

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JUL 12 2018
SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

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

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

v.

Berkeley Electric Cooperative,.....Respondent.

AND

John Steven Robinson,.....Appellant,

v.

Berkeley Electric Cooperative,.....Respondent.

PETITION FOR REHEARING

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Attorneys for Appellant

The Appellants request a rehearing. The basis for the request is discussed below.

I. The Standard of Care issue was preserved for review.

This Court states “a party must file a Rule 59(e) SCRCRCP, motion ‘when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.’” From the Pre-trial Brief, through the opening statement, numerous times throughout the course of trial, and again in the Appellant’s proposed Order, the issue of the Standard of Care was thoroughly and repeatedly raised. By signing the Order written by Respondent, the Standard of Care as outlined by Appellants was rejected and ruled upon. The trial Court had one proposed order with the Standard of Care in place for over 100 years. The Trial Court had another proposed order with a different standard of care. The trial Court chose the latter. To say the Trial Court didn’t rule upon this issue would be to presume the Trial Court was asleep the entire time and failed to read anything submitted by the Appellants.

II. The Latent Defect argument was preserved for review.

Whether the height defect in the line was hidden was repeated throughout trial and the issue was central to the case present by both parties. Appellants spent much time eliciting how often inspections are required and what those inspections are required to include. In the end, Respondent, by its own admission, never inspected the line. A condition cannot be a latent defect if there is no reasonable inspection taking place. Respondent, on the other hand, took the position that the line was sufficiently and reasonably inspected, and no such height defect was noted. In other words, if there was a height defect in the line, it was not readily apparent through Respondent’s reasonable inspection. This, by definition, is a latent defect and the position taken by Respondent. The Trial Court rejected Appellant’s contentions and in citing Grier as support, ruled the height defect in the line was a latent defect.

III. The Grier case is a latent defect case.

With all due respect, one cannot read the Grier decision and conclude that the ruling was not based upon the existence of a latent defect. The only testimony quoted by the Supreme Court was that concerning a latent defect. The ruling itself explicitly states the “reason” for the ruling is because of the existence of the latent defect.

The operator must act with care and diligence to see that his brakes meet the standard prescribed by statute; **but if because of some latent defect**, unknown to the operator and not reasonably discoverable upon proper inspection, he is not able to control the movement of his car, he is not negligent, **and for that reason** not liable for injuries directly resulting from such loss of control. Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966)

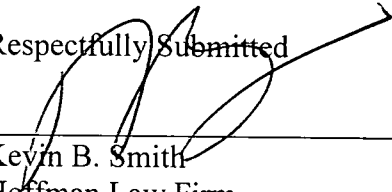
When the Trial Court found Respondent was not negligent and based the ruling on the Grier case, it either cited the wrong case in support of the decision or had to have equated the condition of the line to a latent defect. In so doing, the Trial Court found the condition of the line on the one hand to be a hidden danger/latent defect and on the other hand open and obvious. Because of this problem, Appellant can certainly understand why Respondent argues this is not the reason the Trial Court relied upon the Grier case. But, that does not change the fact that the ruling in the Grier case was based upon the existence of a latent defect. Simply ignoring these words and skipping the “reason” for the ruling, the thing that makes the acts or omissions not negligent, does not change the legal implication of citing this case as support for the ruling.

IV. One cannot compare the acts of each party without first knowing the standard of care that applies to each of them.

It would be impossible to determine if the acts or omissions of either party constituted negligence without first applying the correct standard of care that applied to each of them. It would be equally impossible to compare those acts or omissions without applying of the correct standard of care. It would be an error of law to compare the negligence of one party with the other using

the exact same standard of care if 100 years of case law dictates the standard of care amongst the parties to be different.

Respectfully Submitted



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July 9, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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SC Court of Appeals

Estate of John Fortney, Deceased,
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Representative, Constance S. Fortney,..... Appellant,

v.

Berkeley Electric Cooperative,.....Respondent.

AND

John Steven Robinson,.....Appellant,

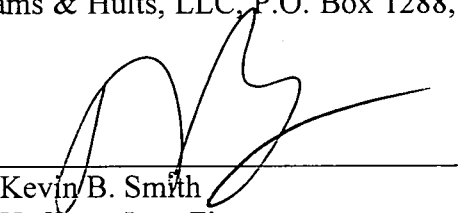
v.

Berkeley Electric Cooperative,.....Respondent.

PROOF OF SERVICE

I certify that on July 9, 2018, I have served the Petition for Rehearing addressed to the attorneys of record as follows: Pope D. Johnson, III, Esquire, 1230 Richland Street, Columbia, SC 29201 and John B. Williams, Esquire, Williams & Hults, LLC, P.O. Box 1288, Moncks Corner, SC 29461.

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July 9, 2018

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Estate of John Fortney, deceased, by his duly appointed Personal Representative
Constance S. Fortney and John Steven Robinson v. Berkeley Electric Cooperative
Ct. App. Case No.: 2016-000521
Date of Accident: 4/23/08

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Appellant's Petition for Rehearing and Proof of Service in the above-referenced matter. Please file the original and six (6) copies, and return to me a file-stamped copy in the envelope provided. I have also included our firm check for \$25.00 for your filing fee.

By copy hereof to Pope D. Johnson, III, Esquire and John B. Williams, Esquire, Attorneys for the Defendant (Respondent), I am serving upon the Respondent a copy of this pleading as shown on the enclosed Proof of Service.

Thank you very much for your assistance in this matter. With kind regards, I am

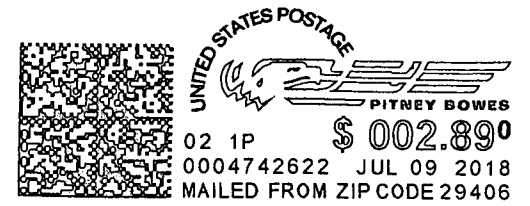
Sincerely,

Kevin B. Smith

A handwritten signature in black ink, appearing to be "KBS", written over the typed name "Kevin B. Smith".

KBS/jhd
Enclosures

cc: Constance S. Fortney, PR for the Estate of John Fortney
John Robinson
Pope D. Johnson, III, Esquire
John "Jack" Williams, Esquire
Don C. Keenan, Esquire
Andrew Gould, Esquire



 **HOFFMAN**
LAW FIRM, LLC

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