

**IN THE COURT OF APPEALS 02/27/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00712 COA**

**MISSISSIPPI POWER COMPANY**

**APPELLANT**

**v.**

**J.C. RILEY AND WIFE, ANNETTE RILEY**

**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WALTER O'BARR

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

RAYMOND L. BROWN

PATRICK R. BUCHANAN

ATTORNEY FOR APPELLEES:

RICHARD W. HAMILTON

NATURE OF THE CASE: NEGLIGENCE

TRIAL COURT DISPOSITION: JUDGMENT FOR APPELLEES

BEFORE FRAISER, C.J., BARBER, DIAZ AND MCMILLIN, JJ.

DIAZ, J., FOR THE COURT:

Mississippi Power Company (MPC) appeals the judgment granted in favor of the Appellees, J.C. and

Annette Riley (the Rileys). The County Court of Jackson County after a bench trial awarded the Rileys \$1,137.96. MPC appealed this judgment to the Circuit Court of Jackson County where the judgment was affirmed. Aggrieved, MPC now appeals to this Court asserting the following issues: (1) the trial court erred in finding MPC negligent; (2) the trial court erred in finding that MPC was responsible for trimming the trees as opposed to the independent contractor; (3) that the trial court should have applied the comparative negligence theory; and (4) that the trial court erred in the assessment of damages. Because the Appellees have failed to file a brief in this appeal, we must reverse and render the judgment.

## FACTS

On the night of July 17, 1992, the power went out at the Rileys' residence. According to Mrs. Riley's testimony at trial, the power outage was preceded by a "big ball of fire". Following the incident, the Rileys had to have their television and refrigerator repaired. They also had to replace their microwave oven. On the morning prior to the power outage, the Rileys had their air conditioner repaired. The air conditioner did not need to be repaired after the power outage. Testimony reveals that the service ground on the Rileys' service drop was disconnected when engineers from MPC arrived to inspect the scene. The Rileys filed a complaint against MPC for \$2,500 in repair costs and consequential damages.

## DISCUSSION

We begin by addressing the fact that the Appellees have failed to file a brief with this Court. "[T]he rule has been stated in numerous cases that the failure of the appellee to file a brief is tantamount to a confession of error and will be accepted as such unless we can with confidence say, after considering the record and brief of appellant, that there was no error." *Snow Lake Shores Property Owners Corp. v. Smith*, 610 So. 2d 357, 361 (Miss. 1992) (quoting *Burt v. Duckworth*, 206 So. 2d 850, 853 (Miss. 1968)). The county court issued a judgment without an opinion finding that the Riley's should be entitled to \$1,137.96, from MPC. We have reviewed the record and the Appellant's brief before us, and after doing so we are unable to say with confidence that we would reach the same result.

## NEGLIGENCE

MPC argues that the Rileys have failed to prove that MPC was negligent. Its argument is that the problem was not reasonably foreseeable to MPC, and the Rileys have failed to produce evidence that any negligence on the part of MPC caused their damage.

Of course, to recover on a negligence theory, the Rileys had to prove that MPC owed a duty to them; that MPC breached that duty; that they incurred damages; and that MPC's breach was the proximate cause of those damages. *Read v. Southern Pine Elec. Power Assn.*, 515 So. 2d 916, 919 (Miss. 1987)

. As a power company, although MPC is not an absolute insurer against injury, it is scrutinized under the highest duty of care in distributing electricity. *Read*, 515 So. 2d at 919 (citations omitted). When the cause of danger is reasonably foreseeable and known to the power company, the company must exercise reasonable care to correct or remove the cause of danger. *Id.* "This standard of care applies whether the injury is to persons or to property." *Id.* In the *Read* case, the court found that the power company should have been aware of the excessive power flowing into the plaintiff's residence, and that the excess power flow proximately caused the damage to the plaintiff's wiring and appliances. *Id.* at 920. In that case, the plaintiffs had power problems for three years before the incident, and when a power company employee finally came to check the problem, he told the plaintiff that she had too much current coming into the house. *Id.*

The present case is readily distinguishable from the *Read* case. The Rileys' complaint was that MPC negligently allowed its power lines to come into contact with the trees on the Rileys' property. MPC hired a tree service to cut the limbs off the tree in front of the Rileys' house that might have interfered with the power lines. Mrs. Riley testified that the last time someone came to trim the limbs off the tree, he asked for her permission. She testified that she gave him permission but told him not to "dissect" the tree. This was in May 1992.

Rob Robinson, an electrical engineer with MPC, testified that the abnormal voltage into the Rileys' house in July 1992 occurred when the power line was abraded by a tree limb. According to Mr. Robinson, MPC follows the guidelines set forth in the National Electric Safety Code (NESC) regarding tree trimming procedures. Pursuant to the NESC guidelines, MPC tries to keep an eight to ten foot clearance on primary lines and three foot clearance on secondary lines. MPC maintains this clearance on a three year cycle. His testimony stated that MPC was denied permission when it tried to trim the trees in June 1990 and May 1992. Mr. Robinson then testified that it is standard practice for the company to cover the lines with tree wire to prevent "touch potential" when they have problem obtaining permission to trim the limbs off a tree. Testimony revealed that there was tree wire on the power line outside of the Rileys' residence.

As to the incident at the Rileys, Mr. Robinson testified that the electricity lost its point of reference because the Rileys did not have their service grounded. He testified that (1) the customer is responsible for maintaining the service ground; (2) the Rileys' service ground was disconnected when he inspected the property; and (3) if the service ground is disconnected, and the service is lost, neutral, or becomes broken in any way, the result would be fluctuating voltages.

The Rileys both testified that as long as they have lived in their house for fifty-one years, they never had an electrical problem with the power company prior to this incident. MPC argues that based on the evidence in the record, the Rileys' problem was not reasonably foreseeable to MPC because they never had any complaints from the location before the incident. Even in spite of this, the damage could have been greatly minimized, or even prevented had the service ground been properly connected according to Mr. Robinson. Based on the record, we agree. MPC could not have anticipated that the Rileys' service ground was disconnected. Of course, the Rileys, having filed no brief, make no claim otherwise.

## CONCLUSION

We find that the Rileys have failed to prove that MPC was negligent as a matter of law. It was not

reasonably foreseeable for MPC to anticipate that the Rileys' service ground was disconnected. Furthermore, absent a brief from the Rileys, we cannot say with confidence that there was no error. Because we hold that the Rileys have not proven negligence on the part of MPC, we do not address the other issues raised by MPC.

**THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT IN FAVOR OF THE APPELLEES IS REVERSED AND RENDERED. COSTS ARE TAXED TO THE APPELLEES.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**