. First, there must be proof of when the inspection should have taken place but was not done. Second, there must be proof the defect in the line existed at the time of inspection should have been performed and could have been discovered. In other words, if the inspection should have taken place in January 2008 and the clearance defect did not occur until February 2008, there could be no liability for failure to inspect. Here, there is no proof of either and the plaintiffs have failed to prove a claim based upon failure to inspect. The plaintiffs have the burden of proof on all the elements of a negligence cause of action. In the absence of proof as to when, why and what caused the excessive sag in clearance, an award based upon the failure

to inspect would be purely speculative and improper.

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

18. I find that the plaintiffs failed to prove that BEC provided false information to the federal government in its preparation and filing of the RUS Form 300's but even if BEC had provided false information, the plaintiffs failed to prove how that was a proximate cause of the accident in this case. The plaintiffs' attorney questioned the BEC witnesses at length, attempting to prove that BEC had provided false information to the federal government in failing to disclose that it did not patrol its entire system annually by walking, riding or aerially. The instructions for completing the RUS Form 300's includes a reference to patrolling the entire system annually, either walking, riding or aerially, the instructions do not mandate that the electrical cooperative patrol its entire system annually. Instead, the instructions state that such patrolling is one of the conditions normally necessary for a rating of 3. The plaintiffs offered no evidence from any representative of the RUS or federal government that they had been misled by the manner in which BEC rated itself on the Form 300. BEC offered evidence from Mr. Bryant that BEC had disclosed that it did not patrol its system annually and that the RUS representative had no objection to BEC having given itself a rating of 3. The plaintiffs offered no factual evidence to contradict the testimony of the BEC employees or former employees regarding the Form 300. The plaintiffs failed to prove that BEC lied or misrepresented to the RUS or any other governmental entity. However, if the plaintiffs had proved that BEC had somehow

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

19. I find that the plaintiffs have not proved that BEC knew or should have known of the clearance defect.

20. Since I have found that the plaintiffs have failed to prove their case and that judgment should be entered in favor of the defendant, it is unnecessary for me to address the testimony of Mr. Robinson or the daughters of Mr. Fortney.

IT IS ORDERED that judgment be entered in favor of the defendant.

AND IT IS SO ORDERED.

_____

The Honorable Roger M. Young, Sr.
Circuit Court Judge

_____, South Carolina

_____, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	
Estate of John Fortney, deceased, by his duly appointed Personal Representative Constance S. Fortney,	)	C/A Nos. 14-CP-08-1231, 14-CP-08-1232
Plaintiff,	)	
vs.	)	**ORDER**
Berkeley Electric Cooperative,	)	
Defendant.	)	
John Steven Robinson,	)	Civil Action No.14-CP-08-1230
Plaintiff,	)	
vs.	)	
Berkeley Electric Cooperative,	)	
Defendant.	)	

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

John Fortney and John Steven Robinson were part of a four-man crew from Stage Presence. Alexander Clayson was the Stage Presence crew leader. At the request of and under the direction of Ms. Donahue and Mr. Richardson, the Stage Presence crew picked up the tent

and walked it into BEC's power line. Two of the workers for Stage Presence, John Fortney and Dexter Keyes, were electrocuted. The other two, Alexander Clayson and John Robinson, sustained burns and other physical injuries.

The line was open and obvious. The presence of the line and the dangers it presented were discussed. As the crew moved the tent, Mr. Clayson actually halted work due to his concern about the proximity of the line and the safety of his crew. Despite this, the crew lifted the tent and, at the direction of Ms. Donahue and Mr. Richardson, carried it directly into the line.

PLEADINGS

The plaintiffs claim that the BEC line did not meet the NESC clearance requirements at the time of the accident. The plaintiffs claim that the 1993 NESC required the primary conductor to be built with a clearance of 18.5 feet. The accident occurred on April 23, 2008. On April 24, 2008, the clearance of the primary conductor at the point of contact was measured to be 18' 2" at the point of contact by John Hall, a BEC employee. On May 9, 2008, the clearance of the primary conductor mid span was measured to be 16' 11", as measured by Joe Jones, a McCall Thomas engineer who is now deceased. The plaintiffs alleged that the BEC line had a clearance defect at the time of the accident which was the proximate cause of the accident.

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

> 6. The Defendant owed a duty to the public to install its power lines at a minimum safe height as determined by the foreseeable use of the property over which the lines are installed.
>
> 7. The Thornhill Farm property over which the Defendant's power line had been installed was cultivated and fallow agricultural land which constitutes "other lands" under the National Electric Safety Code.
>
> 8. Upon information and belief, at the time the Defendant installed the power line over the Thornhill Farm property the applicable Code (National Electric Safety Code) promulgated by the Institute of Electrical and Electronics

Engineers (IEEE) and adopted by the American National Standards Institute (ANSI) required a minimum safe height of eighteen and one-half (18.5) feet at the power line's lowest point between the adjoining power poles.

9. The Defendant also owed a duty to periodically inspect and to maintain power lines to insure continued compliance with the applicable Code for minimum safe height of the power line after the power line had been installed.

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

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

Although not pled, the Plaintiffs further asserted that BEC had failed to maintain the proper records and that BEC lied to the federal government in its preparation and filing of the RUS Form 300's.

BEC alleged the defenses of (1) a general denial; (2) comparative negligence; (3) assumption of the risk; and (4) liability, if any, apportioned pursuant to S.C. Code Ann. Section 25-38-15 (2009 Supp.) In particular, BEC asserted that its lines were constructed according to the guidelines established by its lender the Rural Utilities Services ("RUS"), an agency of the Department of Agriculture with a mid-span clearance of 20 feet for the neutral and 24 feet for the primary conductor. BEC asserted that even if there was a clearance defect at the time of the accident, such a clearance defect standing alone would not render BEC liable. BEC maintained that it could only be liable if it caused the defect or knew or should have known of the existence of the defect and failed to correct it in a timely fashion. BEC asserted that the line was built to exceed the NESC clearance requirement of 18.5 feet. BEC denied that it caused the alleged clearance defect or that it knew or should have known of the defect prior to the accident but

failed to correct it. BEC maintained that it complied with the RUS inspection guidelines as approved by RUS representatives involved in preparing and filing the RUS Form 300.

By consent, the actions were tried before me without a jury from September 28, 2015 to October 2, 2015. I find that the actual and proximate cause of the accident was the failure of the plaintiffs and the others involved in moving the tent to comply with the OSHA ten foot rule which requires non-qualified persons (those not qualified to work around high voltage lines) not to work within ten feet of a high voltage line. I find that the plaintiffs have failed to carry their burden of proof that any act or omission on the part of BEC was a proximate cause of the accident. I order that judgment be entered in favor of defendant BEC based upon the findings of fact and conclusions of law set forth below.

FINDINGS OF FACT

1. BEC is a member owned, non-profit electric cooperative. BEC currently has some 84,000 members and 5,500 miles of electric line. BEC does not generate electricity. It purchases its power from Central Electric, which buys electricity from Santee Cooper, SCE&G, Duke Power, and Southeastern Power Administration. BEC serves members in three counties. (Strickland, Tp. 113, line 11 to Tp. 115, line 1)

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

3. BEC constructs its electrical distribution system to exceed the requirements of the National Electric Safety Code ("NESC"). (Mobley Tp. 201, line 25 to Tp. 202, line 17. The stated purpose of the NESC is:

> "A: The purpose of these rules is a practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and associated equipment. These rules contain basic provisions that are considered necessary for the safety of employees and the public under the

specified conditions. The code is not intended as a design specification or as an instruction manual." (Mobley Tp. 183, lines 13-21)

4. The line in question was designed and built by BEC based upon the guidelines of the Rural Utility Services ("RUS"). (Mobley Tp. 202, lines 6-12) RUS, which is part of the Department of Agriculture, is BEC's lender and provides construction guidelines to electric cooperatives in South Carolina and throughout the United States. Power lines such as the line in question which are built to RUS guidelines have a neutral conductor with a clearance of 20 feet mid span above ground and a primary conductor with a clearance of 24 feet mid span. (Mobley Tp. 186, line 21 to Tp. 191, line 4)

5. The line in question was inspected as part of BEC's pole inspection program in 2002. No clearance defect was noted in that inspection. (Mobley Tp. 192, lines 1-6)

6. A component on one of the two poles supporting the line in question was repaired by a BEC lineman, Nick Van Allen, in 2003. No clearance defect in the clearance of the line was noted by Mr. Van Allen. (Van Allen Tp. 880, line 2 to Tp. 881, line 13)

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

8. Prior to April 23, 2008, an owner of Stage Presence and Alexander Clayson, who was to be the onsite crew leader for Stage Presence, met at the farm with David Richardson and Beth Donahue, professional event coordinators from Memorable Meetings. (Clayson Depo. p.477, line 7-19). At that meeting, the participants noted BEC's line and discussed it and the importance of staying away from the line in erecting the tents. (Clayson Depo. p.37, line 45 to p.41, line 9.)

9. On April 23, 2008, Mr. Clayson returned to the farm with John Fortney, John Robinson and Dexter Keyes, the other tent crew members to set up the tents. The tent involved in the accident was a 20' x 20' High Peak Sierra structure constructed of metal poles covered by fabric. (Clayson Depo. p.22., line 17-20). The tent is peaked and has a center spire that extends 17' 9" above the ground. The crew initially set up the tent involved in the accident well away from the BEC line. (Clayson Depo. p.52, lines 11-19) However, that afternoon, Mr. Richardson asked Mr. Clayson to move the tent and re-position it near the BEC line. (Clayson Depo. p.54, line 15 to p.55, line 25)

10. The four-man crew did not take the tent down before moving it. Instead, they situated themselves at each corner of the square tent, lifted the supporting poles three to six inches off the ground, and then carried the tent in the direction of the BEC line. (Clayson Depo. p.62, lines 5-25) According to Mr. Clayson, he warned the crew to be careful of the electrical line while moving the tent. (Clayson Depo. p.67, line 15 to p.73, line 15; Clayson Depo. p.78, line 2 to p.80, line 2) Ms. Donahue corroborated his testimony, testifying that she heard something said about the line immediately prior to the accident.

11. The crew initially walked the tent nearer to the BEC line and then set it down. (Clayson Depo. p.65, lines 7-14) Mr. Richardson asked them to move the tent again. (Clayson Depo. p.65, lines 15-24) The crew complied and moved the tent closer to BEC's line. As they did, they walked part of the tent under the line and the tent's center spire contacted the hot (energized) line. Mr. Fortney and Mr. Keyes were electrocuted. Mr. Clayson and Mr. Robinson suffered burns and other personal injuries.

12. Mr. Clayson, the crew leader, admitted that he bore some responsibility for the accident and death of Mr. Fortney and the injury to Mr. Robinson. (Clayson Depo. p.104, lines 16-20)

13. No one involved with the event had notified BEC prior to the accident that tents were being erected near the BEC line.

14. No evidence was introduced to establish that BEC had knowledge that the event was taking place or that tents were being moved and placed near the BEC line.

15. No credible evidence was introduced that BEC had caused the line to have excessive sag. There was no evidence that BEC knew or should have known that the vertical clearance was less than 18.5 feet at the time of the accident.

16. After the accident, the line was measured by John Hall, a BEC employee to be 18' 2" above ground at the point of contact.

17. The accident was investigated by the South Carolina Department of Labor. Mr. Wilkes testified that the OSHA act is a federal law the purpose of which is to provide workers with a safe and healthful working environment. South Carolina administers the OSHA program. Mr. Wilkes testified regarding the OSHA investigation of the April 25, 2008 accident. The following citations were issued to Stage Presence:

1. SCRR Chapter 71, 1-1910.332(b)(2): Failed to have employees who are covered by paragraph (a) of this section but who are not qualified persons trained in and familiar with any electrically related safety practices not specifically addressed by 1910.331 through 1910.335 but which are necessary for their safety, as follows:

   A. Employees, who were not specifically qualified to work around electrical hazards, were not trained in, and familiar with any electrically related safety practices at the Thorn Hill Farms barn area

2. SCRR Chapter 71, 1-1910.335(b): Failed to ensure the following altering techniques are used to warn and protect employees from hazards which could cause injury due to electric shock, burns, or failure of electric equipment parts: (1) safety signs and tag. Safety signs, safety symbols, or accident prevention tags shall be used where necessary to warn employees about electrical hazards which may endanger them, as required by 1910.45. (2) Barricades. Barricades shall be used in conjunction with safety signs where it is necessary to prevent or limit employee access to work areas exposing employees to uninsulated energized conductors or circuit parts. Conductive barricades may not be used where they

might cause an electrical contract hazard. (3) Attendants. If signs and barricades do not provide sufficient warning and protection from electrical hazards, an attendant shall be stationed to warn and protect employees as follows;

A. Altering techniques such as signs, warning tag, barricades, or attendants were not provided to warn four employees of electrical hazards associated with overhead energized power lines, at the Thorn Hill Farm barn area.

3a. SCRR Chapter 71, 11-1910.333(c)(3): Failed to deenergize and ground overhead lines or provide other protective measures before work is started if work is to be performed near lines. If the lines are to be deenergized, arrangements shall be made with the person or organization that operates or controls the electric circuits involved to deenergize and ground them. If protective measures, such as guarding, isolating, or insulating are provided, these precautions shall prevent employees from contacting such lines directly with any part of their body or indirectly through conductive materials, tools, or equipment. NOTE: The work practices used by qualified persons installing insulating devices on overhead power transmission or distribution lines are covered by 1910.2269 of this Part, not by 1910.332 through 1910.335 of this Part. Under paragraph (c)(2) of this section, unqualified persons are prohibited from performing this type of work, as follows:

A. Employees working in vicinity of energized overhead power lines had no protective measures, such as de-energized or insulated lines, provided before work started at the Thorn Hill Farms barn area.

3b. SCRR Chapter 71, 1-1910.333(c)(3)(1)(b): Failed to ensure when an unqualified person is working on the ground in the vicinity of overhead lines, the person may not bring any conductive object closer to unguarded, energized overhead lines than the distances given in paragraph (c)(3)(i)(A) of this section, as follows: NOTE: For voltages normally encountered with overhead power line, objects which do not have an insulating rating for the voltage involved are considered to be conductive.

A. Employees working on the ground within a 10 foot vicinity of unguarded energized overhead power line with conductive metal tent pole at the Thorn Hill Farms barn area."

Mr. Wilks testified as to the purpose of the OSHA regulations.

"Q: What is the purpose of the safety regulations which were violated, what purpose do they serve?

Objections omitted.
A: The purpose of the citations?
Q: No, no, the regulations.
A: Oh, the purpose of the regulations is for – it gives the employer the tools – the purpose of the regulation is to provide a safe and healthy working environment for the employees. And OSHA has put these rule3s out for the employers and the employees to abide by to make sure that workplace incidents or accidents or injuries or illnesses do not occur on the job site." (Wilks Depo. p.14, lines 2-4 and lines 11-20)

18. There was evidence that the line had been hit and damaged at some point in time prior to the accident which could have caused the excess sag in the power line. There was also evidence that one of the poles had been struck at some point in time.

19. The plaintiffs offered John Dagenhart as their liability expert. Mr. Dagenhart testified that cooperatives such as BEC must construct and maintain its lines such as the line involved with this accident to a height of 18.5 feet high to prevent injuries to people. He testified that BEC had a duty to inspect their lines to ensure they were at code height to prevent injury to people. He also testified that cooperatives must tell the truth when reporting to the federal government. (Dagenhart Tp.499, line 3 to Tp.500, line 14) Mr. Dagenhart testified that, in his opinion, the BEC line violated the NESC clearance requirement and had the line met code clearance requirement of 18.5 feet, the accident would not have occurred. (Dagenhart Tp.507, lines 10-18) He opined that BEC had made misrepresentations to the federal government in its RUS Form 300 filings. He testified that BEC had failed to inspect its lines and violated the record keeping requirements. (Dagenhart Tp.507, line 24 to Tp.508, line 16)

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

Q: And do you have an opinion to a reasonable degree of medical certainty as to whether or not the power line was constructed properly?
A: You know, I really can't come up with any other conclusion that – other than it was just built wrong to begin with.

Q: And what was it that was wrong?
A: It had too much sag in it, and, as a consequence, not enough clearance.
Q: Meaning they used too much line?
A: In effect, yes." (Transcript p.533, lines 4-14)

However, this was a new opinion provided some three weeks before trial. When his deposition was initially taken in 2012, he had testified that he did not have any opinion as to when the excessive sag occurred or what caused the excessive sag. (Dagenhart Tp.533, line 24 to Tp.595, line 5; Dagenhart Tp.597, line 13) He was deposed a week before trial regarding his new opinion and several other new opinions. At trial, Mr. Dagenhart testified as follows:

Q: Mr. Dagenhart, you gave me one answer two-and-a-half years ago and a completely different answer last week, didn't you, on this point?
A: I did, yes." (Tp. 600, lines 7-10)

Mr. Dagenhart changed his testimony regarding whether the line was built properly in the first place between his first deposition and his deposition a week before trial. (Dagenhart Tp.596, L.14 to Tp.597, L.6). He admitted that he had not received any new information that was the basis of his new opinion. (Dagenhart Tp.595, lines 1-17 to Tp.596, lines 20-23). In his 2012 deposition testimony, he testified that in all his experience he had never seen a line crew build a line with an improper excessive sag. He said that he stood by that testimony, but he inconsistently maintained that the BEC crew had done so here. Mr. Dagenhart's new opinion that the line was improperly sagged when it was built was not only contradicted by his sworn testimony but was also contradicted by other credible evidence. Defense expert, Eric Jackson, testified that he had never seen a line constructed with excessive sag. His testimony further established that the difference between a line with BEC's usual 24' clearance and a line with an approximately 18'2" clearance above ground would be readily apparent to experienced linemen. The BEC foreman who had built lines for BEC on a daily basis for some 41 years testified that

he had never left a line with too much sag and that he and his crew had built the line properly. (Ward Tp. 874, line 3 to Tp. 876, line 8) The pole inspection crew did not observe excessive sag in the line in 2002. The BEC lineman, Nick Van Allen, who repaired a fixture on one of the poles for the line in 2003, did not notice anything unusual or out of the ordinary about the sag of the line. (Van Allen Tp. 880, line 20 to Tp. 881, line 13)

21. Mr. Dagenhart was questioned about the OSHA 10 foot rule. He acknowledged that the rule required non-qualified persons (those untrained to work around high voltage) to stay 10 feet away from high voltage lines. Mr. Dagenhart testified that all who were involved in moving the tent had violated the OSHA 10 foot rule and had contributed to the cause of the accident. Mr. Dagenhart also admitted that he had testified in other contact cases that the OSHA rule was a complete defense. (Dagenhart Tp. 616, line 11 to Tp. 618, line 20)

22. Defense expert Eric Jackson is an electrical engineer with expertise in the interpretation of the NESC. He is knowledgeable regarding the maintenance of electric utility systems. (Jackson Tp. 753, line 2 to Tp. 754, line 18) Mr. Jackson testified that in his opinion, the proximate cause of the accident was the carelessness of the individuals moving the tent and their failure to comply with the OSHA ten foot rule. (Jackson Tp. 755, line 18 to Tp. 756, line 24) He testified that if the men moving the tent had simply complied with the OSHA ten foot rule, there would have been no accident. (Jackson Tp. 756, lines 6-9) He confirmed that the workers and the event coordinators violated the OSHA ten foot rule with respect to the accident. (Jackson Tp. 755, line 18 to Tp. 756, line 24) Mr. Jackson also testified that the clearance requirements of the NESC were not even applicable to this accident, because the area where the tents were being erected would be considered a construction zone and OSHA rules would control. He relied upon a prior interpretation of the NESC in forming this opinion. (Jackson Tp. 758, lines 2-25) According to Mr. Jackson, the interpretation provided that in a construction

zone, the OSHA requirements for work place safety controlled, not the clearance requirements of NESC. Mr. Jackson also relied upon excerpts from the NESC Handbook, Fifth Edition, by Allen Clapp, Mr. Dagenhart's former boss. In his book, Mr. Clapp wrote that operators or erectors of apparatus which have the capability of contacting power lines, have the responsibility to take special care to avoid damaging or otherwise interrupting the service of utility installations. According to Mr. Clapp, employees must be told where lines are located, whether disclosed or concealed, how to avoid the lines, and the consequences of not avoiding lines. (Jackson Tp. 759, lines 3-14; Jackson Tp. 764, line 13 to Tp. 766, line 20)

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

> Q: And if the line were built in 1993 and there was an inspection of the line, a pole inspection that included an inspection, things you inspected in September of 2002, would that be a proper interval for inspection? Your answer?
> A: Yes.
> Q: Now, you say that wouldn't be a proper interval?
> A: No.
> Q: So you're not changing that testimony?
> A: No, I'm not changing that." (Dagenhart Tp.604, lines 7-16)

BEC's inspection program at the time of the accident provided that all of BEC's systems be inspected on an eight year cycle pursuant to a pole inspection contract. The pole inspector was required to report any dangerous conditions on the system. In addition, BEC employees were instructed to look at BEC lines when going about their normal day's work and to repair or report and then repair any defects noted. Mr. Jackson also testified that BEC's inspection program was proper and was consistent with what utilities around the country were doing. He testified that while there was a clearance defect on the line in question at the time of the accident,

there was no evidence that BEC had been made aware of the clearance defect prior to the accident and that BEC had no obligation under the NESC to repair a defect about which BEC was not knowledgeable. (Jackson Tp. 769, line 11 to Tp. 770, line 14)

24. Mr. Jackson opined to a reasonable degree of engineering certainty that the line was constructed properly in the first place and had the proper clearance at the time of construction. He opined that construction of the line using a 35 foot pole was and is a fairly standard construction. He testified that it was easy to obtain proper clearance. Mr. Jackson had also discussed the construction of the line with some members of the crew who built the line and he confirmed they followed a standard construction practice used in building lines such as the line in question. (Jackson Tp. 770, line 15 to Tp. 771, line 25; Jackson Tp. 778, lines 9-17) Mr. Jackson emphasized that if the line had been built with excessive sag, such as the sag that existed on the day of the accident, the improper sag would be readily recognizable to the crew and it would not be something any lineman would have left uncorrected. (Jackson Tp. 778, lines 4-24) Finally, Mr. Jackson opined that the line had been hit and damaged and that suggested to him that the clearance of the line had been affected and altered by being hit. (Jackson Tp. 779, lines 1-11) Mr. Jackson also testified that the so-called safety rules crafted by the plaintiffs' attorney were not consistent with the language in the NESC. (Jackson Tp. 779, line 12 to Tp. 780, line 6)

25. BEC also called two experts in tent safety, Ken Keberle and Thomas Markel. Both witnesses have had lengthy careers involving special event tents and tent safety issues. Both were knowledgeable of the OSHA regulations that related to tent safety or work place safety. Both witnesses testified that in their opinion, the proximate cause of the accident in this case was the violation of the OSHA ten foot rule by the workers, the crew foreman and the event planners, all of whom were involved in moving the tent and contacting the line. (Keberle Tp. 836, line 12 to Tp. 841, line 3; Markel Tp. 845, line 6 to Tp. 849, line 13)

26. Matthew Bryan also testified for BEC. Mr. Bryan is an electrical engineer who worked for McCall Thomas Engineering at the time of the accident. (Bryan Tp. 852, lines 1-25) McCall-Thomas Engineering has supported and assisted electric cooperatives, including BEC, in preparing Form 300s which are reporting forms used by the RUS. Mr. Bryan assisted BEC in completing its RUS Form 300s. Mr. Bryan testified that he also assisted 8 to 10 other electric cooperatives in preparing and submitting RUS Form 300s. (Bryan Tp. 853, lines 1-21) He explained that field service technicians from McCall-Thomas would go out and inspect the BEC system. Data from those inspections would be compiled and put into a report. (Bryan Tp. 855, line 12 to Tp. 856, line 14) He testified that the RUS representative also would typically go and do a visual inspection himself. According to Mr. Bryan, preparation of a Form 300 was a collaborative process and that the RUS representative could require change in the rating assigned by BEC. (Bryan Tp. 856, lines 13-24) Once BEC and the RUS agreed on the ratings, the RUS Form 300 was completed and submitted by BEC.

27. Mr. Bryan confirmed that the BEC inspection program involved use of pole inspectors who were required to report any dangerous circumstances disclosed in their inspection. BEC also required its linemen and employees to visually inspect lines while they were out working in the day or night. (Bryan Tp. 858, line 9 to Tp. 859, line 1) Mr. Bryan was asked about the RUS Bulletin which identified the conditions normally needed to justify a rating of 3 and which included a provision that all overhead lines be patrolled annually, by walking, riding or aerially. Mr. Bryan testified that he was not aware of any cooperative in the state that patrolled its entire system on an annual basis. (Bryan Tp. 859, lines 9-15) He testified that he told the RUS representative about BEC's inspection program and that the RUS representative with this information agreed with the rating of a 3 regarding BEC's inspection program. (Bryan Tp. 859, line 17 to Tp. 860, line 12) He testified that he and BEC had never misrepresented

anything to the RUS representative or the federal government. Mr. Dagenhart admitted that the RUS Form 300 that BEC submitted in 2008 actually explained and described BEC's inspection process. (Dagenhart Tp. 588, line 20 to Tp. 591, line 4)

28. BEC also called Isaiah Ward who was the crew chief of the crew who built the line in question. Mr. Ward testified that he went to work for BEC on April 4, 1973 and that his work had involved line construction every day, five days a week. He testified that he built the line in question in accordance with the RUS guidelines so that the mid span sags would be the neutral at 20 feet and the primary at 24 feet. He testified that was the standard practice for a 35 foot pole. (Ward Tp. 873, line 23 to Tp. 876, line 11) BEC also called Nick Van Allen. Mr. Van Allen had worked for BEC for 22 years. He testified regarding BEC's standard practice for construction and for clearances according to the RUS guidelines. He testified that the lines such as the line in question would have the neutral with clearance of around 20 feet and the primary with clearance of around 24 feet. He testified that had the primary been sagging down to 18'2" or so at the time of construction, it would have been easy to recognize that the line was not sagged properly and to correct the sag. (Van Allen Tp. 879, line 9 to Tp. 881, line 13)

29. Plaintiffs called Ervin Strickland, BEC's former CEO, Tim Mobley, BEC's Vice President of Engineering and Operations, John Villeponteaux, BEC's Manager of Distribution and Operations, and James Elrod, BEC's former Manager of Training and Loss Control. The plaintiffs' attorney sought to have them admit that BEC had made misrepresentations to the federal government in their RUS Form 300 filings. The plaintiffs' attorney premised his questions on Bulletin 1730-1 which contained guidelines related to the electric borrower's operation and maintenance and outlined certain RUS standard practices. Exhibit A to Bulletin 1730-1 is titled "Conditions Normally Needed to Justify a Rating of 3". Page 8, paragraph 3 of Exhibit A provides that "all overhead lines 'including those on private right-of-way' patrolled

annually (walking, riding or aerial); more frequently if experience dictates". BEC gave itself a satisfactory rating of 3 on the RUS Form 300 even though BEC did not patrol its entire system annually.

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

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

and no evidence to establish whether the clearance defect had developed prior to the inspection date or subsequent thereto. I find that the plaintiffs failed to prove that BEC made misrepresentations to the federal government but, even if BEC did make misrepresentations, the plaintiffs failed to prove how the misrepresentations were a proximate cause of the accident.

32. Certain BEC witnesses were questioned regarding the fact that BEC did not record the land use or the NESC clearance requirement on the staking sheet used to construct the line. BEC witnesses were also questioned about the fact that BEC did not measure each line after construction to ensure that the line met the NESC clearance requirement. BEC testified that its lines were constructed to RUS standards and therefore exceeded the NESC clearance requirements. They testified that a line such as the line in question was built using 35 foot poles and because the lines were built pursuant to the RUS guidelines, BEC's lines had a 20 foot mid span clearance for the neutral and a 24 foot mid span clearance for the primary conductor. Plaintiff's expert, Mr. Dagenhart, admitted that he had constructed lines just the way BEC constructed its lines. He admitted that he had not measured the height of lines after construction and that he, like the BEC crew, checked the clearance by "eyeballing" the line. (Dagenhart Tp. 612, line 7 to Tp. 614, line 10)

CONCLUSIONS OF LAW

1. In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. *Moore v. Weinberg,* 383 S.C. 583, 681 S.E.2d 875 (2001).

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

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

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

5. South Carolina does not recognize the doctrine of *res ipsa loquitur*. See also *Fletcher v. Medical University of South Carolina,* 390 S.C. 458, 702 S.E.2d 372 (2012) (However, South Carolina does not recognize the doctrine of *res ipsa loquitur*. *Snow v. City of Columbia*, 305 S.C. 544, 555 n.7, 409 S.E.2d 797, 803 n.7 (Ct. App. 1991) ("In an action for negligence, the plaintiff must prove by direct or circumstantial evidence that the defendant did not exercise reasonable care. South Carolina's rejection of *res ipsa loquitur* is consistent with its general adherence to fault based liability in tort.))

6. John Fortney and John Robinson are as a matter of law charged with the knowledge that contact with a wire charged with electric current is attendant with danger. *Priest v. Brown,* 302 S.C. 4405, 396 S.E.2d 638 (1990). John Fortney and John Robinson are presumed to know the law and are therefore charged with knowledge of the OSHA ten foot rule. *Ahrens v. The State of South Carolina,* 392 S.C. 340, 709 S.E.2d 54 (2011).

7. Mr. Fortney and Mr. Robinson violated the OSHA ten (10) foot rule as did Mr.

Clayson, the crew chief, and as did Mr. Richardson and Ms. Donahue. The OSHA ten (10) foot rule is found in 29 CFR 1910.333(c).

8. The direct and efficient cause of the accident was Mr. Fortney and Mr. Robinson's failure to stay clear of the power line by at least 10 feet. The line presented an open and obvious danger. Ignoring this clear risk, they lifted a tent off the ground and walked that unwieldy metal framework directly into the high voltage power line.

9. The negligence of Alexander Clayson, the crew leader for Stage Presence, was also a proximate cause of the accident. Indeed, Mr. Clayson admitted that he bears responsibility for the accident. He had noted and discussed the danger presented by the line with party planners and the crew prior to the accident. He knew that they were close to the line and actually halted the move briefly because he was worried about the line, and then inexplicably the crew proceeded through the 10 foot danger zone and towards the obvious hazard with disastrous results.

10. The negligence of David Richardson and Beth Donahue was also a proximate cause of this accident. They were aware of the danger presented by the power line and Mr. Richardson had previously discussed that danger with Mr. Clayson, but inexplicably directed the crew to move the tent directly into the 10 foot danger zone and into the power line.

11. The fact that the power line was found to be hanging a few inches below the 18' 6'' NESC mandated height does not excuse the violations of the 10 foot rule by the Plaintiffs and the other responsible individuals. The accident would have been avoided if they had simply complied with the OSHA ten foot rule.

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

credible testimony.

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

14. BEC is not liable as a result of its alleged failure to inspect the line in question for

compliance with the clearance requirements of the National Electric Safety Code. Mr. Dagenhart admitted that the NESC did not provide any specific method or schedule for inspection to be done.

> "Q: Does the Code of Federal Regulations that you're looking at describe how the inspection is to be done?
> A: No." (Tp.571, lines 7-9).

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

> Q: Name me one electrical co-op in the whole country that is doing something different than what Berkeley says it does in terms of construction of line to exceed code requirement and inspections which are the pole inspections and the patrolling by their employees.
> A: I can't give you a particular co-op in that respect." (Tp.585, line 23 to Tp.586, line 4).

The line was inspected in 2002-2003 as part of a pole inspection program based on an eight year cycle. The plaintiff's expert, Mr. Dagenhart testified that an eight year cycle was reasonable. By contract, the contractor was to inspect and report any dangerous circumstances. No report was made of any defect or dangerous circumstances with the line in question. NESC does not state how an inspection should be made. Instead, it states that the lines be inspected as experience dictates. BEC's linemen and employees are instructed to look for hazards as they ride about during the day. The evidence establishes that BEC's inspection program was consistent with what other cooperatives do. (Bryan Tp. 857, line 21 to Tp. 861, line 25)

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

16. The plaintiffs did not offer any credible evidence of how, when or what caused

the line to be out clearance. While failure to inspect an electrical line can be evidence of negligence, there must still be evidence to establish that the negligence was the proximate cause of the accident and injuries. First, there must be proof of when the inspection should have taken place but was not done. Second, there must be proof the defect in the line existed at the time of inspection should have been performed and could have been discovered. In other words, if the inspection should have taken place in January 2008 and the clearance defect did not occur until February 2008, there could be no liability for failure to inspect. Here, there is no proof of either and the plaintiffs have failed to prove a claim based upon failure to inspect. The plaintiffs have the burden of proof on all the elements of a negligence cause of action. In the absence of proof as to when, why and what caused the excessive sag in clearance, an award based upon the failure to inspect would be purely speculative and improper.

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

18. I find that the plaintiffs failed to prove that BEC provided false information to the federal government in its preparation and filing of the RUS Form 300's but even if BEC had provided false information, the plaintiffs failed to prove how that was a proximate cause of the accident in this case. The plaintiffs' attorney questioned the BEC witnesses at length, attempting to prove that BEC had provided false information to the federal government in failing to disclose that it did not patrol its entire system annually by walking, riding or aerially. The instructions for completing the RUS Form 300's includes a reference to patrolling the entire system annually, either walking, riding or aerially, the instructions do not mandate that the electrical cooperative

patrol its entire system annually. Instead, the instructions state that such patrolling is one of the conditions normally necessary for a rating of 3. The plaintiffs offered no evidence from any representative of the RUS or federal government that they had been misled by the manner in which BEC rated itself on the Form 300. Mr. Dagenhart, plaintiff's liability expert offered his opinion that BEC had lied to the government in its Form 300's. However, Mr. Dagenhart admitted that he had no experience with the Form 300 process.

> "Q: What experience have you had in filing RUS-300s?
> A: I have not.
> Q: Have you ever met with a co-op and represented them in trying to comply with RUS-300?
> A: No.
> Q: Have you participated in any meetings with RUS officials regarding RUS form 300s?
> A: No." (Tp.562, lines 8-15).

BEC offered evidence from Mr. Bryant that BEC had disclosed that it did not patrol its system annually and that the RUS representative had no objection to BEC having given itself a rating of 3. The plaintiffs offered no factual evidence to contradict the testimony of the BEC employees or former employees regarding the Form 300. The plaintiffs failed to prove that BEC lied or misrepresented to the RUS or any other governmental entity. However, if the plaintiffs had proved that BEC had somehow misrepresented its procedures in completing the RUS Form 300, this would not establish any liability on the part of BEC. The plaintiffs failed to offer any evidence that the accident would have been avoided if BEC had patrolled its entire system annually. Specifically, the plaintiffs offered no evidence that the clearance defect would have existed at the time the line was patrolled or that the clearance defect would most likely existed and have been discovered by patrolling in a vehicle or aerially which are two of the three acceptable methods of patrolling.

19. I find that the plaintiffs have not proved that BEC knew or should have known of

the clearance defect.

20. I recognize that my decision set forth above may be appealed. If my decision is appealed and if it is reversed, this action may be remanded for trial. The accident occurred on April 23, 2008 and, for reasons unknown to me, the case was not tried until some seven (7) years later. The trial took almost a full week and was obviously expensive for the parties. In an effort to avoid the necessity of a second trial, I find that it is appropriate to make further findings based on the assumption that my rulings as set forth above are reversed and the issue of negligence and comparative negligence would have to be determined. In that event, I find that the plaintiffs' negligence is greater to any negligence on the part of the defendant and therefore the plaintiffs are not entitled to recover. If it is assumed that the line was built with excessive sag and as a result, BEC was negligent, the negligence of the plaintiffs far outweighs the negligence of the defendant. The line was open and obvious. The hazard was recognized and discussed. The clearance at the point of contact was 18.2 inches which was only a few inches less than the 18.5 inch NESC clearance requirement. Although the plaintiffs' complain that BEC's line was a few inches too low, the plaintiffs violated the OSHA ten (10) foot rule. Mr. Fortney and Mr. Robinson, in violation of the OSHA 10 foot rule, proceeded to do the very thing that the law says they should not do. They walked the tent under the line to the point that contact was made between the tent's center point 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. All they would have had to have done was comply with the OSHA ten (10) foot rule. They failed to do so. They violated the OSHA ten foot rule. The very kind of accident that the OSHA ten (10) foot rule was designed to prevent occurred. The negligence of the plaintiffs was greater than any negligence on the part of BEC. The plaintiffs are not entitled to recover against BEC.

21. Since I have found that the plaintiffs have failed to prove their case and that judgment should be entered in favor of the defendant, it is unnecessary to address the testimony of Mr. Robinson or the daughters of Mr. Fortney or their alleged damages.

IT IS ORDERED that judgment be entered in favor of the defendant.

AND IT IS SO ORDERED.

_____

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

Dated: _____, 2016
_____, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 14-CP-08-1231 AND 1232
ESTATE OF JOHN FORTNEY, deceased by his duly appointed Personal Representative CONSTANCE FORTNEY and JOHN ROBINSON, Plaintiff,	)	
vs.	)	ORDER
BERKELEY ELECTRIC COOPERATIVE, INC., Defendant.	)	

TRIAL DATE: OCTOBER 28, 2015-NOVEMBER 2, 2015

TRIAL LOCATION: BERKELEY COUNTY COURTHOUSE

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PRESIDING JUDGE: The Honorable Roger M. Young, Sr.

ORDER DATE: December _____, 2015

STATEMENT OF THE CASE:

The Plaintiffs allege negligence, gross negligence and recklessness against the Defendant for violating Federal, State, Local and industry safety rules regarding the construction, maintenance, and inspection of its overhead power lines. The Plaintiffs allege the Defendant misrepresented its inspection and safety program for nearly twenty (20) years to the United States Department of Agriculture, who oversees the operation of electrical cooperatives and provides funding based upon assurances of compliance.

The Plaintiffs were laborers hired to move tents. On April 23, 2008, John Fortney was killed and John Robinson was injured after a tent they were moving came into contact with one of the Defendant's low-hanging, overhead power lines. The Plaintiffs allege the power line violated the height requirements of the National Electrical Safety Code (NESC or "Code") and that had the line been in compliance, the tent they were moving never would have made contact.

The Defendants contend the power line was above Code height and that they never misrepresented anything. They contend the reason for the electrocution was the negligence of the Plaintiffs and other Third Parties present at the scene.

Comment [D1]: The tent did not "come into contact" with the line by itself. Plaintiffs ignored the 10-foot rule and walked the tent into a power line that they knew was there. This is a classic "Reptile Theory" ploy to take the focus off of Plaintiffs' negligence.

Comment [D2]: This statement is inaccurate. Defendants contend that the power line was built above code height. There is no evidence regarding the height of the power line at the time of the accident. The line was not measured until after the accident.

STANDARD OF CARE:

The highest degree of care is required in the distribution, maintenance and inspection of overhead power lines. Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163, 166. Power companies and their employees, even more than all other people, ought to know the great danger of electricity. They ought to take care to see that their wires, which convey electric current, are properly guarded, so as to prevent injuries to persons and property. This duty is incumbent upon them under the law of this state. Weeks v. Carolina Power & Light Co. et al., 156 S. C. 158, 153 S. E. 119, 122. It is not only the duty of a power company to repair its

electric lines when it has knowledge of needed repair, but is bound to use due diligence to acquire information and knowledge concerning the condition of its electric wires, and the failure to do so constitutes negligence. Mitchell v. Charleston Light & Power Company, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577. (SC 1931).

Based upon the record, testimony and evidence presented at trial, and argument of counsel, this Court hereby rules in favor of the Plaintiffs and makes findings of fact and conclusions of law as outlined below.

FINDINGS OF FACT:

I. NEGLIGENCE – RECKLESS VIOLATIONS OF SAFETY RULES.

A. Testimony of John Dagenhart – Expert in the NESC and the construction, maintenance and inspection of power lines.

The NESC protects people from the hazard represented by power lines through isolation by elevation. Mr. Dagenhart testified that it is common knowledge or foreseeable in the electrical distribution industry that people will get too close to power lines. The most important way the NESC protects the community is through strict adherence with the height requirements for overhead power lines. (HT, pp. 500-506).

General Electrical Safety Rules That Apply To This Case.

a. A power company must construct and maintain its power lines at least 18.5 feet high above farms or lands with animals to prevent injury to people or death by electrocution.

b. A power company must inspect their power lines to ensure they're at Code height to prevent injury to people or death by electrocution.

c. A power company must tell the truth about its compliance with electrical safety laws to prevent injury to people or death by electrocution. (HT, pp. 499-500).

Comment [D3]: This is inaccurate. Mr. Dagenhart testified that this was one of the Code's protection requirements 506:9-19.

Comment [D4]: These "general safety rules" were fabricated by Plaintiff ("I'll be straight up with you and just tell you, we have created three safety rules that we contend apply in this case." T. 164:19-21) This is a classic "Reptile Theory" strategy advocated by one of Plaintiffs' attorneys in his book, "Reptile: the 2009 Manual of the Plaintiff's Revolution" (also on his website at www.reptilekeenanbail.com.)

Comment [D5]: BEC does construct and maintain its power lines above 18.5 feet.

Comment [D6]: BEC does inspect its lines to ensure code height.

Comment [D7]: This general rule is so generalized and contrived that it amounts to nonsense. BEC employees are truthful.

1. Specific Electrical Safety Rule Violations Discovered In This Case.

The Court concludes that Berkeley Electric violated general electrical safety rules which proximately caused Mr. Fortney's death and the injuries to John Robinson. The following discussion and information summarizes Mr. Dagenhart's testimony which the Court adopts as factually correct.

a. Berkeley Electric is subject to the requirements of 7 CFR 1730.21, "Inspections and Tests," which addresses the inspection requirements for their overhead power lines.

b. 7 CFR 1730.21 requires: (1) inspections of power lines for compliance with 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. Berkeley Electric violated each of these requirements. Berkeley Electric conceded these violations in their pretrial interrogatory responses: "The line in question has never been inspected for National Electric Safety Code compliance." (Plaintiffs' Exhibit No. 61). This response clearly shows Berkeley Electric violated the safety rule dealing with inspections for compliance with the height requirements of the NESC. (HT. pp. 542-546).

In addition, based upon the testimony of Berkeley Electric's employees who stated they are not keeping records of the inspections they are doing, the Berkeley Electric violated the requirement to keep records of inspections. Based upon the testimony of Berkeley Electric's employees who stated no one is making sure the lines comply with the NESC, Mr. Dagenhart concluded Berkeley Electric violated the requirement that inspections must include a determination as to whether the line complies with the NESC. Based upon the testimony of Berkeley Electric's employees who stated they don't record all deficiencies found, Mr. Dagenhart concluded Berkeley Electric violated the requirement to record all deficiencies.

Comment [D8]: It would be error to base a decision on the alleged "violation" of admittedly fabricated "general safety rules."

Comment [D9]: It would be error to adopt opinion as fact regarding the terms and requirements of a regulation. The regulation itself sets out its terms and requirements.

Comment [D10]: This is an inaccurate representation of §1730.21. The policies and procedures" of 7 CFR 1730 "are intended to clarify and implement certain provisions of the security instrument and loan contract between RUS and electric borrowers regarding operations and maintenance." 7 CFR 1730.1 (b). §1730.21(a) generally provides that each borrower "conduct all necessary inspections and tests of the component parts of its system, annually exercise its ERP, and maintain records of such inspections and tests." Plaintiff's attempt to bootstrap this generalized regulation into a safety standard governing power line inspection is pure fabrication. §1730.21(b) provides that "the frequency of inspection and testing will be determined by the borrower in conformance with applicable laws, regulations, national standards, and Prudent Utility Practice." Prudent Utility Practice is defined in as "any of the practices, methods, and acts which, in the exercise of reasonable judgment, in light of the facts, including, but not limited to, the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry prior thereto, know at the time the decision was made, would have been expected to accomplish the desired result consistent with cost-effectiveness, reliability, safety, and expedition." Appendix A to Subpart B of Part 1781.

Comment [D11]: The NESC standard is that "Lines and equipment shall be inspected at such intervals as experience has shown to be necessary." Plaintiffs' Exhibit 7, Section 21, 214(A)(2).Further, BEC builds its lines to exceed NESC minimums so, pursuant to Prudent Utility Practice, it would be unnecessary to inspect the line for NESC compliance. The line in question was inspected to determine compliance with BEC's height requirements and was never found to be deficient T.184:12-192:6

Comment [D12]: BEC keeps records of necessary inspections and testing of the component parts of its electric system as required by law, regulation, standard, or Prudent Utility Practice. §1730.21(b). Plaintiffs alleged requirement that a utility keep records of power line inspections to determine compliance with NESC height specifications is a self-fabricated rule.

Finally, Mr. Dagenhart concluded that if they aren't keeping the necessary records, it would be impossible to keep those records long enough to identify long-term trends. Mr. Dagenhart testified these are not minor violations at all. These are violations of specific safety rules designed to protect people and save lives. Based upon the foregoing, Mr. Dagenhart testified Berkeley Electric violated General Electrical Safety Rule 2 above, requiring all power companies to inspect their power lines to ensure they're at Code height to prevent injury to people or death by electrocution. (HT, pp. 545-550).

c. The NESC, Section 232, Table 232-1 governs the minimum height requirements for overhead power lines which includes the power line at issue in this case. (Plaintiffs' Exhibit No. 7). The table takes into account conditions that cause lines to sag. The NESC requires all power lines to be at the specified heights even under those circumstances. Section 232(a)(1) of the NESC provides for additional clearance requirements so that the lines stay at the proper height even under the worst conditions that cause lines to sag. (HT, pp. 508-512).

d. The power line at issue was required to be at least 18.5 feet high at all times. Table 232-1 sets the required height by looking at two (2) categories, voltage and land use. (voltage + land use = required height). The voltage for the power line in this case is 14,400. Since the land was used as a farm, category four (4) applies and provides 18.5 feet is the required height. (HT, pp. 282-289). Section 232(a)(1) of the NESC requires that there be additional clearance needed to account for the worst case sag conditions. In this case, that adds an additional one (1) foot one (1) inch. Therefore, the total height for the line at issue was required to be nineteen feet seven inches (19' 7") based upon specific temperature readings the day the men were electrocuted. All height requirements are for the midspan, or the lowest part of the line. (HT, pp. 512-527).

e. Berkeley Electric violated Section 232 by having a dangerously low-hanging power

Comment [D13]: According to § 1730.21(b), "the records of such inspections and tests will be retained in accordance with applicable regulatory requirements and Prudent Utility Practice. According to the NESC, Section 21, 214(A)(2): "Lines and equipment shall be inspected at intervals as experience has shown to be necessary." "Any defects affecting compliance with this code revealed by inspection or tests, *if not promptly corrected*, shall be recorded; such records shall be maintained until the defects are corrected." (Emphasis added.) BEC employees testified that the company complies with this actual, as opposed to Plaintiff's self-fabricated standard. See Plaintiffs' Exhibit 7.

Comment [D14]: Again, this is a "general safety rule" made up by Plaintiffs as a "Reptile Theory" ploy to simplify complex issues and distract the trier of fact from Plaintiffs negligence.

Comment [D15]: These additional measurements are relevant only if the line had been constructed to NESC minimums. BEC constructed the line according to RUS specifications which are well in excess of the NESC minimums.

line. The line was measured by Berkeley Electric's employees to be seventeen feet three inches (17'3") on the day of the electrocution at the midspan. (Plaintiffs' Exhibits Nos. 8 & 9). Mr. Dagenhart testified the line was too low and in direct violation of the NESC. Berkeley Electric violated General Electrical Safety Rule No. 1 requiring power companies to construct and maintain their power lines at least 18.5 feet high above farms or lands with animals to prevent injury to people or death by electrocution. (HT, pp. 507, 526-531, 537).

f. The line was constructed improperly from the start in 1993. There are only two (2) things can cause a line to sag as far as this one did, too much line was used or the poles are leaning. Mr. Dagenhart visited the scene, personally observed the poles, and testified they looked straight and not causing the line to sag. The Court finds that Berkeley Electric's crew simply used too much line when it was constructed. The theory that something must have hit the line and caused it to sag below Code is unrealistic. Mr. Dagenhart explained nothing is going to stretch a line like this (reinforced steel) and cause it to sag this much. In the unlikely event that this did happen, evidence would be clearly visible on the line, and nothing of the sort was found. (HT, pp. 531-534).

g. Had the line been Code compliant, the tent would have safely passed under without any contact. The measurements taken by Berkeley Electric's employees show the exact point of contact, one hundred nineteen feet (119') from the closest pole. If the midspan was at Code height, that would have made the height at the point of contact twenty feet (20'). The tent was measured to be seventeen feet nine inches (17'9"). The highest estimate given of how high the men lifted the tent was six inches (6"). Therefore, the total height of the tent as it was being lifted off the ground was a maximum of eighteen feet three inches (18'3"). This means if the line complied with the NESC, there would have been one foot nine inches (1'9") of clearance

Comment [D16]: This measurement was taken some hours after the accident. There is no evidence as to the height of the line at the time of the accident.

Comment [D17]: The fact that the line is out of compliance is not deemed a "violation" by the Code, but is rather deemed a "defect" or a "deficiency."

Comment [D18]: Again, this is a "general safety rule" that Plaintiffs made up.

Comment [D19]: Dagenhart's observation only serves to demonstrates his ignorance. Power poles are actually skewed out-of-plumb to create tension on the line and remove sag. T.798:25-799:8

Comment [D20]: BEC's theory is that something impacted the line and that something moved the poles which resulted in excess sag. T.799:9-801:5.

Comment [D21]: This is not Dagenhart's testimony. He said it would be difficult to say, but that it would have to be a significant event to cause the line to sag. T. 534:23-535:3.

Comment [D22]: Mechanical distortion and damage to the line was observed. T. 778:4-10.

Comment [D23]: Had the Plaintiffs obeyed the ten foot rule, the accident would not have happened.

Comment [D24]: This is inaccurate. The crew foreman, Alexander Clayson, testified in his deposition that the tent was raised up to a foot off the ground. Clayson Depo. 84:9-11.

between the tent and the energized line. (HT, pp. 537-541).

h. As a receiver of federal tax dollars from the Rural Utility Service (RUS), Berkeley Electric is required to complete forms and assign performance ratings representing their compliance with electrical safety laws. These forms are called RUS 300 Forms. (Plaintiffs' Exhibit No. 1). The RUS issues Bulletins that explain what the performance ratings represent is being done. (Plaintiffs' Exhibit No. 2). The scores range from zero (0) to three (3), with three (3) being the highest mark. One of the topics is Inspection Program and Records. The records reflect that from 1990-2005, Berkeley Electric has given themselves a perfect score of three (3) under this section. The Bulletin explains that a score of three (3) means, "All overhead lines patrolled annually." (*Internal parentheses omitted*). In giving themselves a three (3), Berkeley Electric is representing they are patrolling all of their overhead power lines each year. Berkeley Electric's employees and their own NESC expert agree they are not patrolling all of their overhead power lines annually. (HT, pp. 551-554).

Under the section Compliance with Safety Codes: Clearances, the RUS records reflect that from 1990-2008, Berkeley Electric gave themselves a perfect score of three (3) under this section. The Bulletin explains that a score of three (3) means "line patrols identify changed conditions requiring greater clearances." Berkeley Electric's lineman, Rico Harrell, stated when he is working on power lines he is not looking to see if the use of the land has changed, that he doesn't know what the original use of the land was when the lines were constructed, and that no one has ever told him he is supposed to be looking for changes in land use. Furthermore, no one records the original use of the land for any power line. Mr. Dagenhart concluded a score of three (3) is a misrepresentation. This would also be a violation of General Electrical Safety Rule No. 3

[1] Arching is when electricity is transferred without contact. Arching at this voltage can only happen when there is less than an inch between the tent and the energized line. Arching would not have taken place with 1'9" of clearance. (HT, pp. 540-541).

Comment [D25]: This conclusion is absurd. There is no evidence that Plaintiffs knew how high the power line was supposed to be above the ground or that they were relying on the line being at Code height—or any specific height—so they could move the tent underneath it. The evidence establishes that Plaintiffs knew the power line was nearby, that they were aware of the danger presented by the line, and that they stopped at least once to assess the situation because of their concerns about the line. Despite all this, they proceeded through the ten foot zone and into the power line.

Comment [D26]: This is how the RUS monitors the security of its loan. See, §1730.1. An RUS representative actively participated in this rating process, approved the ratings, and had the authority to change any scores. T. 855:12-856:24

Comment [D27]: A rating of 2 is acceptable. See Plaintiffs' Exhibit 2, Bulletin 1730-1, 2.3. The consequences of a 0 or 1 rating is that the borrower submit a corrective action plan within 90 days outlining the step to be taken to improve conditions and maintain an acceptable rating. §1730.25(a).

Comment [D28]: BEC's expert testified that BEC's rotating power line inspection practice was consistent with what other electric cooperatives were doing. T. 817:12-818:6.

Comment [D29]: Bulletin 1730-1 Exhibit A, 3(b), Compliance with Safety Codes – Clearances actually states: "All facilities staked prior to construction by personnel familiar with NESC requirements. Line patrols identify changed conditions requiring greater clearances." BEC constructs its lines to exceed NESC clearance.

Comment [D30]: The alleged misrepresentation, if any, on the form is irrelevant. There is no evidence that a different score would have prevented the accident or changed the outcome in anyway.

requiring power companies to tell the truth about their compliance with electrical safety laws to prevent injury to people or death by electrocution." (HT, pp. 554-557).

These are not minor violations. (HT, p. 558, lines 7-9). Mr. Dagenhart testified that the inspection and record keeping practices of Berkeley Electric were not representative of the operation of other electric cooperatives. (HT, pp. 557-561).

B. Testimony of Defense Expert Eric Jackson.

Mr. Jackson admitted that the required height of the line was 18.5 feet and that it was below that height on the date of injury. (HT, p. 786, lines 17-21). He categorizes this as a "defect" rather than as a lack of code compliance. (HT, p. 786, lines 17-21). He additionally acknowledged that "All overhead power lines patrolled annually" means that some form of an inspection is happening to all lines on an annual basis. (HT, p. 810, line 23 – p. 811, line 8). He conceded that Berkeley Electric is not performing some sort of an inspection on all lines on an annual basis. (HT, p. 811, lines 16-19).

Lastly, he acknowledged that Berkeley Electric violated the NESC in failing to inspect the power line in this case. Mr. Jackson agreed that inspections of power lines must include a determination as to whether or not they comply with the height requirements of the NESC. (HT, p. 807, line 20-p. 808, line 25). He was asked to read the Defendant's discovery response stating: "The line in question has never been inspected by NESC compliance." Mr. Jackson admitted this is a violation of the NESC and the Code of Federal Regulations. (HT, p. 809, line 1-p. 810, line 22).

C. Testimony of Ervin Strickland.

Mr. Strickland was employed as the CEO for Berkeley Electric for thirty-two (32) years. This included the time of the electrocution. Currently, Berkeley Electric has over five thousand

Comment [D31]: Again this is Plaintiffs' self-fabricated rule

Comment [D32]: In response to the question: "Was BEC doing what everybody is doing, Dagenhart responded: *In my opinion, no.* T. 561:10-12 However, Dagenhart admits that he has no experience in filing RUS-300s. T. 562:8-15.

Comment [D33]: This is not an accurate representation of Mr. Jackson's testimony as cited. Mr. Jackson testified that BEC's inspection procedures were consistent with what other electric cooperatives are doing. See T. 817:12-818:6

Comment [D34]: The question posed was: "*If you take this verbatim, is that a conflict, a violation of Rule 214, if you take it as exactly what it says.*" Mr. Jackson's honest answer was: "I would say yes, there is a problem with that." T. 810:19-22. This is hardly the endorsement claimed by Plaintiffs. As shown repeatedly through the trial, BEC built its lines to exceed NESC requirements. Any inspection would be to determine compliance with RUS/BEC's higher requirements which would necessarily include NESC requirements.

(5,000) miles of power lines covering most of Berkeley County and parts of Charleston and Dorchester Counties as well. Berkeley Electric has a monopoly in those areas. (HT, pp. 35-37). Mr. Strickland agreed telling the truth in regulatory reporting is a mandatory requirement for Berkeley Electric. One of the ways Berkeley Electric reports its compliance is by the completion of RUS 300 Forms. (HT, pp. 38-41). Mr. Strickland signed these forms and certified the performance ratings as accurate and truthful for thirty-two (32) years. Mr. Strickland has signed off on these forms every time as either the rater or the reviewer. (HT, pp. 41-44). Mr. Strickland testified the federal government uses the RUS reports submitted by Berkeley "to protect their investment...." (HT, p. 109).

When Mr. Strickland certified the performance ratings were accurate, he did not know if those ratings were truthful. Mr. Strickland admitted that, although he signed off as being the person that came up with the ratings or signed off as having reviewed them, he never participated in the process. (HT, p. 95, line 14-22). He could not remember if he actually knew what the individual performance ratings even meant. (HT, pp. 96, line 22-p. 97, line 7). Mr. Strickland was asked, "if Berkeley Electric is representing to the federal government that they're patrolling all overhead lines annually, should Berkeley Electric be patrolling all overhead lines annually?" His answer was "I'm not sure." (HT, p. 117, lines 2-7).

Bulletin 1730-1 explains that a score of three (3) for Inspection Program and Records means "All overhead lines (including those on private right-of-way) patrolled annually (walking, riding, or aerial); more frequently if experience dictates." A score of three (3) also means that records of line patrols are being kept. A review of the RUS 300 Forms from 1990-2005 shows Berkeley Electric has given themselves a three (3) every time. Mr. Strickland testified that linemen do line patrols as they are riding down the highways looking at the power lines, but no

records are kept of that. (HT, pp. 54-58).

Bulletin 1730-1 explains that a perfect score of three (3) for Compliance with Safety Codes: Clearances means that the line patrols are identifying changed conditions requiring greater clearances. A review of the RUS 300 Forms from 1990-2008 shows Berkeley Electric has given themselves a three (3) every time. Mr. Strickland testified a score of three (3) means linemen are required to be looking to see if the use of the land has changed underneath their power lines, but that he has never known whether they kept any records at all showing the use of the land underneath their power lines, including the initial use when the power line is constructed. People doing the pole inspections are not told what the original use of the land is either. (HT, pp. 58-62).

D. Testimony of Timothy Mobley.

Mr. Mobley is Berkeley Electric's Vice President of Engineering and Operations, the second in command. He has worked for Berkeley Electric for thirty (30) years. Mr. Mobley holds an electrical engineering degree. He conceded that the National Electric Safety Code (NESC) governs the work they do along with the RUS regulations. Mr. Mobley testified that the NESC is "the Bible" for safety issues within the electric utility industry. (HT, pp. 124-127).

Mr. Mobley admitted that when he was deposed in 2012, four (4) years after the injuries and fatalities, he did not know how high the NESC required this power line to be. Shortly after the event, Berkeley Electric management visited the scene. Included in this group was John Hall, their staking engineer[2] and Junior Elrod, the Director of Training and Loss Control. Berkeley Electric hired a NESC expert, Eric Jackson, who visited the scene as well. More engineers from the engineering firm they use, McCall-Thomas, also visited the scene. Mr.

Comment [D35]: Plaintiffs omit that Mr. Mobley testified that he did not know the NESC required height because he did not know the land use at the time the line was designed. T. 127:6-15.

[2] A staking engineer is the person who designs power lines and determines how high it will be.

Mobley testified that even with the involvement of all of these people, they were unable to determine how high the NESC required this line to be. (HT, pp. 127-130). Ultimately Mr. Mobley conceded that the minimum required height for the line in question was eighteen and a half (18.5) feet at its lowest point.

Mr. Mobley agrees a power company must inspect their power lines to ensure that they are high enough to prevent injury to people or death by electrocution. (General Electrical Safety Rule No. 2). Mr. Mobley 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. (HT, pp. 140-145).

He also acknowledged the inspectors contracted by Berkeley Electric to perform inspections of the poles holding up the lines are not inspecting overhead lines for proper height under the NESC. Plaintiffs Exhibit 5 specifies the pole inspectors' duties under the contract as "the inspection, evaluation, ground line treatment, and internal treatment of BEC *wood poles*." There is a single mention of power lines stating the pole inspectors are to also look for frayed conductors in addition to the poles. (HT, pp. 158-163).

Mr. Mobley testified that the federal government expects them to tell the truth. This includes their response and performance ratings on the RUS 300 Forms. (HT, pp. 163-170). When he signed off on the RUS 300 Forms, he did not know if what he was certifying was the truth. On the 2008 RUS 300 Form, Berkeley Electric gave themselves a perfect score of three (3) under the section "Compliance with safety codes: clearances. He also admitted that he did not know what a perfect score of three (3) really meant when he signed off and certified that the score was true and accurate. He admitted they had the RUS Bulletin that explained what the performance scores were representing, but he thought their score just meant they were doing line

Comment [D36]: Again, Mr. Mobley testified that he was unable to determine the height required by the NESC because he did not know the land use at the time the line was designed. T. 129:21-130:5.

Comment [D37]: Mr. Mobley actually stated that he did not recognize General Safety Rule No. 2 as a rule or a code. T. 140:20-141:12.

Comment [D38]: Mr. Mobley did not testify that pole inspectors are not inspecting overheard lines. He did testify that pole inspectors are to report any dangerous conditions observed. T. 184:7-21.

patrols as much as they can. (HT, pp. 170-182).

Although the NESC sets the minimum required heights for power lines, Berkeley Electric does not use the NESC in designing their lines. Mr. Mobley testified that when the lines are designed, the staking engineer doesn't use the NESC to determine the height. (HT, p. 202, lines 6-12). Finally, Mr. Mobley acknowledged that Berkeley Electric does not inspect their power lines for proper Code height despite inspections being important for public safety. Mr. Mobley admitted the power line in this case was never inspected for NESC compliance and that they aren't really focusing on the Code in any inspection they do. (HT, p. 200, lines 6-12).

Comment [D39]: because the lines are built to RUS specifications which exceed NESC requirements. T. 201:21; 202:17.

Comment [D40]: The cited passage does not accurately reflect Mr. Mobley's testimony.

E. Testimony of Matthew Bryan.

Matthew Bryan has a BS in electrical engineering from Clemson. He began working for the engineering firm, McCall-Thomas, right out of college where he assisted Berkeley Electric and other cooperatives in the RUS-300 process. (HT, p. 852, line 1 – p. 853, line 8). He examined Berkeley Electric's 2008 RUS 300 Form and testified that he signed off on it and participated in the rating process. (HT, pp. 853, lines 13-21) (Plaintiff's Exhibit No. 1). The term "all overhead lines patrolled annually" means that there is some form of inspection happening on all lines on an annual basis. Mr. Bryan testified he has experience with the completion of the RUS 300 Forms and interpreting the Bulletins issued by the RUS. (HT, p. 865, line 10 – p. 866, line 17). Berkeley Electric has never done some form of an inspection on all lines on an annual basis. (HT, p. 867, lines 2-13).

F. Testimony of John Villeponteaux.

Mr. Villeponteaux has worked for Berkeley Electric for thirty-one (31) years. He is the manager of distribution operations. His job includes the construction, maintenance, and operation of power lines. Mr. Villeponteaux described the power line at issue in this case as a

high voltage power line. These high voltage power lines are found near schools, churches, shopping malls, and down the highways. Berkeley Electric has high voltage power lines nearly everywhere people are in Berkeley County and in parts of Charleston and Dorchester Counties as well. (HT, pp. 214-217).

Berkeley Electric's inspection program of overhead power lines consists of linemen looking at power lines as they are riding past them from the street and linemen looking at the power lines they work on. Mr. Villeponteaux testified that he knows what the inspection program is, and that he is responsible for making sure the linemen in his department are doing what is required of them. (HT, p. 217, lines 15-22, p. 219, lines 1-9). There are no records kept of their inspection of overhead power lines. Management has no way of knowing if any of the lines are actually being inspected because no one is making records of inspections. (HT, p. 221, lines 16-20).

G. Testimony of James Elrod.

Mr. Elrod has worked for Berkeley Electric for thirty-seven (37) years and is the manager of job training and loss control. (HT, p. 233, lines 14-22). He acknowledged and the Court accepts it is foreseeable to Berkeley Electric that people will work around power lines without calling to have them shut off. (HT, p. 224, lines 18-21). He agreed Berkeley Electric does not keep records of the inspections of overhead power lines (HT, p. 235, line 18-p. 236, line 7) and that linemen are not looking to see if the lines comply with NESC height requirements. (HT, p. 243, lines 13-p. 244, line 12).

A full investigation was not done in this case, contrary to the provisions of Berkeley Electric's policy and procedure manual. Mr. Elrod conceded it was part of his job as the manager of loss control to find out what happened. In all the time since 2008, with all of the engineers

Comment [D41]: The cited passage does not accurately reflect Mr. Elrod's testimony.

Comment [D42]: Plaintiffs omit that Mr. Elrod confirms that linemen are building the line by RUS specifications which exceed any height required by the NESC. T. 243:13-21.

and experts they sent to the scene, no one has ever written down or determined how high the law required this power line to be. (HT, p. 241, line 12-p. 242, line 2).

Lastly, Mr. Elrod reviewed the 2008 RUS 300 Form. (Plaintiffs Exhibit No. 1). He read the comments concerning their inspection program, "employees are trained to visually inspect lines in their daily operations." He testified that information did not come from him, the manager of job training. (HT, p. 252, line 11-p. 254, line 2). He also testified that no one ever asked him whether or not employees are being trained to visually inspect lines in their daily operations. (HT, p. 254, lines 3-6).

H. Testimony of Rico Harrell.

Mr. Harrell has worked for Berkeley Electric for nineteen (19) years and his job is a lineman foreman. His job is to construct, maintain and inspect power lines. In 2008, he was a lineman in the district of Thornhill Farms, where the electrocutions occurred. (HT, p. 258, line 24-p. 260, line 2). Once a power line is constructed, he does not measure the line for proper height. (HT, p. 260, lines 6-9). He would need a measuring stick to do that, but linemen aren't given a measuring stick. (HT, p. 260, line 10-p. 261, line 3).

Maintenance records show Mr. Harrell was at Thornhill Farms on February 16, 2007 and August 20, 2007. (Plaintiffs' Exhibit No. 12). On February 16, 2007, Mr. Harrell performed work on one of the poles holding up the power line in this case. He returned to Thornhill Farms for service again on August 20, 2007. He has never inspected the lines at Thornhill Farms to make sure they are at the height required by the NESC. (HT, p. 263, line 23-p. 265, line 15, p. 272, lines 4-7).

I. Testimony of Margaret Yergin.

Ms. Yergin owned the property at the time the power line was constructed. At the time

Comment [D43]: The cited passage does not accurately reflect Mr. Elrod's testimony.

Comment [D44]: Mr. Elrod testified that he handles formal training in classes but does not handle on-the-job training which takes approximately six years to advance from ground man to first class lineman. T. 253:8-255:10.

Comment [D45]: That is correct. Nobody ever asked him that question.

Comment [D46]: Plaintiff omits that to measure the line, Mr. Harrell testified that linemen "do line of sight" and use their eyes. T. 260:10-13.

Comment [D47]: Mr. Harrell testified that his work was in a different area of the property and the he could not see the line from that location. T. 274:21-277:18. See also Defense Exhibit 2.

Comment [D48]: Plaintiff omits that Mr. Harrell testified that all of his work was performed at the front of the farm and that he would not have seen the line in question. T. 263:23-264:24.

of construction, the land surrounding the power line in this case was traversed by vehicles exceeding eight (8) feet in height and used for cultivation, grazing, and riders on horseback. Ms. Yergin testified there were between one hundred (100) and one hundred sixty-five (165) horses on the property. The largest was a Belgian Shire Cross, who was over eight (8) feet tall. People rode horses and she gave riding lessons. There was a dressage area for riding and jumping beside the hay barn that measured twenty (20) by sixty (60) meters. There was a defined entrance/exit that riders on horseback would use and took them directly underneath the power line at issue. (HT, pp. 281-285). Ms. Yergin additionally testified the property was actively farmed at the time of construction. She did fish farming in the pond and grew hay in the fields for her horses and to sell. She also grew hay in the area surrounding the power line. The hay was harvested by tractors that exceeded eight (8) feet in height. Ms. Yergin testified that the tractors were driven directly under the power line. (HT, pp. 282-288).

J. Testimony of Beth Donehue.

The Plaintiffs offered the testimony of Beth Donehue. Ms. Donehue works for Memorable Meetings, an event and promotional company. Ms. Donehue was present and working the day the men were electrocuted and injured. She was part of the team that put the charity event at Thornhill Farms together. (HT, pp. 304-305). Her testimony established Mr. Fortney and Mr. Robinson were lent employees.

On April 23, 2008, Thornhill Farms continued to be a place for cultivation and livestock, and still encountered vehicles exceeding eight (8) feet in height in the area of the power line. Ms. Donehue testified that Thornhill Farms Healing Ministries is an event space that works with disabled children where they also grow crops and had livestock. Large trucks exceeding eight (8) feet in height delivered equipment and drove up next to the barn and power line. Nothing

Comment [D49]: This is a legal conclusion without any factual support. Further, the statement is irrelevant.

about the configuration of the land prevented trucks from driving in the area of the power line. Similar events have been held on the property prior to this event, and similar sized vehicles were needed. (HT, pp. 305-311).

Just before the tent hit the power line, Mr. Fortney, Mr. Robinson and two (2) others were moving the tent at her direction. (HT, p. 318). From where Ms. Donehue was standing, it appeared there was plenty of room between the tent and the energized power line. Ms. Donehue identified a picture representing her point of view and that of her co-worker, David Richardson. (Plaintiffs' Exhibit No. 18). Ms. Donehue has worked with tents this size before around power lines and she thought there was plenty of room. She didn't know how high the power line was, but assumed it was at the height required by law. She did not feel they were in danger of hitting the power line. (HT, pp. 320-324).

K. Testimony of Dr. Cathleen Moore – Expert in visual perception

The Plaintiffs offered the expert testimony of Dr. Cathleen Moore in the field of visual perception. Dr. Moore teaches visual perception and does research in visual perception and brain sciences at the University of Iowa. She is a doctor of psychology. Dr. Moore described vision as an "understanding [of] how the brain in particular processes the information that you have available at the eye to make sense of the world around you, to establish a representation of the external world through visual mechanisms in the brain." Dr. Moore has published forty (40) to fifty (50) peer reviewed articles on issues related to visual perception. (HT, pp. 393-403).

The following summarizes Dr. Moore's opinions in this case:

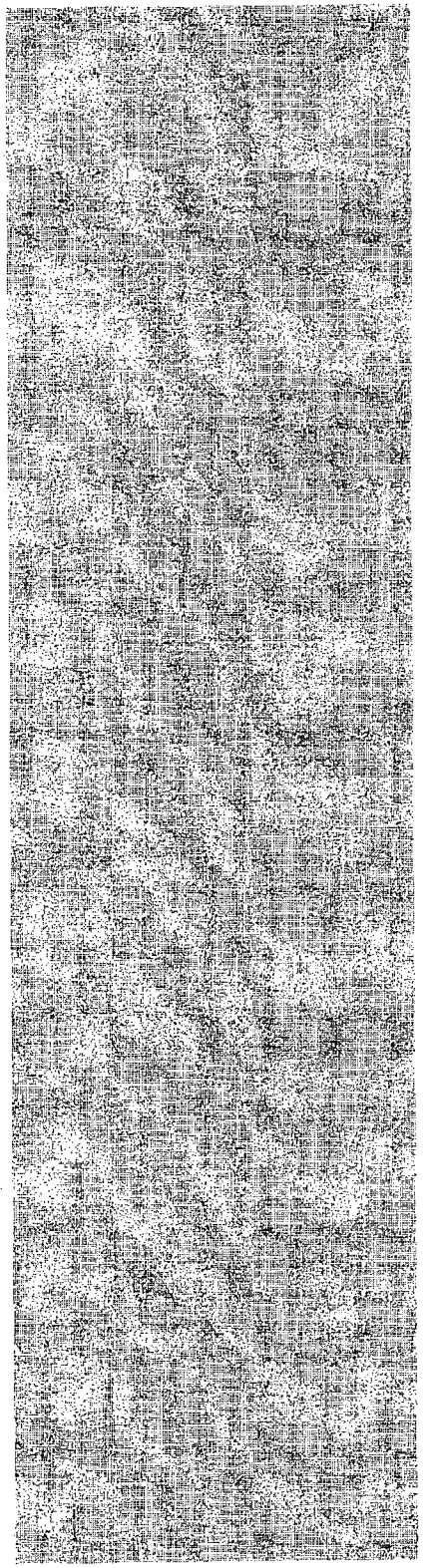
Dr. Moore provided multiple examples of cues our brains use to determine depth or distance of an object. "The fewer reference points or cues means you have a less strong sense and knowledge of depth....So without the cues, you essentially lose the representation of depth

Comment [D50]: This is a classic example of Reptile Theory misdirection designed to divert attention from Plaintiffs negligence. The tent did not magically "hit the power line" by itself—Plaintiffs walked the tent into the power line.

Comment [D51]: Admitting to previously engaging in high risk behavior only serves to emphasize Ms. Donahue's (and Mr. Richardson's) carelessness. There is no evidence that she knew what height the power line was supposed to be or that she conveyed any of her supposed assumptions regarding the height of the power line to Plaintiffs. Her failure to obey the 10 foot safety rule does not excuse the negligence of Plaintiffs.

relative to you and depth, importantly, relative between objects, so where is one object relative to another?" (HT, p. 440, lines 2-13). Dr. Moore also testified how our eyes only see in 2D, despite the world around us being in 3D. She testified that the dimension we lose is distance to the viewer. Therefore, she testified that because we lose that third dimension in our vision, "you literally don't have in the imagine information about depth, and therefore if we want to represent something about depth, we need to rely on these cues that exist in the two dimensional image." (HT, p. 450, lines 7-12). According to Dr. Moore, this is important since the ultimate question is whether a person could reliably predict that the tent pole would come in contact with the overhead wire. As she testified, "in order to be able to do that, you have to be able to be able to represent reliably where they are relative to each other and you in depth, and that's what we need these cues for, because that's exactly what's lost" when we lose the third dimension. (HT, p. 450, line 19 – pp. 451, line 1).

This manifested in the conditions on the ground on April 23, 2008, during the moving of the tent because "There's no linear perspective, no relative image size, no occlusion and no texture gradient." (HT, p. 443, lines 11-18). From where the photo was taken, Dr. Moore testified there were virtually no cues to use in determining whether the pole would hit the power line. Due to these lack of cues, Dr. Moore opined that "it's a very difficult and certainly unreliable task to try to judge the height of the power lines from below, based on vision alone, that there just isn't enough information at the front end of the visual system to assess height of those power lines." (HT, p. 446, lines 18-23). As for the men below the tent, Dr. Moore testified had the men been holding the tent and looked up the tent would have occluded, or blocked their view of the wire above. Dr. Moore therefore opined, because of the insufficiency in cues, an ordinary prudent person could not look up and determine the height of the power line from where



any of the people were standing that day. (HT, pp. 447, lines 1-8).

II. DAMAGES:

A. The Estate of John Fortney Wrongful Death Claim:

John Fortney was forty-five (45) years old at the time of his death. He was survived by his two (2) children who are the statutory beneficiaries in this case, Gina and Emma Fortney.

1. Testimony of Gina Fortney

Gina Fortney testified that she was born in Las Vegas. She did not know her father when she was young. She moved around a lot, staying with family. She had a t-shirt with circus animals she wore repeatedly until she was five (5). Her mother had told her it was a gift from her father when she was born. She testified she probably grew out of it by the time she was four (4), but she kept it because it was so special to her. Growing up, she always hoped she would meet her dad some day. She knew she had a sister too, but they had not met either.

In June of 2007, when she was fifteen (15) years old, she met her father for the first time. She worked up the courage to get in touch with one of her father's sisters who told her he was living in Florida. She got his telephone number, but waited about a week to call. They spoke for a while and arranged to meet face-to-face. She was living in Ladson, SC at the time and her father was in Jacksonville, FL. They met for the first time on Father's Day weekend, 2007. Her meeting "was everything that I had wanted." (HT, p. 707).

It was less than a year later that her father was killed. During that time, her father moved from Florida to Ladson. John, Gina and his other daughter, Emma, lived together. They went to the park together, played football, threw Frisbees. Sometimes they would just stay home and play video games. He never raised his voice at her, never spanked her and never really disciplined her in any way. Gina recalled her sixteenth birthday. She smiled as she described

Comment [D52]: Nobody ever asked that Plaintiffs or Donehue or Richardson or Clayson look at the power line and determine its height—(i.e., is that line 15 feet above the ground? 18? 24?). There is no evidence that any of these individuals knew what the height of the line was supposed to be. There is no evidence that any of these individuals knew the overall height of the tent. What is clear is that they saw the line, that they understood the line presented a danger, and that they knew they were close to it. If anything, Ms. Moore's testimony supports the need for strict compliance with the ten foot rule: if you don't know how high the line is, you don't move closer to it. If you cannot see a line that you know is nearby because the tent is "occluding" your vision, then STOP!

her dad pushing cake in her face.

Gina testified she was still sixteen (16) when she got the call that her father had been killed. Gina now has two (2) children, Riley and Ryder. "I really think my dad would have made a great granddad. I think that he would really adore my son because he never had any, and I think that he would really enjoy my daughter because she's so smart. I really think he would enjoy those things." She texted with her dad frequently. The last text she got from him was right before his death. "Your dumb dad loves you, kid." (HT, 710-715).

Gina acknowledged an incident of domestic violence with her mother. She testified she never excused her father for the altercation with her mom. She was asked why she still wanted him in her family's life after what happened with her mom. She responded, "Because people do really stupid things and people make bad choices, but my dad didn't hurt me the same way my mother never hurt me, and I still love my mother. That doesn't mean that his actions were acceptable. It doesn't mean that what he did was okay, but what he did wasn't unforgivable." (HT, pp. 719-720).

2. Testimony of Emma Fortney

Emma Fortney was eighteen (18) years old at the time of trial. She too was born in Las Vegas where she lived with her dad and mother, Kim. Her mother battled breast cancer for about four (4) years. They all lived together and her father tried to help as best he could. Emma described her dad as her mother's caretaker. Although she had a period of remission, her mother died in 2006. She and her dad moved to Florida a couple of months later. Emma was nine (9) years old at the time. Just over a year later her dad was killed.

Emma testified that she loved her dad and he loved her. She described him as a "promise keeper." "I mean, if my dad told me that we were going to get slushies after school, we were

going to then. If he was going to take my friends and me somewhere, then we would – I mean, that's what happened. It wasn't just something he told me. I could count on him to do that." Just before his death, John made a final promise to her. "That he was—that we were going to be a family again. That we would be living together again soon."

After her dad's death, Emma moved in with her Aunt Karen. She eventually moved down to Jacksonville to live with his sister, Aunt Linda. She graduated high school and is in her first year of college.

Just before her dad's death, Emma was ten (10) years old and used her aunt's phone to text with her dad while he was at work. The last text she sent him was, "Dad, I love you. I can't talk to you. You're dead. I miss you. I don't think you are, but it's true. I miss you." "Don't think I was mad at you. My phone would not go on. I know you are dead, but I can't get over it. I miss you so." Emma texted with her dad daily before his death. He often referred to her as "his treasure." He texted her in the mornings and constantly told her how much he loved her. Images of the text messages were admitted into evidence as the Plaintiffs' Exhibits Nos. 35-60. Emma testified that today, she sometimes feels guilty when she's happy. She wishes her dad could be here with her and enjoy her successes.

Comment [D53]: Plaintiffs have failed to offer any evidence of pecuniary loss or economic loss or loss of decedent's ability to earn money for the support, maintenance, care and protection of his beneficiaries.

Survival Action

1. Testimony of Dr. Kimberly Collins –Expert in forensic pathology

The Plaintiffs offered the expert testimony of Dr. Kimberly Collins in the field in forensic pathology. She is medical doctor and practices forensic pathology. Part of her job is to determine manner of death. She performed the autopsy on John Fortney. She described how electricity can damage internal organs and even break bones. The point of contact with the electricity on Mr. Fortney was through his left hand and the electricity exited through his feet.

Her report was identified and admitted into evidence as the Plaintiffs' Exhibit No. 28.

When Mr. Fortney was first approached by medical personnel, he was in a state of ventricular fibrillation, an abnormal heartbeat. She testified that people who have been electrocuted can feel the pain as the electricity enters and exits their body. She described a sharp pain at first. In this case, the electricity went through Mr. Fortney's liver which would have produced pain as well. The EMS records show Mr. Fortney's heart was beating and he was alive for over an hour after he was shocked. Dr. Collins stated death was not instantaneous.

B. John Robinson

Mr. Robinson is fifty (50) years old, forty-three (43) at the time of the electrocution. He completed the tenth grade. His first memory after being shocked was laying on the ground seeing white. He was put on a gurney and transported by helicopter to the emergency room at MUSC. While in the helicopter, he remembers feeling like he was burning on his chest and left foot. On a scale of one (1) to ten (10), he stated the pain was a ten (10). At the emergency room, his heart felt like it was racing and many people were trying to help him. He was admitted for several days. He still has pain in his left foot. "It feels like a pin is sticking you." (HT, pp. 668-676).

Mr. Robinson testified his life has changed. He cries and gets sad any time he sees a tent. There are times he cries for no reason at all. He gets anxious any time he sees a power line. He gets scared. He gets depressed. Sometimes when he is at work, he starts crying for no reason at all. He usually goes to the bathroom and waits for it to pass (about 10-15 minutes) before going back to work. Before being shocked, he rarely cried. In fact, he did not even cry at his own father's funeral. He has been married for approximately six (6) years. His wife holds him when he cries. When asked how this makes him feel, Mr. Robinson responded, "Like a baby. I feel like I'm the man of the house. I don't need to be up in my wife's arm, crying like a baby." Even

Comment [D54]: Dr. Collins testified that when an individual is in "v-fib" (ventricle fibrillation) "the majority time they are unconscious." T. 387:18-22. She further testified that there is no indication that Mr. Fortney was conscious after walking the tent into the power line. T. 387:23-388:25.

Comment [D55]: He was discharged after two days in the hospital. T. 682:6-19.

Comment [D56]: Mr. Robinson had been hospitalized for depression prior to the accident. T. 685:7-19.

as of the date of trial, these crying spells continue. "This is what I have to deal with." (HT, pp. 676-681).

Dr. Collins also testified regarding John Robinson. She testified, "Electrocution, as I mentioned earlier, is painful. We know – it's used as an element of torture. It produces heat and causes necrosis of tissues. It can break bones, blisters the skin, can cause chronic problems, chronic scarring and complications. It affects the nerves." (HT, p. 378, line 24 – p. 379, line 5). Dr. Collins testified that it is not uncommon for entrance and exit wounds to still be painful many years after being electrocuted. (HT, pp. 380-382).

Comment [D57]: Plaintiffs failed to present any emergency room bills, hospital bills, doctors bills, prescription bills, physical therapy bills, counseling bills, lost wages calculations, or loss of earning capacity calculations.

Comment [D58]: Dr. Collins testified that she had not examined Mr. Robinson and had no opinion regarding his claimed injuries. T. 382:8-383:4.

CONCLUSIONS OF LAW:

I. NEGLIGENCE

The Plaintiffs allege negligence, gross negligence and recklessness against the Defendant for violating Federal, State and industry safety rules regarding the construction, maintenance, and inspection of its overhead power lines. "To prevail in an action for negligence, the plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damages to plaintiff proximately resulting from the breach of duty." Trivclas v. SC Dep't of Tranp., 384 S.C. 125, 133, 558 S.E.2d 275 (Ct.App. 2001).

The duty and standard of care that apply to this case can be traced back to the beginnings of electricity itself. Even as our country began to realize the great benefits of electricity, the danger was apparent as well.

> The rattlesnake warns its victim, but not so with this subtle, invisible, and death-producing power. It is a matter of common knowledge that this wonderful force is of untold benefit to our industrial life. Electric power is an industry producing agency, and the hydroelectric development has been one of the greatest factors in the state's progress and especially its industrial expansion. Every

> legitimate encouragement should be given to its manufacture and distribution for use by public utility corporations, manufacturing plants, homes, and elsewhere. On the other hand, the highest degree of care should be required in the manufacturing and distribution of this deadly energy and in the maintenance and inspection of the instrumentalities and appliances used in transmitting this invisible and subtle power. Hart v. Union Mfg. & Power Co., 157 S.C. 174, 154 S.E. 118, 127 (1930) (quoting Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163, 166).

Comment [DS9]: Plaintiff failed to cite any modern cases for this proposition.

Comment [D60]: Plaintiff omits the year of this North Carolina decision: 1927. The facts involved the electrocution of a boy from a live wire lying in the grass along a path. The power company was aware of the hazard but had failed to repair it.

Recognition of both the danger and what should be required prompted continued belief that nothing but the highest degree of care will keep the community safe. The highest degree of care is required in the distribution, maintenance and inspection of overhead power lines. Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163, 166. Power companies and their employees, even more than all other people, ought to know the great danger of electricity. They ought to take care to see that their wires, which convey electric current, are properly guarded, so as to prevent injuries to persons and property. This duty is incumbent upon them under the law of this state. Weeks v. Carolina Power & Light Co. et al., 156 S. C. 158, 153 S. E. 119, 122. It is not only the duty of a power company to repair its electric lines when it has knowledge of needed repair, but is bound to use due diligence to acquire information and knowledge concerning the condition of its electric wires, and the failure to do so constitutes negligence. Mitchell v. Charleston Light & Power Company, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577. (SC 1931).

The factfinder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case. The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006). Relevant rules of a defendant are admissible in evidence in a personal injury action

regardless of whether rules were intended primarily for employee guidance, public safety, or both, because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury. Tidwell v. Columbia Ry., Gas & Elec. Co., 109 S.C. 34, 95 S.E. 109 (1918). When defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages. Caldwell v. K-Mart Corp., 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct.App.1991). Plaintiffs may establish legal cause by establishing foreseeability. Young v. Tide Craft, Inc., 242 S.E.2d 671 (SC 1978).

The violation of an applicable statute or regulation is negligence per se, and whether or not such breach contributed as a proximate cause to the plaintiff's injury is ordinarily a question for the fact finder. Causative violations of an applicable statute or regulation constitutes actionable negligence and is evidence of recklessness, willfulness and wantonness. Field v. Gregory, 230 S.C. 39, 94 S.E.2d 15 (1956), Fairchild v. South Carolina Department of Transportation, 398 S.C. 90; 727 S.E.2d 407 (2012).

Here, evidence of the standard of care can be found in the NESC, the United States Code of Federal Regulations, the rules imposed by the RUS, as well as in Berkeley Electric's own Safety Manual. Berkeley Electric violated their duties of care in the distribution, maintenance and inspection of their overhead power lines which proximately caused Mr. Fortney's death and the injuries to Mr. Robinson.

A. The Height of the Line

The NESC governs the height of the line at issue and requires a clearance of 18.5 feet at the lowest point, even under the worst possible sag conditions. The testimony of Margaret Yergin laid the factual predicate for the height requirement and Berkeley Electric's vice

Comment [D61]: This is a key point. Plaintiffs have failed to demonstrate that any of the alleged regulatory "violations" are both applicable and causative.

president of engineering and operations, and Berkeley Electric's retained expert witness agreed that the NESC required a minimum 18.5 foot height. Berkeley Electric violated the NESC in allowing the line for hang below 18.5 feet at the lowest point. The measurements done by Berkeley Electric show the power line was 17 feet 3 inches at the lowest point in the line on the day the men were electrocuted. Had the line complied with the Code, the tent these men were moving could not have made contact; therefore the negligence of Berkeley Electric in failing to comply with applicable minimum height requirements was the proximate cause of the damages in this case.

B. Inspections

Pursuant to 7 CFR 1730.21, "Inspections and tests," the following are required of Berkeley Electric: (1) inspections of power lines for compliance with 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 evidence is uncontroverted that Berkeley Electric, through the testimony of its own employees and expert witness, Eric Jackson, violated the provisions of 7 CFR 1730.21. Inspections of overhead power lines must not only take place, but those inspections must include a determination as to whether the line meets the height requirements of the NESC. Mr. Jackson admitted that Berkeley Electric never inspected the line in this case for NESC compliance. Furthermore, based on the testimony of Berkeley Electric's employees, they are not determining compliance with the Code in any inspection of any overhead power line. In fact, the evidence shows Berkeley Electric doesn't design power lines using the Code, doesn't write down what the Code requires, and doesn't tell the people doing the inspections what the Code requires. Had Berkeley Electric inspected the line for proper clearance under the NESC, they should have

Comment [D62]: This is not a violation, it is a defect that BEC must repair, *once it has notice of the deficiency.*

Comment [D63]: This is not true. The tent was 17' 9" tall. If the line was 18', 6" high, Plaintiffs would only have had to lift the tent nine inches to contact the line. Clayson said they lifted it a foot. Even if the line was 20 feet high, plaintiffs would only have had to lift the tent some 27 inches off the ground to make contact. Attempting to pick up and move the tent in an area with such narrow tolerances is not merely careless, it approaches recklessness. This is why we have the ten foot rule. Such behavior is not foreseeable.

Comment [D64]: This is not the language of §1730.21. See comments supra.

Comment [D65]: This is false. See comments supra.

discovered the existence of the dangerous condition posed by the low-hanging line and raised the line and this tragic accident would not have occurred. The failure to do inspections is evidence of the violation of the standard of care and a proximate cause of the damages in this case.

C. Record Keeping

Records of inspections are required. Berkeley Electric's employees freely admitted they do not keep records of the inspections of overhead power lines. In addition, they do not record all deficiencies found in any inspection they are doing. And, if they aren't keeping full records in the first place, it would be impossible to keep them long enough to identify long-term trends. The failure to keep the required records is evidence of the violation of the standard of care and a proximate cause of the damages in this case.

The Court finds that Berkeley Electric's negligent conduct represents 90% of the cause of the damages sustained by the Plaintiffs.

II. COMPARATIVE NEGLIGENCE

"A plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence." Nelson v. Concrete Supply Co.. 303 S.C. 243, 399 S.E.2d 783 (1991).

The defense contends the plaintiffs violated a regulation of the Occupational Safety and Health Administration ("OSHA") requiring cranes and derricks to maintain a minimum distance of 10 feet from overhead lines (up to 50kV); this is known as the "Ten Foot Rule." 29 C.F.R. § 1926.1408, Table A. Plaintiffs were admittedly within the ten foot zone of the power line and therefore bear some degree of negligence and responsibility for their injuries and damages. However, the negligence of the plaintiffs pales in comparison to that of the Defendant.

Comment [D66]: Plaintiffs have failed to establish how the alleged failure to keeping records of inspections was a cause-in-fact and a proximate cause of this accident. No witness, including Plaintiff's NESC expert, has ever heard of a line being built with too much sag as claimed by Plaintiffs.

Comment [D67]: This is just an arbitrary percentage that has no basis in the facts.

The negligence of the plaintiffs was a momentary lapse-they came too close to a line which they could not perceive as representing a clear and immediate danger because of perceptual difficulties. The negligence of Berkeley Electric was continual and multifaceted over a period of 15 years. Berkeley Electric held the necessary expertise to appreciate the particular danger posed by this power line. Berkeley Electric alone possessed the ability to alleviate the danger posed by the power line but failed to do so. Berkeley Electric derived income from the distribution of electricity, and it is after all their responsibility to provide electricity in a safe manner given the monopoly they have been granted. Finally, the Court recognizes that Berkeley Electric, as opposed to the Plaintiffs in this case, is to be held to the highest degree of care in the "distribution of this deadly energy and in the maintenance and inspection of the instrumentalities and appliances used in transmitting this invisible and subtle power." Hart v. Union Mfg. & Power Co., 157 S.C. 174, 154 S.E. 118, 127 (1930) (quoting Ellis v. Carolina Power & Light Co., 193 N. C. 357, 137 S. E. 163, 166).

The Court finds that the Plaintiffs' negligent conduct represents 10% of the cause of the damages sustained by them.

III. NEGLIGENCE OF THIRD PARTIES

The intervening negligence of a third person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care. Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998). The Plaintiff need not prove the defendant should have contemplated the particular event which occurred. Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990).

S.C. Code Ann. § 15-38-15 governs apportionment of liability to third parties. Pursuant to S.C. Code Ann. § 15-38-15(F), there can be no apportionment to third parties when the

Comment [D68]: This is nonsense. BEC is a not-for-profit electric cooperative with territory assigned by the S.C. Public Utilities Commission. Its customers are its members.

Comment [D69]: This section governs apportionment only among *defendants*. See S.C. Code §15-38-15(A). A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damage and may be liable for any or all of the damages alleged by any other party. S.C. Code §15-38-15(D).

defendant is determined to either bear more than 50% of the total fault, or to have acted willful, wanton, reckless, or grossly negligent. Keeter v. Alpine Towers International, Inc., 399 S.C. 179; 730 S.E.2d 890 (2012). Because this Court finds Berkeley Electric was more than 50% at fault and willful, wanton, reckless, and grossly negligent in the performance of their duties, there can be no apportionment to any third party. However, even without this finding, the record establishes that any acts or omissions of third parties (i.e. getting too close to energized power lines) was foreseeable to Berkeley Electric, thereby precluding a ruling of negligence as to third parties. Furthermore, the record establishes it was foreseeable to Berkeley Electric that low-hanging power lines are dangerous and increase the chances of people being injured or killed. The most disturbing aspect of this case is that, even with this knowledge, they still neglected to ensure lines were constructed at Code height and stayed that way. And, when reporting to the federal government on issues such as the height of the lines and inspections, Berkeley Electric knowingly misrepresented what they were doing, thereby preventing others from stepping in and rectifying the violations before Mr. Fortney was killed and Mr. Robinson was injured. This is what it means to act with a conscious disregard of the rights and safety of the members of our community.

Comment [D70]: It is not reasonably foreseeable that Plaintiffs would disobey the ten foot rule and approach a known danger and walk the tent made of fabric-covered metal poles right into the line. It is not reasonably foreseeable that, having identified the lines for Plaintiffs and knowing the danger presented by the power lines Clayton, Donehue and Richardson would violate the ten foot rule and direct the tent into the line.

Comment [D71]: See above comments.

Comment [D72]: There is no evidence to support this claim.

IV. DAMAGES

Where a case comes before the Court for a bench trial, "[t]he trial judge has considerable discretion regarding the amount of damages, both actual and punitive." Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310, 594 E.E.2d 867, 873 (Ct.App. 2004)

The Estate of John Fortney

Wrongful Death

Under S.C.Code Ann. § 15-51-20 (Supp.1993), a personal representative may bring a

wrongful death action for the benefit of statutory beneficiaries, including the parents of the deceased where there is no surviving spouse or child as in this case. Ballard v. Ballard, 314 S.C. 40, 41, 443 S.E.2d 802, 802 (1994). Damages recoverable for wrongful death are the damages sustained by the statutory beneficiaries resulting from the death of the decedent, including pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship. Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993); Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972); Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640 (1969).

Mr. Fortney left behind two children. Although defense counsel argues their relationship with their father wasn't the norm, few relationships are. The damages in a wrongful death claim look to measure the mental shock, suffering, wounded feelings, grief, sorrow, and loss of society and companionship from their point of view.

Gina Fortney looked forward to the day she would meet her father for nearly 15 years. Even as a young child, she cherished what little she knew of him or had to know him by. When they finally did meet, it was everything she had wanted for all those years. Unfortunately, their time together would be taken away less than a year later. Gina loved her father and misses him all the time. Gina will never see her father again and her children will never have the opportunity to even know him. The grief and sorrow she has suffered and will most likely continue to suffer is immense.

Emma Fortney, on the other hand, spent her entire life with her father. Emma, John and her mother, Kim, lived together and were by all accounts a family. Emma's loss is compounded and made worse by the fact that just about a year before her father was killed, her mother died following a long battle with cancer. At the time of her father's death, Emma was 10 years old and now without either of her parents. Both Gina and Emma were in constant communication

with their father. They enjoyed texting back and forth on a regular basis. These text messages reviewed in court show they loved their father and thought of him often.

Much argument was received from defense counsel concerning the alleged bad acts of John Fortney. In determining the amount of the damages to be awarded in an action under the statute for wrongful death, the question is not one of the value of the human life, but is rather the damages sustained by the beneficiaries from the death of the deceased. Bennett v. Spartanburg Ry., Gas & Electric Co., 97 S.C. 27, 81 S.E. 189. In the end, both Gina and Emma proved to the Court that although they didn't approve of everything their father did, they still loved him and miss him dearly.

Survival Action

Damages in a survival action include recovery for the deceased's conscious pain and suffering and medical expenses. Baker v. Sanders, 301 S.C. 170, 391 S.E.2d 229 (1990). Dr. Collins was qualified as an expert and has experience with victims of electrocutions. Her testimony establishes that Mr. Fortney suffered conscious pain and suffering from the electrical shock. She described how the electricity burns its way through the body, causing pain at each location along the way to where the electricity exits the body. Mr. Fortney's heart was still beating and he was alive for over an hour after he was electrocuted.

A. John Robinson

Actual Damages

"Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was prior to the damages received insofar as this is monetarily possible." Austin, 358 S.C. at 311, 594 S.E.2d at 874. "The goal is to restore the injured party, as nearly as possible through the payment of money, to

Comment [D73]: Plaintiffs provided no evidence of pecuniary or economic losses.

Comment [D74]: Dr. Collins testified that there was nothing in the medical record to indicate that Mr. Fortney was conscious after being shocked. See above comments.

Comment [D75]: No medical bills introduced, no evidence of lost wages, no evidence of loss of earning capacity. See comments above.

the same position he was in before the wrongful injury occurred." Id.

Plaintiff is also entitled to damages for "loss of enjoyment of life" and "pain and suffering." Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001). These are two separately compensable elements of damages. See id. "Pain and suffering compensates the plaintiff for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself." Id. at 501-02, 541 S.E.2d at 244.

Further, "[s]eparate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence." Boan, 343 S.C. at 5012, 541 S.E.2d at 244 (citing Turner v. ABC Jalousie Co. of North Carolina, Inc., 251 S.C. 92, 160 S.E.2d 528 (1968)).

Damages for loss of enjoyment of life, on the other hand, "compensate for the limitations resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations." Boan, 343 S.C. at 502, 541 S.E.2d at 244.

1. **John Robinson's Past Mental Anguish, Pain and Suffering and Loss of Enjoyment of Life.**

It has been over seven (7) years since Mr. Robinson suffered the electrical injury. 14,400 volts entered through his chest, surged through his body, and exited his foot. He was taken by helicopter to MUSC where he was admitted for two (2) days over concerns with his heart. He received care for the wounds and counseling to help deal with the memories of this horrible event and the dead coworkers left behind. Mr. Robinson has suffered physical pain and mental anguish for the past seven (7) years proximately caused by the negligence of Berkeley Electric.

2. **John Robinson's Future Mental Anguish, Pain and Suffering, and Loss of**

Enjoyment of Life.

John Robinson is fifty (50) years old, and according to the life expectancy table codified at S.C. Code Ann § 19-1-150, he is expected to live to the age of 79 - an additional 29.18 years after trial. He will most likely suffer from the physical pain in his foot for the remainder of his life.

In addition to the physical pain, Mr. Robinson will most likely suffer from mental anguish for the rest of his life. These events have reduced his relationship with his wife from that of equal partners to a feeling that he is a child and she is the parent. Although they have what was described as a loving relationship, Mr. Robinson desires to be the man of the house and is distraught about the reality of their interactions. He has and will most likely have in the future anxiety and fear any time he sees a power line. He has and will most likely have in the future frequent crying spells and depression related to what he went through, the anxiety he suffers, and the memories of his dead coworkers.

B. Punitive Damages

"Punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. Moreover, they serve "as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated." Gamble v. Stevenson, 305 S.C. 104; 406 S.E.2d 350 (1991). A conscious failure to observe due care has been repeatedly held to warrant a jury in giving not only actual damages, but punitive damages as well. When a person with the thought that his negligent act may produce an injury to another proceeds to do the act or omission, such circumstances evidence a conscious failure to observe due care. Wannamaker v. Traywick, 136 S. C. 21, 134 S. E. 234, 235. Punitive damages may be appropriately imposed

Comment [D76]: There is no medical testimony to support this claim.

Comment [D77]: There is no medical or psychological testimony to support this claim.

Comment [D78]: Despite Plaintiff's best efforts to establish this issue, there is no evidence of reckless, willful or malicious conduct on the part of BEC warranting punitive damages.

when the conduct of the defendant which causes injury is negligence per se because the violation the applicable statute or regulation is evidence of willfulness or recklessness. Fairchild v. South Carolina Department of Transportation, 398 S.C. 90; 727 S.E.2d 407 (2012). The plaintiff has the burden of proving entitlement to punitive damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135. The Court concludes the Plaintiffs have met this burden.

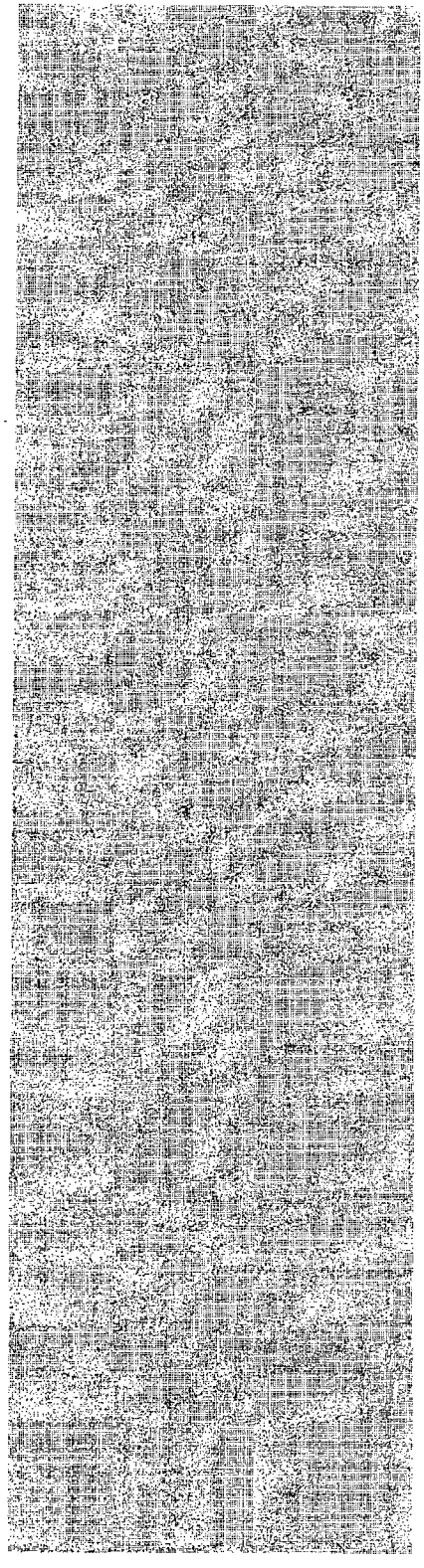
The Supreme Court in Gamble, supra, mandated that where punitive damages were awarded by a jury as the trier of fact that the Trial Court conduct a post-trial review of the verdict in which the following factors may be considered: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) other factors deemed appropriate. In sitting as the trier of fact in this case, the Court deems review of these same factors helpful in rendering a decision on the request for punitive damages. After consideration of the evidence, the Court has determined that a judgment for punitive damages in the amount of $5,000,000.00 is appropriate and to be divided by the two plaintiffs proportionally to the judgment for their actual damages. Discussion of the Gamble factors follows.

(1) **The defendant's degree of culpability**: The Court finds that this factor weighs in favor of a significant award of punitive damages. Berkeley Electric holds a public franchise and is charged with providing electricity to citizens of the community on a safe and reliable basis. The evidence recited above shows that for years Berkeley Electric failed to fulfill the public trust in this regard. Despite the regulatory requirement for an inspection program that specifically required inspection for compliance with the NESC and with great regularity representing to the

federal government that all power lines were inspected for such compliance on an annual basis, the truth of the matter was that Berkeley Electric, if inspecting their lines at all did so on an extremely haphazard manner. The best that can be said for Berkeley Electric's inspection program is that it consisted of some workmen who were untrained in the specifics of inspection driving down the road and potentially eyeballing high voltage electrical lines for compliance with some unknown requirements.

Berkeley Electric was required to know the law that was applicable to their operations. Even if they lacked such knowledge, their regular completion of the RUS 300 forms in which they continually made representations that they were conducting annual inspections for NESC compliance should have alerted them to the necessity that more was required of them. Moreover they were required to know the NESC mandated an 18.5 foot clearance for the line in question given the undisputed use of the property in question. Berkeley Electric's own expert acknowledges that the line failed to meet code requirements. The Court accepts and believes the testimony of Mr. Dagenhart that the line was initially strung too low, resulting in its failure to comply with the NESC minimum height requirements from February 1993 all the way up until the date that it produced injury. The Court further credits Berkeley Electric's admission that the line in question had never been inspected for NESC code compliance over a fifteen year period. The Court, as a matter of fact and as a conclusion of law, finds that such conduct by Berkeley Electric carries a strong degree of culpability.

(2) **The duration of the conduct**: As noted above, the conduct of Berkeley Electric was long standing, extending over a period of fifteen years. It represented a potential hazard to every person coming onto the property for that entire period of time. The longevity of this conduct weighs heavily in favor of a significant judgment for punitive damages.



(3) **The defendant's awareness or concealment**: While the Court does not believe that Berkeley Electric attempted to conceal their lack of safety compliance, the Court does find that Berkeley Electric made a conscious decision not to conduct the annual safety inspections or to keep the safety records that they represented to the federal government was being done. This factor weighs in favor of a significant judgment for punitive damages.

(4) **The existence of similar past conduct**: The former manager of safety and training of Berkeley Electric acknowledged that there were other lines in the Berkeley Electric system which had probably never been measured for NESC clearance compliance. (HT, pp. 251-252). While there was no evidence that either the line in question or any other line had ever produced injury to any other person, Mr. Elrod's testimony shows that the systemic issues with the line in question were not an isolated incident but rather were representative of Berkeley Electric's pattern and practice of neglecting their regulatory safety responsibilities.

(5) **Likelihood the award will deter the defendant or others from like conduct**: Business entities, even not for profit business entities such as Berkeley Electric, must maintain practices of fiscal responsibility or they will fail to survive as ongoing operations. The goal of the Court is not to punish Berkeley Electric into bankruptcy and indeed that would be constitutionally impermissible. On the other hand, a significant penalty is appropriate considering the deterrent function of punitive damages. The ratio determined by the Court is less than 1:1 in reference to the total actual damages determined to represent fair and reasonable compensation for the actual damages sustained by the Plaintiffs. The ratio is low only because the degree of harm inflicted by Berkeley Electric was so large.

(6) **Whether the award is reasonably related to the harm likely to result from such conduct**: The conduct of Berkeley Electric in this case cost the lives of two men and

severely injured two others. Berkeley Electric created an exceptionally dangerous condition. That condition existed for a long period of time because of Berkeley Electric's continuing neglect. During some portion of that time, the area in question was open to the public for use in events, much like the charity event being prepared for at time of the events of April 23, 2008. Thus, the conduct of Berkeley Electric represented a potential hazard to the public at large.

(7) **Defendant's ability to pay**: No evidence was introduced of net worth of Berkeley Electric.

(8) **Other factors**: The Court has not considered any additional factors in this regard.

CONCLUSION

Based on the above findings of fact and conclusions of law, this Court finds that the Plaintiffs have incurred the following damages:

As to the Estate of John Fortney:

Wrongful Death	$5,000,000.00
Survival Action	$1,000,000.00
SUBTOTAL	$6,000,000.00

As to John Robinson:

Intangible damages (pain and Suffering, mental anguish, and Loss of enjoyment of life)	$1,500,000.00
SUBTOTAL	**$1,500,000.00**
COMBINED SUBTOTALS	**$7,500,000.00**
PUNITIVE DAMAGES	**$5,000,000.00**
TOTAL DAMAGES	**$12,500,000.00**

LESS: 10% COMPARITIVE NEGLIGENCE $1,250,000.00

Comment [D79]: These are just arbitrary amounts.

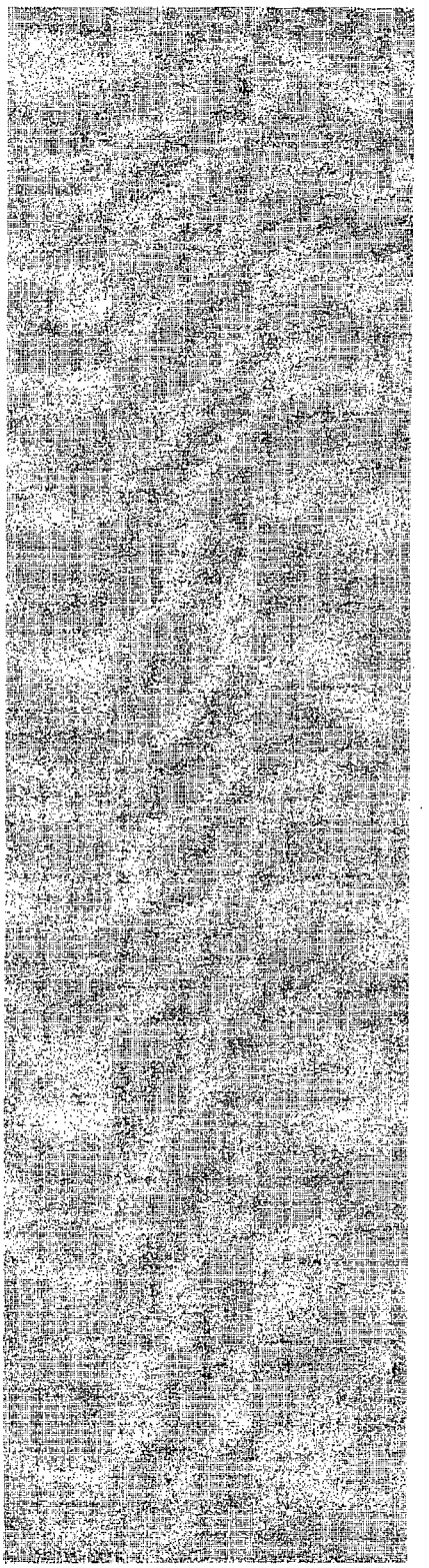
Comment [D80]: This is an arbitrary amount.

FINAL AWARD $11,250,000.00

Accordingly, IT IS HEREBY ORDERED that judgment be entered in favor the Plaintiffs against the Defendant for a total judgment of Eleven Million Two Hundred Fifty Thousand ($11,250,000.00) Dollars representing the total damages of $12,500,000.00 found by the Court less a deduction in the amount of 10% representing the degree of comparative negligence assessed against the Plaintiffs.

_____
The Honorable Roger M. Young, Sr.
Presiding Judge, Ninth Judicial Circuit

_____, 2015
Charleston, South Carolina



STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF BERKELEY — 2014-CP-08-01230
2014-CP-08-01231
2014-CP-08-01232

ESTATE OF JOHN FORTNEY, deceased, by his duly appointed personal representative CONSTANCE S. FORTNEY,

Plaintiff,

-vs-

BERKELEY ELECTRIC COOPERATIVE,

Defendant.

JOHN STEVEN ROBINSON,

Plaintiff,

-vs-

BERKELEY ELECTRIC COOPERATIVE,

Defendant.

TRANSCRIPT OF RECORD

September 28 - October 2, 2015

Moncks Corner, South Carolina

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

A P P E A R A N C E S:

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Circuit Court Reporter

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Ervin Strickland	35	99	116	--
Timothy Mobley	124	182	198	--
John Villeponteaux	214	230	231	--
James Elrod	233	255	257	--
Rico Harrell	258	274	278	280
	--	--	280	--
Margaret Mary Yergin	281	290	296	--
Beth Donehue	304	324	344	--
Kimberly Collins	346	382	--	--
Cathleen Moore	393	402	483	487
	417	457	--	--
John Dagenhart	494	562	621	--
John Robinson	638	681	--	--
Gina Fortney	698	715	719	--
Emma Fortney	722	740	743	--
Eric Jackson	752	780	817	--
Timothy Kulp	822	--	--	--
Kenneth Keberle	836	842	843	--
Thomas Markel	845	849	--	--
Matthew Bryan	851	862	870	--
Isaiah Ward	873	876	--	--
Nick van Allen	879	881	--	--

E X H I B I T S

NUMBER	DESCRIPTION	IDENTIFIED	ADMITTED
Plaintiff's 1	Review Rating Summary	68	68
Plaintiff's 2	Bulletins	68	68
Plaintiff's 3	Code of Federal Regulations	73	73
Plaintiff's 4	Safety Manual	85	85
Plaintiff's 5	Pole Inspections Contract	87	163
Plaintiff's 6	Map	36	36
Plaintiff's 7	National Electric Safety Code 1993 Edition	131	131
Plaintiff's 8	Sketches	135	135
Plaintiff's 9	Letter from McCall-Thomas Engineering	135	135
Plaintiff's 10	Staking Sheet	225	225
Plaintiff's 11	Job Description and Specifications for a Lineman	228	228
Plaintiff's 12	Maintenance Records	268	268
Plaintiff's 13	Small Map	299	299
Plaintiff's 14	Zoom-in Shots	316	316
Plaintiff's 15	Photograph	312	312
Plaintiff's 16	Promotional Plan	314	314
Plaintiff's 17	Photograph	316	316
Plaintiff's 18	Photograph	320	320
Plaintiff's 27	EMS Report	376	376

E X H I B I T S

NUMBER	DESCRIPTION	IDENTIFIED	ADMITTED
Plaintiff's 28	Autopsy Report	362	362
Plaintiff's 30	Photographs and Texts	744	744
Plaintiff's 31	Photographs and Texts	744	744
Plaintiff's 32	Photographs and Texts	744	744
Plaintiff's 33	Photographs and Texts	744	744
Plaintiff's 34	Photographs and Texts	744	744
Plaintiff's 35	Photographs and Texts	744	744
Plaintiff's 36	Photographs and Texts	744	744
Plaintiff's 37	Photographs and Texts	744	744
Plaintiff's 38	Photographs and Texts	744	744
Plaintiff's 39	Photographs and Texts	744	744
Plaintiff's 40	Photographs and Texts	744	744
Plaintiff's 41	Photographs and Texts	744	744
Plaintiff's 42	Photographs and Texts	744	744
Plaintiff's 43	Photographs and Texts	744	744
Plaintiff's 44	Photographs and Texts	744	744
Plaintiff's 45	Photographs and Texts	744	744
Plaintiff's 46	Photographs and Texts	744	744
Plaintiff's 47	Photographs and Texts	744	744
Plaintiff's 48	Photographs and Texts	744	744
Plaintiff's 49	Photographs and Texts	744	744
Plaintiff's 50	Photographs and Texts	744	744
Plaintiff's 51	Photographs and Texts	744	744

E X H I B I T S

NUMBER	DESCRIPTION	IDENTIFIED	ADMITTED
Plaintiff's 52	Photographs and Texts	744	744
Plaintiff's 53	Photographs and Texts	744	744
Plaintiff's 54	Photographs and Texts	744	744
Plaintiff's 55	Photographs and Texts	744	744
Plaintiff's 56	Photographs and Texts	744	744
Plaintiff's 57	Photographs and Texts	744	744
Plaintiff's 58	Photographs and Texts	744	744
Plaintiff's 59	Photographs and Texts	744	744
Plaintiff's 60	Photographs and Texts	744	744
Plaintiff's 61	Berkeley Electric's Answers to Interrogatories	209	209
Plaintiff's 62	Demonstrative Aids	750	--
Plaintiff's 63	Answers to Interrogatories	516	516
Plaintiff's 64	Hand-drawn Diagram	658	658
Plaintiff's 65	Deposition Transcript of Dr. Stuhlmiller	696	696
Defendant's 1	National Safety Code 1993 Edition	183	183
Defendant's 2	Maps	276	276
Defendant's 3	Large Map	304	304
Defendant's 4	Drawing	343	343
Defendant's 5	Answers to Interrogatories	402	402
Defendant's 6	Plaintiff's Work History	687	687

E X H I B I T S

NUMBER	DESCRIPTION	IDENTIFIED	ADMITTED
Defendant's 7	Photograph	717	717
Defendant's 8	Photograph	717	717
Defendant's 9	Photograph	717	717
Defendant's 10	Series of Photographs	889	889
Defendant's 12	NESC Interpretation Excerpts	889	889
Defendant's 13	Berkeley Electric Guide to Membership	889	889
Defendant's 14	Transcript of Constance Fortney	889	889
Defendant's 15	Transcript of Anthony Wilks	889	889
Court's 1	Consent Order	693	693

(September 28, 2015.)

THE COURT: All right. Do we have everybody ready?

MR. KEENAN: Yes, sir.

THE COURT: All right. Well, we're here on Robinson versus Berkeley Electric Coop and the estate of John Fortney versus Berkeley Electric Co-op?

MR. KEENAN: Yes, sir.

THE COURT: All right. So what do we need to do to get started? I signed an order admitting somebody from out of state. Who is that?

MR. GOULD: Mr. Gould.

THE COURT: Welcome.

MR. GOULD: Thank you, sir.

THE COURT: This being a nonjury trial, a lot of pretrial motions, I think I gave you pretty much an idea of how I ruled on some of them, and most of them are kind of, well, I don't have to send the jury out, so we'll just deal with them when they come up. That's just my way of dealing with it.

Have we got anything we need to deal with, do you think?

MR. KEENAN: May it please the Court: Your Honor, having been in front of two very good judges on bench trials, I just wanted to alert the Court that we

don't have a bit of problem with the Court interrupting at any stage of the opening or direct examinations or anything if the Court has a question. I mean, that's one of the advantages of -- I guess some lawyers get kind of aggravated. We don't.

In fact, the quicker you get to what you want to hear, the quicker the thing ends, really, okay? And the other thing is, obviously, you don't voir dire a judge, but it would help us to understand if the Court knows anything about an electric cooperative, how it operates, what its rules are.

If you have some particular knowledge, then we don't have to go over those things, but if you don't --

THE COURT: I don't have a great deal of knowledge of how this particular one is set up. I know there's this thing called Santee Cooper and they sell power to co-ops, and beyond that, I'm serviced by SCE&G so I don't really pay attention to it too much.

MR. KEENAN: And then the final issue, obviously, the Court knows that one of the men died from electrocution. The other man had serious injuries.

Does the Court have any special knowledge about the effects of electricity or electrocution or have you studied it or is your level like mine was at the

beginning of the case?

THE COURT: My level is one of the four things in life that I understand nothing about, and it scares me to death. You don't want to know what the other three are, but I'm an amateur, and electricity scares me to death. That's one of the things I pay people to do. If something goes wrong with electricity in my life, I pay somebody to fix it.

MR. KEENAN: Well, believe it or not, your comments have been most helpful in guiding us into what we need to do, so we thank you for that.

THE COURT: Okay.

MR. KEENAN: And I guess the next would be an opening statement.

THE COURT: Do you have anything you want to say before?

MR. JOHNSON: I do have a question: We submitted pretrial briefs and memorandums of law. Did you have an opportunity to look at them?

THE COURT: I did. They were helpful. Y'all did a good job.

Ready whenever you are.

MR. SMITH: Yes, sir. May it please the Court:

Roughly every 72 hours, an American worker is

killed by a power line. This is according to the National Bureau of Labor and Statistics. What brings us together in the Berkeley County Courthouse are the safety rules that protect each and every one of us against the danger of electrocution. The safety rules will protect us only if our Courts choose to enforce them.

The safety rules, we will be discussing, protect all of us as we are working and carrying on our daily lives around power lines. Based around our homes, farms, businesses, highways, schools, even our courthouses, power lines are found nearly everywhere people are.

Your Honor, there are three safety rules that apply in this case. Number one: From the National Electric Safety Code, a power company must construct and maintain its power lines at least 18.5 feet high above farms or lands with animals to prevent injury to people or death by electrocution.

Safety rule number two, from the code of federal regulations, a power company must inspect their power lines to ensure that they are at code height to prevent injury to people or death by electrocution.

Safety rule number three: A power company must tell the truth about its compliance with electrical safety law when reporting to the federal government to

prevent injury to people or death by electrocution.

Your Honor, this is a story 20 years in the making. We need to go back to 1993, McClellanville. A power company installs a new high voltage power line. The location: A horse farm. There are about 100 horses on the farm. They raise horses. They teach people to ride and jump. They also raise crops.

The power company puts a power line near one of the old wooden barns in an area where horses are ridden. No one knows what the land is being used for; no one knows how high it is required to be. No one tells the workers how high it's required to be. Even after it's put up, no one measures the power line to make sure it's at the right height. This is their standard procedure. The evidence will show they're doing what they always do.

Ten years passes, and no one has ever inspected the power line to make sure it's at code height. The power company sends its workers out to the farm twice that year. Still no inspections for height compliance.

A lineman who is supposedly inspecting these power lines, he doesn't know how high it's required to be. The lineman also doesn't know he's required to be looking to see if the use of the land has changed because

that might affect the required height.

It's now 2005, 12 years after the power line was put up. The power line still has never been inspected to make sure it's at code height. The CEO for the power company and other high level executives sit down to complete a safety form for the government. The CEO sees the section called compliance with safety codes. He doesn't know how many power lines his workers are inspecting, and he doesn't know what they're required to look for. He does know that even if the inspections are taking place, they are not patrolling all of their overhead power lines annually.

He signs off and certifies that all overhead power lines are being patrolled annually. The power company gets federal tax dollars if they say they're in compliance. The power company sends its employees out to the power line on the farm six more times. No one measures the power line to see if it's at the required height. No one has ever made sure the power line is at the height required by law. The lineman assigned to the farm's district concedes he did not inspect the power line for code height. He still doesn't know how high they're required to be.

Jumping ahead to the fall of 2007, the plans are underway to hold a charity event out at the farm. A

staging company is hired to set up tents, chairs, and a dance floor. Promotional plans are being made. It's now 2008, 15 years after the power line was erected. It's time again to fill out the government safety forms.

The CEO still doesn't know how many power lines have been inspected, but he knows if they are inspected, no one is noting whether the power line is up to code. The people he represents are inspecting these power lines have still never been told how high they're required to be. They don't know they're supposed to be looking to see if the use of the land has changed.

He signs the form, this time certifying that inspections are taking place and that the linemen are looking to see if the use of the land has changed.

Federal funds are at stake each time he completes these forms. Just months after the government safety forms are signed, the charity event is about to happen on the farm. It's now called Thornhill Farms Healing Ministries. They still do farming; they still have livestock.

On this day, four men are setting up a tent. Three of them are day laborers. The men get the tent put up. It has four poles around the edges. It has another pole in the center, and that pole has a tip at the top and that's called the spire. The spire fits through a

little hole in the canvas and holds the tent up high. Once the tent is erected, the spire cannot be seen by anyone standing underneath the canvas.

Now that the tent has been put together, the men are instructed to move the tent. Each of them picks up one of the supporting poles. They don't lift the tent up high, just enough to move it. They walk the tent to the new spot. They're told to move it again, this time in the direction of the power line, but from where they're standing, they can't see it. The people directing them are standing on the ground, and from their point of view, it looks like there's plenty of room.

The men pick up the tent. Just as they start to shuffle it backwards, the tent spire hits the high voltage power line. Everyone hears a loud pop. The high voltage electricity surges through their bodies. Two of the men are killed. The current goes through the other two, leaving entrance and exit burns. All four men fall to the ground. The power company finally measures the power line. It's over a foot and a half too low.

The evidence will show that had the power line been at the height required by the National Electric Safety Code the tent these men were moving never would have touched the energized line. If the power company had just done the inspections they said they were doing,

they could have caught it, and I submit to Your Honor this never would have happened.

Now, we're suing Berkeley Electric for four reasons: The first reason we're suing Berkeley Electric is because Berkeley Electric violated the safety rule requiring the power line to be 18 and a half feet high. We know this because the measures taken the day the men were killed show the power lines were far below code.

The law sets minimum heights for power lines. It does this based on what the land is being used for. If the land is a farm, this is the required height, 18 and a half feet high. If the land is used for riding horses, this is the required height, 18 and a half feet high, or, if the land has vehicles over eight feet in height, this is the required height, 18 and a half feet high.

We spoke to the woman who owned the property when the power line was first put up. She not only grew crops, but she also raised horses. She even had a riding course set up to teach people to do the riding in the jumping competitions. They rode horses in the area around the power line. She had vehicles over eight feet high, and those vehicles were driven in the area of the power line.

Next we spoke to an architect near named John

Dagenhart. Mr. Dagenhart worked on the committee for the National Electric Safety Code. Now, for those working with electricity, this book is the bible for safety issues. This is where the height requirements come from.

He pointed us to a chart that sets the required height. We have the chart for Your Honor to look at. It's easy to read and understand. You'll see the power line was required to be at least 18 and a half feet high at all times.

Now, keep in mind the 18 and a half feet requirement, it applies to the very lowest part of the line, and that point is called the mid-span. In this case, the point of contact was not at the lowest point, but if the lowest point is 18 and a half feet high, then the other parts, including where this tent hit, are going to be higher.

You've see there would have been plenty of room for the tent if the lowest point was at least 18 and a half feet high. The evidence will show that had the power line been at the required height the tent these men were moving would not have hit the power line and this never would have happened.

The second reason we're suing Berkeley Electric is because Berkeley Electric violated the safety rule requiring them to inspect power lines for code

height. This means they missed every opportunity to ensure the power line complied with the National Electric Safety Code.

Berkeley Electric concedes they are required to inspect their power lines for height. This requirement comes from the National Electric Safety Code, the Code of Federal Regulations, and Berkeley Electric's own safety manual. Berkeley Electric has told us this power line was never measured after it was put up, and it wasn't measured over the next 15 years. The Code of Federal Regulations specifically requires that inspections of power lines must include a determination of whether the line complies with the height requirements of the National Electric Safety Code. Berkeley Electric has told us the power line has never been inspected for compliance with the National Electric Safety Code. They also told us this isn't the only one. Now, that's in part because they don't tell their linemen what the law requires, and it's not written down anywhere.

The evidence will show that had Berkeley Electric inspected this power line, they could have raised it before the men were killed and the others were injured.

Now, the third reason we're suing Berkeley Electric is because Berkeley Electric repeatedly lied to

the federal government, which we submit to Your Honor prevented others from knowing the unsafe conditions in time to step in and rectify the violations and save lives.

We have copies of the forms Berkeley Electric completed. We know who all signed off on them. We know that the scores Berkeley Electric gave themselves warrant that they are patrolling all of their overhead power lines for code height each year. The scores they gave themselves over and over mean, and I quote, all overhead power lines patrolled annually.

Berkeley Electric concedes that they have never patrolled all overhead power lines annually, and since they don't tell their linemen how high the power lines are supposed to be, even if they do inspect the power line, they wouldn't know what they're looking for, and these government safety forms, I only mention two of them.

You should also know they do these every three years. We have copies of these safety forms dating all the way back to 1990. You'll hear Berkeley Electric has been giving themselves these perfect marks over and over again.

Now, the final reason we're suing Berkeley Electric is because Berkeley Electric refuses to accept

responsibility for what they did so we're forced to bring them to trial. Now, before we came to trial, over the last six or seven years, Your Honor, the parties have done extensive discovery, and we've all dove very deep into the issues. One of those issues concerns the event organizers.

You'll hear that they are the ones who told the men where to move the tent. We needed to know if Berkeley Electric was still responsible, even though the event organizers directed the men towards the power line. 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.

The law also requires power companies to think about how to keep people safe, to see what is foreseeable, so we took the sworn testimony of several employees of Berkeley Electric. We asked them about foreseeable harms. We asked them specifically is it foreseeable that people would work around energized power lines without having them shut off? They said yes, it is foreseeable that people would work around their power lines without having them shut off.

This not only includes the laborers working with the tents in this case, but also people using

machinery to drive posts in the ground or using a boom truck to pour concrete.

Now, Your Honor, those are the pretty obvious examples. You'll hear from our expert that also within the foreseeable class is anyone who's helping a neighbor put up a flag pole, hang a sign, or trim their trees. If this is going to happen, and Berkeley Electric knows it's going to happen, our expert will explain that the one and only thing that Berkeley Electric has to do is make sure their high voltage power lines are at least as high as the law requires. It's called isolation by elevation.

The evidence will show that's why Berkeley Electric is required to inspect their power lines, so they can make sure they're in compliance with the law and reduce the chances of death by electrocution: Isolation by elevation.

With this in mind, we wanted to know if Berkeley Electric complained to the event planners to doing what Berkeley Electric admits was foreseeable. The law says when someone does something wrong and someone else comes along and makes a mistake later, the first person is still responsible if what the other did was foreseeable.

In other words, if Berkeley Electric violated the safety rules by having a low power hanging line and a

faulty inspection plan and they know people will work around their power lines without having them turned off, that does not excuse their violation.

The evidence will show that Berkeley Electric has one job to do. Again, it's make sure the power lines are high enough and in compliance with the law. It's called isolation by elevation.

If someone is killed, Your Honor, I submit our laws hold Berkeley Electric can't excuse themselves by saying, So what? He shouldn't have been around it in the first place.

Our expert will explain that would negate the whole purpose behind the height requirements of the National Electric Safety Code, and to quote the law, it says, Power companies and their employees, even more than all other people, ought to know the great danger of electricity. They ought to take care to see that their wires which convey electric current are properly guarded so as to prevent injuries to persons and property. This duty is incumbent upon them under the law of this state.

You're going to hear the defense talk a lot about OSHA and those regulations, Your Honor, and I believe you already have read some of the pretrial filings. You're going to hear about the things the OSHA investigator says Mr. Fortney's employer, a company

called Stage Presence, did wrong. You'll hear there is something called a ten-foot rule, that people should not go within ten feet of an energized power line.

OSHA cited Stage Presence for failing to teach them not to encroach the ten-foot territory. The OSHA investigator has testified that had he found either Mr. Fortney or Mr. Robinson knowingly did anything wrong, he would have issued separate citations for what's called employee misconduct, and that wasn't done here.

Our expert on visual matters will explain that neither Mr. Fortney nor Mr. Robinson had any concept of the danger. She'll explain that from where the party planners were standing, it would have looked like the tent had plenty of room. Remember, the law of foreseeability says this was not a valid defense because they were simply doing what Berkeley Electric knew was foreseeable.

You're going to hear Berkeley Electric say they aren't liable because they didn't cause the line to be this low. Again, another part of the pretrial filings.

Our expert, John Dagenhart, will explain to Your Honor they did cause the line to be low. They will testify that one of the reasons the line was too low is because the Berkeley Electric crew used too much line,

and, Your Honor, this caused it to sag 12 feet from the connection points of the poles.

Berkeley Electric claims something must have hit the line, pulled it down, and caused it to sag. You'll see from the evidence that could not be true. You'll hear that nothing is going to stretch a power line that much, and we have evidence that the damage to the line they'll point to was actually caused five years before the men at Thornhill Farms were electrocuted.

The evidence will show this does come as a surprise to Berkeley Electric because they weren't inspecting the lines. Berkeley Electric is also expected to take the position that they had no actual knowledge the line was too low.

Now, Your Honor, we agree with that assertion. The reason is, is because the evidence will show that Berkeley Electric's lawyer contends the line was only required to be 14 and a half feet high.

Now, again, our expert will show Your Honor the chart. He'll explain that 18 and a half feet is what the law requires, so we agree they did not know it was too low and that's because, number one, they had the required height wrong; and, number two, they didn't ever inspect the lines for compliance with the National Electric Safety Code.

Berkeley Electric has told us their inspection program consists of basically two parts: First, they say they tell their linemen to inspect power lines they're working around. In other words, if they have to service a power line, they say their linemen also inspect the power line; and, second, that they hire a company to do what's called pole inspections. And, remember, the Code of Federal Regulations requires that these inspections include a determination as to whether or not the power line complies with the height requirements of the National Electric Safety Code.

We already discussed how the lineman aren't told how high the lines in their district are supposed to be. Even if a lineman calls back to the home office, Berkeley Electric does not write down anywhere what the law requires for the height of their power lines.

In regarding the pole inspections, the evidence will show, Your Honor, that they're just that, pole inspections. We have a copy of the contract of the pole inspectors, and nowhere does it say anything about inspecting power lines for height. Although there is a vague request in the pole inspection contract to report unsafe conditions, the pole inspectors aren't asked to determine if the heights comply with the law, and just like the lineman, the pole inspectors are not told how

high the power lines are required to be.

Finally, Berkeley Electric contends in their pretrial brief that maybe, maybe, the National Electric Safety Code didn't apply that day, that it applies every other day since 1993, but just not this one day. They explained there is some question as to whether or not the area around the power line was a construction zone because they said the men were constructing tents.

Mr. Dagenhart will explain to Your Honor that first there is no mention of a construction zone free-for-all in the National Electric Safety Code; however, the handbook does describe some leeway under two very limited scenarios. First, when people are wiring a house or a building and doing tests on the lines before they're permanently installed, the requirements are relaxed just so those tests of the lines can be done. Of course, if the tests come back okay, the final installations must be up to code.

The second scenario discussed is when the power companies bring out -- I'm sorry, when construction companies bring out big cranes to erect buildings. They don't have to go and raise the power lines hundreds of feet in the air above these cranes. Now, that's it. That's the leeway the handbook describes.

Berkeley Electric will contend that the laws

didn't apply simply because the men were putting up tents that day. Our expert will testify that this is when the laws matter the most. When you're putting up tents on a farm for a charity event, that's precisely the time the height requirements of the National Electric Safety Code matter the most.

Now, Your Honor, you've probably figured out by now that the parties see this case very differently. On the one hand, we will be discussing what we submit to be clear violations of nearly every statutory and industry safety rule that applies in this case. The defense, on the other hand, will treat this trial as a character assassination.

Their expert, Eric Jackson, who has worked on this case for six years, yet he still refuses to tell us how high the power line was required to be. He told us this is because he doesn't know what the land was being used for at the time the high voltage power line was built, and at the time he said this, Your Honor, he confirmed that he had read the deposition of the landowner who describes in detail everything I've just told you.

You don't have to go to law school to know how high -- how dangerous high voltage electricity is. One touch and it can kill any one of us. We submit to

Your Honor, did Berkeley Electric exercise the highest degree of care and act in accordance with the danger? If they didn't, the family deserve a verdict. If not, these legal doctrines, these safety rules, they don't mean a thing, and Berkeley Electric gets a free pass.

At the end of trial, we will ask Your Honor to decide how much money should be in the verdict. You'll hear how the electricity entered John Robinson's chest and exited through his foot. He fell to the ground and was taken by helicopter to the emergency room. He spent three days there over concerns with his heart.

He required follow-up care for his wounds and counselling and medications to help deal with the memories of his dead friends. Still, to this day, Mr. Robinson is reminded of all this by the burns on his chest and foot.

John Fortney was electrocuted by high voltage electricity. 14,400 volts of electricity surged through his body and caused his heart to stop beating. This is seven times the electrical current used to put people to death in this state. He endured attempts to save his life at the scene in the ambulance and at the emergency room. John was pronounced dead about an hour later.

John left behind two beautiful children. One piece of advice he gave them was, Don't turn out like

your dumb old dad. His little girls, Gina and Emma, they miss their dumb old dad, and they want his life and his death to have meant something.

Emma was asked, When you lost your dad, what did you lose?

She responded, I lost my best friend.

We will ask Your Honor to place a value on that, a value that reflects the emotional pain and sorrow that will last with both of his children for life.

Berkeley Electric is going to tell you what a horrible man John was. The lawyer is going to tell you his kids haven't lost anything, and if cross-examination goes anything like the depositions, you'll actually see defense counsel try to convince these girls that their dad never even loved them.

But if you remember one thing about John Fortney, that's that the evidence will show he had just gotten a steady job, was trying to make amends, trying to be a better man, a better father, all until he was killed. Clearly, John had not arrived, but for him he had come so far. Gina and Emma are without a father. They'll never have a chance to have a relationship with him. Their children will never have a chance to even know him.

As I said before, Your Honor, there is a

stark contrast in our cases. The defense is more interested in running down the people they kill, insulting their families, and minimizing the value of human life.

The evidence will show you Berkeley Electric is totally ignoring their violations of the National Electric Safety Code which is designed to prevent the very thing that happened here.

Full and fair compensation will have the effect that the people in our tri-county area are not a magnet for this kind of thing. We will ask that Your Honor doesn't deny us a verdict that is fair, reasonable, and substantial.

Now, Your Honor, we know and we respect that it's your job to place a value on what these girls have been through and what they'll go through for the rest of their lives. We also feel that it's our job to assist you, and after you heard all of the evidence in this case, you'll hear why we submit $3 million per child and $1.5 million for Mr. Robinson is supported by that evidence.

Thank you.

Your Honor, I'm sorry. I didn't want the family here for my presentation. Do you mind if I bring them in?

THE COURT: Sure.

MR. JOHNSON: Could we bring in our witnesses?

THE COURT: Whoever you like.

MR. SMITH: They can come in for opening, but I would like to sequester the defense witnesses that I'm going to call right away, but I don't have a problem if they come in for your opening.

THE COURT: You want witnesses sequestered; is that what you're asking?

MR. SMITH: Yes. I have four Berkeley Electric employees scheduled for today, and I would like to sequester those witnesses.

THE COURT: Each of those witnesses can be sequestered, but if you have an expert, the expert can stay in. Okay?

MR. JOHNSON: Could I ask what sequestration means, means you can't discuss --

THE COURT: You shouldn't be able to run out and just tell them what they said inside, so not only do they stay out, you don't talk to them about what went on and what the testimony was, but if you have an expert, experts can stay in.

MR. JOHNSON: Pope Johnson, Jack Williams for the defendant.

We submitted a full memorandum of what we think is going to occur in the case, so my remarks will be short and to the point: We expect to show that Berkeley Electric built the line in question under its standard building practices.

In building the line, according to the standard practices, there would be the primary, the energized line, was at 24 feet. The neutral was at 20 feet at the time of construction. We expect to show that Berkeley had nothing to do with the sag defect, did not know that the defect existed, and that there was nothing Berkeley could have done since they got no notice they were working in area of the line to have prevented the accident.

We expect to show Mr. Fortney and Mr. Robinson violated the OSHA ten-foot rule. What that rule says is that you cannot, unless you're a qualified person, work within ten feet of an energized conductor. We're going to show that that is, by law, an obligation they have to comply with.

We will show that the crew chief, who was in charge of the crew, who had seen and discussed staying away from the line violated the OSHA ten-foot rule. We'll show that the event planners who were directing them to bring the tent towards the line violated the OSHA

ten-foot rule. Had these individuals simply followed that rule, the line could be laying on the ground and there would be no accident. It would be five feet high and there would be no accident, but when they violated it and failed to comply with it, theirs was the proximate cause of the accident in this case.

We expect to show that Berkeley Electric does what every other co-op in the state does in terms of inspection. They put their system on, I think, an eight-year cycle, where within eight years every line would be inspected by a qualified pole inspector. The inspection does involve poles, but it requires a pole inspector to report any unsafe practices or anything about the line that they deem is unsafe. The evidence will show this line was inspected in 2002, and there were no defects noted in this particular line.

You'll hear that Berkeley also, like other co-ops, trains its people to look for unsafe conditions. They did it here. There was never any unsafe condition regarding this line reported.

You will hear that Berkeley Electric does not train its line personnel to be experts in the National Electric Safety Code or what the requirements are. They're trained to build the line according to the standard practice, and when they do that, it always

exceeds the requirements of the National Electric Safety Code.

And, finally, Your Honor, Berkeley doesn't have a specific code inspection, but it's patrolling in its use of pole inspections is what it does and other co-ops do and what is accepted by RUS as being appropriate as to satisfying inspection requirements.

We deny that Berkeley Electric is at fault in this case. At the conclusion of the evidence we'll ask you to hold that.

We will challenge the damage claims that are being made, and what we now hear is $3 million, $3 million, and a million five. We look forward to presenting our case to you.

THE COURT: Okay.

All right. Do you have your first witness?

MR. SMITH: Your Honor, before we begin with the witness examinations, I have prepared a couple of things for Your Honor. One is just a trial notebook. It contains the parties' pretrial briefs, CVs of the experts, the motions that both parties had filed. There is a summary judgment order in this case that's in there as well. Everything we have filed with Daniel and everything they filed with Daniel is in here as well.

THE COURT: Good.

MR. JOHNSON: Your Honor, I object to any consideration of the order on summary judgment.

THE COURT: I take it it's an order denying summary judgment?

MR. JOHNSON: Which has no effect on the trial of this case.

THE COURT: Mine usually just say denied, because if you put anything else in it, it gets people all fired up. So if it's in there, that's fine, but I don't get upset about orders denying summary judgment.

MR. SMITH: And, Your Honor, what I've also prepared is the exhibits that the parties are going to be using here. I just prepared a notebook of all the exhibits. I'll be referring to them by exhibit number. I didn't figure we would get out projectors and all that kind of stuff.

THE COURT: That will make it easy.

MR. SMITH: Everyone will have a copy of what we're dealing with, and there is a log at the front, Your Honor, as well.

MR. JOHNSON: Your Honor, those aren't -- we're not agreeing that all of them are admissible.

THE COURT: All right.

MR. JOHNSON: Or any of them for that matter. It depends on how the evidence unfolds.

THE COURT: If you're ready, I'm ready.

MR. SMITH: Plaintiff calls Ervin Strickland as our first witness, Your Honor.

ERVIN STRICKLAND,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q. Good morning, Mr. Strickland.

A. Good morning.

Q. You served as CEO of Berkeley Electric for approximately 32 years; is that correct?

A. That's correct.

Q. You retired in October of 2012?

A. Yes.

Q. And you were CEO during the period of 1993 through 2008?

A. That's right.

Q. And at that time, you were top in the chain of command?

A. Other than the board of trustees, yes.

Q. And you hold an engineering degree, is that true?

A. Industrial engineering management option.

Q. And over the 3# years that you served as CEO of Berkeley Electric, is it fair to say that Berkeley

Electric underwent some very massive growth, rapid growth?

A. Yes.

Q. And I would like to hand you an exhibit, Your Honor. This is marked as tab six.

I'm handing you what has been marked Plaintiff's Exhibit 6. Do you know what that is?

A. It's the territory of Berkeley Electric Cooperative.

Q. Berkeley Electric has 5,000 miles of power lines?

A. Approximately.

Q. And it covers most of Berkeley County and parts of Dorchester and Charleston County?

A. Yes.

Q. All right.

MR. SMITH: I'll move to admit Exhibit No. 6 into evidence.

MR. JOHNSON: No objection, Your Honor.

THE COURT: Admitted.

(Plaintiff's Exhibit No. 6 was marked for identification and admitted into evidence.)

BY MR. SMITH:

Q. In the territory that Berkeley Electric has, is it true that Berkeley Electric has a monopoly in that territory?

A. Pretty much all of it.
Q. So the customers and the coverage zone, they don't have a choice where to get their power; is that true?
A. The existing customers do not have a choice. There are areas of unassigned territory that a customer may have a choice.
Q. Okay. I want to talk to you --
A. A new customer.
Q. Sir?
A. A new customer would have a choice.
Q. I want to talk to you about some of the sources -- not specifically the rules, but more the sources of the rules that apply to Berkeley Electric, one of those being the National Electric Safety Code.
Is it true that the National Electric Safety Code governs the work that Berkeley Electric does?
A. Yes.
Q. All right. And the RUS, we heard from Mr. Johnson, is that called the Rural Utility Service?
A. Yes.
Q. Are they a part Department of Agriculture?
A. Yes.
Q. A part of the federal government?
A. Yes.
Q. And the RUS rules, do they apply to the work that

Berkeley Electric does?

A. I would say yes.

Q. And there are federal laws, various federal laws, and do the federal laws that deal with cooperatives and power companies, do those apply to Berkeley Electric?

A. Well, I'm not sure what federal laws you're talking about.

Q. Okay. If there are federal laws out there that do apply to the work y'all done, would it be fair to say that those would be mandatory for Berkeley Electric to follow?

MR. JOHNSON: Your Honor, two objections: One is leading; the other is relevance.

THE COURT: Well, it's really kind of an improper question. It's like, well, if there are federal rules that, apply do they apply?

MR. SMITH: Yes, Your Honor. I'll withdraw the question.

BY MR. SMITH:

Q. The Berkeley Electric safety manual, does the Berkeley Electric safety manual contain a set of rules that applies to the work that Berkeley Electric does?

A. It governs the work of the employees, that's correct.

Q. Yes, sir. Now, Mr. Strickland, what I'm going to

talk to you about today is safety rule number three. It says a power company must tell the truth about its compliance with electric safety laws when reporting to the government to prevent injury to people or death by electrocution.

Do you agree with that as written, sir?

A. Power company must tell the truth about the compliance with the electric safety laws when reporting to the federal government to prevent injury or death by electrocution.

Q. Do you agree with that?

A. I've never seen that, but -- I've never seen that, at least I don't recall seeing that.

Q. Do you agree with that statement as written?

A. Must tell the truth? The power company must tell the truth and about the compliance with the electrical safety, I guess I agree with that.

Q. Okay.

A. I don't know the source of that, so I -- you know.

Q. Okay. Now, the -- I want to talk to you in the beginning about the RUS, the Rural Utility Service. As a receiver of federal tax dollars, is Berkeley Electric required to follow any rules set by the RUS?

A. Yes.

Q. And the RUS rules, are those safety rules?

A. I suspect they are.

Q. Are the RUS safety rules designed to prevent harm to every single human being that could ever possibly come anywhere near a Berkeley Electric power line?

MR. JOHNSON: Your Honor, could we get a foundation for the question by hearing what safety rules he's talking about?

THE COURT: Fair enough. Kind of an open-ended question.

MR. SMITH: Yes, sir. I'll come back to the question.

THE WITNESS: Okay.

BY MR. SMITH:

Q. Is Berkeley Electric required to complete what are known as RUS-300 forms?

A. Yes, sir.

Q. And these forms, are they used by the federal government to ensure compliance with the RUS safety rules?

MR. JOHNSON: Your Honor, again, a foundation. What safety rules are we talking about, or he contends apply?

MR. SMITH: That's going to be our very next exhibit, Your Honor. I'm going to go over the exact form.

THE COURT: Go ahead.

BY MR. SMITH:

Q. Mr. Strickland, I would like to hand to you what has been marked as the Plaintiff's Exhibit No. 1.

First of all, do you recognize that, sir?

A. Yes.

Q. Are these the RUS-300 forms?

A. Yes.

Q. And in that stack, Mr. Strickland, I'll tell you, they go from the 1990 form all the way to 2008. Are these business records maintained in the normal course of Berkeley Electric?

A. Yes.

Q. Are they filed at Berkeley Electric after they are produced?

A. Yes.

Q. Did you sign these forms?

A. Yes, I did.

Q. Did you sign each and every one of them?

A. Yes.

Q. And is it true that you signed every one of them for the 32 years before -- well, the 32 years of your tenure at Berkeley Electric?

A. That's correct.

Q. All right. And you also participated in the

completion of RUS-300 forms even before you started with Berkeley Electric; is that true?

A. Yes.

Q. I want you to turn to the 2005 version, and that will be the second one from the last. The last will be 2008. The one before that will be 2005.

A. Okay.

Q. And the title of that document is Ratings Review?

A. Yes.

Q. And the scores that are next to the portions, those scores are the ratings?

A. Yes.

Q. All right. And these forms, do they ask for performance ratings for various safety-related topics? Some of the topics on those forms, do those include safety-related items?

A. Yes, compliance code, if that's what you mean, yes, sir.

Q. And there are three people that sign these forms; is that correct?

A. That's right.

Q. And one signs as rated by?

A. Yes.

Q. And then there are two people that sign as reviewed by. Do you see that?

A. Yes, I do.
Q. All right. On this form, Matthew Bryan, he signed as rated by; is that true?
A. Yes.
Q. And that means he's the one that did the ratings; is that right?
A. That's right.
Q. And you signed under reviewed by?
A. That's correct.
Q. And does that mean that you reviewed it?
A. Yes.
Q. Paul Chris, he signed as having reviewed it as well. Do you see that?
A. Yes, I do.
Q. And Mr. Chris, he is the RUS representative?
A. Yes.
Q. And GFR, what does that mean?
A. General field representative, I think.
Q. And in terms of order, the RUS representative, does he sign last?
A. Yes.
Q. The person that did the ratings signs first?
A. That's correct.
Q. The first reviewer would sign second?
A. That's right.

Q. And then the RUS general field representative would sign last; is that true?

A. Yes.

Q. And if you'd turn to the first page there, Mr. Strickland, the 1990 form, who signed as the rater on that one?

A. I did.

Q. Okay. And how about the one from 1994? Who rated that one as well?

A. 1994? Rated by E. Strickland.

Q. That's you?

A. Yes.

Q. And we're going to talk about the scores in particular, Mr. Strickland, and on the 1990 form, I want you to look at part two on the first page. 1990 is the first one. Look at part two, distribution facilities. Do you see that?

A. Yes.

Q. All right. Look down to number four where it says distribution lines overhead. Do you see that?

MR. JOHNSON: Your Honor, I have an objection.

THE COURT: What's that?

MR. JOHNSON: As we point out in our memorandum of law, it's our position that violation of

any of this with the RUS cannot give rise to a private cause of action, and we object to it therefore on the grounds of relevance, and to the extent he is asking about ratings of others, that would be hearsay and would have to be stricken from the document.

MR. SMITH: Your Honor, we are not contending -- and this was all addressed in our pretrial filings as well.

We are not contending that simply because these forms were created or these rules were made by the federal government, we're not contending that creates our cause of action. Our cause of action is negligence, and as you know, Your Honor, the standards in a negligence case can come from many different sources. They can come from industry rules; they can come from federal rules; they can come from the defendant's own company rules.

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.

Regarding the objection as to hearsay, Your Honor, this witness made those marks. These are his

marks. Also, it's a hearsay exception, Your Honor, as to business records.

We asked for the RUS-300 forms. They gave them. He's identified what the forms are. They were produced. They were stored immediately. We would contend these are an exception to the hearsay rule because they are business records themselves.

THE COURT: Why wouldn't it be business records?

MR. JOHNSON: Your Honor, they may be business records, but Rule 8036 says that opinions in business records must be stricken or are not admissible.

THE COURT: Well, they're his opinions. He signed off on them.

MR. JOHNSON: To the extent he asked about opinions of others and it's unclear what opinions he was asking about, it would be hearsay.

THE COURT: Overruled. Go ahead.

MR. SMITH: Thank you, Your Honor.

BY MR. SMITH:

Q. Now, Mr. Strickland, we were talking about the part two distribution facilities, and we went down to number four, distribution lines overhead.

First, before we begin that, the power line we're here about today was an overhead distribution line; is

that true?

A. Yes.

Q. And is that why it is included under the term distribution facilities ahead of it?

A. Yes.

Q. Section 4-A, inspection and maintenance program and records for overhead distribution lines, do you see that?

A. Yes.

Q. Now, the possible scores here on these forms, they range from zero to three; is that correct?

A. That's right.

Q. All right. Zero would be the worst score?

A. It says no records.

Q. Well, in terms of the ranking of the scores, zero is the lowest score, three would be the highest score. Is that true?

A. Well, as far as rankings, if there is no records, I would say number one is the first one, but that's just my opinion.

Q. All right. We're going to go over -- all I'm asking you about, not specific ranking itself, sir, but just the choices and numbers to use, and those numbers would be anywhere from a zero to a three.

Is that your understanding of the choices of the

numbers?

A. Yes.

Q. And so for your inspection program and recordkeeping, Berkeley Electric gave itself a perfect score of three; is that true?

A. That's right.

Q. All right. And under Section 4-B, compliance with safety codes, the safety code it's referring to, is that the National Electric Safety Code?

A. I assume.

Q. When it talks about clearances, does that mean the height of power lines?

A. Yes, probably so.

Q. And when it says compliance with safety codes clearances, is that talking about the lines are at the heights required by the National Electric Safety Code, based on your understanding, sir?

A. Based on my understanding, but I'm not an expert in that area.

Q. And under that section, there is another perfect score of three; is that right?

A. Yes.

Q. All right. In 1994, a year after the power line was put up in this case, there's another 300 form, and that would be the next in your stack?

A. All right.
Q. And same stores that time, under sections 4-A and 4-B, threes and threes?
A. Yes.
Q. And if we skip ahead to 1998, 2002, and 2005, we're going to see the same scores again, threes and threes under sections 4-A and 4-B?
A. I'm on January 2002.
Q. Okay. And still we're talking about sections --
A. The form has changed a little bit, so --
Q. We're looking for -- the title says inspection and maintenance program.
A. What part?
Q. This would be 2-C under the 2002 version.
A. Okay.
Q. Inspection program records, you see that? And if you just follow that over to the right, is that a score of three again? 2-B.
A. Desperate condition.
Q. I'm sorry. I misspoke.
A. Inspection program and records, three? Yes.
Q. And distribution, we were looking at transmission lines, I'm sorry. 3-A and B is what I'm asking you about. Are those scores of three as well?
A. Yes.

Q. And if you'll turn to the next one, sir, the next year?

A. 2005.

Q. Yes, sir. And, again, this one would be, it looks like under part 3, distribution lines overhead.

A. Yes.

Q. And under inspection program and records, there's another score of three there?

A. Yes.

Q. And under compliance with safety codes for clearances, is there another score of three there?

A. Yes.

Q. And if you'll flip to the last one, and this is the 2008, again, under distribution lines overhead, part three, inspection program and records, there's a two on this one; is that true?

A. That's right.

Q. But, again, under compliance with safety codes for clearances, there's another score of three.

A. Yes.

Q. Now, the RUS issues bulletins regarding the completion of these forms, does it not?

A. That's right.

Q. Mr. Strickland, I'm going to hand you what's been marked as Plaintiff's Exhibit No. 2. We may refer back

to these so how about keeping these here.

We were talking about the RUS -- I'm sorry. I'll give you a moment to review that.

MR. SMITH: Your Honor, with your permission, I'm going to switch this out with the copies I actually brought in to give to you.

BY MR. SMITH:

Q. Do you recognize that?

A. I've seen it, but it's not something I look at, or used to look at all the time.

Q. This is the RUS bulletin from 1998; is that true?

A. Yes.

Q. And these are sent by the Rural Utility Service to Berkeley Electric; is that your understanding?

A. That's right.

Q. And Berkeley Electric would maintain these bulletins in their office?

A. Yes.

Q. And they would file these in their office as they are sent to them by the RUS?

A. I'm sure they would.

Q. I want you to look at section 2.1, and that would be the third page in, under borrower guidelines. Do you see that?

A. Yes.

Q. Is Berkeley Electric a borrower under the terms described in this document?

A. Yes.

Q. And what you're borrowing is federal tax dollars; is that true?

A. That's right.

Q. It says each borrower is responsible for maintaining records of the physical and electrical condition of its electric system; do you see that?

A. Yes.

Q. And under, it says such records include but are not limited to, do you see that?

A. Yes.

Q. Part B here says overhead and underground line inspection and maintenance records, including pole inspection and line patrols. Do you see that?

A. Yes.

MR. JOHNSON: Your Honor, we would stipulate that this document says what it says, and what this witness may say it says or doesn't say is irrelevant. He's not an expert. He couldn't give an opinion, and if it would speed it along, we would stipulate to saying that it says what it says.

MR. SMITH: Your Honor, I can understand why they would not want this discussed in court, but I'm

laying a foundation for this witness's testimony at this point.

THE COURT: Go ahead.

BY MR. SMITH:

Q. So borrower guidelines, Berkeley Electric is the borrower, and they're responsible for maintaining those records, and those records include but are not limited to overhead and underground line inspection, maintenance records, pole inspection, and line patrols.

Let me ask you this, Mr. Strickland: I asked you before about rules from RUS, and there was an objection, and I told you I was going to come back to that question.

Is this an example of an RUS rule, that Berkeley Electric must maintain records of the physical and electrical condition and those records include but are not limited to what's listed in there in part B?

MR. JOHNSON: Objection, Your Honor. Asking opinion testimony from a lay witness.

THE COURT: Well, I don't know who would testify about it except for somebody -- he's the former CEO of the company. Someone ought to know something about it.

MR. JOHNSON: The bulletin says what they are on the first page, under purpose. So if he says I agree with that or disagree with it, it wouldn't make any

difference. It says what it says.

THE COURT: All right. Overruled. Let's keep moving along.

MR. SMITH: Yes, sir.

BY MR. SMITH:

Q. And, Mr. Strickland, if you could now turn to section 2.3, and that's just the very next page. Do you see where it says system ratings?

A. Yes.

Q. And that's what we were talking about before, that the scores, the range of scores, range from zero to three; is that correct?

A. Yes.

Q. And that's the meaning for those different scores of what they represent?

A. That's correct.

Q. Okay. And it says in there that Exhibit A, that first full paragraph under system ratings, it says that Exhibit A provides a guide for the conditions normally needed to justify a rating of three for each of the items on the RUS-300 form. Do you see that?

A. Yes.

Q. And what I want to do is turn to Exhibit A, that's about -- if you just flip three pages. Are you there?

A. Yes.

Q. All right. And so the title of this, Exhibit A, RUS-300 rating guide, conditions normally needed to justify a rating of three.

THE COURT: Where are you at?

MR. SMITH: Under tab number two. It looks like this, Your Honor.

THE COURT: Okay. Which -- which page?

MR. SMITH: I'm sorry. Page seven.

THE COURT: All right.

BY MR. SMITH:

Q. And then if we look under Exhibit A, we're going to direct to the distribution lines overhead, and that's on the very next page, still under the conditions normally needed to justify a rating of three. All right? Are you there?

A. All right.

Q. This corresponds to the sections that we were viewing on RUS-300 forms for the inspection programs and records, clearances, things like that; is that true?

A. It appears to be.

Q. Okay. And so inspection -- inspection program -- I'm sorry, inspection and maintenance - program and records, do you see that? And if we get down to the, what, third sentence there, It says all overhead lines, including those on private right-of-way, patrolled

annually, walking, riding, or aerial, more frequently if experience dictates. Do you see that?

A. Yes.

Q. So does a rating of three mean that all overhead power lines are patrolled annually?

A. These lines are always being patrolled, so I would say yes.

Q. I don't know if you answered the question I asked you, but I'm not asking what y'all do right now. We're going to get to that, but just in terms of what a rating of three represents to the government, it represents that all overhead lines are patrolled annually.

Do you agree with that?

MR. JOHNSON: Your Honor, I object to that. He's asking an opinion from the lay witness. He's asking what that means. The Court can determine from the documents admitted into evidence what it means, but his opinion is irrelevant. He's not even an employee of the co-op anymore.

MR. SMITH: Some of the forms that we're reviewing Mr. Strickland actually made that rating. He put that number down as rated by. On the rest of them, he signed as reviewed by, which I believe the testimony will show he is certifying that is actual and correct.

I'm merely trying to establish if he knew

what those rating scores meant when he either marked them himself or signed as reviewing them.

THE COURT: If he's the guy who is signing off on these, either as the actual rater or reviewer, he should know what it means. He's got a lot better chance of knowing what it means than I do, so as far as the lay person, anybody could figure it out argument goes, he signed off on it. His understanding of what that means is more important than the average lay person.

I understand he's not qualified as an expert, but he is the person that reviewed it, and if these are the standards by which he reviewed it, then he can testify as to why he gave it the rating he did.

BY MR. SMITH:

Q. And, Mr. Strickland, I'll make it a little easier. When it says all overhead lines patrolled annually, does it mean to you exactly what it says?

A. Well, it appears to.

Q. It also says if you look down, the sentence starting with, Records maintained for pole inspection and line patrol with deficiencies corrected in a timely manner, so does a score of three also mean that Berkeley Electric is maintaining records of its line patrols?

A. Now, where are you at?

Q. The same part, distribution lines overhead, part

A, inspection and maintenance program and records, and it would be the very next sentence after, All overhead lines patrolled annually. It begins with, Records maintained for pole inspection and line patrol with deficiencies corrects in a timely manner, and the question is, does a rating of three also mean that Berkeley Electric is maintaining records of its line patrols?

A. I would say that's what it says.

Q. Yes, sir.

This is a summary of what we've just reviewed here in terms of the RUS-300 forms, a rating of three. We discussed, first of all, the rating of three represents all overhead lines patrolled annually and also that records of line patrols are being maintained.

Now, an example of line patrols, would that be when the linemen are riding down the highway looking at power lines?

A. That's what I would interpret it to mean.

Q. But linemen don't keep records of the spans they see when they're riding down the highway, do they?

A. No, they don't.

Q. And you've never seen any records of line patrols, have you?

A. I haven't, that I can recall.

Q. Okay. And under compliance with safety code we're

still on this bulletin, page eight, distribution lines overhead, part B, compliance with safety codes clearances, do you see that?

A. Say it again.

Q. I'll point it to you.

A. Here (indicating)?

Q. Yes, sir.

A. Okay.

Q. Now, it says here compliance with safety code clearances, second sentence, line patrols identify change conditions requiring greater clearances.

Do you see that?

A. Yes.

Q. So does a perfect score of three under this mean that the people doing the line patrols, they're looking to see if the use of the land has changed?

A. That's part of it.

Q. Okay. And the reason that they're noting the use of the land is so they can identify change conditions which might require greater clearances for the power lines; is that fair to say?

A. Yes.

Q. Is it your understanding that Berkeley Electric does not keep any records that show the use of the land underneath power lines?

A. I'm not familiar with that. I don't know.

Q. All right. When a line is put up, or any time thereafter, does Berkeley Electric make any note anywhere of what the land is being used for at the time?

A. Well, I don't do that. They may, but I don't know if they do.

Q. Is it fair to say you had no idea when you were either completing these forms as the rater or reviewing these forms as the reviewer?

A. You know, it says on here that I was the rater. When you go to the new forms, it says I approved the rating.

Q. As the reviewer?

A. In the forms that you're talking about, it says that I'm the rater. I didn't actually go out there and do the rating, but I was the one that was supposed to sign the form, according to RUS, but did I actually go out there and rate them during these years that you're talking about? I did not. Somebody that worked under me did.

Q. But in terms of whatever you were doing, whether you were rating it, whether you were viewing it, or whether you were just telling somebody else to take care of all that, at the time that was taking place, you had no idea whether or not records were being kept of line

patrols or whether anyone was reporting the use of the land, either when a power line was built or any time thereafter?

A. There was something that somebody would do that worked for me.

Q. Yes, sir.

A. And I'm not familiar with that.

Q. All right. Is that a -- I want to get a straight answer to the question. Is that a yes, I did not know whether or not people were noting the use of the land and I did not know whether or not records were being kept of line patrols?

A. I would say that's a yes, I did not know.

Q. Do you know whether or not Berkeley Electric tells its linemen to look for, never mind note, but look for changes in the use of the land?

A. I think they do that all the time.

Q. All right. And Rico Harrell, would he have been the lineman assigned to the Thornhill Farms district?

A. I don't know that.

Q. And if they're looking for the changes in the use of the land, is it true that linemen are not told what the use of the land started out with when the line was built?

A. They may have been.

Q. But you just don't know either way?
A. I don't know.
Q. And the people doing the pole inspections, they aren't told the original use of the land either, are they?
A. I would say no.
Q. Okay. And they aren't told to identify the use of the land around the poles as they are inspecting the poles and report that back to Berkeley Electric, are they?
A. I don't know if they're told that or not.
Q. All right. We're going to review the contract with the pole inspectors in a bit, and I'll come back to that question, sir.

The 2008 RUS-300 form, that would be the last one in the form, sir, Exhibit No. 1.

A. Okay.
Q. And this is the one I think you were talking about before. This is where the other fellow signed as rated by?
A. Yes.
Q. And who does that fellow work for? His name is -- I'm sorry, 2005 version. I told you the last one in the stack, but it's the next to the last.
A. Okay.

Q. Matthew Bryan, who does he work for?
A. I think he works for McCall-Thomas Engineering.
Q. And McCall-Thomas, is that an engineering firm that Berkeley Electric has used for a very, very long time?
A. Yes.
Q. And you signed that one as reviewed by?
A. Yes.
Q. And under the 2008 form, this is the very last one, now, this would have been signed in January of 2008; is that right?
A. Yes.
Q. All right. And you signed this 2008 one as reviewed by?
A. Yes.
Q. If you look down to part one on the first page, transmission and distribution facilities, all right, and down to number three, distribution lines overhead --
A. I'm not sure where you are.
Q. Oh, 2008 form, part one.
A. Okay.
Q. And part three, distribution lines overhead, the power line in this case was a distribution line; is that correct?
A. Yes.

Q. It was an overhead line; was it not?
A. It was an overhead line.
Q. Part B, it says compliance with safety codes clearances. We reviewed that earlier. That is a score of three, right?
A. Yes.
Q. But a score of three in that situation means that someone is noting the use of the land, as we reviewed before, right?
A. I think that's what it said.
Q. All right. And I think your testimony is that you've never seen those records, if they're keeping them. You don't know if they exist or not; is that true?
A. That's correct.
Q. Inspection program and records, that's number -- A, right above that, and there's a score of two. Do you see that?
A. Yes.
Q. Is it fair to say that's the only score of two in these sections that we see from 1990 all the way through 2008?
A. I haven't looked at it. I don't know that, but if you say it is.
Q. I'll represent that to you, and I'm sure Mr. Johnson will point that out. We flip the page there

and we see a comment, explanatory notes?

A. Okay.

Q. And the comment corresponds with part one. It says 1.3(a), do you see that?

A. Yes.

Q. Under comments, 1.3(a)? And then it corresponds back with part one, number 3-A, the inspection program and records, and it has a two next to it. Do you see that?

A. Okay.

Q. Okay. And it says here under the explanatory notes, approximately 10 percent of Berkeley Electric poles are inspected annually by an outside contractor; is that true?

A. That's my understanding, yes.

Q. And it says employees are trained to -- and I'm going to read this as it's written. Employees are trained to visual inspect lines in their daily operations.

A. Where are you?

Q. Under the explanatory notes, 1.3(a).

A. In the bulletin?

Q. No, sir, the actual form, the rating form. Yeah, here, 1.3(a).

A. Okay.

Q. And the purpose of these explanatory comments, is that to explain the rating from the previous page?

A. I would assume so.

Q. Since it wasn't a three, something was written down here to explain; is that your understanding?

A. I don't know if that's the only reason.

Q. Okay. And what it represents here, since it's under the section for inspection program and records, does this part, 1.3(a), does this describe Berkeley Electric's inspection program?

A. 1.3(a)?

Q. Yes, sir.

A. I think it's pretty accurate.

MR. SMITH: And Your Honor, at this time I will move to admit Exhibits No. 1 and 2 into evidence, and that is the RUS-300 form and the bulletin created by the federal government.

THE COURT: Over your objection?

MR. JOHNSON: Yes. I would ask that the forms be redacted as to any opinions given by any other person than this witness, under rule -- under the rule of admitted as an exception to the hearsay rules, business records.

THE COURT: How you would accomplish that on this? What rules are you referring to?

MR. JOHNSON: Well, one way would be to ask the witness to identify the opinions he gave, and any he didn't give would have to be redacted.

THE COURT: Again, he reviewed, or signed off, on the whole document.

MR. JOHNSON: But as you will hear when I project what the evidence will show, the evidence will show that his review was simply he relied on his staff to do it, and he was required to sign.

They used outside raters, one was McCall-Thomas, to do the actual ratings. RUS can change the ratings. These are the final ratings after they make their initial -- they meet with RUS. RUS goes out and spot checks whatever they want to do, and they have the authority to change the ratings that are given to each -- when they accept them, they're accepting the ratings that were given.

So I think it's the plaintiff's burden to redact what is an opinion in a business record rule. The rule says that pretty plainly.

THE COURT: You want to respond to that?

MR. SMITH: Yes, sir. I think as per the last response I gave, and as Your Honor pointed out, this gentleman was either making these ratings or reviewing every one of them. They are, again, simply evidence to

show the standard of care, to show the representations that were made, and just simply to aid Your Honor in making his determination.

THE COURT: An opinion exception to the business records rules would be -- for instance, if he weren't available and could not be here to testify and you bring somebody else in and say, this is what the business records exception is all about. These are regularly conducted activities, reports are generated, and here they are, and you don't have anybody to cross-examine them about particular statements, and there's an opinion in there, and that person is not available to cross-examine them about that, well, then you could apply that rule to strike that out.

But in this case, he either rated or reviewed it, and therefore either that was his opinion or he adopted it as his when he reviewed it, and so I don't think that particular exception applies, so overruled. It's admitted.

MR. SMITH: Thank you, Your Honor.

(Plaintiff's Exhibit Nos. 1 and 2 were marked for identification and admitted into evidence.)

BY MR. SMITH:

Q. We're going to switch gears for a minute, Mr. Strickland. What I'm going to do is --

MR. JOHNSON: Would I be able to make a proffer of his testimony on that point?

THE COURT: You can cross-examine him on it if you want.

MR. JOHNSON: Okay.

THE COURT: Why don't we just do it that way. Again, it's nonjury, so we have a lot of flexibility. You'll be able to cross-examine the witness on that, and, who knows? Maybe you can get me to change my mind. Make a note.

Okay? Go ahead.

BY MR. SMITH:

Q. Mr. Strickland, I've handed you what has been marked as Plaintiff's Exhibit No. 4. Do you have that in your hands?

A. Yes.

Q. Is this Berkeley Electric's safety manual?

A. It appears to be. I haven't seen it in three years.

Q. Okay. And I want to -- there's a section I want to ask you about specifically, and it's part one, part C. I'm going to get you the page number.

Okay. It's going to be labelled page one, and, Your Honor, it comes right after the definitions that are the Roman numeral parts.

THE COURT: Which tab?

MR. SMITH: It's tab four. It's labeled Section One, safety responsibility, part A, management's responsibility.

BY MR. SMITH:

Q. Are you to the page, Mr. Strickland?

A. Yes, I am.

Q. What I want to ask you about is part C under management's responsibility. It says here in the third full sentence, Management must ensure that all regulatory compliance issues are adequately addressed.

Do you see that?

A. Yes, sir.

Q. Management must ensure all regulatory compliance issues are adequately addressed.

So if management must ensure that all regulatory compliance issues are adequately addressed, would the code of federal regulations be regulatory issues?

A. The code of federal regulation? You want to explain exactly what you're talking about?

Q. Well, I want to ask the questions first. Would the Code of Federal Regulations be regulatory issues that management is responsible for ensuring compliance?

MR. JOHNSON: Can we ask counsel to lay a foundation by telling us what regulation he's referring

to?

MR. SMITH: Your Honor, at this point I'm just trying to figure out if when we look at the management's responsibility that they are to ensure compliance with all regulatory issues, I'm just asking the witness if he would consider the code of federal regulations within the term regulatory compliance. If he knows, he knows; if he doesn't, he doesn't.

THE COURT: Go ahead. You can ask him.

BY MR. SMITH:

Q. So I'll rephrase the question, sir.

The Code of Federal Regulations, would those be part of the regulatory compliance that management is to make sure that compliance is addressed?

A. I don't know.

Q. All right. Well, I anticipated that, and I would like to hand you Plaintiff's Exhibit No. 3, and I don't believe this would require any authentication.

This is a printout of the Code of Federal Regulations. Do you see that?

A. Code of federal regulations. I see that.

Q. And if you look here, down to -- past the title and all that, you'll see the actual number here is 7 CFR 1730.21. Do you see that?

A. Yes. 1730.21?

Q. Yes, sir.

A. Yes, I see that.

Q. And if we look back to the actual RUS bulletin, the RUS bulletin is titled 1730-1, do you see that? On this one, sir.

A. Yes, I see that.

Q. And it says under the bulletin on Exhibit No. 2 that 7 CFR 1730 contains the policies and procedures of RUS related to the borrower's O&M practices and RUS review and evaluation thereof.

Does that sound like what the bulletin explains? You want me to read it again?

A. Yeah, read it again.

Q. It says 7 CFR 1730, which is what you're holding, contains the policies and procedures of RUS related to electric borrowers' O&M practices -- what is O&M?

A. Operation and maintenance.

Q. And RUS review and evaluation thereof, so my question is this, sir: Is this specific code section from the federal regulations, is this referenced directly in the RUS bulletin marked as Plaintiff's Exhibit No. 2?

MR. JOHNSON: Objection, Your Honor. Question of whether the law applies or what law applies is for you. What a lay witness says is irrelevant to it.

THE COURT: Well, it not like he's just

walked in off the street and is being asked to give his opinion. He's the former CEO, and if that's what their manual says, then I think it's fair they ask him about it. I don't think he's an expert.

MR. JOHNSON: It is an opinion.

THE COURT: It is an opinion, but, you know, he's the guy that would know this. He's the former CEO of the company, and if they're saying, Well, that's part of our job, well, then he was, in essence, the head manager. He ought to -- he may be able to say I know; he may be able to say I don't know, but I think he's certainly within those realm of people that can say, Yeah, that's what that means or not means.

MR. SMITH: Thank you, Your Honor.

(Plaintiff's Exhibit No. 3 was marked for identification and admitted into evidence.)

BY MR. SMITH:

Q. Mr. Strickland, with regard to this federal statute, 7 CFR 1730.21, you see here it's titled Inspections and Tests?

A. Yes.

Q. All right. Now, I want to go back to the question I promised I would come back to earlier. These are some of the laws from the federal government that I was asking you that Berkeley Electric is required to follow, and

since this document is specifically reflected in the bulletin that accompanies the RUS-300 forms, now I'll ask you the question with the foundation. Is Berkeley Electric required to follow this federal regulation?

A. It appears so.

Q. Okay. And one of the purposes for inspections and tests, is that for safety?

A. Yes.

Q. And what you want to do here is -- I'm going to look at part A, and tell me if there's anything in here that you don't understand in terms of these words.

Part A says: Each borrower shall conduct all necessary inspections and tests of the component parts of its electric system. Do you see that?

A. Yes.

Q. And power lines, are they a component part of Berkeley Electric's system?

A. Yes.

Q. So the federal law, as you understand it, is Berkeley Electric is required to inspect their power lines; is that true?

A. Yes.

Q. All right. If you look down, it starts out, Each borrower shall conduct all necessary inspections and test the component parts of its electric system annually,

exercise its ERP, and maintain records of such inspections and tests.

Do you see that?

A. Yes.

Q. And so based on your understanding of this, does this federal regulation also require that Berkeley Electric is to make records of inspections? When it says maintain records of such inspections and tests, does that require Berkeley Electric to maintain records?

A. To the extent that I understand what this is saying, it does.

Q. And if you look down to part C there, it says, Inspection of facilities must include a determination of whether the facility complies with the National Electric Safety Code.

Do you see that?

A. Yes.

Q. All right. So based on your understanding of this regulation, are the inspections supposed to include the determination as to whether or not the line complies with the National Electric Safety Code?

A. That's what it appears to say.

Q. And the last sentence of part C says, any other deficiencies found as a result of such inspections and tests are to be recorded, and those records are to be

maintained until such deficiencies are corrected or for the retention period required by paragraph B of the section, whichever is longer.

So does that say to you that records of deficiencies must be kept?

A. That's what it appears to say.

Q. And then it referenced the retention period of part B above, and if we look to the next to last sentence under part B, it says, The retention period should be of a sufficient time to identify long-term trends. Records must be retained at least until the applicable inspections or tests have been repeated.

So is it your understanding that the records must be kept long enough to identify long-term trends?

A. Here again is what it appears to say.

Q. Were you watching as I was writing these things down?

A. A little bit.

Q. Just to review what we've got under the section -- we're done reviewing this document, sir, but under 7 CFR 1730 inspections are required, make records of the inspections, determine if it's up to code, record all deficiencies, keep records long enough to identify long-term trends.

Is that a summary of your understanding of this

regulation?

A. That's what I understand your summary is.

Q. When we took your deposition, is it true that you hadn't even heard the Code of Federal Regulations; is that true?

A. That's probably true.

Q. Okay. And even as you walked into the courtroom here today, before you testified, you hadn't even heard of the code of federal regulations, had you not?

A. You know, I may have over the years, but it's just not something that's come to my mind.

Q. Okay. We're going to switch gears for a moment, sir, and what I want to ask you about is safety rule number two: It says, A power company must inspect power lines to make sure they are at code height to prevent injury or death to people by electrocution.

Do you agree with that?

MR. JOHNSON: Objection, Your Honor. It's an opinion being asked of a lay witness. It's not the area that a lay witness has the right to give an opinion of, and regardless of what his opinion is, it isn't something that tags Berkeley in this case.

He's not our witness. He's a former employee. His opinion would not be considered admissible against Berkeley, but I rely on Rule 701 as to what a lay

witness can give an opinion of is basically what he observes with the five sentences.

MR. SMITH: Your Honor, you know, I think we just went through a really long process for me to lay the foundation on this, but I think in a general sense, I'm entitled to ask the person who served as the CEO for 32 years as to what rules apply to the company he presided over. And, as a practical matter, Your Honor, I can't disagree with it, given what we just went over with the federal code of regulations, but I wanted to give the witness an opportunity as the former head of the operation to tell us what rules apply. He's free to answer whatever he wants.

THE COURT: Overruled. Go ahead.

BY MR. SMITH:

Q. Mr. Strickland, what we've put up here is safety rule number two: A power company must inspect their power lines to ensure that they're at code height to prevent injury to people or death by electrocution.

Do you agree with that?

A. Where does that state the rule?

Q. Well, we went over the code of federal regulations, and you testified those apply to Berkeley Electric, that inspections are required, and one of the things you're supposed to determine is if it's up to

code. So, hence, safety rule number two, must inspect power lines to ensure they're at code height, do you agree with that?

A. Well, to a degree that I'm, you know, an expert at this, which I'm not.

Q. Okay.

A. Looks like to me.

Q. Yes, sir. All right. Now, we're going to talk about the inspection program itself. We talked about that initially when we were looking at the RUS-300 form from 2008, and we saw the explanatory comments.

And I asked you, does this explain Berkeley Electric's inspection program and I believe your answer was yes.

Do you remember that?

A. Okay.

Q. As I understand it, we're going to review now Berkeley Electric's inspection program. I already asked you before, lineman inspect the power lines they're working around, true?

A. Yes.

Q. And linemen also inspect power lines as they're driving down the roads, the streets, the highways?

A. They do.

Q. All right. And they would do this from the car?

A. The truck.

Q. The truck? And sometimes, like on a rainy day, linemen may go out and ride around and patrol the lines; is that true?

A. In a lot of cases it is.

Q. And Berkeley Electric also takes the position that pole inspectors are also inspecting power lines; is that right?

A. No, I don't think I said that.

Q. Let me rephrase the question for you: Does Berkeley Electric -- do the pole inspectors also inspect power lines?

A. I don't deal directly with the pole inspectors, but if that's what they were told to do by the operating people.

Q. All right. If I was to tell you that part of Mr. Johnson's opening statement here was that the pole inspectors are inspecting power lines, we certainly expect this testimony later in the trial, would you have any reason to disagree with that?

A. No.

Q. Okay. And is it true that you were responsible when ensuring regulatory compliance, filling out RUS-300 forms, reviewing RUS-300 forms, is it fair to say it was your job to at least know what the inspection program

was?

A. Ultimately, I was responsible for everything that went on here. I may not have been the one that actually did the work.

Q. In terms of responsibility for the 32 years you were there and signing those forms and being responsible for regulatory compliance, were you responsible for at least knowing what the inspection program is?

A. I would say yes.

Q. Now, going back to the Code of Federal Regulations, line patrols, those are the ones doing the inspections, true? The linemen are doing the line patrols?

A. Yes, among other people.

Q. Okay. None of them are making notes of those inspections, are they?

A. I don't know.

Q. Okay. And are linemen told how high power lines are to be in their district?

A. Are they told -- well, I'm sure they are.

Q. All right. Is that written down anywhere, the required height of any power line in all of the Berkeley Electric system? Is it written down anywhere?

A. Any line segment written down?

Q. Yeah, any line segment.

A. I don't think every line segment is written down; may be some that are.

Q. Do you know if any line segment at all -- do you know for sure any line segment is written down as to what the code requires?

A. Well, I don't know if any are written down. I think what the code requires, it's written down somewhere.

Q. Well, the National Electric Safety Code obviously has what the code requires, right?

A. That's my understanding of the National Electric Safety Code.

Q. Okay.

A. But I'm not an expert in that.

Q. What I'm asking you about, does Berkeley Electric write down what the National Electric Safety Code requires for any power line in its entire system?

A. I don't know if they write it down.

Q. Is it fair to say that the required height for this power line that killed these men, that required height is not written down anywhere?

A. I do not know that.

Q. You've never seen it, have you?

A. No, I haven't seen it.

Q. Did anyone tell you that we have been asking for

documents that could show that?

A. I'm sure you have been, but I don't know if anybody told me that.

Q. I'm just curious if you're one of the people they checked with. If a lineman sees a defect on his inspection, he fixes it, right?

A. If it's something that needs fixing right then and there, they would fix it or get it fixed.

Q. He doesn't make a record of what the defect was, does he?

A. I don't know.

Q. I asked you this question in your deposition.

Before we go through this exercise, if I told you in your prior testimony you said they don't necessarily make a record of that, do you recall that testimony?

A. I would accept that.

Q. Okay. So in terms of the record that they would make, not necessarily, if they correct it right then and there on the spot, but if it's something that can be corrected later, I think they make a record of it. Would that describe your understanding of when the records are made?

A. I think I just about said that a few minutes ago.

Q. Okay. So some records -- as far as your understanding, some records are kept of deficiencies, but

not all, depending on the circumstance. If it's something they can fix right away, they fix it. If it's something they got to come back to later, maybe they make a record of it?

A. That would be a good assessment.

Q. We're getting there.

MR. SMITH: Before I forget, I would like to admit the safety manual, which is Exhibit No. 4, and just so Your Honor has the printout from the Code of Federal Regulations, I'd like to also admit that document into evidence, so that would be Exhibits No. 3 and No. 4.

MR. JOHNSON: Your Honor, object to the safety manual coming in unless there is some evidence that it was violated; otherwise, it will be an irrelevant document in the record, and I'm not agreeing with putting in the law as an exhibit in the case. That would seem to me that would be available to you.

MR. SMITH: I'll leave it up to you as to whether or not you want the printout from the Code of Federal Regulations.

THE COURT: Well, it's handy to have. Technically, he's correct, it's not an exhibit, but I've got it and you brought it to my attention.

As far as the handbook goes, I presume that you are offering it to show a violation of the standard,

in particular, the section which kind of says, well, we ensure that we have complied with all the regulatory requirements.

MR. SMITH: Yes, sir.

THE COURT: All right. Overruled. It's admitted.

(Plaintiff's Exhibit No. 4 was marked for identification and admitted into evidence.)

BY MR. SMITH:

Q. And what we were talking about before is sometimes records of deficiencies are kept. Sometimes they're not. If it's something you can fix right away, you're probably not keeping a record of that. If it's something you've got to come back to later, you probably keep a record of that.

Is that fair to say?

A. I think that's what I said.

Q. And in terms of keeping records long enough to identify long-term trends, would you agree with me you can't really do that on the times that you're not making those records?

A. Or if you didn't have a record, you couldn't.

Q. You can't keep it long enough if you're not making it in the first place, right?

A. That's right.

Q. And still in the topic of the pole inspections -- sorry, of the inspection program, safety rule number two, we're going to talk about the pole inspections in particular, and what I would like to hand to you is what I've marked as Plaintiff's Exhibit No. 5, and we're going to try to go through this document pretty quickly, Mr. Strickland.

MR. JOHNSON: Your Honor, I object. Unless there is some foundation that this witness has knowledge of the document, reviewed it at some point in the past, or been involved with it, you recall he said he did not work with pole inspection.

THE COURT: I don't know where we're going with this question.

MR. SMITH: Yes, sir. You recall the previous question, that he is responsible for knowing what the inspection program is, and we reviewed the RUS-300 form that described the inspection program, and one of those things discussed the pole contractors, the pole inspectors.

So I'm simply reviewing with this witness his knowledge as to the inspection program that he admitted he was responsible for for the 32 years he worked there. We intend to show Your Honor the totality of their inspection program. If they claim that the pole

inspectors are doing it, we're going to bring this evidence to Your Honor. We're not going to wait for them to -- it is what it is, Your Honor. Everybody has got what everybody has got.

My intention is to review the entirety of the inspection program, and, for Your Honor's information, this is the last of it.

THE COURT: All right. Overruled.

(Plaintiff's Exhibit No. 5 was marked for identification.)

BY MR. SMITH:

Q. Mr. Strickland, I've handed you what's been marked as Plaintiff's Exhibit No. 5. Is this the contract with the pole inspectors?

A. Well, I didn't have anything directly to do with it, and this is the first time I recall seeing this. This date is 2001, so -- so I can't say it is or it isn't.

Q. All right. Is there -- the first page here is -- this is a letter from Berkeley Electric to Frank Drose of Tomberlin Pole Treatment Company.

A. That's right.

Q. Does this reference the 2002-2003 pole inspection?

A. It says, You're invited to submit a quotation in connection with the 2002-2003 pole inspection program.

Q. I know you weren't here for opening statements, but we heard that the line in this case was inspected by pole inspectors in 2002. Do you have any knowledge of that?

A. I do not.

Q. What I want to review with you -- let me ask you this question in general, sir, before we kind of go through it in specific terms.

First of all, would this document be kept in Berkeley Electric's home office?

A. Well, not necessarily.

Q. If Charles Stanley, the vice president of outside operations, sent a pole inspection quotation to Frank Drose of Tomberlin Pole Treatment Company, you're going to tell me Berkeley Electric does not keep a record of that?

A. I think he said in the headquarters or something like that.

Q. I'm sorry. I may have misspoke. Would Berkeley Electric keep this and the attachments in its records?

A. Yes.

Q. And would those records be kept contemporaneously, close in time, to when the document was sent out or produced?

A. Yes.

Q. Under the notice and instructions to bidders, and that would be -- it's not really numbered here, but it's right after the table of contents, right after the MSD sheets. It says notice and instructions to bidders. Do you see that?

THE COURT: Was this a successful bidder, or what is the purpose in offering this particular solicitation? It looks like -- we're soliciting bids. You're invited. Here's one. Is this the one that got the job?

MR. SMITH: Yes, sir.

BY MR. SMITH:

Q. Are you there, where it says notice and instructions to bidders?

A. On the table of contents, notice and instruction to bidders.

Q. Turn to the very next page, and you'll see it's titled notice and instruction to bidders.

A. All right.

Q. It says here, Sealed proposals for the inspection, evaluation, and necessary treatment of standing poles; do you see that?

A. Yes.

Q. Is it fair to say, based on the description of the

project, Berkeley Electric is telling the pole inspection company their job is to inspect poles?

MR. JOHNSON: Objection, Your Honor. This is an opinion by a lay witness who's never even seen the document before. He said he never recalls having seen it. I don't understand how he can be examined about something that he's not a party to or knew about.

MR. SMITH: Your Honor, again, I'll go back to, I guess, my response from last time. He's testified it's his job to know the inspection program. You heard from Mr. Johnson that this is part of their inspection program.

You know, we've probably got a bigger issue if he hasn't ever seen the thing and doesn't know about it, but let's assume his memory can be refreshed, at the very least, as to what the pole inspectors are doing. If they're going to represent that the pole inspectors are part of their inspection program, we're going to review this document and see if looking at the heights for power lines is in here, looking at the notes of the use of the land is in here.

We're going to look for things like that, and Mr. Johnson has pointed out already that there is a reference to reporting dangerous conditions.

MR. JOHNSON: I didn't say it can't come into

evidence, I just said it can't come in through this witness and he can't be examined about it because he hasn't seen it.

THE COURT: I suppose if he's never seen it, then there's not much point in going over it with this witness. If he's in charge of the inspection program overall and he's never seen it, then for whatever that is worth, then can you draw from that, but I don't think it's fair to cross-examine the witness over a document that he's never seen.

You can probably get it in, but I don't know that you can get it in through him, so if he's never seen it, then we won't let it in at this time.

BY MR. SMITH:

Q. I just asked you a general question. You testified earlier it was your job to know what the inspection program was, true?

A. I'm not sure I said it that way. As CEO, you're the one where the buck stops. You're supposed to know everything, but the fact of the matter is the organization is so large you have to let other people, management, people do things, and that's what this document is.

I didn't deal with the pole treatment, but ultimately it doesn't mean you're the one that went out

here and inspected these lines. It doesn't mean you're the one that negotiated a contract with the pole treating people. So if I said anything different than that, then I misspoke, but that's what I was trying to imply, at least.

Q. So when you were completing the RUS-300 forms and either being the person that rated by or being the person that reviewed by, when you look at those sections that talk about the inspection program and the words that were offered to explain the inspection program, is it your testimony that you had no idea what the inspection program was that you were signing off on?

A. Over the 32 years, I probably read that bulletin and understood it. I think I also testified that in the early years, 1992 or anyway up to about 2005, I signed off on that thing on that form 300 saying I rated it.

I have never gone out in the field and rated it. I'm not sure why RUS wanted me to sign that document, but you can see they changed the document later on to reflect what the CEO or the manager really did as relates to the form 300.

Q. Okay. And the person below you on the chain of command that would get a little bit more specific in these details, would that be Mr. Mobley?

A. They're the ones who would be knowledgeable.

Q. And we go down and start with Mr. Mobley and spread out from there?

A. Yes.

Q. All right. We're going to switch gears, and we're almost done at this point, Mr. Strickland.

Do you know what the required height of the power line that killed Mr. Fortney was? Do you know what the National Electric Safety Code required that line to be?

A. I did not know.

Q. And did you ever try and find out? Once you learned that two men had died and two men were injured and that the families were claiming it was a low-hanging power line, did you ever try to find out, Hey, was our power line below code?

MR. JOHNSON: Relevance. Objection. We don't have a responsibility to review and come to some conclusion one way or the other, and it's not an element of the claim for negligence.

THE COURT: Overruled.

THE WITNESS: Ask the question again.

BY MR. SMITH:

Q. Once you learned that two men had died and two men were injured and the families claimed the reason that happened is the Berkeley Electric power line was below code, did you ever attempt to find out if that was true

or false?

A. I don't know if it was below code, and it happened in 2008. And I know we had discussion about the situation, but the details of the discussion -- I don't remember the details of the discussion.

Q. Is it fair to say you didn't make any effort to determine whether or not those claims were true, whether or not the power line violated the high requirements of the National Electric Safety Code?

A. I just don't recall discussions about that. It may very well have happened.

Q. Okay. The RUS-300 forms that we were going, you typed a sworn affidavit in this case when we were wanting to take your deposition.

Do you remember that?

A. I think I do.

Q. And the reason you swore that affidavit is you were trying to ask the Court to protect you from being questioned about the RUS-300 forms.

Do you remember that?

A. I don't remember that; no, I don't.

Q. Did you say at the end of the statement that you asked to be protected from testifying in this case?

A. If that's what the document says and I signed it, that's what I asked for.

Q. Did you also swear that you didn't even participate in the review process?

A. I don't recall.

MR. SMITH: This affidavit would be in the Court's file.

BY MR. SMITH:

Q. I'm looking at the statement from May 16, 2012. Let me ask you this: I do not participate in the preparation of the summary.

Is that true?

A. The summary of what?

Q. The RUS-300 form, the rating review summary.

A. Ask the question again.

Q. Did you participate in the preparation of the summary, which is --

A. Which is form 300?

Q. Yes, sir.

A. Did I participate in the preparation? No.

Q. Okay. And that includes even when you signed as rated by, you didn't even participate in the preparation of the summary; is that true?

A. I didn't.

Q. And is it also true that you did not know the details of how the system was rated; is that true?

A. Yes. I think I may not have known, but over the

years, I have known how it's done. It's been done different ways.

Q. And does that accurately reflect your position, that you did not know the details of how that was written, meaning what those scores even meant?

A. I know what the scores meant.

Q. You knew that when you put a three next to the inspection program and records that you were certifying all overhead lines were being patrolled annually? You knew that when you signed those forms?

MR. JOHNSON: Objection, Your Honor. The record shows that's not correct at all. The form shows -- the bulletin simply says these are things normally considered to be -- considered for a three rating. It didn't say they were required at all.

THE COURT: You can cover all that in cross-examination. Go ahead.

MR. SMITH: Your Honor, I'll just correct it. It doesn't say what you might, it says need to require a rating of three.

BY MR. SMITH:

Q. So my question was, sir, did you even know -- well, I asked you what the scores meant, and you say, Yes, I believe.

And so my question is, when you put down a three

as rated by or if you approved it as reviewed by from 1990 all the way through 2005, when you put down a three under inspection program or records, did you know that that was certifying that all overhead lines were being patrolled annually? Did you know that in particular?

A. I don't know the answer to that question. I don't remember.

MR. SMITH: I don't have any other questions, Your Honor.

THE COURT: Okay. I'll tell you what: Let's take ten minutes before we start on cross.

(Recess taken.)

MR. SMITH: Before Mr. Johnson begins, when we began, we requested that Berkeley Electric's witnesses be sequestered so that they couldn't simply respond to each other in their testimony, and that brought Mr. Johnson's analogy that the heirs in this case, Mr. Fortney's children and Mr. Robinson himself shouldn't be here either.

I apologize to the Court and to the family, but as I think about it now, Your Honor, the purpose of the Berkeley Electric witnesses being sequestered is, as you described, so they can't respond to each other in their testimony. I submit to you, Your Honor, the family has nothing to do with this testimony. There's no risk

the family is going to respond to any --

THE COURT: Well, they're parties, right? I usually let parties in, if I didn't say that. I think parties have the right to be in there.

MR. SMITH: I didn't ask you about it, because I didn't think about it when he said it, but, Pope, I'll ask, can I bring the witnesses in?

MR. JOHNSON: The ones that are going to be witnesses or not witnesses?

MR. SMITH: Gina, the daughter, and John Robinson.

MR. JOHNSON: Oh, yeah. John Robinson can be here.

MR. SMITH: We'd also like Mr. Fortney's daughter Gina to be here. There's no risk she's going to respond to any of the testimony. She's going to testify about her loss of her father, not any of the safety rules that apply to Berkeley Electric or what their operations were.

MR. JOHNSON: She's not a party.

THE COURT: Well, if she's not a party, what is it that she's going to testify about?

MR. SMITH: She lost her father. She's going to talk about the elements under wrongful death, her grief or sorrow, her wounded feelings. She's not

responding to any of these safety rules, federal inspections, any of this stuff, Your Honor. She really, really wants to be present and to hear what's going on in her father's case.

MR. JOHNSON: Put her up as the next witness, and she can hear the rest of it, but she's not a party and consistency would say she doesn't come in.

THE COURT: Well, if she's not a party and if you insist, I will have to agree that that's the rule.

MR. SMITH: Yes, sir. All right. I'm going to bring Mr. Robinson in.

THE COURT: All right. You ready?

MR. JOHNSON: Yes, sir.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Strickland, I want to go to the safety manual. Mr. Smith asked you about it, and I want you to turn to the page, fourth page there. You see where it says safety manual at the top? What exhibit number is that?

A. 4.

Q. Looking at Exhibit 4, on the fourth page, does it have the heading safety manual?

A. Yes.

Q. Would you read into the record what the paragraph says?

A. Berkeley Electric Co-op accepts this safety manual as the minimum standards for employees. The purpose of this manual is to promote safety and consistent work practices from Berkeley Electric Cooperative. Further resolved that the cooperative must establish policies, practices, and programs as the system deems necessary to maintain a safe working environment.

Q. Now, I want you to turn to section one that you were asked about by Mr. Smith.

A. All right.

Q. And the sentence he referred to as being the violation, or alleged violation, reads, Management must ensure that all regulatory compliance issues are adequately addressed.

Do you see that? Second sentence in paragraph C, I believe.

A. Management must ensure that all regulatory compliance issues --

Q. Right.

A. Okay.

Q. When you were at Berkeley Electric, did Berkeley Electric have a department that was responsible for dealing with safety issues and training?

A. Yes.

Q. Who was head of that department?

A. Well, Junior Elrod was the safety and training director, and later on we divided it up between Junior Elrod and Kevin Mizell was the training.

Q. And did it involve regular safety meetings?

A. Yes.

Q. Did it involve training on safe work practices?

A. Yes.

Q. And was that something that was emphasized at the cooperative?

A. Always.

Q. And as far as you know, were you ever criticized or was there ever a claim that weren't ensuring that all regulatory compliance issues were adequately addressed?

MR. SMITH: Your Honor, I object for hearsay.

THE COURT: Overruled.

THE WITNESS: What was the question?

BY MR. JOHNSON:

Q. Was the cooperative ever criticized or did anyone ever claim that the cooperative was not adequately addressing regulatory compliance issues?

A. Not to my knowledge.

Q. And as far as you know, as the CEO, were all regulatory compliance issues adequately addressed?

A. As far as I know.

Q. Now, to your knowledge, is there anything in the

National Electric Safety Code that would require a record, that is, a written record, something to be recorded, as to what land use was that was under a power line?

A. I'm not familiar with the National Electric Safety Code.

Q. You don't know one way or the other?

A. I don't know one way or the other.

Q. You were asked a lot of questions about inspection. During the time you served as CEO of Berkeley Electric, were you ever criticized or any loan denied because Berkeley had had an inadequate inspection from them?

A. No, sir.

Q. Turn, if you would -- let me hand you Exhibit 1. Is Exhibit 1 the form 300 that you were asked about?

A. Yes.

Q. Now, the first one is October the 17th, 1990?

A. That's right.

Q. And you signed as rated by and Paul Chris reviewed it; is that correct?

A. That's right.

Q. Did you rely upon the staff members and information from staff as to the rating process before you signed it, or in signing it?

A. It was in 1990. I don't know if I relied on the staff or I relied on the RUS field engineer.

Q. Does the RUS field engineer have the right to change the ratings?

A. Our RUS field engineer could do the rating, and I've known of instances where they did do the rating.

Q. To your knowledge, are you able to look at this October the 17th, 1990 rating and determine which ratings were from you and which were from the RUS guy?

A. Page 12 of form 300? All of the ratings were somebody besides myself.

Q. Look at the next RUS-300 form, March 29th, 1994.

A. All right.

Q. Who was the rater, shown as the rater?

A. I signed off as being the rater.

Q. And who -- did RUS sign off as having reviewed it?

A. I'm sure they did, but on my copy, it's not signed by RUS.

Q. Who is it signed by?

A. It's blank.

Q. Do you know who -- this contains a whole series of ratings of the system. Do you know which ones were given by Berkeley and which ones came from RUS?

A. No, sir. I don't remember that.

Q. Did the RUS representative in connection with

these forms generally meet with you or staff members of the cooperative to complete the form?

A. To complete the form?

Q. Yes, sir.

A. Not with me to complete the form, but to meet with me and to go over the form if it had been completed.

Q. And when they and met with you, could they change anything they wanted?

A. RUS could change the form any time they wanted.

Q. Did the RUS representative go out and spot check what Berkeley was doing as part of its involvement in the rating process?

A. I know RUS could do that. I don't know if RUS did that.

Q. Let's look at the rating January 28th, 2002. Who signed as reviewer?

A. I signed as reviewer and Chris signed as a reviewer.

Q. Who signed as the rater?

A. Thomas Meyers.

Q. And who was Thomas Meyers?

A. Thomas Meyers was vice president of engineering.

Q. Let me ask you again on this form. Could you tell us under oath which ratings were assigned by Berkeley and which ratings would have been assigned by RUS? Can you

differentiate that out?

A. Can you ask that question again? I'm not clear.

Q. Can you tell me which of the ratings on the rating of January 28th, 2002 were assigned by Berkeley as opposed to assigned or changed by RUS?

A. No, sir. I couldn't tell you that.

Q. Would that be true of the rating review summary of January 2005?

A. Yes, sir.

Q. And it shows you were the reviewer?

A. Yes.

Q. And who does it show was the rater.

A. Matthew Bryan.

Q. And he worked for who?

A. I think Matthew worked for McCall Thomas Engineering Company.

Q. And who hired him?

A. Berkeley Co-op did.

Q. Can you tell me from looking at the form which ratings were assigned by him or by Berkeley or by RUS?

A. I can't tell that by looking at this, but I assume they were all done by Bryan.

Q. I want you to look at January 2008, and look at the second page, and go down to item 13(a), and read that into the record.

A. 13(a)?

Q. Yes. I'll show you. Read that comment to the RUS-300.

A. Approximately 10 percents of BEC's poles are inspected annually by an outside contract. Employees have trained to visually inspect lines in their daily operation. BEC is currently in the process of a complete field inventory and GPS of their entire system. Each location on the distribution system will be visited during this project.

Q. To your knowledge was, Berkeley Electric telling RUS exactly what its inspection program consisted of with these comments?

A. Yes, sir.

Q. You were asked about Berkeley misrepresenting information to the government for failing to report that it was not doing a an annual inspection or patrolling those locations; is that true?

A. Yes.

Q. I want you to look at Exhibit 2, and on the first page where it says the purpose of the bulletin, read to the Court what the purpose is, first page.

A. This bulletin contains guidelines related to electric bars, operations, maintenance, O&M, and outlines the Rural Utility Service, RUS, standard practices with

respect to review and evaluation of all O&M practices.

Q. Does the purpose refer to guidelines?

A. Yes. This bulletin contains guidelines.

Q. And guidelines are just that, aren't they? They're not something that's mandated; they're just a guideline that suggested guideline to follow?

A. Yes.

Q. If we look at the provisions regarding operation -- excuse me, distribution lines overhead, it's on page eight?

A. Okay.

Q. This section is entitled conditions normally needed to justify a rating of three; is that correct?

A. Yes.

Q. It doesn't say conditions that have to be performed in order to justify a rating of three, do they?

A. No, sir.

Q. And then under distribution lines overhead, one of the items is overhead lines, including those on private right-of-way, patrolled annually, walking, riding, or aerial, or more frequently if experience dictates.

Did Berkeley Electric ever do such overhead inspections annually?

A. I don't recall.

Q. Are you aware of any co-op in the state -- do you

know how many co-ops are in the state electric co-ops?

A. Yes, sir. There's 20 distribution co-ops.

Q. To your knowledge, do any of them do an annual -- patrolling of the entire system, either walking or by vehicle or by airplane?

A. Not to my knowledge.

Q. Did you ever represent -- did Berkeley ever represent to RUS that Berkeley did that?

A. Not to my knowledge.

Q. You were also asked about, Line patrols identify change in conditions regarding greater clearances.

Do you see that, last sentence on paragraph nine? Excuse me, 3(b).

A. Okay. I see that.

Q. Were your lineman trained to look for changes in line and condition, land conditions and notify and take action if there is some need for a change?

A. The lineman have the experience to look at the lines and tell it if there's something wrong. If there was something wrong, they would make the changes either right now or get it changed.

Q. Now, are these revisions in this bulletin part of the loan process with RUS?

A. Yes.

Q. In other words, these are things that would have

to be done to RUS's satisfaction in order for Berkeley to continue to borrow money from RUS?

A. RUS loans the cooperative quite a bit of money, and they're using this to protect their investment in the lines, so --

Q. And has Berkeley, to your knowledge, ever been denied a loan from RUS?

A. No, sir.

Q. Has Berkeley ever -- RUS say, You aren't giving us accurate information; therefore, no money?

A. No, sir.

Q. Has Berkeley, as far as you know, complied with all RUS requirements necessary for Berkeley to borrow money under that program?

A. As far as I know.

Q. Counsel came up with a handwritten document called RUS-300 forms ratings of three. Do you see that?

A. Yes, sir.

Q. It says all overhead reasons patrolled annually. Did RUS ever require as a condition of a loan that you show them that you are patrolling overhead line -- all overhead lines annually?

A. I've never seen that.

Q. Can you write on that yellow pad sticky, RUS never required overhead lines patrolled annually?

A. RUS never required overhead lines to be --

Q. Patrolled annually.

Then he's got records of line patrols. Did RUS ever criticize Berkeley because of its recordkeeping regarding its line patrols?

A. Not that I'm aware of.

Q. Put no RUS criticisms.

A. How do you spell criticism?

Q. Let's just put no objection from RUS.

Did RUS ever criticize Berkeley regarding whether it noted or did not note land use changes?

A. Not that I know of.

Q. So that would apply as well. No objection from RUS.

The second page is 7 CFR 1730. Do you recall ever reviewing that regulation before you were asked to do it here in the courtroom?

A. No, sir. I don't remember that.

Q. Have you ever asked anybody to help you understand what a regulation of the Code of Federal Regulations means?

A. Ask that question again.

Q. Let me ask this: Who was the cooperative's general counsel during the period you were CEO?

A. Jack Williams.

Q. Is he sitting here in the courtroom?
A. Yes, sir.
Q. Did you ever call him and say, We need to talk about this regulation one way or the other?
A. No, sir.
Q. Did RUS ever raise as part of its loan practices compliance or noncompliance with that CFR?
A. Not that I'm aware of.
Q. Did RUS ever say you weren't doing the necessary and required inspections?
A. No, sir. They never said that.
Q. Did they ever say, You got to keep records of inspections like you should?
A. Not to me they didn't.
Q. Did you ever determine that -- criticize you for not determining whether you complied with the National Electric Safety Code?
A. Never talked to me about the code.
Q. Did they ever say you needed to recall all deficiencies and you weren't doing that right?
A. Not that I'm aware of.
Q. Do you have any record of -- recollection of them saying the records -- you weren't keeping records long enough to determine long-term trends?
A. I've never heard that.

Q. Has anybody at RUS ever been critical of Berkeley in the loan application process?
A. Not that I recall.
Q. Write on here, if you could, no RUS objection.
Did Berkeley ever default on a loan?
A. No.
Q. Has Berkeley made every payment to RUS in a timely fashion?
A. During my time.
Q. Let me ask you a few questions about your background. You told your age as what now?
A. Seventy-one.
Q. Where do you reside?
A. 1415 Sterling Oaks Drive in Moncks Corner.
Q. How long have you been living in Moncks Corner?
A. Since February 4, 1980.
Q. Did you come here to serve as CEO of Berkeley?
A. Yes, sir.
Q. Did you serve until -- October you said?
A. October 1st, 2012.
Q. Are you married?
A. Yes.
Q. Children?
A. Yes, sir.
Q. Grandchildren?

A. Yes.
Q. Tell the Court your education.
A. I graduated from Souther Technical Institute with a bachelor's degree in industrial engineering, management option.
Q. Were you an electrical engineer?
A. No, sir.
Q. Do you claim to have any expertise in the National Electric Safety Code?
A. No, sir, I don't.
Q. Is Berkeley a non-profit or a for-profit business?
A. It's not a profit.
Q. Is it member owned?
A. It is member owned.
Q. What do you mean when you say it's member owned?
A. The people who consume the powers are the owner of the electric company.
Q. When you came here, how many members did you have?
A. We had about 29,000 meters.
Q. And how many do you have now, or when you left?
A. About 84,000.
Q. And how many miles of line did you have when you first came here?
A. I don't remember that.
Q. How many did you have when you left?

A. I think there was about 5,500, something like that.

Q. How many employees did you have when you came?

A. Around 130, as I recall.

Q. And when you left, how many did you have?

A. Probably over 250.

Q. Does Berkeley generate electricity?

A. No, sir.

Q. Where does Berkeley buy its electricity?

A. It has a wholesale power contract with Central Electric which buys it from Santee Cooper, SCE&G, Duke Power, and Southeastern Power Administration.

Q. Is Berkeley what is known as a distribution company?

A. Yes, sir.

Q. You distribute power in exchange for payment?

A. Yes, sir.

Q. Does Berkeley -- how is it managed?

A. Well, the board -- there nine elected board of trustees. They're elected every three years, three are elected every three years, and the board of trustees hires the manager.

Q. Does the CEO serve at the board's pleasure?

A. Yes, sir.

Q. How many counties does Berkeley serve?

A. They serve partially in three counties.

Q. Does Berkeley have a department that designs lines that are to be constructed?

A. The operations and engineering department handles that.

Q. And does Berkeley build a good bit of its own line?

A. A good bit.

Q. Does Berkeley have linemen who day in and day out are involved in new construction?

A. Yes, sir.

Q. Does Berkeley participate in regular meetings with the heads of -- department heads of other cooperatives around the State?

A. Say that again.

Q. Let me ask this: Do the CEOs of the cooperatives meet on a regular basis?

A. Yes, sir.

Q. How often?

A. About four times a year.

Q. Do the department heads at Berkeley meet with their counterparts at other cooperatives regularly?

A. Yes, sir.

Q. To your knowledge, is what Berkeley doing regarding line construction, inspection of lines, record

retention, consistent with what is occurring at other co-ops across the state?

A. The co-ops are all doing about the same.

MR. JOHNSON: Thank you. That's all I have.

THE COURT: Redirect?

MR. SMITH: Yes, sir, Your Honor.

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Strickland, you were asked moments ago, did the RUS require annual patrolling. Do you remember that?

A. Yes, I would say so.

Q. And that's true, isn't it?

A. I don't remember them requiring it, the RUS people.

Q. Yes, sir. And how we got to the language about annual patrolling was that was what a score of three represented to the federal government that Berkeley Electric was doing; is that true?

A. That's what it says.

Q. Do you believe if Berkeley is telling the federal government they are patrolling all overhead lines annually that they should be patrolling all overhead lines annually?

A. I believe we were doing what the RUS field engineer told us we needed to do.

Q. I appreciate that, but that's not the answer to my question. My question is if Berkeley Electric is representing to the federal government that they're patrolling all overhead lines annually, should Berkeley Electric actually be patrolling all overhead lines annually?

A. I'm not sure.

Q. Okay. And you said the guidelines -- I forget how you classified that, but are these just optional? You can choose whether or not you want to follow the guidelines promulgated by the RUS?

A. Ask that question again or a different way.

Q. Mr. Johnson was asking you to read from the title of the RUS bulletin, Exhibit No. 2, and he emphasized and y'all talked about the fact that these are guidelines. Remember that?

A. Yes.

Q. Okay. Is it your testimony that Berkeley Electric can simply choose whether or not to follow the practices and procedures referenced on that RUS memo because they are guidelines?

A. They're guidelines. That's all they are, just guidelines.

Q. All right. So Berkeley Electric, as far as your testimony goes, you can just choose to disregard all

that; is that true?

A. I don't think so, not from a practical matter.

Q. And guidelines is contained on the actual bulletin, right? That's where the language comes up about guidelines, right?

A. Yes. In the bulletin it says guidelines.

Q. And are those guidelines to help Berkeley Electric put the performance ratings down on the RUS-300 forms?

A. I suspect you could say that.

Q. They're used as a guide to explain what the different scores mean, true?

A. Okay.

Q. Is that true?

A. I guess so.

Q. Okay. And when it says that a score of three means you're patrolling all overhead lines annually, it's not that you have to do that. You're just simply representing that's what you're doing, right?

A. I don't know how to answer that question. We're using these guidelines, and we're trying to do what they say we ought to do in the bulletin and according to what the RUS man all asks us to do.

Q. And you said the 1990 forms, which would have been, what, 28 years ago -- well, longer than that -- 25 years ago?

You remembered from 25 years ago in 1990 that all of those ratings that you signed as rated by, all of those ratings were actually done by somebody else? Do you remember that?

A. From what I remember is I've never gone out in a field and rated them. What I remember in the very beginning is the RUS, the REA people is what they called them back in the day, they would actually go out in the field. They would take a system map and throw gym clips on the system map, and everywhere those gym clips lay, that's where they would go out and inspect the lines.

They may have inspected them in the 1990s. I don't recall, but I know that I personally have never inspected a line, but I signed off because that's what the RUS wanted me to do, to sign the document.

Then they changed the document. They changed the form to reflect more of how it's actually done.

Q. And when you're completing a performance rating about your inspection program, inspection program and records, that's not something you need to go out to the system to look at, is it? That's something you question Berkeley Electric about, Hey, what's your inspection program?

You don't have to go out to the line and inspect lines in the system to answer the question about what is

your inspection program and records? I feel like that may have been a bad question.

A. Well, it's a bad one for me. I don't quite understand.

Q. Is it safe to assume that the RUS official relied on the things Berkeley Electric told them with regards to its inspection program and the records it was keeping?

A. Yes. That may be true, but it also may be true that the RUS folks went out in the field with our people to do the inspection.

Q. But when they went out in the field with your people, they would have no idea whether or not Berkeley Electric is patrolling all overhead power lines annually, would they?

MR. JOHNSON: Your Honor, I object. There is no way the witness could possibly -- he said he wasn't involved with that.

THE COURT: Well, that may very well be his answer, but you can ask him the question. He may not know the answer to it.

THE WITNESS: What's the question?

BY MR. SMITH:

Q. The RUS officials relied on things Berkeley Electric was telling them when they were reviewing the system; is that true?

A. Maybe. They may have been out there in the field with our people.

Q. And your signatures on these documents, as you've just told us now, either as rated by or reviewed by, your signature on these documents certifies the performance ratings on those documents are true and accurate; is that fair to say?

A. I would say that's fair to say.

Q. Now, Mr. Strickland, we took a considerable amount of time to review the regulatory issues and the code of federal regulations, what the scores actually mean. The Code of Federal Regulations, was that easy to read?

A. I guess it is. I don't recall.

Q. And do you think if you had ever called Mr. Williams and said, You know what, I'm responsible for making sure all regulatory issues are addressed. Are there any regulations that apply to us?

Did you ever make that call?

A. No, sir.

Q. And had you made that call, do you think that Mr. Williams could have explained it to you in these terms, to say, number one, inspections required, make records of inspections, determine if it's up to code, record all deficiencies, keep those records long enough to identify long-term trends?

Are you confident that Mr. Williams could have explained that to you had you asked him?

A. Sure. I'm confident he could have explained it to me.

Q. And as you reviewed your testimony and what these things represent, we know this is what the scores of three represent on these forms. We know this is what the Code of Federal Regulations requires.

Sir, I understand that you didn't know anything about this, either as it was being done or after the men had died, but after we've gone through it and we've listed it out, have you learned anything with regards to any deficiencies Berkeley Electric has made or anything like that? Have you learned anything at all?

MR. JOHNSON: Object on the grounds of relevance. Whether he's learned something or not isn't a part of the claim for negligence.

THE COURT: Sustained.

BY MR. SMITH:

Q. Mr. Strickland, when you started out and you had 29,000 members, was Berkeley Electric -- was there compliance with the federal regulations with the RUS rules? Was it the same back then when you started?

A. No. There was probably -- for the most part, yes, but the rules changed over time.

Q. Do you know what they used to be and what they ended up to be?

A. I wouldn't remember that.

Q. Okay. Is it fair to say that had Berkeley Electric complied with these regulations and done what they were representing on the RUS forms, back when you had 29,000 members that it would be a lot easier to do that as you grew rapidly to 80,000 something members?

A. You want to ask that again?

Q. Had Berkeley Electric complied with these federal regulations when you started out 32 years ago with 29,000 members, right, you complied with these, you did what was reflected on the ratings scores, if you did that back then, would that have made it easier to keep up with the rapid growth of 80,000 members?

A. I don't know.

Q. With the amount of members that you have now, is it even possible to do the things that you're representing to the government you're doing on the RUS forms and the things the federal code of regulations require? Is it even possible?

A. I'm sure it is.

MR. SMITH: I don't have any other questions.

THE COURT: Recross?

MR. JOHNSON: No, sir.

THE COURT: All right. You can step down. Why don't we take a break till 2:00 for lunch.

(Recess taken.)

A F T E R N O O N S E S S I O N

THE COURT: Are you ready to go? Y'all ready to go? Call your next witness.

MR. SMITH: The plaintiff calls Tim Mobley.

TIMOTHY MOBLEY,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q. Good afternoon, Mr. Mobley.

A. Good afternoon.

Q. What is your job title?

A. Vice president engineering and operations.

Q. You work for Berkeley Electric Cooperative?

A. Yes, sir.

Q. Are you the second in command?

A. You could say that. We have other people on my level, but yeah.

Q. How long have you held that title?

A. For close to five years, since 2011, January.

Q. What was your job title before vice president?

A. Manager of technical services.

Q. How long did you hold that position?
A. I think it was about six years. I can't remember for sure.
Q. How long have you worked for Berkeley Electric altogether?
A. Altogether, 30 years. I started as a student engineer.
Q. Do you hold an electrical engineering degree?
A. I do.
Q. I'm going to ask you some sources for some rules that apply to work that Berkeley Electric is doing. I'm just going to ask you in a general sense some of the sources for those rules. I'm not going to get to the various just yet, okay?

Does the National Electric Safety Code have rules that apply to work Berkeley Electric is doing?
A. Yes, sir.
Q. The RUS, Rural Utility Service, do they have rules that apply to the work Berkeley Electric does?
A. Yes, sir.
Q. And the federal regulations, the Code of Federal Regulations, are the regulations that apply to the work that Berkeley Electric does?
A. Yes, sir.
Q. And Berkeley Electric's safety manual, does the

safety manual contain a set of manual safety rules that apply to the work that Berkeley Electric does?

A. Yes, sir.

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.

Q. Yes, sir. And you have a copy of the National Electric Safety Code in your office; is that true?

A. I do.

Q. Mr. Mobley, I want to hand you what's been marked as Plaintiff's Exhibit No. 7. Is that the national -- well, is that portions of the National Electric Safety Code?

A. Yes, sir, it is.

Q. And is that the 1993 version?

A. Yes, sir.

Q. The 1993 version, is that what would apply to the power line in this case?

A. Yes, sir.

Q. I want you to turn to section 232-1.

A. Okay.

Q. And this is the chart. Are you on the same page?

A. Yes, sir.

Q. All right. Do you remember reviewing this chart

in your deposition?

A. I do.

Q. Is this the chart that sets required heights for power lines?

A. Yes, minimum requirements, yes, sir.

Q. Do you recall telling us in your deposition that you did not know what the height requirement was from the National Electric Safety Code regarding the power line involved in this case?

A. I recall discussion about that, yes, sir.

Q. And you told us that you didn't know the required height because you didn't know what the land was being used for at the time; is that true?

A. That's right. I wasn't there at the time it was designed.

Q. And this was 2012, your deposition. Does it sound right?

A. When I did the deposition?

Q. Yes, sir.

A. That's right, 2012.

Q. And this would have been four years after the 2008 electrocution in this case?

A. That's correct.

Q. And up to this point, in 2012 when you testified you did not know what the height requirement was for this

line, I want to talk about some of the people that Berkeley Electric employed up to that point to work on issues regarding this case, okay?

A. Okay.

Q. People in management from Berkeley Electric, did they go out to the scene at Thornhill Farms?

A. You mean when the incident occurred?

Q. Yes, sir.

A. I'm sure they did, yeah.

Q. And was John Hall one of those people?

A. He was at one point.

Q. And he's a staking engineer; was he not?

A. At that time he was staking engineer.

Q. Did Mr. Elrod come out to the scene?

A. I'm sure he did, yes.

Q. And Mr. Elrod's title is the director of training and loss control; is that true?

A. I couldn't tell you the exact title, but that's right.

Q. He's been in loss control for Berkeley Electric for quite some time; is that true?

A. That's correct.

Q. And Berkeley Electric hired an expert in the National Electric Safety Code named Eric Jackson. Did Eric Jackson visit the scene of Thornhill Farms as well?

A. No. I really couldn't tell you. I know he was involved. I couldn't tell you who hired him or how he got involved.

Q. Is it fair to say Eric Jackson went out to Thornhill Farms pretty soon thereafter?

A. That's what I recall, yes.

Q. And there were -- some engineers from McCall-Thomas, the engineering firm, did they go out to the scene as well?

A. They did.

Q. And other people, I understand, went out there; other engineers took measurements and did things like that?

A. I couldn't tell you who else.

Q. The list we've just gone over, can you add anyone to that list to investigate this case?

A. I couldn't, and, just to clarify, I wasn't involved in that investigation at the time of going out there, so that's why I can't answer.

Q. Okay. Mr. Johnson went out there?

A. I really don't know. I really don't know.

Q. And the reason I ask you that is because out of all the people that visited the scene of the electrocution in the four years that passed, the complaints that were filed, the allegations were made,

four years after that had happened, after we took your deposition, you still didn't know how high the power line was supposed to be; is that true?

A. Because I didn't know the use of the land at the time, that's correct.

Q. And did you understand that the person who owned the land when the power line was first constructed, she had already been deposed. Her deposition had been taken before you gave your deposition?

A. I believe I learned that at the time of my deposition.

Q. Now, do you understand that the National Electric Safety Code sets heights based off of two things: One, the voltage running through the line; and, two, the use of the land?

A. Correct.

Q. Those two things and those two things alone determined the required height of the power line?

A. Yes, I agree.

Q. Berkeley Electric obviously knows what the voltage is running through their power lines; is that fair to say?

A. That's right.

Q. And it's Berkeley Electric's job to figure out what the land is being used for, true?

A. I would agree.

Q. Because the current plus use of land equals required height.

A. Voltage, yes, sir. Voltage instead of current, yes, sir.

MR. SMITH: Your Honor, at this time I would move to admit portions of the National Electric Safety Code as Exhibit No. 7.

MR. JOHNSON: Your Honor, he's only printed portions of it. We think the whole code ought to come in.

THE COURT: You can put that whole thing in if you want. I'm only interested in the portions that y'all think are relevant.

MR. JOHNSON: We're going to put those out.

THE COURT: You can put the whole thing in if you want. Mark for me the parts that you want me to see because I don't plan on reading that whole thing just for fun, but if you feel like you need to put the whole thing in, then make a copy of it available and put it in.

MR. JOHNSON: I'll do as you suggest, put in portions.

(Plaintiff's Exhibit No. 7 was marked for identification and admitted into evidence.)

BY MR. SMITH:

Q. Mr. Mobley, after reviewing the landowner's testimony, the person that owned the land when the power line was installed, is it true that you then testified that 18 and a half feet would have been the required height?

A. Yes.

Q. And that's because she had horses, and it was a farm; is that correct?

A. Correct.

Q. And we've all been through this different times, through presentations and depositions and that, but, obviously, the judge here hasn't been privy to all, so I want to take a few moments just to review this chart and see how we're getting to this.

A. Right.

Q. So the top section here, on table 232-1 --

THE COURT: Hold on. Which --

MR. SMITH: That would be --

THE COURT: There's numbers on the pages on the bottom.

MR. SMITH: Okay.

THE COURT: Got you. Okay.

BY MR. SMITH:

Q. So the top portion here, when it talks about you can see the insulated communication conductors,

non-insulation, supply cables, open supply conductors, that describes the voltage going through the power line; is that correct?

A. Yes.

Q. And then off to the left here, that describes the use of the land.

A. Correct.

Q. All right. And so if we look at the top one here, open supply conductors over 750 volts to 22,000 volts, do you see that?

A. Yes.

Q. The power line in this case was 14,400 volts, true?

A. That's correct.

Q. And so this section here, open supply conductors over 750 to 22,000, that would apply to the power line in this case?

A. That's correct.

Q. And if we switch over here to the use of the land, I'm going to direct your attention to number four.

A. Right.

Q. And it says, Other land traversed by vehicles, such as cultivated, grazing, forest, orchard, et cetera?

A. Correct.

Q. And is that what you were looking at when you

reviewed the landowner's testimony to determine that the required height was 18 and a half feet high?

A. Yes, sir.

Q. And if we look at number five here, the next category down, it talks about spaces and ways subject to pedestrians are restricted to traffic only; do you see that?

A. Yes, sir.

Q. And it has a footnote number nine; is that correct?

A. I do.

Q. If you flip the page, we'll see what footnote number nine says, and it describes that spaces and ways subject to pedestrians or restricted traffic only are those areas where riders on horseback, vehicles, or other mobile units exceeding eight feet in height are prohibited by regulation or permanent terrain configurations or otherwise not normally encountered or reasonably anticipated.

Do you understand that as I read it?

A. I do.

Q. Okay. And so if there were riders on horseback, if there were mobile vehicles exceeding eight feet in height and those things were able to travel in the area of the power line, that's why number five would not

apply; is that true? Category number five, flip the page back.

A. Yes, that's true.

(Plaintiff's Exhibit Nos. 8 and 9 were marked for identification and admitted into evidence.)

BY MR. SMITH:

Q. And I'd like to hand you what has been marked as Exhibit 9 and No. 10 -- I'm sorry, No. 8 and No. 9. Are these the measurements done to the power line after the men were electrocuted?

A. Are you talking about No. 8?

Q. Yes, sir.

A. It appears to be.

Q. Okay. And those were done by John Hall?

A. Well, not sure about this first drawing. I know the second drawing was done by John Hall. I'm not sure about the first drawing. In fact, the initials are --

Q. Maybe that was Joseph Jones.

A. It might have been Joe Jones.

Q. And he's with McCall-Thomas?

A. He was. He's passed now.

Q. And do these measurements show -- in Exhibit No. 8, do these exhibits show the height of the power line?

A. Yes.

Q. And I believe if we turn the page there, those are the ones done by John Hall?

A. That's correct.

Q. And the other set here, McCall-Thomas, this was the other Exhibit No. 9?

A. Right.

Q. And there is a cover letter there addressed to Mr. Johnson, Pope Johnson?

A. Yes, sir.

Q. And does that letter indicate these are the measurements of the power line taken at his direction?

A. Yes, sir.

Q. Do these measurements fairly and accurately represent the height of the power line?

MR. JOHNSON: Your Honor, I object on the grounds of hearsay. These are measurements made by other people. He's being asked an opinion about it.

THE COURT: Well, if he took measurements, I guess he could say whether or not they were fair and accurate representations, but if he's not able to say that, then it will be hearsay. He can get it in through somebody else, I suppose, unless he's an expert, and you could get it in through them.

MR. SMITH: I think as we proceed with the examination, Your Honor, and I think based on what we

already heard, these are people that Berkeley Electric hired to take these measurements, and one of them was, in fact, a Berkeley Electric witness, a Berkeley Electric employee, the staking engineer.

I'll proceed further and establish a foundation for these, but one of these measurements was taken by a Berkeley Electric employee himself at the request of Berkeley Electric. That was the John Hall guy that came out to the scene the day of the electrocution and took these measurements.

THE COURT: Is this witness unavailable?

MR. SMITH: I'm sorry?

THE COURT: Is the witness unavailable?

MR. JOHNSON: He's outside.

MR. SMITH: He's on their witness list.

MR. JOHNSON: He's outside.

MR. SMITH: The purpose is to ask how high was the power line on the date the men were killed.

THE COURT: He may be able to answer that without looking at the document.

BY MR. SMITH:

Q. Mr. Mobley, how high was the power line on -- I'm sorry, on April 23rd, 2008? What was the height of the lowest point of the power line, the mid-span?

MR. JOHNSON: Your Honor, could we get a

foundation as to whether he measured it or checked it himself?

THE COURT: Let me ask you this: Is this coming in ultimately down the road? I mean, if it's not going to come in, then I'm not going to spend a lot of time on keeping it out through this witness if it's just going to come in through the next witness.

MR. JOHNSON: Your Honor, I'm going to object to it when they try to use it with the next witness on the grounds of relevance because they are unable to identify the point in the line where the contact was made.

So, for example, if the point was 18 or 25 feet high and it hit right there, there would have been more than 18.5 clearance, so --

THE COURT: Nobody ever took a measurement as to where this thing was set up in relation to the two poles?

MR. JOHNSON: That's correct, so no.

MR. SMITH: Your Honor, that's not entirely correct. That measurement is 199 feet. It's on that document done by Berkeley Electric themselves.

THE COURT: Well, I'll tell you what: I'm going to let it in now. It sounds like it's coming in anyway. If later on there is no foundation for it, if

it's not going to come in through the next witness or another witness, then we can strike it.

BY MR. SMITH:

Q. Let me ask you another question about the document, Mr. Mobley: The measurements that John Hall, the staking engineer, would have taken, and I believe that's Exhibit No. 8, would those have been maintained in the offices of Berkeley Electric?

A. Yeah. I'm sure John Hall had it in his file.

Q. And would those have been maintained in the Berkeley Electric files close in time to when the documents were created?

A. I would expect so.

Q. If you could look at the first page of Exhibit No. 8, could you tell me what the height was the day the measurement was taken?

A. On this date, it looks like the primary was 16 foot 11 inches, and the neutral is 14 foot, even at apparently the lowest point. Again, I haven't seen this drawing before. I apologize, but I haven't.

Q. And so the lowest point, is that referred to often as the mid-span?

A. It is often, but I would assume that the ground is level the whole way, because that could be different depending on the terrain.

Q. But that measurement taken on that day was 16 feet, 11 inches; is that true?

A. It appears that way. I'm reading off of here. It's a little bit sketchy, but it does appear to be.

Q. Yes, sir. And the measurements taken by McCall-Thomas, Exhibit No. 9, if you'll just flip to the second page, and it says there for the mid-span primary clearance, what was that reported at?

A. It's 16 foot, 11 inches.

Q. And both of those would be about a foot and a half under 18 and a half feet; is that true?

A. Right.

Q. Now, I want to ask you some questions about pole inspections. We were asking Mr. Strickland about some of these, and my memory was he referred that off to you. Do you see that okay?

A. Yes, sir.

Q. A power company must construct and maintain its power lines -- I got the wrong one.

A power company must inspect their power lines to ensure they are at code height to prevent injury to people or death by electrocution. First, do you agree with that?

A. Is that a specific rule or code or something that you found somewhere, or is that a statement that's been

put together?

Q. Well, when we started off my direction examination of you, I talked about some of the sources for the rules, right? And is this a rule that applies to Berkeley Electric, that they must inspect their power lines to ensure they're code height to prevent injury to people or death by electrocution. Is that a mandatory rule for Berkeley Electric?

A. I don't recognize that as a rule or a code. It looks like rules and codes and assumptions to me. Unless you can tell me you found that written somewhere, maybe I'm overlooking.

Q. Well, one of the -- this is where it comes from. We made some notes of the Code of Federal Regulations, and we reviewed with the prior witness -- we reviewed this document with the prior witness, and we talked about that this Code of Federal Regulations requires inspections.

It requires records be kept of the inspections. It requires that the inspections determine if the line is up to code. It requires records be kept of all deficiencies, and it requires the records of those deficiencies be kept long enough to identify long-term trends in a general sense.

Does that sound accurate to you?

MR. JOHNSON: I object. It's a compound question with a whole slew of alleged facts. Object to the perform of the question.

THE COURT: Overruled.

BY MR. SMITH:

Q. Based on your understanding of what the Code of Federal Regulations requires of Berkeley Electric, is that a fair summary of what it requires?

A. I'll have to admit that I haven't studied that Code of Federal Regulations to find those exact words out. I just have to admit that to you. We have other documentation and things that we go by, the National Electric Safety Code, like you mentioned.

Q. But as we sit here today, is it your testimony that you don't know whether or not Berkeley Electric is required to inspect their power lines?

A. I don't know if we can say we're required. I know the National Electric Safety Code talks about inspecting as experience dictates. There are U.S. bulletins that we go by that spell out some inspections; for example, inspection and treatment on an eight-year cycle, which we followed. I don't want to get ahead, but --

Q. Well, if we talk about the National Electric Safety Code that inspections are -- what was the term that you used, that inspections are required as

experience has shown necessary?

A. As experience dictates, yeah.

Q. Is never an option?

A. No. I wouldn't say that's an option.

Q. So did that tell you that Berkeley Electric is required to inspection of its power lines?

A. I don't know if required. Expected to do inspections, that may be a better word.

Q. Are the rules from the National Electric Safety Code, specifically the one that you just mentioned, that power lines shall be inspected at intervals as experience has shown necessary, is that a mandatory rule?

A. Again, it's -- you could say that, but it doesn't really tell you anything about how often or anything. Yes, they expect you to do it.

Q. All right. And I've got the printout with the actual words from the statute. Would that help you in answering these questions?

A. For this?

Q. Yes, sir. And that's Exhibit No. -- what is that?

A. 3.

Q. And this is entitled inspections and tests?

MR. JOHNSON: Your Honor, could we ask for some foundation showing that the witness has ever seen it before?

THE COURT: Who is the letter from?

MR. SMITH: This the printout from the Code of Federal Regulations.

BY MR. SMITH:

Q. Mr. Mobley, do you know what the federal regulations require of Berkeley Electric?

A. I don't know this in this format. It just looks like it's very similar to the RUS bulletin on operations of maintenance and review, and I just haven't looked at it in this format.

Q. Because the bulletin actually says our practices are contained in 7 CFR 1730, do you remember that?

A. That may be true. I just don't remember that number.

Q. But you never went and read 7 CFR 1730?

A. I can't tell you I read it in detail, no.

Q. All right. So if we end up, as the vice president of engineering and operations, it's your testimony that you do not know whether or not Berkeley Electric is required to inspect their lines to make sure they're at code height; is that true?

A. No. I believe that we are expected to inspect our lines. I believe that.

Q. And do you believe part of that inspection must include a determination of whether the utility complies

with the National Electric Safety Code?

A. I believe that's part of the inspection, yeah.

Q. So a power company must inspect their power lines, true?

A. I would agree.

Q. All right. And part of that inspection must be to ensure it's at code height; is that true?

A. I would agree with that.

Q. And the reason you want to make sure it's at code height is so you can prevent injury to people or death from electrocution?

A. I certainly hope that to be a result; however, I have to clarify that does not guarantee prevention of injury to people or death. It just doesn't. It doesn't guarantee it. That's the only issue I have with that statement.

Q. We heard the term before. I believe it's Mr. Jackson that came up with this, isolation by elevation. What does that mean to you?

A. Isolation by elevation? It means the higher you get in the air, the less chance -- it would be more isolated.

Q. Sure. Keeping it at the right height, that makes sure that the people who are underneath, or at least helps that the people underneath, won't make contact with

it, wouldn't get hurt?

A. I would agree the terminology helps.

Q. Okay. And I just mentioned it before, the pole inspectors, and someone asked you some questions about that with regards to the inspection program?

A. Right.

Q. Tomberlin?

A. Tomberlin.

Q. Tomberlin that's the pole inspection company?

A. They were the ones that were doing the work at the time of the inspection report that I saw related to this.

Q. The 2002-2003.

A. Correct.

Q. Okay. And is there a bid that goes out to the pole inspectors first?

A. We have bid it in the past, but sometimes we renew it without bidding, so if that's what you're asking.

Q. In the bidding process, y'all generally describe the work to be done so they can give you a price on that work?

A. That's correct.

Q. I'm going to hand you what's been marked as Plaintiff's Exhibit No. 5. Does that reference -- what is it, Tomberlin?

A. Tomberlin is the way I pronounce it.

Q. And does this contain -- it says, You're invited to submit a quotation in connection with the Berkeley Electric Cooperative's 2002-2003 pole inspection program. Use the enclosed form for submitting proposals.

And then right behind it, we've got some MSD sheets. I imagine those would describe the chemicals the poles inspectors would be using to treat the poles?

A. That's correct.

Q. And in the actual bid here, we've got a table of contents?

A. Yes, sir.

Q. And the first thing on the table of contents, notice and instructions to bidders, so would this contain the instructions for the pole inspection project?

A. Yes.

Q. And it says here, number one, sealed proposals for -- what's that?

MR. JOHNSON: Your Honor, I note an objection and ask for foundation testimony, if the witness has had any -- that he's seen this before today.

MR. SMITH: Your Honor, I think we heard from the previous witness that he's not the person to question about this, that Mr. Mobley is.

Mr. Mobley told us before I handed him the document he knows it was Tomberlin. He knows it was the

bid going on. He knows the bid describes the work to be done. We're going through the work for the bid that was to be done.

THE COURT: Is this the first time he's ever seen this document, though? I guess that's something we need to know.

MR. SMITH: Yes, sir.

BY MR. SMITH:

Q. You testified earlier that part of Berkeley Electric's inspection program was done through the pole inspectors. Do you recall that?

A. I do.

Q. When you testified to that, did you know what the pole inspectors were actually doing?

A. I do have an understanding of that, yeah.

Q. Do you know what Berkeley Electric has asked pole inspectors to be doing?

A. I do have knowledge of that, yes, sir.

Q. And would you expect these notice and instructions to bidders to include just that, instructions to Berkeley Electric to know exactly what it is to be doing?

A. I would. The notice of instructions to bidders alone would not accomplish all that. It would have to be a specification attached to it as well.

Q. Okay. But in term terms of the -- it says sealed

proposals. It says that's for the inspection, evaluation, and necessary treatment of standing poles; is that true?

A. Correct.

Q. It doesn't describe anything in that section about --

MR. JOHNSON: Your Honor, I need to interrupt and object. He never asked the question. Has the witness seen this before?

THE COURT: He's the vice president in engineering. The guy that wrote this letter out was the vice president of outside operations, whatever that is. So just because they work for the same company doesn't mean he's ever seen this before. It may be outside the area of his being a vice president.

BY MR. SMITH:

Q. Mr. Mobley, I want to ask you this in a general sense: You said when they bid out, or maybe they just renew the old bids, but instructions go out to tell the pole company exactly what they're supposed to do; is that right?

A. Yes.

Q. Is part of those instructions to inspect, evaluate, and treat standing poles?

A. That's true.

Q. Does Berkeley Electric tell the post inspectors specifically, Inspect our power lines for proper code height under the National Electric Safety Code?

Is that part of the instructions to pole inspectors?

A. I really can't remember specifically what it says. I feel sure the National Electric Safety Code is referenced, but I don't remember exactly what it says.

Q. Okay. But the term inspection, evaluation, and treatment of standing poles, does that describe in general the work the pole inspectors are required to do?

A. Yes, it does. I'm familiar with it.

Q. And the reason you call them pole inspectors is because they're doing exactly that: They're inspecting the poles, right?

A. That's the primary thing they're doing. That's not everything they're doing.

Q. Let me ask you this: Have you ever seen the bid to the pole inspection company?

A. Have I ever seen it?

Q. Yes, sir.

A. At different times I may have. I may not have seen this specific one, but I have been involved in different ways over the years.

Q. You've seen several of them in the past. You may

not have seen this one in particular. Is that your testimony?

A. Yes.

Q. Have they changed drastically over the years, meaning you asked for certain things at this time and asked for totally different things at another time, or would you expect the pole inspection team to be pretty uniform as you go through the process?

A. I don't recall it changing a bunch. I can't say exactly.

MR. SMITH: I don't want to lead without your permission, but does that satisfy --

MR. JOHNSON: May I ask a question, simple question?

THE COURT: I don't think you've asked him yet. The question he is objecting to is, has he ever seen this document before?

MR. SMITH: I believe his testimony was he's seen lots of them over the years. I don't know that he's seen this one in particular, but he does know they haven't really changed much over the years.

THE COURT: I take it this Charles Staley is not available, or is there some reason why you're just not going to bring him in and ask him this question as opposed to trying to bring it in through someone else who

may or may not peripherally dealt with that issue?

MR. SMITH: Yes, sir, and it's a good question. I think as we went through with the last witness and we went through with this gentleman, one of the things that Berkeley Electric is representing in these RUS-300 forms is their inspection form and the details thereof.

While Mr. Strickland certainly testified to his, Mr. Mobley is on those forms as well, and he's representing what the inspection program is. If Berkeley Electric is going to claim that part of their inspection program is what the pole inspectors do, and he signed those forms indicating what that inspection program is, I think it's fair game to cross-examine him about the details of their inspection program.

THE COURT: Well, I suppose that's fair enough. If he's going to say it was done properly, then I guess it's fair game to ask him what his basis is for coming to that conclusion and being willing to sign his name to a piece of paper saying it's done correctly, or at least that it's done.

MR. SMITH: And we'll go a little bit out of order here. Exhibit No. 1, the very last page which contains Mr. Mobley's signature under rated by on that form, that is the one that has the comments regarding the

inspection program, approximately 10 percent of the poles are inspected annually. Employees are trained to visually inspect lines during their daily operations.

THE COURT: All right.

BY MR. SMITH:

Q. Mr. Mobley, down here on number seven, it says contract is the entire agreement. That's back on the notice and instructions to bidders?

A. Yes, sir.

MR. JOHNSON: Your Honor, I object. I don't object to the questions he's asking about the form, the RUS-300. If he put his name and signed it somewhere, he's fair game, but on this document, we still haven't heard the question has the witness ever seen this document before? If he hasn't, I don't think it's appropriate for him to ask questions about it. He could ask about other parts of the inspection program.

THE COURT: Well, go back to what he just said on this 2008 inspection, where he's the guy that rated this thing, and it says approximately 10 percent of BEC's poles are inspected annually by an outside contractor, and he, in essence, is signing off that this was done.

I guess it's kind of fair game that asks him what standards are operated -- or were they done to. If

you're going to sign your name and say those inspections were done, it either means that he knows that they did it, or he just signed his name to a piece of paper, saying it's done, but what is he certifying when he puts his name down?

MR. JOHNSON: Well, Your Honor, this is a pole inspection in 2001-2003. The RUS form he signed off on is 2008. We started this exercise with counsel saying that we had misrepresented to the government what we were doing in terms of inspection, and we spell it out on the form itself.

So I'll have objections to him asking how he got to the rating, but I don't think it relates back to the time period we're talking about.

THE COURT: Was there one that was done in between 2001, when this request for bid went out, and the 2008 certification?

MR. SMITH: Your Honor, we initially got on to this document because we asked for any and all records of inspections. The 2002-2003 pole inspection program is all we got. I guess that they examine a certain amount of poles each year, but, you know, back to what you said originally, Your Honor, the 2008 form, he's saying what the inspection program is, and that includes the pole inspectors.

THE COURT: Let me ask you this: When Tomberlin got the bid, presumably in 2001, when they were doing their inspection that you reported was done in 2008, was this the contract they were operating on, or was there a subsequent contract?

MR. SMITH: We asked for records of all inspections, and, Your Honor, this is -- the only one we ever got was the 2002-2003 pole inspection, you know.

THE COURT: Unless you can say there is something else, it sounds like you're trying to -- it's not exactly Whack a Mole, but if this is the contract that these inspections are done under and he is certifying under 2008 that they're being done, then he ought to, in all fairness, be able to be cross-examined as to what goes into him saying, Yeah, you know what? I certify that these things are done.

How do you know that?

MR. JOHNSON: There is the 2002-2003 contract. There was an RUS rating 2005. There was one in 2008, which I believe is the only one he signed off on, and I don't believe they asked -- what they asked us to give them was records of inspections of this line. This was the inspection --

THE COURT: Are you saying that there was a different contract that Tomberlin was operating under

when they did the last inspection that got signed off on in 2008, other than the one that got turned over to them in discovery?

MR. JOHNSON: No, Your Honor.

THE COURT: Is it possible that there's one contract for multiple years?

MR. JOHNSON: I think it's possible.

THE COURT: Well, I guess I'm trying to understand what you're saying.

Tomberlin has the contract. They either got it as a result of their winning bid in 2001, or they got it on a different bid after 2001.

Now, he says y'all didn't give him anything after 2001 that is responsive to their request for it, so he and I would assume that Tomberlin is still operating under the 2001 guidelines that they wanted to bid on when they got the inspection done in 2008.

MR. JOHNSON: The 2002-2003 inspection was the last inspection of this line until the eight years runs, so they would not have been back to inspect this line because they do this percentage of their system every year on an eight-year cycle.

The witness said he's seen contracts prior, maybe subsequent. He doesn't know whether he's seen this one before. I think that's what he's seen.

MR. SMITH: Maybe I can help narrow it down a little bit. What this is, I imagine, is the 2002-2003 part, and they inspected this power line in particular at that time, if they do 10 percent this year or whatever, but this was the contract in place for the inspection by the pole inspectors in 2002-2003 that included the line in question, the actual line.

THE COURT: That's the only one I care about then.

MR. SMITH: Yes, sir.

THE COURT: Okay. Overruled.

BY MR. SMITH:

Q. Number seven, sir, under the notice and instructions to bidders: Contract is the entire agreement.

As the vice president of engineering and operations and your tenure at Berkeley Electric, does that tell you that the things that are written into this contract are the entire agreement?

A. Yes.

Q. And that means if we said verbally or we sent another note or we had different instructions, those aren't valid. What's valid is in this agreement; is that what that means to you?

A. It does. We may have written in here the ability

to make modification. I'm not sure, but we may have. It's not uncommon.

Q. If you'll flip to what's labeled as page three, ten pages in, it's got a three at the bottom?

A. Yes, sir.

Q. It starts with general at the top?

A. Yes.

Q. Does that describe the scope of the work?

A. It does.

Q. Read for me what that says.

A. This specification covers the requirements for the inspection, evaluation, ground line treatment, and internal treatment of BEC wood poles.

Q. So in terms of the scope of the work that was being done, nowhere does that say that the pole inspectors are to be inspecting power lines for National Electric Safety Code height?

A. It doesn't say it in that statement. There may be something else in the document that that refers to in more detail.

Q. In terms of 83, if you look down to contractor requirements, it says, Contractor shall furnish all supervision, labor, tools, equipment, transportation, chemicals, pesticides, and material necessary for the inspection and treatment of wood poles as required by the

specification; is that correct?

A. Yes, sir.

Q. In terms of the contract requirements, nowhere does it say anything about be familiar with the National Electric Safety Code, use people that are trained in the National Electric Safety Code, know what the required heights are, make sure the power lines are those heights. It doesn't say anything about that, does it?

MR. JOHNSON: Object to the form of the question.

MR. SMITH: I withdraw the question, Your Honor. I think it was probably compound.

BY MR. SMITH:

Q. If we kind of break down my last question, you look on the next page, A(6) personnel requirements?

A. Yes, sir.

Q. I'm sorry, personnel requirements. I'm sorry, personnel qualifications. In this whole description of the qualifications the pole inspector personnel are supposed to have, does it say anything about experience with the National Electric Safety Code, knowing the required heights, knowing what land use is, things like that?

A. No. I don't see that in there.

Q. It says supervisors must have at least two years'

experience in wood pole inspection and treatment, right?

A. That's correct.

Q. And if we go to the actual part B(1), and it's got a number seven at the bottom, general procedure, do you see that?

A. Yes.

Q. A wood pole inspection begins with a visual inspection that must be done with the aid of binoculars, right?

A. Right.

Q. And the visual inspection, I think under part B(3), the visual inspection, that includes the sounding. What is sounding?

A. It's basically hitting the bottom of the pole with a sledgehammer and listening for rattling or vibration inside the pole.

Q. The pole inspectors can tell the condition of the pole, and one of the things that they do is they knock on the pole and they have been trained to recognize what that sound represents.

A. Correct.

Q. And boring, what is boring?

A. When they drill into the pole and check the inside.

Q. And that's part of the evaluation of pole

strength?

A. That's correct.

Q. Let me ask you a question, and, sir, I want you to feel free to review this document all that you need to and take the time that you need to do that, but does it say anywhere in this contract, in this bid, in this agreement, does it say anywhere in the entire thing part of your job is to inspect the height of power lines for code compliance, National Electric Safety Code compliance?

A. Under page seven, section B, general procedure, where it talks about looking at other things, and, of course, it says problems which must not be overlooked.

Q. Okay.

A. They include frayed conductors, chipped or broken insulators, loose or missing hardware, split or damaged cross arms, loose or broken guy-wires, broken ground wires, leaning or damaged apparatus. Pole shall be examined, and it talks about things that should not be overlooked.

Q. Okay.

A. It doesn't say specifically everything that may be looked at.

Q. And in terms of the list you just described, I noticed the term frayed conductor. Conductor is a power

line, correct?

A. That's correct.

Q. Is there anything else in that whole entire sentence that you just mentioned that reflects a conductor of a power line?

A. It does what now?

Q. Is there anything in this description of other things to look for -- is there anything in there other than frayed conductors? Is there anything in that list that specifically mentions conductors, power lines, or anything that you would term to be that?

A. I don't see anything else in that.

Q. In terms of the -- and I think -- is this what you were talking about before in terms of what to look for?

A. I think that's one of the things I had in mind.

Q. Okay.

A. I don't think it calls for anything anywhere else.

Q. And a frayed conductor would mean what to you? What is a frayed conductor?

A. Typically -- the conductors we use typically have multiple strands in them, and then you'd have one that might break away and kind of come away from the rest of them.

Q. Okay. But what they're specifically looking for with the conductors, is that what you just described?

A. Well, that's -- again, that's a list of things not to overlook. Not to overlook, that means you're not supposed to look for other things.

Q. Okay. But what I'm asking you here is, very specifically, is there any language in this agreement, this bid, any of this stuff, is there any language that very specifically says inspect our power lines to make sure they're at the height required by the National Electric Safety Code?

Is that anywhere in this agreement?

A. I don't believe that statement is in this agreement.

Q. Is there anywhere in the agreement that the pole inspectors are specifically required to note what the use of the land is at the time that they're inspecting the poles and looking for the frayed conductors?

A. Yes, I believe so.

MR. SMITH: I think, based on the testimony, I'll move to admit the pole inspection bid as Plaintiff's Exhibit No. 5.

MR. JOHNSON: Same objection.

THE COURT: Over their objection, I'll admit it.

(Plaintiff's Exhibit No. 5 was admitted into evidence.)

BY MR. SMITH:

Q. Mr. Mobley, let me switch gears for a moment.

I'm going to ask you about safety rule number three that's up on the board: A power company must tell the truth about its compliance with electrical safety laws when reporting to the federal government to prevent injury to people or death by electrocution.

Do you agree with that statement as written?

A. When you call them safety rules and they have these numbers is this coming from a particular document or is this something that you have put together or --

Q. We talked earlier in your testimony about different sources for rules, the National Electric Safety Code, the Code of Federal Regulations, the Rural Utility Service, Berkeley Electric Safety Manual, those documents and those laws contain various rules that apply to Berkeley Electric; is that correct?

A. Correct.

Q. I'll be straight up with you and just tell you, we have created three safety rules that we contend apply in this case.

Number one we contend comes from the National Electric Safety Code, requires the lines to be 18 and a half feet above land with field and animals; number two, inspect lines to make sure they're at code height, and

that comes from the National Electric Safety Code; number three, I don't know that there is a particular source for this.

What I'm asking you is if you have to tell the truth when reporting to the federal government? I think that's what this is getting to.

A. I believe we always tell the truth.

Q. My question is -- I don't want to put you off. My question is -- I know you do tell the truth, but are you required to tell the truth or is that just a choice you're making?

A. I would expect the federal government expects us to tell the truth. I just don't know if that statement as written, I'm not trying to be -- I just don't know if that statement is written anywhere. Sure, I know they would expect us to tell the truth, absolutely.

Q. And these electrical safety laws -- and I'll just tell you again, part of what we're telling you here, part of the regulations on power companies, certain things are expected. National Electric Safety Code you said requires inspections at intervals as experience has shown necessary.

Never is not an option, right?

A. I agree.

Q. Those are some of the electrical safety laws that

I'm referencing, that Berkeley Electric must tell the truth about their compliance.

Does that help?

A. Yeah.

Q. I want to ask you about the RUS-300 from, and I want to ask you about the one you signed, okay?

A. Okay.

Q. And that would be 2008 version, and this would be Exhibit No. 1. I'm handing you what has been marked as Plaintiff's Exhibit No. 1.

Do you recognize that?

A. Yeah. I recognize the forms.

Q. If you'll turn to the last two pages.

THE COURT: Which document?

MR. SMITH: That's Exhibit No. 1, and it would be the last two pages of Exhibit No. 1.

BY MR. SMITH:

Q. They were reviewing the review rating summary from January 2008?

A. Yes, sir.

Q. If you flip the page, we can look at the signatures there.

A. All right.

Q. You signed that one, did you not?

A. I did.

Q. And you signed as rated by; is that true?
A. That's true.
Q. Does that mean you're the one that did the ratings?
A. No.
Q. No? Mr. Strickland signed those as reviewed by.
A. Correct.
Q. Based on his understanding of the document, does that mean he reviewed it?
A. It would.
Q. What does rated by mean to you?
A. It means somebody rated it.
Q. You signed this document as the person that did the ratings?
A. I will have to explain the process and the explanation.
Q. Well, I want your explanation, but let me ask you just point blank again, you signed as the person who did the ratings; is that true?
A. I did.
Q. But you're telling us you were not the person that did the ratings?
A. I did not fill out the form to do the ratings, no.
Q. Did you know what the ratings even meant?
A. I did. I had an understanding of it, yeah.

Q. Did you use the bulletin to figure out what those ratings meant?

A. Again, jointly with a consultant that we work with and our RUS GFR, my involvement -- I'm sorry.

Q. All right.

A. I'll wait till asked.

MR. JOHNSON: Your Honor, can the witness give the explanation he started to give a moment ago?

THE COURT: Sure.

THE WITNESS: My experience with the O&M reviews, what I can really speak to, which it's actually been a joint effort, but as long as I can remember, we have hired a third party consultant to come in and do the ratings for us and to look at our records and to examine what we do, ask questions, look at files.

They complete the rating, the form that you're looking at in a draft format, and typically we sit down, the consultant. I've been in on some of those sit-downs, and then the RUS GFR go over them and discuss what has taken place.

And as you probably know, the one before this one, 2005, there was a consultant that signed off on it under rated by. When this one was completed, the RUS GFR wanted somebody from the co-op to sign where it said rated by and he didn't want the consultant to sign it.

So I'm not real sure what his logic is there other than he wanted to make sure the co-op personnel, which in this case would be me, had looked at it, the engineering on staff, and I just want to clarify that. The consultant does it and we do that because we want to.

We want a third party to come in and take a look, examine everything, and there's actually been cases where the GFR would actually change a rating, so, ultimately, they have not only -- when they sign and it says and reviewed by, this gentleman, Doug Wilson, it's more than reviewed by. He's very involved, and even the bulletin, if you read it, it actually talks about them initiating it. It talks about them being involved, talks about the RUS-GFR going out and doing inspections themselves, which he has, so it's almost a joint process.

Q. When the RUS official requested Berkeley Electric signed that form, do you think this is because these are Berkeley Electric's ratings, not McCall Thomas's ratings, not some engineering firm y'all hired, but these are Berkeley Electric's ratings?

A. They are a rating of Berkeley Electric Co-op.

Q. And Berkeley Electric is required to complete this form, true?

A. Yes. We are required to complete it, but, again, we get somebody else to do it.

Q. Berkeley Electric chooses to hire another company, like McCall-Thomas, to give y'all opinions, information, about what the ratings should be; is that fair to say?

A. Forgive me, but they actually do the rating and go over it with us, but it is true that a co-op could do this on their own, and what we do is get somebody else to look over it and help us with it and take the lead on it, which I consider to be a positive.

Q. When Berkeley Electric signs this form, are you certifying that the performance ratings are true and correct?

A. Yeah, I am, and I agree with them, yeah.

Q. Okay. If you can look at that form from 2008, part one?

A. Yes, sir.

Q. See where it says part one up top, transmission and distribution facilities?

A. Right.

Q. And if you look down to distribution lines overhead, do you see that, number three?

A. Yes, sir.

Q. And part B, under distribution lines overhead, says compliance with safety codes clearances; do you see that?

A. Yes, sir.

Q. And that's a score of three; is that right?
A. That's right.
Q. And that is the highest possible score a power company could get under that; is that true?
A. That's true.
Q. If you look at what's been marked as Plaintiff's Exhibit No. 2, this is the bulletin that RUS puts out to help electrical companies fill out this form; is that correct?
A. That's true.
Q. If you turn to Exhibit 2 on the bulletin, we're going to go to section four, distribution of lines overhead. You'll see that in the top left-hand corner.
A. Yes.
Q. Part B, distribution lines overhead, part B, compliance with safety codes, clearances; do you see that?
A. I do.
Q. The title of this document is conditions normally needed to justify a rating of three.
Do you understand that?
A. That's right.
Q. So this explains what a rating of three means when it's on the RUS-300 form. Is that your understanding?
A. Yes. I think the word is important there.

Q. Was anything abnormal about Berkeley Electric in 2002 when this form was filled out?

A. Anything abnormal?

Q. Yeah.

A. I'm trying to figure out the exact date it was filled out.

Q. I think it was January 2008, if I'm not mistaken.

A. That's when it was signed, but --

Q. Anything abnormal during that time? Is there anything abnormal that would mean that these conditions normally needed would not apply?

A. Apparently nothing to our knowledge that was abnormal.

Q. Okay. So under compliance with safety codes, clearances, it says all facilities staked prior to construction by personnel familiar with National Electric Safety Code requirements.

Do you see that?

A. Hold on one second.

Q. Page eight, all the way at the bottom.

A. Okay. Yes.

Q. In the second sentence here, it says, Line patrols identified changed conditions requiring greater clearances; do you see that?

A. Correct.

Q. And the changed conditions, this is talking about are changes in the use of the land, true?

A. I think it could mean any kind of changed conditions.

Q. One of those changed conditions could be the use of the land?

A. I don't think any -- again, I don't think it specifies a type of condition, so I think it could be anything.

Q. Okay. Including changes in the use of the land?

A. I would say.

Q. You know, line patrols are done by linemen; is that right?

A. During the time of these O&M reviews that we've been talking about, line patrols were done by anybody and everybody who worked out in the field including meter readers who went to every meter monthly so they were all trained to look at the lines as they went about.

Q. All right. Linemen and all those people you described, no one is specifically told to note the use of the land when they're out there are they?

A. Specifically told?

Q. Yes, sir.

A. I don't know they were told to look at that.

Q. Berkeley Electric does not write down what the use

of the land is at any time, does it?

A. I don't know who would write that down, no.

Q. Not when the plans were drawn to construct the power line.

A. I couldn't say that about -- you know, I wouldn't say that about every design. Everything that would be written down would be written down on the staking sheet at the time the job was designed, and they have been known to put notes on there about things in that area, primarily to let people know who are constructing lines what to look out for, what to watch out for.

Q. But is it your testimony here that there is a place on the staking sheet? When you have the staking sheet -- I believe you've seen that before?

A. I have seen it, yes.

Q. Is it your testimony here the staking sheet has a place for someone to write down use of land?

A. I can't remember if there is a specific heading of that nature, but there is a blank space where people can write names and things.

Q. My question is, is there any space on the form that people are supposed to specifically fill that notes the use of the land on the staking sheet, is there?

A. I don't believe so.

Q. If it's not written down on the staking sheet,

it's not written down anywhere, the use of the land?

A. I don't think so.

Q. And it's not written down when the linemen are inspecting the power lines, working on the power lines, the meter readers and all those other people, they're not specifically looking for changes in the use of the land, are they?

A. I think you're looking for anything that's abnormal.

Q. Right.

A. And I think there has been occasions where they came across people doing construction or building a barn or building something near a line and then they brought it up to our attention and we deal with it.

So we're always looking for things that are abnormal, unsafe. Possible hazardous conditions are the words that we typically use, possible hazardous conditions.

Q. When you talk about looking for possible hazardous conditions, are you saying that that also says -- does that also mean you're supposed to write down what the use of the land is at the time you're inspecting that power line?

A. I don't know that you need to write it down. I don't know.

Q. The reason I'm asking you is, if a lineman is supposed to be identifying changed conditions which require greater clearances, and we talked about this with the chart, changes in the use of the land, maybe it needs to be a higher clearance. It might mean a lower clearance. Changes in the use of the land could indicate that?

A. It could.

Q. So a lineman, if it's never written down in the first place what the line started at, right -- you don't think it would be important to write that down, so if a lineman is out there and he's looking at a power line and he needs to note whether or not the use of the land has changed, you don't think it's important that the original use of the land be written down somewhere?

MR. JOHNSON: Your Honor, I object. I was thinking we would get through this, but there's no claim in this case that the failure to note the use of the land was the proximate cause of the accident, so if they did it or didn't do it, it wouldn't be relevant for the claim being made in this case.

THE COURT: It's not going to the issue of proximate cause. It's going to the issue of the breach of the standard duty. You may not agree there is such a duty, but this isn't going into proximate cause, it's

going to the standard of care, breach of duty.

MR. JOHNSON: Your Honor, breach of duty has to be tied back to cause some injury to the plaintiff, and there is no evidence --

THE COURT: They may not prove that, but there are three elements in every negligence claim. There's duty, breach of duty, and proximate cause for damages that are proximately caused by that.

His question, line of questioning, isn't going to proximate cause, it's going to standard of care, so overruled.

BY MR. SMITH:

Q. That explanation I gave you about the use of the land -- and we talked about the people going out to do these inspections, right, the linemen, the meter readers, all those people. Well, if a score of three means line patrols are identifying changed conditions, changed conditions, don't they need to know what the conditions started out in the first place?

A. I think -- not necessarily. I think what we can look at is the line as it is and the condition of what's going on it around it today. I don't think you have to know what it was before. I think if you have a knowledge of what the line should be and you know what's going on around that line today, that's really what is critical.

So I don't know that you really need to know what it was before. I don't think you do.

Q. But you would have to know what it was originally before it's changed; would you agree with that?

A. But a change alone doesn't mean it's unsafe.

Q. Okay.

A. Or that it's a possible hazard.

Q. But for line patrols to identify changed conditions, regarding change, the people doing those line patrols, they have to know what it was originally to know that it has changed?

A. I understand the argument you're making, but I don't think there's an assumption being made in this writing that when you go out there and you find something that is unsafe that something has changed. I'm pretty sure that's the context that is written. If I go out there today and I find a tower leaning, communication tower leaning, I'm pretty confident that's not the way it was built, so it's changed.

So in that context, I know you're focussing on change, but what I'm more concerned about is, is it safe today? Is it solid today?

Q. I guess to get to the meat of what I'm really asking you about, the perfect score of three, perfect compliance with safety codes, that represents to the

federal government line patrols are identifying changed conditions regarding greater clearances?

A. Right.

Q. And if they don't know what it was originally, they don't know it changed, the meter readers, the linemen, none of those people, right?

A. I guess they wouldn't know it was different than it once was, yeah.

Q. But that's what this score of three represents is happening, is it not?

A. I believe it's we're not aware of some condition due to some change occurring.

Q. But that's not what it says, does it?

A. Well, you read it.

Q. And there is only two sentences.

A. Right.

Q. All right. Mr. Mobley, did you know what the ratings meant when you signed that form as the rated by? Did you know what these rating scores mean?

A. I do.

Q. Did you know what this score for three -- under compliance and safety code clearances, did you know that was representing that line patrols are identifying changed conditions requiring greater clearances? Did you know that?

A. I knew that it represented that we've done line patrols to -- as much as we possibly could to make sure things were safe.

Q. Right. That's what you understood it meant, not the actual text of this bulletin contained in Exhibit No. 2, right?

A. Probably didn't focus on the changed word, as you have.

Q. And we asked you that question before in your deposition, and I believe your answer was we did all we can. Was that what was in your mind when you were signing as rated by the 2008 form?

A. Well, you know, again, if I can clarify going back to our hiring of a consultant and working with the GFR, by working with those people, they are rating us in the context of what they see as normal practice in the co-ops in the State of South Carolina and even in the nation.

So, again, when those ratings are done by those folks, they're doing them in that context. This, again, is a guide, and it has the word normally in it up at the top, but it is a guide, and that's why I have to emphasize consulted in the GFR because they have knowledge of, again, going back to what the NESC says as experience dictates.

So when they look at us in the context of other

utilities and what they're doing, then that's where you get your ratings, so that's something you have to consider.

Q. You never asked those people who were giving input on these ratings, Hey, I'm signing this form under compliance of safety code clearances, and I see a three here. What exactly am I certifying with this three?

You never asked him that, did you?

A. Sir, we went through every rating and talked about every rating, so --

Q. Did you ask them that specifically for that part three, distribution lines overhead, compliance with safety codes clearances? Did you ask them exactly what that score of three meant when you did this whole review process with all these folks?

A. I couldn't tell you exactly what I asked them.

Q. Had you asked them, you probably could have turned to the bulletin and reviewed those two sentences describing what the rating represents; is that true?

A. I'm sure I could have turned to it.

Q. And the bulletin was in Berkeley Electric's possession, right? This is something that RUS sends to Berkeley Electric, true?

A. It's posted on their web site. It's available.

Q. They send it to you also, don't they?

A. I can't say they send the bulletin to us, but, I mean, we can get it different ways.

Q. Either way, you had the bulletin, right?

A. Yes, yes, we did.

MR. SMITH: That's all the questions I have for you.

THE COURT: Let's take five before we start cross.

(Recess taken.)

THE COURT: All right. You ready?

MR. JOHNSON: Yes.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. First, I want to show you the cover sheet and provision of the 1993 National Electric Safety Code.

A. Yes, sir.

Q. On the second page of this document, does it show the purpose?

A. Yes, sir.

MR. JOHNSON: I would offer this into evidence.

MR. SMITH: I don't have any objection, Your Honor.

THE COURT: All right. It's admitted.

(Defendant's Exhibit No. 1 was marked for identification and admitted into evidence.)

BY MR. JOHNSON:

Q. Mr. Mobley, looking at Defendant's Exhibit No. 1 on the second page, does it provide, under introduction to the National Electric Safety Code, the purpose of the code?

A. Yes, sir.

Q. Would you look there and read to the Court what the purpose of that code is.

A. The whole section?

Q. If you don't mind.

A. The purpose of these rules is a practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and associated equipment. These rules contain basic provisions that are considered necessary for the safety of employees and the public under the specified conditions.

The code is not intended as a design specification or as an instruction manual.

Q. Thank you.

I want to refer to you Plaintiff's Exhibit No. 9, which is McCall-Thomas Engineering's letter dated May 29, 2008.

A. Yes, sir.
Q. And it has numbered paragraphs.
A. Right.
Q. Will you read to the Court paragraph two.
A. There were no detectible marks on the line which would indicate the exact point of contact.
Q. I'm going to show you Plaintiff's Exhibit 5, which is the invitation and the contract with the pole inspector. Do you remember being asked questions about that?
A. I do.
Q. On page seven, is there something underlined in the middle of page seven?
A. Yes, sir.
Q. Would you read what's underlined.
A. The contractor shall report any dangerous circumstances to the superintendent immediately. Also, the presence of oil on or around a pole should be reported to the superintendent immediately.
Q. Is a low-hanging line a dangerous condition?
A. Yes, sir.
Q. Should it be reported?
A. Yes, sir.
Q. Immediately?
A. Yes, sir.

Q. I want to refer you to the 2008, and I'll show you what I'm going to ask you about. You were asked questions about it, right?

A. Yes, sir.

Q. Does it have the ratings that you described?

A. Yes.

Q. And on the second page, does it have comments regarding explanatory notes and comments?

A. Yes, sir.

Q. Did you look at paragraph 13(a)? And I believe it begins with comments that began with approximately.

Do you see that?

A. Yes, sir.

Q. Read, if you would, into the record where it begins approximately.

A. Approximately 10 percent -- I'm sorry. Approximately 10 percent of BEC's poles are inspected annually by an outside contractor. Employees are trained to visually inspect lines in their daily operations.

BEC is currently in the process of a complete field inventory and GPS of their entire system. Each location on the distribution system will be visited during this project.

Q. Did you on the form itself tell RUS what Berkeley's inspection program was?

A. I'm sorry. Can you ask that again?

Q. Yes. Did you tell RUS by the comments and notes to that form 300 what Berkeley's inspection program was?

A. Yes, sir.

Q. Did Berkeley misrepresent anything to the RUS about what its inspection program was?

A. No.

Q. In your role as vice president of --

A. Engineering and operations.

Q. -- engineering and operations, did you know or have you become familiar with Berkeley's practice with designing lines and constructing lines?

A. Familiar.

Q. And I want to ask you some questions about that. Who designs lines for Berkeley in house?

A. We either call them our distribution design personnel or service planners. They've also been called staking engineers in the past. They've had different titles, but it's the design personnel and staking personnel.

Q. And under the Berkeley standard practices, what does a staking engineer do to design the line? What is the process?

A. They go out to the location, obviously, and they do look at the lay of the land and what's around, what

they're going to design that line for, and then they have a staking sheet they can complete.

They also go to the RUS specifications and guidelines which are for how you construct the line. So then they complete the staking sheet, and on it, they show the heights of the poles, the types of assemblies that go on the poles, the size of conductors, the span lengths that are involved, and just any detail that would be involved in constructing a line.

Q. And who do they give the staking sheet to?

A. Ultimately given to line personnel to build the line.

Q. Who has a responsibility for ensuring that design and construction will build a line that meets or exceeds the National Electric Safety Code?

A. Yeah. The primary responsibility lies with the line personnel.

Q. Now, do they set out on the staking sheet what the clearance would be under the National Electric Safety Code?

A. No, they don't.

Q. How do they incorporate it in their design, that it will have proper clearances?

A. Well, again, by building according to the RUS specifications and designing it that way on the staking

sheet, in every case it's going to meet or exceed the National Electric Safety Code, so there's really no reason to put that on there.

Q. All right. And then the line crew who builds a line, explain the process for which they go to build a line. Are they supposed to build according to the staking sheet?

A. Absolutely. The staking sheet is the design sheet for that job.

Q. What is the standard practice for construction on the line?

A. Certainly once they get all the materials that are involved, they go to the job site. Particularly, they lay the poles out and typically frame them up while they're laying on the ground because it's easier. When I say framing, it has to do with what we call the assemblies that are on top of the pole.

So they may go ahead -- if it's a cross-arm, they may go ahead and install it on the top of the pole before they set the pole. That's pretty typical, and then, of course, there's a stake driven in the ground where the pole is supposed to go.

They'll remove that stake. They'll set up a truck and drill the holes for the posts to go in and put them in depth according to specifications, and they'll set the

poles and tamp them down and make sure they are plumb and straight and level.

Then, if they got any more, like, insulators to put on top of the pole, they'll do all that work, and then typically the first thing they'll do is string the primary conductor, which is the conductor that carries current. So they'll string that conductor first.

They'll usually pull it, pull it tight, between the spans, and then they'll properly sag it, and then they'll bring up the neutral conductor underneath it. Typically the neutral conductor is about four foot lower than the primary conductor in most of the designs.

Q. And if a crew puts in a 35-foot pole and builds it according to the requirements of the staking chart, what would be the expected clearance for the primary and the clearance for the neutral?

A. Again, in this example of the line we've been talking about, the primary would be 24 foot from the ground and the neutral would be 20 foot from the ground.

Q. And would that meet and exceed 18 and a half feet?

A. Yes, sir.

Q. Fourteen and a half feet?

A. Yes, sir.

Q. And would it exceed the minimum requirements of the National Electric Safety Code?

A. Yes, sir.

Q. And do they have to make sure they have the sag correctly done?

A. Yes. They also have sag charts at their disposal to be able to use, which is -- like, a temperature type of conductor or size of conductor, and it tells you how far you should sag that line in, and then they'll -- one of the methods they'll use is to put a board on a pole at the level of sag that they can have, and then they're able to look from pole to pole and see when that line has the proper sag.

Q. Have you heard the term they use a line of sight methodology?

A. Yes, sir.

Q. What is a line of sight methodology?

A. Again, over time, if the linemen have built enough lines, they get a trained eye as to what that sag should look like, and that's not uncommon. That's very common.

Q. So if the line crew who built the line in question built it according to the staking sheet and/or the sag chart, would it ultimately meet or exceed the minimum requirements of the National Electric Safety Code?

A. Yes, sir.

Q. Have you ever seen a crew build a line build it with too much sag on a load?

A. No, I haven't.
Q. The crews that do this, do they do this day in and day out?
A. Yes, sir.
Q. Once the line is built, you build a line, is there any checks, spot checking done, to determine whether the construction was done appropriately?
A. Any spot checking done?
Q. Yes.
A. Once a particular line is built?
Q. As you build lines, do you have an outside third-party contract or someone within the co-op to go out and spot check the work that was done?
A. We have work order inspections.
Q. And what are work order inspections?
A. Again, we use a consultant, and they go out and they get with, like, the contractors, and then they look at the job that's being built, make sure it's being built as specified. That's the whole purpose of the inspection.
Q. Do you know whether this line was spot checked or not at any time?
A. I can't say for sure.
Q. When was the line constructed?
A. 1993.

Q. And when was it the subject of the pole inspection, or inspection by a pole inspector?

A. 2002, I believe.

Q. And was there any report by the pole inspector that there was any problem with the line in question?

A. No, sir.

Q. If the line was built appropriately according to standard practice, do you know or have any explanation as to why the clearance was 18.5 on the day of the accident -- excuse me, 17.6, I believe.

A. No, I do not.

Q. Are there things that can cause a line, after it's properly built, to end up with more sag than it should?

A. Oh, sure, yeah.

Q. What sort of things can happen?

A. Typically, it's going to be something external, but obviously a tree could fall in the line. Sometimes they can fall and fall away. You know, equipment, construction type equipment, could get into the line. Somebody could hit the pole, knock the pole over, cause a pole to lean. I guess it's just about anything that could happen. Those are some examples.

Q. Do you know or have an opinion as to what happened here?

A. No. I don't have a conclusion as to what

happened.

Q. Now, let me ask you about inspections, a standard inspection program, that's used by Berkeley. Are you familiar with it?

A. Yes, sir.

Q. Let me tell you before that, does the National Electric Safety Code require that the clearance be written down on the staking chart?

A. No, sir.

Q. Does the National Electric Safety Code require that a record needs to be made of the use, so if the use changes, you can recognize there's been a change?

A. No, sir.

Q. Is there any industry standard or RUS guideline that would require that kind of information to be kept?

A. No.

Q. You were asked about these safety rules. Do you know whether or not there are rules that are made up by counsel for purposes of this litigation or whether there's anything in the code, RUS guidelines, or the CFR that would require -- would be a safety rule as they described?

A. The reason I asked the questions I asked when we were going through there is because I've never read those statements before, but I can only assume that they must

have been put together.

Q. Mr. Mobley, you're familiar with what we're going to talk about, the inspection program?

A. Yes, sir.

Q. Does the National Electric Safety Code require inspection on any particular schedule?

A. No, sir.

Q. What does it provide, as far as scheduling inspections?

A. I believe the terminology as experience dictates, or it's related to experience, but it's no specific schedule.

Q. Does the National Electric Safety Code describe how the inspection is to be done?

A. No, sir.

Q. What records are required to be kept regarding what was done?

A. The only thing I believe that it talks about is recording discrepancies, if you find something that is wrong and that you record that and that you then address it, and that's what we call possible hazardous conditions. So if we ever saw anything that looked like a possible hazard, that is what we would record.

Q. From the time this line was built until the time of the accident, was it inspected based upon the schedule

Berkeley selected for inspecting its lines and facilities?

A. Yes, sir.

Q. And what kind of cycle were you on?

A. In the pole inspection and treatment, there's an eight-year cycle, and, as we said, we've always leaned on our day-to-day operations of linemen and meter readers being on our system all over and keeping their eyes open on the lines.

Q. Was this one subject to the ordinary standard instruction?

A. Yes.

Q. And that was in 2002 or '03?

A. I believe it was September 2002, if I remember right.

Q. Now, I want to turn to the RUS-300's. Explain to me your role with the one you signed off on in 2008.

A. My primary role with that is really coordinating, getting it done; getting people together and getting it done is my primary role.

Q. Where do you go to coordinate to get information from?

A. Well, again, as I said earlier, we hire a third party consultant, and that's by our choice because we want somebody else to look at what we're doing. But they

come and meet with different folks in that department depending on their area of expertise or area of responsibility and spend time with them, and they go look at the records and they go out and inspect, and then the consultant fills out the form.

And then at some point the consultant, myself, the RUS GFR, and somebody else on my staff will sit down and go through it together. That's the process I'm familiar with that we've done.

Q. And is that how it was handled in 2008?

A. Yes.

Q. When you signed it?

A. Right.

Q. Now, on the form when you signed off on it, did the RUS have any objection to the manner in which it was rated or completed?

A. No, not at all.

Q. Did he agree with the ratings that were given?

A. Yes, he did.

Q. Did you mislead him in any way regarding any item of the RUS-300?

A. No, sir.

Q. Filling out the forms, is that part of the borrowing or lending process with RUS?

A. Yes. It's an expectation or requirement they have

related to your borrowing.

Q. Has RUS ever denied Berkeley a loan to your knowledge?

A. No.

Q. Has RUS ever, to your knowledge, said, Wait a minute. You're misleading us. We're not giving you a loan?

A. No.

Q. Has RUS ever not signed off with whatever rating -- whatever the consensus was on the rating?

A. Not that I've seen.

Q. Does the RUS representative have the ability to change the ratings?

A. Yeah. Not only does he have the right, but I can recall the GFR changing before we finalized off on it. It might have been one or two different places.

Q. Does Berkeley Electric patrol its lines on foot, by vehicle, by airplane every year?

A. We believe we do, but we can't prove we have been to every inch.

Q. Has RUS ever said you have to do that in order to qualify for a rating of three?

A. No. If I can clarify, again, the common understanding in our business is when your linemen and your meter readers and other folks are out in your

system, then that qualifies as line patrol, and that's pretty consistent in the State of South Carolina, especially then, and nationally, and that's what most have leaned on.

Q. And if you were to patrol the lines aerially on an airplane or helicopter, do you know whether you would be able to check the line for proper clearance?

A. I can't imagine patrolling distribution lines aerially at all, but I don't think you could see a whole lot, no. You couldn't make that judgment.

MR. JOHNSON: That's all we have, Your Honor.

THE COURT: Redirect?

MR. SMITH: Yes, sir.

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Mobley, I want to begin, you were asked some questions about these safety rules you've been putting up here on the board.

Do you understand the language that is used on these safety rules?

A. I do understand the language, yeah.

Q. Regardless of where they come from, do you agree that these rules must be followed?

A. I agree that we should be -- again, given the circumstances or the use and things that we discussed

earlier, that we should maintain, in those cases, the line is 18 and a half feet high; that we should be inspecting our power lines; and that certainly we should be telling the truth in every situation.

What I do not agree with is that those things guarantee that injury will be prevented or death will be prevented, and that's why I have difficulty with those statements as written, because I don't think it guarantees.

And I would hate to mislead anybody to say that that guarantees -- because you still have a responsibility to stay away. Something could happen the day after we inspect a line, and then we could inspect it today and something could happen tomorrow, and then somebody could go out there and get too close to it.

So nothing that we do can guarantee, you know, that things could be prevented. That's what I'm careful about.

Q. That's fair. You can't guarantee what others do.

A. Right.

Q. But you can guarantee what you do?

A. That's right.

Q. And these rules apply to Berkeley Electric, and they would at least reduce the chances of death by electrocution or injury by contact with a power line; is

that fair to say?

A. I would think they would reduce the chances, yes. I think it's fair.

Q. You were asked to look at some of the measurements in this case. You were asked to look at Exhibit No. 9, which are the McCall-Thomas measurements.

What I want to ask you about are Exhibit 8, John Hall's measurements.

A. Okay.

Q. And John Hall was a staking engineer, right?

A. Yeah. Again, they've had different titles, but yes, sir.

Q. If you look at page 2 under Exhibit 8, do you see the words point of electrical contact?

A. Yes, sir.

Q. And if you look off to the right of that, does that give a 119 mark?

A. Yes, it does.

Q. So that would indicate that John Hall, the staking engineer for Berkeley Electric, recorded the point of contact at 119 feet; is that true?

A. It appears that way, yeah.

Q. With regards to the pole inspections, you looked at some language that there says report dangerous conditions, right?

A. That's correct.

Q. Are you saying that that term tells the pole inspector specifically, I want you to inspect our power lines and make sure our power lines are at the height the National Electric Safety Code requires?

Is that term telling them to do that?

A. My expectation would be that they would look for anything that's hazardous, including a line that's too low.

Q. But Berkeley Electric doesn't tell the pole inspectors what the required heights of these lines are, do they?

A. No. We don't tell them that.

Q. So do you really think they can tell whether or not the line is at the height required by the National Electric Safety Code if you don't tell them what the National Electric Safety Code requires that height to be?

A. Again, I think most people are looking for something that looks abnormal. They're looking for frayed conductors or line hanging too low.

Q. Right. Would a line 12 feet from the sagging -- 12 feet from the connection points, would that be something pretty obvious?

A. Yes.

Q. And with regards to the National Electric Safety

Code, I think you testified that y'all build these lines to be 24 feet high; is that right?

A. Again, in this line we've been talking about, if it were built the way it was designed, the primary would be 24 foot high.

Q. But y'all don't need to look at the National Electric Safety Code. You don't need to look at the chart. You don't need to consider the voltage, the land use, any of those. Y'all are just going to put them up to be 24 feet? Is that what you're saying?

A. We're going to build them according to the RUS specifications, yeah.

Q. And those specifications would end with a power line that's 24 feet high?

A. That's correct, just taking these -- the engineers are looking at the design, and they know what the height is going to be.

Q. But there are certain conditions under the National Electric Safety Code that would require power lines to 28 feet high, 34 feet high, or even 50 feet high?

A. Right.

Q. Is that your understanding?

A. I don't remember the exact numbers, but I know there's probably others. I don't remember the exact

numbers.

Q. Okay. But does that sound correct to you, that the National Electric Safety Code would require some lines to be as high as 50 feet high, 34 feet high, or 28 feet high?

A. There could be certainly other requirements, yes.

Q. And to know how high the power line has to be, according to the National Electric Safety Code, you've got to consult that chart, right?

A. Sure. You would have to consult that chart, and our design and staking engineers would.

If I may, they're -- you know, there are places that you build lines that are pretty, you know, normal and regular and ordinary, but then there are situations when you're going across railroads or highways or things of that nature where you've got to take extra consideration, and it's just going to have to be above and beyond what you would normally build, and that's when they pull out the National Electric Safety Code and look at what its requirements are.

Q. And you were asked some questions about the staking sheet, and does National Electric Safety Code require the height, the minimum height, to be recorded on that staking sheet? Do you remember those questions?

A. Yes, sir.

Q. That's true, isn't it? There's not a law out there, a federal regulation, a part of the National Electric Safety Code that requires that height be written on the actual staking sheet, is it?

A. Not that I'm aware of.

Q. But if you're going to send people out to inspect a line to make sure it's at the height required by the code, don't you think that would be a good place to put it?

A. Again, we have the overall understanding of how we build our lines, and if we build them, they're going to meet or exceed the NESC. We want our personnel to identify something that doesn't look right, and even though that line might have been designed for 24 foot, if they would have went out there and it looked like it was 20, they still would have met the NESC, but I would have still wanted them to fix it.

So we don't focus on the NESC, which is a minimum, we focus on the way it should be built. I don't know if I can say it any clearer than that. We don't want them to go up there and say, Well, it's above 18 and a half feet, so it's good to go, so I'll go to the next place.

They're looking for, you know, excessive sag for it to be out of the norm, and they have a trained eye. They can look and tell if that thing is abnormal or not.

Q. A lineman like Rico Harrell, he can tell that?
A. I think so.
Q. Rico Harrell is a first-class lineman, right?
A. Yes, sir.
Q. Rico Harrell is assigned to the district where the lines out of Thornhill Farms Healing Ministries are at, correct?
A. That's correct.
Q. Can he tell if a line is 15, 16, 17, 18 feet high? Can he tell that by looking at it with his trained eye?
MR. JOHNSON: Your Honor, it seems to me --
THE COURT: Sustained. Pure speculation as to what -- Mr. Harrell, whatever he can say. He's going to testify, right?
MR. SMITH: Yes, sir.
THE COURT: Ask him that.
BY MR. SMITH:
Q. But in a general sense, you expect your linemen to have a trained eye to know what they're looking at, right?
A. That's true.
Q. Even against a blue sky background, they're expected to know that?
A. I expect them to be able to identify that a line is out of sag.

Q. But out of sag has nothing to do with the height required by the National Electric Safety Code, does it?

A. I can't say it has nothing to do with it, but, again, we're not so much focussing on the code if we know that we're building to a level that exceeds that.

Q. Okay. So when the inspections are taking place when a line is built, no one is making sure it's up to code, but they're making sure it was built according to the specs; is that right?

A. That's true.

Q. And when a lineman is going out there to inspect a line after it's built, or the meter readers or anybody, they don't have those specs with them, do they?

A. Which specs?

Q. The specs that y'all use to build the line originally. They're not carrying around those specs, are they?

A. They should, yeah. The RUS specs? Yeah, they should have those with them.

Q. The meter readers have the specs for the construction of power lines with them?

A. I thought you said linemen.

Q. Let's talk about the meter readers first. They have the specs, the RUS specs, for the construction of power lines?

A. I can't say for sure if they do.
Q. But you said the linemen, they carry those around with them?
A. Yes, they do, because they have to build a line, so yeah. You have to have them.
Q. You talked about some things that can make a power line sag. I believe you said that trees could hit it, equipment could hit it, somebody could hit the pole? Do you remember those things?
A. Yes, sir.
Q. Is it also true that just over time -- the environment, the air, the heat, the water, the current, the voltage running through it, is it true that also those things can cause a power line to sag over time?
A. Yeah. I'm sure they can cause it to sag some.
Q. And that's why the inspections are so important, isn't?
A. They're important for a lot of reasons, yeah.
Q. And one of the things that you reviewed in here in terms of the frequency of the inspection process was as experience dictates necessary; is that right?
A. That's right.
Q. And we talked in here with the Code of Federal Regulations, it says, Keep records of deficiencies long enough to identify long-term trends.

Do you see that?

A. Yes, sir.

Q. All right. Do you think the part of the National Electric Safety Code that shows this experience is deemed necessary and keeping them long enough to identify long-term trends, do you think the point of that is so that you can say, Hey, we've been having a lot of problems with this span of line. We need to devote more time to it. We need to figure it out.

Is that what the purpose of doing inspections as experience has shown necessary?

A. When I read that as experience shows necessary, I think, again, it's a feel for how long you need to get around the system, experience how long it takes for things to deteriorate.

Q. Because if you go to a particular span of lines over and over again and they're always correct, but then you go to another particular span of lines and you're constantly having problems, you would know from that that there is a problem with that span. We need to devote some more time; some more inspections. There's a problem with that span.

MR. JOHNSON: Objection. Not in reply.

THE COURT: Can you speak up?

MR. JOHNSON: Yes. I object. It's not in

reply. It was not covered on cross.

THE COURT: Sustained. It is new area.

BY MR. SMITH:

Q. When Mr. Johnson was asking you questions, were you talking about your inspection program?

A. Right.

Q. And that inspection program is contained in the comments on the 2008 form, right?

A. Right.

Q. And you talked about the meter readers, the line patrolman, all them, right?

A. Right.

(Plaintiff's Exhibit No. 61 ws marked for identification and admitted into evidence.)

BY MR. SMITH:

Q. All right. I want to hand you what's been marked as Plaintiff's Exhibit No. 61. Turn to the second page for me.

It says here in number three: The line in question has never been inspected for National Electric Safety Code compliance. Is that true?

A. I'm trying to make sure I'm in a --

Q. It's the second page in, under number three.

Answer: The line in question has never been inspected for National Electric Safety Code compliance.

Is that true?

MR. JOHNSON: I ask that he read the entire answer under the rule of completeness.

MR. SMITH: Sure.

THE WITNESS: The entire answer?

MR. SMITH: I will.

THE COURT: What exhibit are you on?

MR. SMITH: No. 61.

BY MR. SMITH:

Q. Question number three: Please state when the power line, which is the subject matter of the plaintiff's complaint, was last inspected prior to April 23rd, 2008 for National Electric Safety Code compliance and what items were inspected at that time.

The answer is: The line in question has never been inspected for National Electric Safety Code compliance; however, it was part of a pole inspection conducted in 2002; is that true?

A. I think it's a little bit of a play on words here, but --

Q. What do you have a problem with? I'm talking about the line in question has never been inspected for National Electric Safety Code compliance. And, sir, if you'll turn to the next page, you'll see whose signature this is. Did you see who sent that to me?

A. Yes, I do.

Q. All right. Do you see down under number two, do you see that little signature there or the little -- I guess those are initials?

A. Yeah.

Q. So I ask you again, the line in question has never been inspected for National Electric Safety Code compliance; is that true?

A. I guess the statement is true. I mean, I think -- I guess it's true like we talked about earlier. We're not necessarily focussing on the code, but we know we built in excess of that.

Q. Mr. Mobley, has anyone ever asked you all those questions, the questions I asked in your deposition, the questions I asked you today, the subject of all that, has anyone ever taken you to task over all this?

MR. JOHNSON: Objection. Relevance.

THE COURT: What is the relevance?

MR. SMITH: We've heard repeatedly that the RUS didn't object to this. They didn't deny him loans here, that they didn't do this. I'm wondering has anyone ever asked you these questions that I'm asking you --

THE COURT: It might be you're wondering, but why are you wondering it? Why is it relevant?

MR. SMITH: Well, I would assume the question

was relevant that Mr. Johnson asked about if anyone denied a loan? Did the RUS guy object to these? I would assume that question is relevant.

BY MR. SMITH:

Q. And my question to him is, Well, has anyone even asked these questions? Have you even ever been taken to task over all this?

I understand no one has ever objected and denied them loans, but my question is, has anyone ever done what we're doing here? Have you ever been taken to task over these issues like we are?

A. I don't know how to answer that, really. I'm not sure I understand.

Q. I don't want to cut you off.

A. I'm just not sure I understand. I'm not sure we would have been because we haven't had this happen before where we've been questioned by an attorney, but -- so when you say taken to task, again, we've talked about the review and check and balance that we have with RUS. I'm not sure specifically what you're talking about.

Q. Well, anyone asking you what does the Code of Federal Regulations require? Does it require inspections, records, determine if it's up to code, record deficiencies? Has anyone ever questioned you about, Hey, are you following this federal regulation?

Has that ever happened?

A. Nobody has ever asked me about that regulation. I believe those regulations end up in RUS bulletins that we go by.

Q. Has anyone ever said, Hey, you put a three on this thing, and you signed as rated by. Tell me what a three means. Is that true? Has anyone ever done that with you?

A. I don't know if they've asked me that way, no.

Q. We did it in your deposition. We've done it today. We've gone through all this, we've gone through what those ratings mean, the Code of Federal Regulations, the National Electric Safety Code, what the plan is, all those things, and we've also now gone through the discovery answer filed by your lawyer on your behalf saying the power line was never inspected for National Electric Safety Code compliance.

I ask you this, sir: Have you learned anything regarding the operation of Berkeley Electric's inspection and maintenance program? Have you learned anything with regards to what you have heard and what you've participated in?

THE COURT: Mr. Johnson wants to object to that.

MR. JOHNSON: Relevance.

THE COURT: I'm going to sustain.

MR. SMITH: Yes, sir. I don't have any further questions.

THE COURT: Do you have recross?

MR. JOHNSON: No, sir.

THE COURT: All right. You can step down.

All right. Let's start back up tomorrow morning at 9:30.

MR. JOHNSON: Can we excuse Mr. Mobley?

THE COURT: Well, he's on your witness list as well. Is anybody else going to need him, or do you want him back?

MR. JOHNSON: I don't think so.

THE COURT: You're free to go then. Thank you. Okay.

We'll see y'all tomorrow morning.

MR. JOHNSON: Thank you, Your Honor.

(Recess taken.)

(September 29, 2015.)

THE COURT: All right. Are we ready with your next witness?

MR. SMITH: We are, Your Honor.

THE COURT: Ready when you are, then.

MR. SMITH: We call John Villeponteaux.

JOHN VILLEPONTEAUX,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q. Good morning, Mr. Villeponteaux.

A. Good morning.

Q. How are you?

A. Good. Thank you.

Q. You work for Berkeley Electric?

A. Yes, sir.

Q. What's your job title?

A. My current job title is the manager of distribution operations.

Q. And distribution operations, does that include the construction of power lines?

A. Correct.

Q. Does it include the maintenance of power lines?

A. Correct.

Q. And does it include the operation of power lines?

A. Correct.

Q. You would say a majority of BEC linemen are in your department?

A. The majority, yes, sir.

Q. And you report to Mr. Mobley?

A. Correct.
Q. How long have you been with Berkeley Electric altogether?
A. Since 1984.
Q. And before you were the manager of distribution operations, is it true you were the director of safety?
A. Yes, sir. That's one of the positions I had.
Q. And I believe Mr. Elrod took over that position when you moved up?
A. Yes, sir.
Q. Now, the power line in this case, is that a high-voltage power line?
A. Yes, sir.
Q. And high-voltage power lines, they run down the highways?
A. The highways, across country, it's -- I mean, it's wherever we get easements.
Q. Near schools, churches, shopping malls?
A. Yes, sir.
Q. Is it true that Berkeley Electric has high-voltage power lines nearly everywhere people are in Berkeley Electric?
A. The populated areas, yes, sir.
Q. And that would extend into parts of Charleston and Dorchester Counties as well?

A. That's correct.

Q. Mr. Villeponteaux, I want to hand you an exhibit that's been previously admitted and marked as Plaintiff's Exhibit No. 4, and that is the Berkeley Electric safety manual, correct?

A. That's correct.

Q. Are you familiar with that?

A. Yes, sir.

Q. And you're obviously a manager, right?

A. I'm the manager of distribution operations, yes.

Q. So the portions of the safety manual that deal with management, though, would apply directly to you and the job that you do?

A. Part of it, yes, sir.

Q. Is it true management's job is to make sure employees are doing the things they're supposed to do?

A. That's part of our requirements.

Q. Are linemen required to inspect power lines they're working around?

A. Are they required?

Q. Yes, sir. Is that part of a lineman's job?

A. That's part of it.

Q. But they don't write down anywhere that they've done that; is that true?

A. They do not write down?

Q. Yes, sir.

A. If they're going down the road and they see any abnormalities or any hazardous conditions, then what they do is, what we used to do is we had a hazardous condition form, and they would contact one so they possibly could write that down for that, yes, sir.

Q. My question is more in a general sense. When a lineman is riding down the highway and he's looking at power lines or when a lineman is working on a power line or a streetlight or something and he's looking at the power lines, inspecting those power lines, he doesn't write down that he did that, does he, that the inspection was completed?

A. Well, that's -- he's looking at it, but he's actually not doing an inspection. If it's an inspection, he would write something down. If he's riding down the road and he's just looking and he sees something like that, you know, if everything looks good, then, of course, he would not write that down.

Q. And I guess I'll maybe -- one of the things that we've been talking about in this case is some of the federal statutes, and we have talked about whether or not their statutes require inspections, all right, and whether or not their statutes require that someone writes down that an inspection was done. Okay?

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.

Q. So my question is, when they're doing that, do they ever write down that that was done; meaning, I rode down the street? Check. Checked these power lines. I went over to these lines over here, worked on it. I also checked, inspected that power line.

Is there any check system to say they did it? Regardless of what they found, but is there a system where records are kept that the inspection itself was done?

MR. JOHNSON: Your Honor, I have an objection on relevance. He has said -- I mean, there's no evidence --

THE COURT: What is the relevance? If the lack of records -- unless you're going to the area of did they not produce everything, I do not know how not having a record could be -- even if it was a standard of care to

have it, how a lack of a record could be the proximate cause of the damages these folks suffered.

MR. SMITH: It's our position, Your Honor, that the reason the line was too low, the reason they didn't catch it is because they weren't inspecting that.

THE COURT: That's a whole other thing, so if you're just going to go, well, you don't do any recordkeeping at all, get to that point and move on, but I'm not really sure where you're going with this line of questioning, but wherever you're going is going slowly.

MR. SMITH: 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 the federal laws 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.

THE COURT: Again, just from a common sense sort of perspective, not keeping a record, it's hard to see how that's going to cause the injury. Not doing an inspection, I could see, so I'm saying for the sake of moving along --

MR. SMITH: Yes, sir.

THE COURT: -- I wouldn't spend a lot of time on their lack of recordkeeping being a relevant issue.

MR. SMITH: Okay.

BY MR. SMITH:

Q. How does management know that the linemen are actually inspecting the records -- I mean, sorry, inspecting the power lines?

A. How do we know?

Q. You're a manager of most of the linemen in Berkeley Electric. How do you know they are doing those inspections?

A. Right now, it's through -- when we have -- they find something out there, they do a hazardous condition report, and so that's how I know that they're checking.

Q. Okay. But you have no way of knowing that they're actually inspecting the lines they're working around. If they don't find something wrong, you have no way of knowing that it's actually being done, do you?

A. At that time, that is correct.

Q. Okay. And after an incident where someone is injured or killed by a Berkeley Electric power line, is Berkeley Electric required to look for safety rule violations?

A. No, sir.

Q. No? Is Berkeley Electric required to find out what happened?

A. Yes, sir.

Q. All right. And one of the things that they would be required to look for is if the power line was too low, if it was below code. Is that something Berkeley Electric is required to look for after an injury or death?

A. We would look for any circumstances at that time that occurred at the time for reason of the accident, even if it was a multitude of -- at a construction site, if it was, as it was in this case, someone had raised the tent up and put it into the power line, we would look at all the multiple causes that caused the accident.

Q. Do you also look at -- whether or not the power line that caused the injury or death, would you also look at whether or not that power line was below code or above code or met the code? Is that something you're looking for?

A. That's what I was saying. We would look at everything, not just one thing.

Q. Because that's how Berkeley Electric takes steps to make sure it doesn't happen again; is that true?

A. We would look at all the factors that occurred, and anything we found, that's what we would work on to

correct, yes, sir.

Q. Regarding the construction of power lines, engineers draw the plans; is that true?

A. Yes, sir.

Q. And those plans are on what's called a staking sheet?

A. That's correct, sir.

Q. And the engineers give you the staking sheet?

A. They do not give it to me, they give it to my superintendent.

Q. Your department?

A. Yes, sir.

Q. Yes. And then your department gives that to the actual linemen that built the lines?

A. Correct. The superintendent is over that particular line crews, and then he schedules the jobs, and then he would give it to that line foreman, or journeyman lineman to do.

Q. I'd like to hand you an exhibit we've marked as Exhibit No. 10. Is this the staking sheet for the line we're here about today?

A. Yes, sir. That looks like it.

Q. It's a staking sheet for out at Thornhill Farms, the Healing Ministries?

A. I believe that is the address, correct. I don't

see Thornhill Farms on it, but that does look exactly like it, yes, sir.

Q. Staking sheets do not have a place to record the use of the land, do they?

A. To record the use of the land?

Q. Yes, sir.

A. No, sir.

Q. And staking sheets don't have a place to record the required height of a power line; is that true?

A. That is correct.

Q. And staking sheets don't have a place to record how high the power line was actually installed; is that true?

A. That is correct.

Q. And when a lineman is building a new power line, he or she is not told how high the power line is required to be?

A. That's correct.

Q. They're not told what the National Electric Safety Code requires for that power line?

A. Correct, sir.

Q. And after the power line is put up, linemen do not go back and measure the line for height; is that correct?

A. That's correct.

MR. SMITH: Your Honor, I would like to offer

Exhibit No. 10 into evidence.

MR. JOHNSON: No objection.

THE COURT: Admitted.

(Plaintiff's Exhibit No. 10 marked for identification and admitted into evidence.)

BY MR. SMITH:

Q. I would now like to hand you what we've marked as Plaintiff's Exhibit No. 11. Is this the job description? And the second page would be the position, specifications for a lineman.

A. Yes, sir.

Q. And those two -- is this a Berkeley Electric document?

A. That is correct, sir.

Q. Is this document stored in Berkeley Electric's offices?

A. Correct.

Q. And I want you to take a moment to review those for me, and I'm going to go ahead and tell you the question I'm going to ask, okay?

A. Okay.

Q. Is inspecting power lines mentioned anywhere in either the job description or position specifications? I'll ask you the question again.

Is there anything on Exhibit No. 11 that would

mention anything about power lines, inspection of power lines, being a part of a lineman's job duties?

A. The closest would be number E, observe, repair, report all hazards and unsafe conditions to proper authorities.

Q. That's the closest thing that you would get to inspect power lines?

A. Yes, sir. As he's riding, if he sees a hazard or an abnormality, that he would do that.

Q. But it's not mentioned anywhere specifically, part of your job is to inspect power lines. Would you agree with that?

A. It's to look for any hazards or any abnormalities.

Q. And that same language is in the safety manual, is it not, report unsafe conditions?

A. That is correct.

Q. Between the job description, the position specifications, and the safety manual, that's the only thing that's mentioned that could be interpreted as inspect power lines, report unsafe conditions. Would that be true?

A. In his training, he would pick that up.

Q. I'm talking about written documentation, written documentation that Berkeley Electric has that says part of a lineman's job is to inspect power lines. Is the

closest you have to that -- on this position specification, the job description, and the safety manual, the closest thing you have to that statement is report unsafe or dangerous conditions; is that true?

A. That's correct.

Q. But that's not word for word anywhere, as far as you know?

A. Right. It's just like it says.

Q. Management's job is to make sure the employees get the training on the things they're expected to do; is that true?

A. Correct.

Q. And if we assume linemen are required to inspect lines, do you know whether or not they need training to help them judge the height of power lines?

A. Do they need training to judge the --

Q. Height of power lines?

A. That's part of their training, to become a journeyman lineman. That's a process of six years. So during that time, they're having OTT, which is on-the-job training, and then they're also going to formal training classes. So during that process, you know -- and then, plus knowing from the staking sheet how high the pole is and then how deep they set the pole, they know from that how high, you know, for a reference, so --

Q. Is it your testimony that there is specific training classes to teach linemen how to judge the height of power lines?

A. Oh, Pacific {sic} classes for just that?

Q. Right.

A. Not through my knowledge, but it's through experience, yes, sir.

MR. SMITH: Your Honor, I would like to admit Plaintiff's Exhibit No. 11 into evidence.

MR. JOHNSON: No objection.

THE COURT: Admitted.

(Plaintiff's Exhibit No. 11 was marked for identification and admitted into evidence.)

BY MR. SMITH:

Q. Mr. Villeponteaux, is there ever a time when a lineman is required to measure the height of a power line?

A. No, sir.

Q. Do linemen have a measuring stick they can use to do that?

A. Yes, sir.

Q. They carry it in their truck?

A. Yes, sir.

Q. Did I spell your name right?

A. Yes, sir.

Q. Is it also true from the safety manual management is required to assure compliance with all federal, state, local standards and laws?

A. Correct.

Q. And so management must first know what those laws and standards are, right?

A. Well, it depends on who handles what part.

Q. Let me rephrase the question: Is management required to know the laws and standards that apply to the work in their department?

A. There again, we don't -- from my side of it, I do not know Pacific {sic} every law, but I understand the general part of it.

Q. Do you know what the federal laws are regarding inspecting power lines?

A. No, sir.

Q. Do you know what the federal laws are regarding the records that are supposed to be kept regarding power lines?

A. No, sir.

Q. Do you know what the RUS rules say about inspections and recordkeeping?

A. No, sir. I don't handle any of that side.

Q. Do you know what the laws state regarding the maintenance of power lines?

A. No, sir.

Q. Do you know what Berkeley Electric is representing to the government in terms of its inspection program?

A. No, sir. I don't handle any of that.

Q. And although your job duties include construction, maintenance, and operation of power lines, is it your testimony there are not any rules in the National Electric Safety Code that apply to the job you do?

A. That's correct.

MR. SMITH: That's all the questions I have, Your Honor.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Villeponteaux, you were asked on direct whether there was any record made of the land use on the staking sheet. Do you remember that question?

A. Yes, sir.

Q. Does the National Electric Safety Code have any requirement that the land used be included on the staking sheet?

A. Not to my knowledge, no, sir.

Q. You were asked about the clearance and recording of the clearance on the staking sheet. Do you remember that question?

A. Yes, sir.

Q. Does the National Electric Safety Code require that clearance to be put on the staking sheet?

A. Not to my knowledge, no, sir.

Q. Does Berkeley use the method of construction that you described on all of its lines?

A. Yes, sir.

Q. And if they build the line according to the staking sheet, will the clearance at the sag at the mid-point meet and exceed the requirements of the National Electric Safety Code?

A. It will always meet or exceed.

MR. JOHNSON: Thank you.

THE COURT: Redirect?

MR. SMITH: Yes, sir. I'll be very brief.

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Villeponteaux, you were just asked about some of the requirements from the National Electric Safety Code with regards to land use and height. Do you remember that question?

A. Yes, sir.

Q. All right. I thought you just told me you don't know what the National Electric Safety Code -- well, first of all, I thought you told me the National Electric

Safety Code doesn't apply to anything you do, and you do the construction, maintenance, and operation of power lines.

A. From my job, yes, sir, correct.

Q. Is it fair to say you don't know what the National Electric Safety Code requires?

A. Sir?

Q. Is it fair to say you do not know what the National Electric Safety Code requires?

A. I know generally that what we just talked about is correct.

Q. So you know --

A. That's all I know.

Q. Okay. Have you read that somewhere in the National Electric Safety Code?

A. No, sir.

Q. Okay. Are you -- is this something somebody has told you?

A. That's general knowledge over the years that I've been there.

Q. But is your general knowledge based on something somebody's told you, as opposed to reading the National Electric Safety Code?

A. Correct.

MR. SMITH: Okay. That's all the questions I

have.

THE COURT: Recross?

MR. JOHNSON: No, sir.

THE COURT: You may step down. You're free to go.

MR. SMITH: We call James Elrod, Your Honor.

JAMES ELROD,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q. Good morning, Mr. Elrod.

A. Good morning.

Q. How long have you worked for Berkeley Electric?

A. Thirty-seven years.

Q. And what are some of the positions you've held over that thirty-seven years?

A. I started in the staking department, went from there to mapping to right-of-way procurement to safety and training.

Q. And your current position is the manager of job training and loss control?

A. Well, I just retired, so -- but at the time of this accident, yes.

Q. When did you retire?

A. I'm actually using up my vacation to retire, so I'm not truly retired, but I'm retired.

Q. After your vacation runs out, you'll officially retire? And this position, manager of job training and loss control, that was previously called director of training and loss control; is that right?

A. I believe it was prior to my taking the job, but it was always manager since I've been in it.

Q. And how long have you been in that position or doing that particular kind of work?

A. Fourteen years.

Q. And before you held that position, it was held by Mr. Villeponteaux who just left?

A. Correct.

Q. Job training means training the employees for the things they're required to do, right?

A. Right.

Q. And that was your job?

A. At the time of this incident that was my job, but, basically, my job at that time? Job training meant coordinate the job training for our guys. I didn't actually do that training.

Q. You set it up, make sure people were there. You didn't actually teach the classes?

A. Right.

Q. And to know what training linemen need, you must first know what they're required to do; is that true?

A. Yes, pretty much.

Q. Okay.

A. Not everything, but yes.

Q. Is inspecting power lines part of a lineman's job?

A. I think all our guys, when they're out of town driving, that's just something they naturally look at, yes, so when they're going from job to job, they're looking at the lines.

Q. Is that an important part of the lineman's job?

A. I think all of us, if you see anything that is perceived to be a problem, it's reported and taken care of, yes.

Q. I asked if it was important, and I think you said if they see something, they take care of it.

A. I think it's an important part of the job.

Q. Is a lineman required to keep a record of the inspections he's doing?

A. We have an inspection program where I think it's a formal inspection. This doesn't fall under me, but I believe it's like an eight-year rotation.

Q. Okay.

A. But our guys are pretty -- like you say, from job to job, they're looking. If they see something, it's

reported, and, yes, they don't keep track of it, but it is.

Q. They don't keep track of the instructions they're doing unless it's something that needs to be written down?

A. If they see something, it's a process they go through, but they don't hang on to that.

Q. And, like you said, if a lineman sees something wrong, he's going to fix it, right?

A. If he sees something that is an immediate hazard, he's going to stay there with it until it's fixed. If it's something that's not, whether a hazard or not, but if something needs correction, it's going to be something turned in.

The superintendent is going to look at it and see whether -- everything is usually done within a two-week period if it's considered a nonhazardous problem. If it's hazardous, it's immediately.

Q. I want to ask you if you agree with this statement: I think if we come across a power line that we don't feel meets the code, we're going to straighten it out. I don't see where we need to write that down.

Is that true?

A. I think if we come across something -- our guys probably aren't really trained into the code. What

they're looking at is they're building these jobs by RUS specs, and they pretty much look at, Okay. Something is not right about it, and they're going to turn it in.

If it's perceived to be a hazard, they're going to go ahead and take care of it. The only report you would probably see is if a hazardous condition is done and it goes through the system, like I told you earlier.

Q. Hazardous condition, I don't know if that equates to that the line doesn't meet the code, but let me ask you again if you agree with that sentence, really, as written: I think if we come across a power line that we don't feel meets the code, we're going to straighten it out. I don't see where we need to write that down.

Is that true, exactly as stated?

A. I think that can be a true statement. If they come across something that they believe is -- and, again, they're not looking at the code. I know in our manual a lot of stuff refers to these different codes, but what they're trained on is doing that job, doing it safely. Those reflect where that safety rules come from, and if they're doing it and building it by that, it meets that code. So if they're looking at construction and they believe the construction isn't right, generally, they're going to take care of it right then, and, no, it probably wouldn't be written down.

Q. And you're in management? Or -- well, before you retire, you're in management, right?

A. Job title was manager, yes.

Q. And does Berkeley Electric have a rule in the safety manual requiring management to fully investigate anything if something like this happens?

A. I can't really recall exactly how it's written in there, but --

MR. JOHNSON: Objection. Relevance.

MR. SMITH: Your Honor, from the safety manual, that's one of the things they're required to do, is fully investigate accidents and take proper corrective steps to make sure it doesn't happen again.

It's our position that that represents the standard of care in this case, the highest degree of care, and that's not being done. We'll get into this particular accident, Your Honor, without there being any more generalities, but the conscious failure to do what's required -- and this may lead to evidence of concealment as well.

THE COURT: I think it's relevant to show if they did an investigation to find out what their investigation revealed. If it gets too off into the area of subsequent remedial measures, it's not allowable, but for the purpose of, well, there was an investigation that

resulted in death -- or there was an incident that resulting in death to find out what it was and what caused it and what the results are I think are relevant. Overruled.

BY MR. SMITH:

Q. Mr. Elrod, is there a rule for Berkeley Electric in the safety manual that requires them to fully investigate any time something like this happens?

A. Under safety responsibility, there's a section in there that talks about investigating the incidents. I don't know whether that's worded exactly the same way, but yes, there's something in there about that.

Q. But in this case, y'all did not do a full investigation; is that true?

A. In this case, we assisted the sheriff's office with their investigation, and then I think outside people actually did the investigation.

Q. All right. But in terms of what Berkeley Electric did, can I quote? No, we didn't do a full investigation.

Is that true?

A. In house, we didn't do a full investigation. It was outside people. Any time a major incident happens, so there doesn't appear to be any conflict, we hire someone to come in and do the investigation. So Berkeley Electric does the investigation, it just wasn't done by

in house.

Q. The first thing you did in this case after you heard the men had died out in Thornhill Farms, one of the first things you did was call Pope Johnson; is that true?

A. I don't know if it was one of the first things, but he was called, yes.

Q. And you understood that Pope was there to start working on Berkeley Electric's defense, didn't you?

A. I think with any major incident -- I don't even know for sure at the time this happened if I knew there was a death at that time. I knew it was a major incident that someone had got in a power line, and, yes, you start preparing for any litigation that might come up.

Q. Okay. And y'all had your staking engineers out there, John Hall?

A. John Hall did come out there, yes.

Q. Engineering firm McCall-Thomas, they came out there too?

A. He was out there. I don't remember how soon he got out there, but yes, McCall-Thomas came in.

Q. And the expert that Mr. Johnson hired, Eric Jackson, he was out there too?

A. I don't remember at what point he come out there, but yes, he was out there too.

Q. And in all the time since 2008, throughout the

entire investigation, is it fair to say that no one has ever written down how high the law required this power line to be; is that true?

MR. JOHNSON: Objection, Your Honor. Relevance. That can't be a proximate cause of the accident.

THE COURT: Overruled.

MR. SMITH: You want me to restate the question?

THE WITNESS: Sure.

BY MR. SMITH:

Q. In all the time since 2008 throughout the entire investigation, no one has written down how high the law required this power line to be, true?

A. I don't know that that's true. I mean, I didn't write it down. I can't say for sure.

Q. And part of your job is loss control, right?

A. Right.

Q. And that's the kind of thing that we're talking about here with investigations --

A. Well, again, we hired an outside person to come in and do the investigation, so I can't truthfully answer the question whether it was done or wasn't done. I didn't do it.

Q. But this investigation and finding out what

happened, that's part of the role in loss control, true?

A. Sure, yes.

Q. Is it foreseeable that power lines can become worn, damaged, broken, or otherwise be affected by the environment?

MR. JOHNSON: Objection. Asking for an opinion from a lay witness.

THE COURT: Overruled.

THE WITNESS: One more time, please.

BY MR. SMITH:

Q. Is it foreseeable that power lines can become worn, damaged, broken, or otherwise be affected by the environment?

A. I think so, yes.

Q. That's one of the reasons linemen need to inspect power lines, right?

A. Things change on the system, so yes.

Q. Is it also foreseeable that people will work around power lines without calling y'all to have them shut off?

A. Yes.

Q. And Berkeley Electric knows that when a power line is below code, the chances increase of people or equipment hitting that power line, true?

MR. JOHNSON: Your Honor, could I have a

running objection to these?

THE COURT: Noted.

THE WITNESS: One more time.

BY MR. SMITH:

Q. Berkeley Electric knows that when a power line is below code, the chances increase of people or equipment hitting that line, true?

A. I would say true.

Q. And that's why it's important for Berkeley Electric's power lines to be at least as high as the law requires, right?

A. Right.

Q. But linemen aren't specifically inspecting power lines for code height, are they?

A. Linemen are building the line by RUS specs. Our engineering department are the ones that lay out that job. Any time it's built, our goal is to exceed any required heights, and if they're built by that spec, they will exceed it, so no, they don't specifically look at the code. The engineering department is the one that does that.

Q. And you just described the construction. My question was really the inspection and so let me ask you again: Regarding the inspection of the power lines, linemen are not specifically looking to see if the line

complies with the height requirements of the National Electric Safety Code, are they?

A. I'll add that to what I just gave you. Our system is built by RUS specs. Our linemen will go out there, and they'll build it by that spec, so when they leave that job, they know it exceeds that.

And what they're trained to do is they're looking for something that's out of the ordinary on that job to make them think -- they're not specifically looking at the height. If they're looking at the construction, if the construction looks proper, then they know it meets that height.

Q. When you say they're looking at height, are you saying they're looking to make sure that the height requirement of the National Electric Safety Code is met or are they just looking for other problems?

A. They're looking for anything that is abnormal on that line. If something isn't right about construction on it, then they're going to correct it. They're not out there looking at just height. If construction looks right on that pole, they know the height is there.

Q. Are they looking at height? Is that one of the things they're looking for?

A. That could be something that's abnormal, yes.

Q. But the linemen don't know what the required

height is of the power line they're working around or inspecting; is that true?

A. I can't say that's a blanket true statement, but it could be true.

Q. Do you know whether or not untrained people will have difficulty judging the height of a power line when standing on the ground?

MR. JOHNSON: Objection. Asking for an opinion from a lay witness.

THE COURT: Well, he's the guy that trains these people, so I think he's certainly within his job description to be able to answer it, so overruled.

MR. SMITH: Repeat?

THE WITNESS: Yes, please.

BY MR. SMITH:

Q. Do you know whether or not untrained people will have difficulty judging the height of a power line when they're standing on the ground?

A. I think a lot of untrained people could look at a power line and have a rough estimate of the height. The exact height, I'm sure they couldn't do. I think if something abnormal was about the power line, I think they would probably recognize it.

You know, we have a safe reporting incident where the public if they call in and they see -- if they

perceive something to be low, then we'll take care of the problem, so the answer is they couldn't narrow it down to the exact height, but yes, I think people can recognize that they perceive the line to be low, yes.

Q. Do you recall I asked you that question in your deposition?

A. No, sir. I don't recall it.

Q. Mr. Elrod, let me hand you a copy of your deposition, and I would like to -- I'm going to ask you to read the question and answer. I'm going to mark it here.

MR. WILLIAMS: What page is it?

MR. SMITH: Page 75, line 20, through page 76, line 8.

THE WITNESS: Are you ready?

MR. SMITH: Yes, sir.

BY MR. SMITH:

Q. I'll ask you the question and you give me the answer.

Question: Do you believe that untrained people will have difficulty judging the height of a power line when they're standing on the ground?

Start from where you see witness.

A. I don't know how to answer that. I mean, you're talking about looking at something and estimating height.

I don't know whether you have to be trained or whether you could walk out there and do that or me or one of our linemen could do that. You could estimate height if you have proper training in that.

Again, it goes back to they build the job to specifications on the staking sheet, and it's going to be the proper height.

Q. So is it fair to say that your deposition testimony back in 2012 was you don't know if untrained people have difficulty judging the height of a power line when standing on the ground?

A. I think that answer is real close to the answer I gave you earlier.

Q. Does Berkeley Electric have a class set up where linemen are taught to judge the height of power lines?

A. I don't believe Berkeley has a class specifically on heights, no. They're taught how to do a job on RUS specs. It goes back to the engineer staking the job. It's laid out. It's put on paper, they know it is going to exceed the height when they build the job to those specs. I do think that they are trained when they go out on a job if they see an abnormal sag or a line they believe to be out of sag, then it's a problem. Whether they know it's exactly under that code or not, I don't know, but if they can look at that job and tell whether

that line is out of sag and if they perceive that to be so, they're going to correct the problem.

Q. Do you believe that Berkeley Electric must provide linemen with the tools they need to judge the height of power lines?

A. I believe that's the same answer I just gave. They know if they build that line to specs it's going to meet or exceed the required height. I believe that they are trained -- they can look at that line and tell whether it's out of sag, and, if it is, they're going to correct the sag.

Q. But is there a tool linemen would use to actually measure a power line?

A. I don't think they measure a power line. Again, I think they're looking at how the job is built, and they know from their training that if it's built by their specs, it's going to meet or exceed that, and when they look at it, it doesn't look proper, but if something changed about the job, they're going to correct it.

Q. My question is, is there a tool linemen would use to measure the height of a power line?

A. They don't use a tool for that. They use their training.

Q. Is there a tool to measure the height of the power line?

A. There is a tool to measure the height of a power line.

Q. It's called a measuring stick, right?

A. It's called a measuring stick.

Q. Measuring stick?

A. Yes.

Q. How much do these things cost?

A. I have no idea.

Q. Couple hundred bucks, maybe?

A. That would be a good guess.

Q. When a linemen is out constructing a power line, they've already got boom trucks out there, don't they?

A. Yes. Well -- more time than not, yes.

Q. And if a lineman wants to measure the height of a power line, he's already got the boom truck out there. He could just stick it on the line and drop it all the way to the ground, and that would give him the exact height of the power line, would it not?

A. Yes.

Q. But Berkeley Electric does not provide this to the linemen, do they?

A. No. Not to my knowledge, no.

Q. Once a line is put up, managers or supervisors don't go out and measure power lines for National Electric Safety Code compliance, do they?

A. I think -- this is outside of what I do. I'm going to tell you what I think, okay? Our lines are inspected randomly. If we do build by RUS specs, I think McCall-Thomas comes in. They pull out a certain number of jobs and inspect them by that.

Do we follow our guys? No. They're trained to build a job properly. Superintendents are on a regular basis out on the jobs, were out on the jobs. If it's built by specs, it meets or exceeds those.

Q. But manager supervisors don't go out and measure it, do they?

A. To my knowledge, no.

Q. It's no one's job to measure the height of a power line after it's been constructed to meet the National Electric Safety Code compliance, is that fair to say?

A. To my knowledge, no, because if it's built to code, they know it's going to exceed it, so they don't see a reason to measure.

Q. I may have asked the question poorly. I said is that fair to say, and you started with a "no". Were you meaning to agree --

A. Ask the question again, please.

Q. Is it anyone's job to go and measure the height of a power line after it's put up?

A. There are times it's probably done, but to be a

Pacific {sic} job that's done all the time, I would say the answer is probably no.

Q. And are there many power lines in the Berkeley Electric system that have never been inspected, specifically for compliance with the height requirements of the National Electric Safety Code?

A. I'm sorry. Ask again?

Q. Are there any power lines in the Berkeley Electric system, the whole system, are there any power lines in that whole system that have never been inspected for compliance with the National Electric Safety Code?

A. I don't know.

Q. Is anyone at any time ever doing an inspection of a power line to specifically determine if it meets the height requirements of the National Electric Safety Code? Does that ever happen?

A. Our jobs are built by RUS specs. If they look at it and the construction is proper, it meets or exceeds that. Do they go out and measure each power line when they do their inspection? I would think the answer is no.

Q. And when they go and they're looking at the specs, is it true they're not looking to see if it specifically meets the height requirements of the National Electric Safety Code; is that true?

A. They're looking at everything on that pole to make sure that it's proper and in good condition, and if it is, they know that it meets that.

Q. But they don't know the required height when they get out there, right?

A. I would think no. I don't think they're -- no.

Q. And they're not going out there to make sure that power line meets that specific height requirement. That's my question.

A. No.

Q. Okay. Mr. Elrod, I would like to hand you what's been marked as Plaintiff's Exhibit No. 1, if you could turn to the very last page. Are you there?

A. Yes.

Q. Down in the comment section, you'll see a number -- you'll see a No. 1.3(a). Do you see that?

A. Yes.

MR. JOHNSON: Your Honor, I'm going to object unless he has some foundation to show the witness has any involvement with the RUS-300 or has ever even seen it.

MR. SMITH: Your Honor, I've got one very specific question with regards to employee training and a sentence regarding employee training.

THE COURT: Go ahead.

BY MR. SMITH:

Q. Mr. Elrod, I see here this says --

A. Are we on 13(a) again?

Q. Yes, sir. Second sentence is, Employees are trained to visually inspect lines in their daily operations.

Do you see that?

A. Yes.

Q. Do the people completing this form, did they get that from you, the manager of job training?

A. That training?

Q. Did the people -- yeah. Employees are trained to visually inspect lines in their daily operation. The question is, did they get that from you, the manager of job training?

A. Our guys do formal training, one to two classes a year, formal training. The rest of the training is one-the-job, probably takes about six years to achieve from ground man to first-class.

During that on-the-job training, they're taught that in each step of the way as they progress, but that training does not come from me.

Q. When the people wrote that on the form, employees are trained to visually inspect lines in their daily operations, did they get that from you --

A. You're asking if that sentence came from me?

Q. Yeah.

A. No.

Q. Did anyone ever ask you whether or not employees received training to visually inspect power lines in their daily operations?

A. No.

Q. Okay. Because there is no specific training for that, right? There is no training course?

A. Yes, there are training courses. They go through several courses during their time starting as a ground man as to when they become a qualified first-class linemen. Whether that topic is exactly covered in there, I cannot answer that question. I do not know.

On-the-job training is a daily training. You know, they go through that. There's steps they got to take through that year or two years before they make that next step that they're required to know. Is it taught during that training? I'm sure it is, yes.

Q. Hold on a minute.

A. On-the-job training, they're taught at each step, as they progress through that training, things they need to be doing and looking for, so --

Q. As they're working and figuring out what needs to be done, that's where they get that knowledge; is that what you're saying?

A. As they're working and the guy that's the qualified lineman above them is teaching them how to do it. Not that they're figuring out how to do it, someone is teaching them how to do it.

Q. Sure.

A. Okay.

Q. But there is no specific class that is set up to teach linemen to estimate the height of power lines. That class does not exist, true?

A. To my knowledge, no.

MR. SMITH: Thank you.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Elrod, you described the manner which Berkeley Electric designs and builds its lines, didn't you?

A. Yes, sir.

Q. Is what Berkeley Electric doing consistent or inconsistent with what co-ops across the state do?

A. We all build by the same RUS specs, so it's very consistent. Our linemen could go to any other co-op in the nation and the line would be built the exact same way.

Q. You were asked about linemen patrolling or inspecting as they go about their day's work. Berkeley requires them to do that, correct?

A. Yes.

MR. SMITH: Objection, Your Honor. Leading.

THE COURT: Leading? Well, it's technically your witness. While it's not a witness, it's -- overruled.

THE WITNESS: Could I add to that?

MR. JOHNSON: Yes.

THE COURT: Why don't you let him ask some questions, and if you need to explain something, you can.

BY MR. JOHNSON:

Q. Would you like to explain something?

A. You asked if our guys are required to do that during the daily operations. They do do that, but I think if you talk to any lineman, whether it's our lineman or a lineman from any other co-op, most linemen, even when they're traveling out of town, it's just something they are naturally going to do, look at the power line as they're travelling. It just becomes part of their routine so yes, they do that.

Q. Is what Berkeley is doing in having linemen look for and inspect and try to identify hazardous situations consistent with what other co-ops across the state are doing?

A. Yes.

MR. JOHNSON: Thank you.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Elrod, you've never had any personal, firsthand knowledge of what other co-ops do, do you?

A. Yes.

Q. How is that?

A. We participate in a program through NRECA and their insurance carrier to where it's a RESAP program where it qualifies you for a discount on your rates, but what it is, they come in. They look at all the operations. They look at how many safety meetings you're doing per month. They look at how you operate, your co-op operates.

You bring in other people in from other co-ops to look at you and inspect your co-ops and I've participated in doing that for other co-ops, so yes, I think I've seen that at other co-ops.

Q. Did you address with them specifically are your linemen inspecting power lines specifically for compliance with the National Electric Safety Code height requirements?

A. No. I don't think I've ever had a conversation Pacifically {sic} how you described it. I think from attending different meetings and foreman conferences that

the topics just come up in conversations about how you look at stuff. But specifically the way you asked, the answer would be no.

Q. You may or may not have heard it, and if you did, you don't even know who you heard it from; is that fair to say?

A. At other co-ops?

Q. Yes, sir.

A. That would be fair to say.

MR. SMITH: No further questions.

THE COURT: Recross?

MR. JOHNSON: No.

THE COURT: Okay. You can step down. Why don't we take a five-minute break before we go to the next witness.

(Recess taken.)

THE COURT: Next witness.

MR. SMITH: Plaintiffs call Rico Harrell.

RICO HARRELL,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q. Good morning, Mr. Harrell.

A. Good morning.

Q. You work for Berkeley Electric?
A. I do.
Q. How long have you worked there?
A. Going on 19 years.
Q. What is your job title?
A. I'm a crew foreman right now.
Q. Okay. And before that you were a lineman?
A. No. I was service -- run a service crew.
Q. Okay. Were you a lineman?
A. Yeah, yeah, yeah.
Q. And back in the time frame of 2008 and before, were you also a lineman at that time?
A. Yes.
Q. And was part of your area -- did that include Thornhill Farms Healing Ministries in McClellanville?
A. Yes.
Q. Do you construct power lines?
A. I do.
Q. Do you do maintenance on power lines?
A. Yeah. We do maintenance.
Q. Are you 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's part of our job riding down the lines. If we see something, we fix it.

Q. When you construct a power line, are you told how high the power line is required to be?

A. No.

Q. After you construct a power line, do you measure the power line to make sure it's at the height it's required to be?

A. No.

Q. What tool would you need to measure the height of a power line?

A. To measure a power line, we do from line to sight. That's using your eyes.

Q. Is there a tool that you could use if you wanted to actually measure the height of a power line?

A. Yeah. I guess you could say, yes.

Q. Measuring stick?

A. Yes.

Q. Does it look like this?

A. Yeah, yes.

Q. Hook it on to the top of the line, drop it down, gives you the height?

A. Right.

Q. Gives you the exact height, right?

A. Yes.

Q. Linemen do not get a measuring stick in their truck, do they?
A. No. We didn't have it.
Q. Two Rs, two Ls?
A. Right.
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.
Q. I thought you said when you are constructing a power line you weren't told what the National Electric Safety Code requires that power line to be.
A. Right. We don't go by the National Electric Safety Code.

Q. I'm sorry?

A. We're not required to learn the National Electric Safety Code.

Q. So you don't know what the National Electric Safety Code requires for any height of any power line in the system; is that fair to say?

A. No. I know that 18 and a half feet during this time.

Q. During -- are you talking about -- are you saying every line in the system at this time -- I don't know what you mean by this time.

A. No. What I'm saying is, going through all this information, we know exactly what it is, but we go -- the national electric standards is 18 and a half feet.

Q. When I took your deposition back in 2012, did you tell me that you did not know how high the power lines at Thornhill Farms are required to be?

A. I told you that I didn't know what the height was.

Q. Did you tell me that you did not know what the National Electric Safety Code required the height of the line out at Thornhill Farms to be? Did you tell me that back in 2012 at your deposition?

A. As far as I know, I said no, I believe.

MR. SMITH: Unseal, Your Honor?

THE COURT: Go ahead.

BY MR. SMITH:

Q. I'm going to hand you a copy of your deposition. I'm looking at page 13, and I'm going to ask you to read lines 9 through 14. I put a little thing there. I'm going to read you the question. You just read me what is next to the A, the answer, okay?

Question: How high are the power lines supposed to be at the Healing Farms Ministry?

A. I'm not sure.

Q. I'm not sure?

A. Right.

Q. Okay. Did anyone ever tell you?

A. No.

Q. So at the time we took your deposition, back in 2012, is it fair to say that you did not know what the height requirements were for the lines out at Thornhill Farms?

A. Yeah. I told you I didn't -- let me explain. I told you I didn't know for the fact I didn't build power lines at that time.

Q. But that was within your district, right?

A. Yes.

Q. And you went out there for service calls?

A. Yes. I did a service call.

Q. And 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 at the 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've 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.

Q. Okay. But you've been out before 2008. You had been out to Thornhill Farms many times to do service; is that true?

A. No, not many times. I've been out there a few times.

Q. Okay.

A. Yeah.

Q. Has there ever been a day, like a rainy day, when

you've been told to just ride around and make sure the power lines in your district are high enough?

A. No.

Q. Have you ever been asked to measure the height of the power lines out at Thornhill Farms?

A. No.

Q. You've never inspected the line at Thornhill Farms to make sure it's in compliance, true?

A. 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're in compliance; is that true?

A. True.

Q. Were you aware that the lawyers in this case representing Berkeley Electric have claimed that the power line was required to be 14 and a half feet? Are you aware of that?

A. No.

Q. No? And when you inspect the power line, you're just looking at it, right?

A. Looking for hazardous condition.

Q. But you're just looking at it, right?

A. Right.

Q. In an open field with no structures around, you can't tell exactly how high a power line is by just looking at it, true?

A. False.

MR. JOHNSON: I'm sorry. What was your answer?

MR. SMITH: He said false.

BY MR. SMITH:

Q. If you could, turn to page 19, lines 2 through 14. Are you there, page 19?

A. Yeah.

Q. Line two, you see the little two on the left?

A. Yeah.

Q. I'm going to ask you the question: Let's assume for the sake of argument that you're in an open field that doesn't have any structures around it and the line is supposed to be 18 and a half feet high. Do you mean to tell me that you can just look at that on a sky background and tell us that it is or it isn't 18 and a half feet? Answer?

A. I can't tell exactly if it's 18 and a half, but I can tell if it's high.

Q. You can tell if it's high?

A. Yeah, high enough. Well, that's what I'm saying.

Q. Just read.

A. Yes.
Q. You could tell if it's high?
A. Yes.
Q. All right. But you couldn't tell how high?
A. No.
Q. Because you can't visually verify the height of a power line, true?
A. Not the exact number, but high enough.
Q. If you would look on page 20, lines 3 through line 6, question is: I understand that's what you do, but in order for you to actually verify the height, you can't really do that visually, right?
What's the answer?
A. No.
MR. JOHNSON: I ask the witness be permitted to read the answer to the question following what counsel --
THE COURT: Sure.
MR. JOHNSON: -- identified.
BY MR. SMITH:
Q. You would need a measuring stick, right?
A. Yes. To get the exact measurement, yes.
Q. Okay. That was my next question. If you were given a measuring stick and told to measure power lines, would you do that?

A. Yes.

Q. And a moment ago, you said you had been out to Thornhill Farms. What was the term you used to describe how many? Did you say several or a few? I forget what you said.

A. I said a few.

Q. And that would be before 2008, correct?

A. Yeah, including 2008.

Q. In all the times you've been out there, you've never known what the National Electric Safety Code requires that power line to be, have you?

A. No.

Q. All right. And whenever you go out to do an inspection of a power line, you don't ever look around to see what the property, what the land is being used for; is that true?

A. Yes.

Q. Because no one's ever told you that's what you're supposed to be doing, that you're supposed to be looking to see what the land is being used for when you're working around a power line, true?

A. True.

(Plaintiff's Exhibit No. 12 was marked for identification and admitted into evidence.)

BY MR. SMITH:

Q. I want to hand you what we've marked as the Plaintiff's Exhibit No. 12. What does it say up top?

A. Healing Farm Ministry.

Q. That's what Thornhill Farms is, Thornhill Farms Healing Ministries?

A. Yes, it is.

Q. Is this the maintenance records for the Thornhill Farms Healing Ministries?

A. These look like -- these are trouble calls.

Q. Are these records that would show some of the times that Berkeley Electric would have occasion to go out to Thornhill Farms to fix trouble, fix this, fix that?

A. Right.

Q. All right. Would these be helpful in reviewing the times that you went out to Thornhill Farms?

A. Yes.

Q. Okay. And on that very first page there, you see an entry for August the 20th, 2007, next to the last entry? See the creation date?

A. Yes.

Q. August 20th, 2007? Did you go out to Thornhill Farms on August the 20th, 2007?

A. I did.

Q. And we know that because it say crews on the

right-hand side, Rico Harrell?

A. Right.

Q. I want you to assume for the question here 4/23/08, the next entry, that's the date of the electrocution in this case, okay?

A. Okay.

Q. Was that the last time -- when you went out there in 8/20/07, was that the last time that Berkeley Electric went out to Thornhill Farms before the men were electrocuted?

A. I'm not sure. That's the last time I went there.

Q. But that form isn't just you, right? That's got the crew of Isaiah Ward, Nick van Allen, Kenny Holloway, Rico Harrell? These aren't records just for you, are they?

A. No.

Q. On the face of this record, when you went out on August the 20th, 2007, that's last time anyone from Berkeley Electric went out there before the men were electrocuted on 4/23/08?

A. I don't know that.

Q. You can't tell from this record here that you would be the last person --

A. From this record, there is nobody else, but we got a different system. We went to a different system in the

computer.

Q. But back in 2008, the system is what you're looking at right now, right?

A. I'm not sure about that. I know we changed over.

Q. Well, this system has entries in 2007 and 2008, so would that tell you you were using this system in 2007 and 2008?

A. It don't say the whole year 2008, so I'm not sure where we switched. I think we switched in 2008.

Q. I'm not asking you about anything after 4/23/08, so is it fair to say, based on this document, y'all were using this system at least as of 4/23/08?

A. Yes.

Q. And this system and this document would show that was the last time Berkeley Electric had been out to the Thornhill Farms Healing Ministries before 4/23/08?

A. Right.

Q. And that was you?

A. That was me.

Q. Did you do an inspection of the power line involved in this case?

A. No.

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

A. Right.

Q. Now, you said before, this isn't the only time you've been out there, is it?

A. No.

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

A. True.

Q. Now, you told me that back in 2012 in your deposition, remember that?

A. Yes.

Q. Remember Mr. Mobley was in the room when you gave your deposition and heard you say that? Do you remember that he was there?

A. He was in the room with me, during my deposition?

Q. Yeah. Do you remember when we took your deposition, Mr. Mobley was in the room and heard the things that you said?

A. I think he was in there, I think. I guess.

Q. Did you ever get written up? Were there any discipline actions taken against you when you admitted you had never inspected this power line for compliance with the National Electric Safety Code and you hadn't inspected it at all when you were out there on 8/20/07? Did you get in any trouble for admitting that?

A. No.

Q. And you've been written up for other things, right?

A. Once.

Q. What was the thing you got written up for once?

MR. JOHNSON: Your Honor, I object. Relevance. We don't have a time. We don't have a foundation for it.

THE COURT: What's the relevance?

MR. SMITH: Your Honor, this is a major violation in failing to inspect the power line by the last guy who was out there at the time. Once he admits it and doesn't get in trouble for it, it just shows what degree of care they're using in their supervision of linemen.

THE COURT: What's the relevance of whatever else it was that he got written up for? That's what the objection was to. He didn't object to you asking if he ever got written up.

MR. SMITH: I anticipate he would have been written up for something very, very minor, and the connection we would draw with Your Honor is, you know, he's admitted to something that is pretty major, in our eyes, but the only thing marked against him is for something very minor. It would be a very limited question.

THE COURT: All right. Go ahead.

BY MR. SMITH:

Q. Mr. Harrell, what were you written up for?

A. Dropping a transformer.

Q. It cost Berkeley Electric money to fix it?

A. Yes.

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.

Q. No?

MR. SMITH: No further questions, Your Honor.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Harrell, so we can be sure everyone knows where you went to when you went out to do work at Healing Farms, would you look at this document, this map, and tell me whether you recognize it as showing Healing Farms Ministries property?

A. Did my underground repair right here, and I fixed the security light right here.

Q. All right. Let's do this: Mark right where you did the security light, and just put an circle beside it. And what else? Did you go out and do a repair? What was the problem there?

A. Had to dig in -- sewer lines digging into our underground servers right there.

Q. And where is the line involved in this accident?

A. The line's over here.

Q. Write the word "line" and draw an arrow to it.

MR. JOHNSON: We offer this into evidence.

MR. SMITH: Your Honor, I wouldn't object to a map in general, but I have no idea what those lines are, and, to be honest with you, I've never seen that before.

Maybe there is another witness he can use to get that in, but this is the first time I've ever seen it, and I wouldn't object --

THE COURT: That's another objection. If he can testify that's a fair and accurate representation of what it appeared like at the time he went out there, then they can get it in through this witness. If you say, well, I've never seen this picture before, I don't think it's fair, that's a different objection.

BY MR. JOHNSON:

Q. Mr. Harrell, does this map appear to be a reasonable and reliable picture of what is out there, the lay of the land, at Healing Farms Ministry?

A. Yes.

MR. JOHNSON: We'd offer it into evidence, Your Honor.

MR. SMITH: No objection, Your Honor.

THE COURT: It's admitted.

(Defendant's Exhibit No. 2 was marked for identification and admitted into evidence.)

BY MR. JOHNSON:

Q. Mr. Harrell, looking at Defendant's Exhibit 1 so the Court can see what you're referring to, where did you do the security light?

A. I did the security light right here.

MR. JOHNSON: Can you see it?

BY MR. JOHNSON:

Q. Security light where?

A. Here.

Q. And the damage underground?

A. Actually dig into this underground service right here.

Q. And tell us, if you would, where the line is?

A. The line is over here.

Q. Did you ever have occasion to go back and see that line and what it looked like prior to the accident in this case?

A. No, sir.

Q. Does Highway 17 appear on this?

A. Yes, sir. Right there.

Q. Thank you.

Do you and BEC use the staking sheet as your design for construction of lines of this nature?

A. Yes.

Q. If you build them according to the line -- according to the staking sheet, will the clearance on the line at mid-span meet and exceed the requirements of the National Electric Safety Code?

A. Yes.

Q. Is there any reason that you would need a measuring stick to measure that?

A. No.

Q. I've written on this yellow slip of paper measuring stick is not needed, or lines built to exceed National Electric Safety Code. Would you write your name on it?

MR. JOHNSON: Thank you. That's all I have, Your Honor.

THE COURT: Any redirect?

MR. SMITH: Yes, sir.

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Harrell, even if you went out this line and these particular poles, is it true you would not be looking for the use of the land? You wouldn't be looking around to determine what the use of the land was, right?

MR. JOHNSON: That was not covered in cross, on reply.

MR. SMITH: I think it was absolutely provided in cross because the whole point of cross was to say you didn't visit this particular pole. That's what the map was for.

THE COURT: So what was your question again?

BY MR. SMITH:

Q. Even if you went to this particular pole, this particular span, you would not be looking for the use of the land, true?

A. Right.

Q. And when you went out there to the poles and the places you described, you didn't look at the use of the land then either, right?

A. No.

Q. You don't do that because no one has ever told you to do it, right?

A. We got the staking engineer go out there before us, before we build a job, check all that out.

Q. And in these maintenance records here, on Exhibit No. 12, I'm going to turn your attention to the maintenance records from -- it looks like 2/16/07, February 16th, 2007. Do you see that date there?

A. Yes.

Q. And it says, out, dispatched to Rico. Do you see that right there?

A. Yes.

Q. And it has the pole number here, doesn't it?

A. Where?

Q. Right there. Well -- oh, I'm sorry. Pole number. See that? What's that pole number it says?

A. 24594005.

Q. The staking sheet, document No. 11, poles 24595005, right?

A. Right.

Q. Same number?

A. Yes, sir.

Q. Okay. And pole No. 005, that would be this pole right here, number five?

A. Right.

Q. Okay.

MR. SMITH: Your Honor, referring to

Plaintiff's Exhibit No. 7, this pole is the pole indicated on the --

BY MR. SMITH:

Q. You just don't remember going to that particular pole; is that fair to say?

A. Yes.

Q. That was 2007. That was a long time ago, wasn't it?

A. Yes.

MR. SMITH: No other questions.

May I have an moment?

THE COURT: He has an opportunity for recross too. Do you want to ask any more questions?

RECROSS-EXAMINATION

BY MR. JOHNSON:

Q. Yes. Mr. Harrell, do you know whether you are the one that actually went to that pole and did that work, or whether somebody else might have done it?

A. Could have been, yes, sir.

MR. JOHNSON: Thank you. That's all I have.

FURTHER REDIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Harrell, when you installed the power line, you talked about how you're looking for that proper sag. There's no need to measure it; is that right?

A. Right.
Q. But over the years, things can change. Height of the power line could change, right?
A. Yeah.
Q. Could that be one of the times later on down the road you would need a measuring stick? Because you didn't build the thing. Maybe it changed.
MR. JOHNSON: Your Honor, I object. It's not in reply.
THE COURT: That's true. It's kind of a hyped up question, more suited for argument.
MR. SMITH: Thank you, Mr. Harrell. That's all the questions I have.
THE COURT: All right. You can step down.
MARGARET MARY YERGIN,
having been first duly sworn,
was examined and testified as follows:
DIRECT EXAMINATION
BY MR. SMITH:
Q. Good morning, Ms. Yergin.
A. Good morning.
Q. Where did you live back in 1993?
A. Bellfield Farms in McClellanville.
Q. Is that the property that's known now as Thornhill Farms Healing Ministries?

A. Yes.

Q. I would like to hand you an exhibit, Exhibit No. 13. Actually, I'm going to make it a little bit easier. I've blown this up.

Is that the same thing you're looking at?

A. Yes.

Q. You can just use this if you like. Do you recognize this?

A. Oh, yeah.

Q. What is it?

A. It's an aerial view of the farm.

Q. Is it a fair and accurate representation of Bellevue Farms back in 1993?

A. Yes. There's a section of it that's missing off to the left.

Q. Okay.

A. But yes, overall, and it's Bellfield.

Q. I'm sorry. I keep saying that.

Would this picture be helpful for you in explaining what you did on the property back at that time?

A. Yes.

Q. Did you have horses out there?

A. Yes.

Q. How many horses did have you?

A. On the high, we had 165, averaged about 100.

Q. What was the biggest horse you had?

A. We had a Belgian Shire cross. He was about 19-1, 19-3 hands. He was hard to measure because he was so tall.

Q. So you measure horses in terms of hands?

A. Right, four inches to a hand, so, roughly, that's 80 -- he's 79 inches tall at the shoulder.

Q. Do you know what that is in feet, in inches?

A. Divide it by 12. They took my calculator away. I don't know.

Q. That's just under seven feet?

A. Just under seven feet, yeah.

Q. And that height would be from his feet to the base of his neck?

A. Yes, the withers, the shoulder.

Q. So his head would have stuck up higher than that?

A. Oh, yeah.

Q. Would his head alone, the tip of his head, have taken him over the eight foot mark?

A. Definitely. From the withers to the top of his head probably was another two-and-a-half feet.

Q. And if somebody was riding him, not me, a normal person, how high would that person's head be likely above the ground?

A. Well, someone short like me, I would be just above the top of his head, but an average-sized person, probably another six, eight inches above that.

Q. And did you have boarding stables out there?

A. Yes.

Q. People ride the horses?

A. Uh-huh.

Q. Did you also give lessons?

A. Yes.

Q. And what kind of lessons did you give?

A. We did hunter, jumpers, and combined training.

Q. What is a dressage area?

A. The dressage area was beside the hay barn. It's probably easier --

Q. I was going to give you this. Your glasses seem to be fogging up.

A. They are fogging up. Thank you. Okay. Explain to me, what are you asking me?

Q. What is -- just what is it, in general?

A. It's a training area.

Q. Where you teach them to ride and jump and things like that?

A. And teach dressage.

Q. And show us on here where the dressage area was. I'll just point. You tell me if I got it.

A. Right there pretty much, yes.
Q. And this is -- how big was that dressage area so we can get some perspective here.
A. I believe it was 20 by 60 meters.
Q. And was there a combined entrance and exit?
A. Yes.
Q. Where was the entrance and the exit?
A. The entrance would be on the farm side.
Q. So one up here, on this side?
A. Well, it would be right dead in the middle of the fencing.
Q. Right here?
A. Yes.
Q. Okay. Is that the only entrance or exit?
A. Yes. There were other ways to access, but as far as our training was concerned, there was only one entrance and exit.
Q. And if we assumed the power line was roughly in this area right here --
A. Okay.
Q. -- did that cause horses to be ridden in the area of the power line?
A. Yes.
Q. Did you have a fish farming area as well?
A. Yes.

Q. Where was that? I imagine in the lake.
A. Yes. In the pond right there.
Q. In this area right here?
A. Well, actually the fish were free in the pond, but we did our feeding and culling right there at the dock.
Q. This dock right here?
A. Uh-huh.
Q. Is that a yes?
A. Yes. I'm sorry.
Q. What kind of fish did you raise?
A. Tilapia.
Q. Did you also grow hay?
A. Yes.
Q. Where did you grow hay?
A. Right there. Most of that was the hayfield. There are other smaller sections of hayfield, but the majority of the hayfield was right there.
Q. Was some of the hay used to feed your horses?
A. Oh, yes.
Q. Did you also sell the hay to other people?
A. Uh-huh.
Q. Is that yes?
A. Yes.
Q. Where did you keep that hay?
A. In that hay barn that's beside the dressage arena.

Q. And when we talk about the barn, or the old barn, can we always refer to this one?
A. Uh-huh.
Q. Is that a yes?
A. Yes. I'm sorry.
Q. How much hay would the barn store?
A. We could probably put in probably about 40,000 bales, somewhere in there.
Q. How was the hay harvested?
A. We had tractors and all the balers and the rakes.
Q. How many tractors did you have?
A. We had three total tractors.
Q. Can you describe the biggest tractor that you had?
A. Yes. It was a Ford 7700. I printed off a picture of it.
Q. Did you have to climb in and out of it?
A. Yes.
Q. The exhaust pipes on the tractor, would those exhaust pipes go on higher than eight feet in the air?
A. Yes.
Q. Did you also grow hay and harvest the hay around the barn itself?
A. Yeah. Yes, we did. There was a nice patch right in there.
Q. Around in here?

A. Uh-huh.
Q. Yes?
A. Yes.
Q. You're all right. And was the tractor, the big one you described, was that driven around the area of the barn?
A. Yes, it was.
Q. Was it driven all around the barn?
A. Yes.
Q. Did you also use a backhoe out there from time to time?
A. Occasionally.
Q. The backhoe is the thing with the digger that goes up in the air?
A. Yes.
Q. With the digger attachment on as high it would go, would that exceed eight feet as well?
A. I'm sure.
Q. Now, if someone drove on to your property back in January or February 1993, would they have been able to see the horses?
A. Yes. Not all of them at one time, but yes. We had horses in the front pastures as well as in the back.
Q. Were there other farm animals out there as well?
A. Yes.

Q. And were those farm animals visible to the people entering the property?

A. Yes.

Q. Did they actually greet the people entering the property?

A. Yes.

Q. And you had security lights out there?

A. Yes.

Q. And those attached to some of the power poles?

A. Yes.

Q. All right. If a bulb burned out, who would you call?

A. The power company.

Q. They would send somebody out to come fix it?

A. Yes.

Q. When the men came out to install the power line, did they ever ask you any questions about what y'all were doing out there, what the land was being used for?

A. I don't remember ever talking to them myself. I was married at the time, so he would have taken care of that.

Q. And all the other times they came out there, all the other times, did anyone ever ask you then what the land was being used for, if it was being used for anything different? Did anyone ever ask those questions?

MR. JOHNSON: Your Honor, I object. She just testified she didn't talk to anyone.

MR. SMITH: The question was, when they came out to install the power lines. She answered that question. My question is, when they came out after that, did they ever ask you that? She's free to give the same answer.

THE WITNESS: I'm going to say no, I didn't talk to anybody, because I would have only called because a light bulb was out, and they would come and do their job and it was done.

MR. SMITH: Those are all the questions I have for you. I move to admit Exhibit No. 13 into evidence, Your Honor.

MR. JOHNSON: Your Honor, may I question her about the document before you rule on its admissibility?

THE COURT: Sure.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Ms. Yergin, will you step down over here where we have the photograph?

A. Yes, sir.

Q. Do you know the date this photograph was taken?

A. No.

Q. Do you know who took it?

A. No.
Q. Do you have any idea whether it was done in '90, '91, '92, or '93?
A. It had to be done after '89, for sure. '90 -- it had to be done around '90, '91, somewhere around there. It was after the hurricane that the garages were built, so --
Q. Could you take my pen and you mark where the dressage was?
A. Yes. Right here.
Q. Is it a circular pen?
A. No. It's rectangular.
Q. Could you draw a little rectangle around where it was.
A. You can actually see it here with the white poles.
Q. Okay. And what else -- you talked about there being a storage barn. Where is that?
A. This is the hay barn right here.
Q. Was this the one that was damaged in Hugo?
A. Yes.
Q. Was it repaired?
A. No. We just took down -- it collapsed. This had been larger, and --
Q. Did it have a concrete pad?
A. I don't remember. I don't believe so.

Q. All right. The barn you're talking about is here. Would you circle that and write barn.

A. Okay.

Q. Does this photograph show the barn before or after Hugo?

A. After.

Q. You wrote barn. Now, do you recall the line that's involved in this case?

A. Not really, no.

Q. Do you know what it was going to or why it was going anywhere?

A. Yes, because they built these garages back here under the trees.

Q. All right. Can you draw for me the line, where it would have come off this roadway here. Could you put it on the map?

MR. SMITH: Pope, we can't see.

THE WITNESS: I can't really tell you how it came off the barn. There were power security lights coming down the alley here, and then there was power that went over to this barn, to the hay barn, but I could not really tell you how it got from there to the big garages.

BY MR. JOHNSON:

Q. Could you put it on the map?

A. Put what on the map?

Q. Draw a line on the map where it ran to and from.
A. Well, just that -- you can actually see these power poles here, okay? I guess I don't see one here, but I believe it was one here, and that was the power poles, and --
Q. Can you identify any power poles that would enable you to say that was the line in question?
A. Not really, no.
Q. Do you recall seeing the line as it ran from the roadway over to the garages that were being built, that had been built?
A. It's one of those things, you know it's there, but in my -- going back and thinking about it, I cannot tell you exactly where that might have been.
Q. Good. You can return.
Oh, one other question.
A. Yes, sir.
Q. In this photograph, do you see any horses around the barn or the dressage area?
A. No. You can see right along this area is where the horse -- there were horses right in here.
Q. I want the judge to see it.
A. I'm sorry.
THE COURT: That's okay.
THE WITNESS: There were horses -- these were

pasture run-ins right here for horses. You can see the line where the fencing was, so that was it. The horses were not boarded in this area. They could ride in this area, but they did not stay there.

BY MR. JOHNSON:

Q. Could you show me any horse that appears on this map?

A. Right there is one. That little white dot right there? That's a horse, and there's a horse. There's one -- I know it's hard to see them. There's Bick Buck right there. It will give you an idea how big he was compared to this. I mean he shows up better on the map.

Q. Circle where you see a horse and just draw an arrow and put an H. Any other horses?

A. I know there's a lot more, but -- I can definitely see at this point and know it's a horse.

Q. And are you telling me this was a fence that kept the horses fenced in where these stables or stalls were?

A. Yes.

Q. Can you tell me how far it was from the barn to the fence we talked about?

A. No, I really can't.

Q. Can you write fence?

A. Sure. That would have been one side. There was actually a little road between there, so this went out

between there.

Q. Do you know how far it would have been from the dressage area to the fence?

A. I couldn't guess as to how far that is.

Q. If someone were looking at this map in terms of staking a line and the information they had that was on this map, did it show any horses in the area of where the barn and the dressage area were?

A. No. Not as living there.

Q. All right. And let me ask you this: Is it correct that y'all lost this property, had to give it back to the mortgagee?

A. Yes, right.

Q. And when was that?

A. 1993.

Q. And when in '93 did you shut down and give it back --

A. I believe it was December of '93.

Q. That you signed the deed?

A. Well, that we left the property.

Q. So you were using the property with horses on it?

A. Yeah. The last of the horses left in the first part of December.

MR. JOHNSON: Thank you. That's all I have.

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Ms. Yergin, you could stay right there just for a moment I'll be very brief. You said this picture was taken around 1991?

A. Yeah, I would think so.

Q. Were you doing the same thing that's -- well, let me ask you this: Did the property look the same in January or February of 1993?

A. Yes.

Q. Okay. Is this a fair and accurate representation of how the property was in January and February of 1993?

A. Yes.

Q. And you said the garages. Where did you point to the garages?

A. They're under these trees.

Q. And that's where the power was running to from the power line?

A. Yes.

Q. And you said there was power to this barn right here?

A. Yes.

Q. And how did the power get from here to there? Was it a power line?

A. Well, it would have had to have been.

Q. Why don't you write on here where you think -- I

don't care about any of these poles on the street. I'm talking about the pole that went from here to here. What's your estimation of where that power line would be? Just draw a line straight across.

A. See, I don't remember where that power line came in. I know it would not have gone across the top of my dressage arena, and so I'm really having to guess as to where I would have said it had to go here and not there.

Q. We've got other witnesses later on that will tell us, so if you don't know, you don't know. I won't ask you to guess.

A. I don't know. I really can't say for sure where it goes.

Q. But you do know the power was connected to the barn here and the power was going to these garages in there?

A. Yeah.

Q. That was the purpose for the power line?

A. I'm looking at this barn. It's something I haven't looked at in a very long time, and I'm looking at this barn, trying to even remember if the barn had power.

After the hurricane, it literally cut that barn in half, and so there could have been power lines running to it and we just never used the power, but this barn wasn't really off limits, but we didn't allow people to go hang

out in the barn because of the tractors and the hay and snakes would get in there. So we pretty much discouraged people from going in this barn except as a working barn.

Q. Do you remember horses being ridden around this area?

A. Yes.

Q. Do you remember tractors being ridden around this area?

A. Absolutely.

Q. The entrance to the barn is actually on this site?

A. It's right here.

Q. So if you're coming from the even the fish farming operation, you're taking this route?

A. Right. There's a bridge right here.

Q. And if the hey was harvested down here, right?

A. Yes.

Q. How would you get the hay from the field on the tractor to the barn?

A. I would have just come up along the side right here.

Q. Can you make sure Your Honor sees this path? If you can show the path, Ms. Yergin.

A. There is a small lane that comes right up in here.

Q. And where would you be taking it, straight to the entrance of the barn?