THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Case No. 2008 - CP -10 - 1983
Hon. Mikell Scarborough, Master in Equity

ROOSEVELT SIMMONS
Plaintiff, Appellant
Vs.

BERKELEY ELECTRIC COOPERATIVE, INC.
and
ST. JOHN'S WATER COMPANY, INC.
Defendants, Respondents

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case concerns petitioner's claims against two utility companies, Berkeley Electric Cooperative, Inc. (Berkeley Electric) and St. John's Water Company, Inc. (St. John's) for trespass of his property known as TMS 498 and TMS 135 by their power and water lines. The Master in Equity granted summary judgment dismissing petitioner's claims against both utilities. R.pp.10-21. The Court of Appeals affirmed the decision as to Berkeley Electric and reversed part of the decision as to St. John's water line across TMS 135. App. at 3-12. The facts relating to petitioner's claims against each utility are set forth below.

A. The subject properties

TMS 498 is bordered by Kitford Road to the south, the abandoned Seaboard Coastline Railroad right of way to the east and TMS 118 owned by Gordon and TMS 319 owned by Frasier to the north. R. p. 52. TMS 135 is bordered by the Seaboard Coastline Railroad right of way to the west, TMS 136 owned by Andersen to the north and TMS 138 to the east. R. p. 75, para. 2.

B. Electric power lines affecting the property

In 1956 the estate of Edward Heyward granted Berkeley Electric a 75' wide easement across land known as lot 27 ½ of the California tract to construct and maintain an electric transmission line. R. p. 131. It is not disputed that this easement encompasses both TMS 498 and 135. In 1972, Edward Brown granted Berkeley Electric an easement of unspecified width to construct and maintain a distribution line on property described as consisting of 4.7 acres bounded on the east by the lands of the Seaboard Coast Line

Railroad. R. p. 132. It is not disputed that this easement included lands of which TMS 498 was a part.

Petitioner obtained title to TMS 498, which was part of TMS 115, and TMS 135 in 2003 from his family. TMS 135 allowed his access to TMS 138 where he lived. R. p 126-127. In 2005, Petitioner hired Richard Lacey, a licensed surveyor, to prepare a plat of his property . R. p. 49 The plat dated May 12, 2005 shows petitioner's property consisting of 3.257 acres of the original 4.7 acre Brown parcel, situated west of the Seaboard Coastline Railroad right of way. R. p. 52. The remainder of Brown's 4.7 acres was owned by Christopher Brown. R. p. 52. The Lacey plat indicates that a Berkeley Electric transmission line crosses TMS 135 and TMS 498 (shown as Lot C on the plat) and that a Berkeley Electric distribution line crosses TMS 498. Id. The Lacey plat also shows that the distribution line is attached to a power pole on property in the name of Frazier, TMS 319 to the north of TMS 498, which is in a 20' easement created by a 1981 subdivision plat. Id. The subdivision plat was prepared on October 7, 1981 for the Frazier property and shows the existence of the Berkeley Electric transmission line located across the Frazier property (TMS 117) but not any power pole or distribution line attached to it. R. p. 53. The Lacey plat also shows power poles and lines located to the south and east along Kitford Road. R. p. 52.

Lacey supplemented the plat on September 22, 2010 to show Berkeley Electric distribution lines traversing TMS 135 in two places. R. p. 130. One of these lines runs from the main transmission line across TMS135 west to Kitford Road and ends at the pole in front of the Turner residence on the south side of Kitford Road. R. p. 119. Petitioner contends this line was used by Berkeley Electric to service its customers on

the south side of Kitford Road and that Berkeley Electric's line across TMS 498 has not been there for 20 years. Id.

Petitioner filed a complaint alleging trespass of his property by Berkeley Electric as to both TMS 498 and 135. R. p. 32-34. In discovery, Berkeley Electric produced documents in response to petitioner's request for the location of its power lines affecting petitioner's property from 1980 to the present. R. pp. 134-136. One of these was a plat dated November 8, 1983 of TMS 118, to the north of TMS 498, which located the Berkeley Electric 75' transmission line easement but did not show any power pole or distribution line on that property or on TMS 498 to the south. R. p. 134. Berkeley Electric also produced two "system maps" , the 1995 location and the current location of its lines, which contained different locations for the distribution line that was constructed over TMS 498. R. pp. 121,135, 136.

Berkeley Electric filed a motion for summary judgment for a prescriptive easement across petitioner's property, relying upon affidavits of two employees, Frank and Seeney. R. pp. 43, 45-48. They asserted that they are familiar with a utility line located at 3507 Kitford Road and that " the line is clearly visible from Kitford and is obvious to anyone inspecting the property." R. p. 45, para. 3, R. p. 47, para.3. According to its own system maps, the Berkeley Electric power line at 3507 Kitford Road is in front of property owned by Ivory Turner, R. p. 136, and across the street from TMS 498. R. p. 130. Both employees claim that the line has been in existence since "at least 1980" although the poles on which the line is located contain "birthmarks" indicating they were installed in 1984 and 1986. R. p. 45, para.4 ; R. p. 47, para. 4.

There was no specific reference in Berkeley Electric's motion, its brief or affidavits to any lines across TMS 135.

In opposition, petitioner asserted that was a dispute of fact as to the claim of a prescriptive easement. Based upon petitioner's personal knowledge, this line was not there for 20 years. The Berkeley Electric employees' statements were contradicted by two different plats of adjacent properties, neither of which indicated any poles or wires where they were supposed to be. R. p. 118. Petitioner also contended that there was no evidence of any written easement across TMS135 for any distribution line and that the Berkeley Electric distribution line connecting power to Andersen was trespassing across TMS 135. R. pp. 110-119. Petitioner contended that Berkeley Electric had exceeded the scope of the easements by crossing his property from multiple directions and that there were material facts in dispute. R. p. 110-114. Petitioner argued that the Master should give all reasonable inferences from the evidence to the petitioner; and that a hearing was required to consider the balance of the equities based upon the circumstances relating to the grant of the 1972 Brown easement. R. p. 115-117.

At the motion hearing, Berkeley Electric submitted an affidavit from another employee, Robert Bradley who opined that Berkeley Electric's distribution line to the Anderson property were within the 75'easement granted in 1956 and did not cross TMS 135 outside the easement. R. p. 195, line 8-20. Petitioner's counsel objected to the Bradley affidavit on the basis that it introduced new matter; should have been submitted as part of their original motion not as a reply and was not appropriate for the court to consider, R. p. 199, line 24 – p. 200, line 6. Petitioner's counsel also asserted that Berkeley Electric hadn't named an expert to opine about the location of its lines across

TMS 135 and Bradley was not qualified to give an opinion. R. p. 213, line 4 -13. Simmons counsel also asserted that there was another Berkeley Electric power line that crossed TMS 135 from the transmission line which ran to the west down Kitford Road, R. p. 198, line 10-21, R. p. 213, line 13 -18; that the 1972 Brown easement did not extend to TMS 135 since it was expressly limited to lands to the west of the Seaboard Coastline Railroad right of way and TMS 135 was to the east. R. p. 204, line 6 – p.205, line 9.

The Master in Equity granted summary judgment to Berkeley Electric on the basis that Berkeley Electric had not exceeded the scope of its written easements and had prescriptive easements for its lines to cross both properties; that the plats Simmons offered to dispute the testimony of Berkeley Electric employees did not raise an issue of fact as to the existence of a prescriptive easement across TMS 498. R. p. 17-19. The Court of Appeals affirmed the decision in a separate opinion. App. 3-9.

C. Water lines affecting the subject property

In February 1977, St John's obtained an encroachment permit from Charleston County to "install water mains . . . along Kitford Road as shown on sheet U 25." R. pp. 67, 69. According to the engineer in charge of the installation, " the first construction project began in 1977 and included the installation of a water line in and along Kitford Road." R. p. 59, para. 3. St John's business records indicate that water service was not connected to its customers to the north of TMS 498 until 1986 (Gordon) and 1987 (Frazier) and to the north of TMS 135 until 1987 (Anderson). R. p. 65. Petitioner lived to the east of Kitford Road on an unimproved private road and had well water as did many of the other property owners in the area. R. p. 75, para. 2. Petitioner was unaware of St John's water lines until he accidentally discovered a water meter on TMS 135 in

2005. R. p. 75, para. 3, p. 76, para.5 . St. John's later marked the location of its water lines with blue flags which indicated that the water lines had crossed both TMS135 and TMS 498. R. p. 76, para. 4. This was the first time that petitioner knew that there were water lines across both parcels. Id. Petitioner joined St. Johns in the action against Berkeley Electric since the alleged trespass by St. Johns involved the same two parcels. R. p. 32-34.

St John's sought summary judgment for a prescriptive easement based on the encroachment permit. R. pp. 62-63. In an affidavit, Hugh Miley, Jr., the engineer in charge of the installation stated that the water main was installed in 1977-78 " in and around Kitford Road" but didn't identify where the work was done or that it was done on either parcel owned by Simmons. R. p. 59, para. 3, p. 62. St John's motion did not include a copy of the map referenced in the permit, U 25.

In response, petitioner denied that there was any written easement allowing water lines across his property, asserted that the encroachment permit was limited to Kitford Road and was not an adequate basis to locate a water line under TMS 498; that the use was not open and notorious for 20 years since that St John's customer lists indicated that the water lines to the customers served by the lines under Simmons property were installed in 1986-87. R. p. 71- 76, 109-110. The date of the installation and location of the lines and their actual use were material facts in dispute. Id.

During oral argument on the motion, St John's counsel contended that there was a dirt road extending from Kitford Road which Charleston County considered to be part of Kitford Road. R. p. 217, line 8-17. St. Johns asserts that during oral argument, a map designated as U 25 was shown to the Master. R. p. 215, line 24 to 216, line 9. The map

was never served on petitioner's counsel or shown to him during oral argument or identified in the motion record.

The Master in Equity granted summary judgment to St. Johns and found that it had both written and prescriptive easements to locate its water line under petitioner's property. R. p. 12.

In his Initial Brief, petitioner contended that St. Johns did not file or serve any map referenced in the encroachment permit as U 25 on appellant with its motion for summary judgment or in response to his opposition, did not ever identify it in the motion record or show it to appellant's counsel during the motion hearing. Appellant's Brief at pages 16-17, 37-38. St. Johns did not deny these contentions in its initial Brief. St. Johns admits that this map is necessary to establish the location of its easement under TMS 498. Respondent's Brief at page 8-9.

Petitioner moved to strike the map U 25 from St. John's Designation of Material on the basis that petitioner was denied notice and an opportunity to respond to the last minute introduction of an unfiled, unserved, unidentified document. The Court of Appeals denied the motion and the map U 25 is part of the Record on Appeal. R. p. 245.

The Court of Appeals reversed the decision as to the express easement finding that the encroachment permit could not create an express easement. The Court of Appeals affirmed the Master's decision as to the prescriptive easement across TMS 498 but not TMS 135 and remanded the case to determine further facts regarding TMS 135. App. at 11-12.

ARGUMENT IN SUPPORT OF PETITION

I. DISMISSAL OF THE CLAIMS AGAINST BERKELEY ELECTRIC IS CONTRARY TO ESTABLISHED LAW

Petitioner asserts that the Court of Appeal's decision affirming summary judgment for Berkeley Electric was contrary to established law. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn there from must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004). Petitioner contends that the Court improperly weighed the evidence to find that Berkeley Electric did not exceed the scope of its easements and that it had a prescriptive easement to cross petitioner's property. Even if the court disagreed with Simmons contention as to the significance of the facts, disagreement as to the conclusion to be drawn from the facts requires that it should have denied summary judgment. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990). These arguments are set forth fully below.

A. The scope of the 1972 easement

Petitioner's position before the Master and the Court of Appeals was that Berkeley Electric exceeded the scope of the 1972 Brown easement by crossing TMS 498 to serve a customer on the north side of Kitford Road while also using another line to serve customers on the south side of Kitford Road. The Court of Appeals found that " the electric lines had been in their current configuration for an extended period of time. This demonstrates that the easement holder and the landowners' understanding that such

configuration did not exceed the intended scope of the easements." App. at 7. The Court of Appeals also found that Berkeley Electric's employee Bradley " indicated the power lines did not exceed the scope of the easement." Id. The Court found that there was no dispute of fact regarding the scope of the easements. Petitioner contends that the Court of Appeals decision indicates that it impermissibly weighed the evidence instead of following the establish rule of recognizing that the evidence was subject to differing inferences; and of viewing the inferences most favorably to petitioner.

It is undisputable that the 1972 Brown distribution line easement applied only to his lands and extended only to the Seaboard Coastline Railroad right of way. R. p.132. This easement did not grant Berkeley Electric any right for distribution lines over TMS 135 which was on the other side of the Seaboard Coastline Railroad right of way, outside the lands owned by the grantor. Petitioner's affidavit together with the Lacey plat and Berkeley Electric's own exhibit confirms that TMS 135 lies between its transmission line easement and the Seaboard Coastline Railroad right of way. R. p. 157. Therefore, the Court of Appeals plainly erred in finding that Berkeley Electric did not exceed the scope of the 1972 easement as to TMS 135 since it did not extend to TMS 135.

Petitioner also contends that there was a scintilla of evidence that Berkeley Electric exceed the scope of the 1972 easement in another way, by crossing TMS 498 from the north when it had already installed its distribution line across Kitford Road to the south. A grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated. Hill v. Carolina Power & Light Co., et al., 204 S.C. 83,

28 S.E. 2d 545 (1942). The easement should be construed to permit only what is reasonably necessary for its purposes. Id.

The reasonable assumption is that the 1972 easement was given so that Berkeley Electric could bring power from its transmission line to Kitford Road. The transmission line was already in place and crossed Brown's property in the northeast corner. However, it would not have been reasonable to assume that the grantor wanted Berkeley Electric to cross his property twice from two different places on the transmission line- one from the northeast and the other from the east.

Petitioner contends that Berkeley Electric exceeded the reasonable scope of the 1972 easement when it had already used the easement to run its power line down Kitford Road . If its line was already down Kitford Road to access the transmission line, why did it need to cross TMS 498 to get to the transmission line to the north. Berkeley Electric has not offered any explanation for this "loop" in its power line.

The Court of Appeals said that the lines were there and therefore, they must be consistent with the grantor's intent. That is conclusory and only one inference that could arise from the facts. Petitioner urged the Master and the Court of Appeals that his interpretation of the easement was a reasonable one based upon its general terms and the facts surrounding the grant.

The scope of the 1972 easement was a question of fact. There were different interpretations of the evidence. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. David v. McLeod Regional Medical Center, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary

judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusions to be drawn from those facts. Piedmont Engineers, Architects and Planners, Inc. v. First Hartford Realty Corp., 278 S.C. 195, 196, 293 S.E.2d 706, 707 (1982). Petitioner contends that there was sufficient evidence that Berkeley Electric exceeded the scope of the 1972 easement by crossing TMS 498 after it had already installed its distribution line down Kitford Road to deny summary judgment and that the Court of Appeals ignored the facts and reasonable inferences in favor of weighing the evidence.

B. The prescriptive easement standard

If, as petitioner asserts, there was no express easement to cross TMS 498 twice, then Berkeley Electric must establish the existence of a prescriptive easement and the lack of material facts in dispute to order to obtain summary judgment to do so. To establish a prescriptive easement, a party must show (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years ; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right." Horry County v. Laychur, 315 SC 364, 367, 434 S. E. 2d 259 (1993). Berkeley Electric's motion for a prescriptive easement relied entirely upon the affidavits of its employees Seeney and Frank. R. pp. 43-48, 85. Each employee referred to " the age. . . of the utility line located at 3507 Kitford Road, which is clearly visible from Kitford Road." R. pp. 45 and 47. Petitioner contended and Berkeley Electric did not deny that they were referring to the distribution line across TMS 498. They do not mention of any distribution line on the other side of the Seaboard Coastline Railroad right of way across TMS 135. The Record is clear that Kitford Road ends in front of the Seaboard Coastline Railroad

right of way. R. p. 130. Berkeley Electric had the burden to establish by a preponderance of the evidence "the identity of the thing enjoyed". Neither the Seeney or Frank affidavits are specific as to the location of the line to which they refer and thus cannot be used to satisfy this requirement. Therefore, the Seeney and Frank affidavits cannot establish a prescriptive easement for Berkeley Electric's distribution line crossing TMS 135 because the plain language does not sat that.

The Court of Appeals concluded that petitioner had not provided " the required scintilla of evidence to create a genuine issue of fact on this [prescriptive easement] point." App. at 9. Petitioner contends that the evidence was sufficient to deny summary judgment and that the Court of Appeals did not give him all reasonable inferences.

Petitioner asserted based upon personal knowledge that the line across TMS 498 was not there in 1980. He submitted the Lacey survey (done in 2005 and supplemented in 2010) the Gaillard plat done in 2001 and the Schuler plat done in 1983. Both the Galliard and Schuler plats show the Berkeley Electric transmission line but neither show the poles or power line which Frank and Seeny claim were there from 1980. The Gaillard plat creates an easement for a road across TMS 117 and shows the location of the Berkeley Electric transmission line across TMS 498 as well as a dirt road on TMS 498 to which that proposed road is to connect. R. p. 53. (The property was still in the ownership of Edward Brown and was designated as TMS 115). The Schuler plat was commissioned by Berkeley Electric and computed the area under power line easement on TMS 118. R. p. 134. It shows the location of the transmission line on TMS 118 and also on TMS 498 (then TMS 115) but no distribution line from the transmission line to TMS 498. The Lacey survey shows the distribution line across TMS 498 extending to

the north onto the property that was the subject of the Gaillard and Schuler plats where it attaches to a power pole near the transmission line. R. p. 130.

The Court of Appeals found that the Schuler and Gaillard plats were not of Simmons property and did not contradict the testimony of Seeny and Frank. App. at 9. Even though the Gaillard and Schuler plats were for other properties , the Court of Appeals had no basis to find that the details (or lack thereof) could be ignored. Both of the plats show details of surrounding properties. Both of the plats show the location of the transmission line . Both of the plats show the dirt road across TMS 498. The Lacey survey includes details of surrounding properties including those properties shown on the Gaillard and Schuler plats. The Lacey plat locates the power poles on those properties to which the line across TMS 498 was attached. The Court of Appeals failed to recognize that the omission of the power line on two plats raised an inference that it was not there in1983 as contended by Berkeley Electric. Therefore, petitioner contends that the court improperly weighed the evidence instead of merely accepting it as creating a dispute of fact.

Petitioner contends that the system maps Berkeley Electric produced by in discovery also created a dispute of fact. The 1995 map shows a power line across Kitford Road but does not indicate whether it encroaches on TMS 283-00-00-498. R 135. The current map shows the same power line in a substantially different location. R 136. Berkeley Electric did not produce any system map showing the location of its power line across TMS 498 prior to 1995 .

It is reasonable to conclude from the inconsistent system maps that the power line was moved between 1995 and the present; otherwise the two system maps would be

identical. Therefore, the this additional documentary evidence supports the conclusion that there was no power line crossing TMS 498 at the end of 1983; and that the location of the power line changed from 1995 to the present based upon system maps prepared at different times. The evidence and all inferences which can reasonably be drawn there from must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004) Under the summary judgment standard, the court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Service, Inc. 376 S.C.632, 635, 658 S.E. 2d 110,111 (Ct. App. 2008).

If the court found that the maps required further explanation to decide if they established an issue of fact, it should have denied summary judgment instead of rejecting them. Summary judgment is appropriate only if the moving party can establish that inquiry into the facts is not desirable to clarify the application of the law. Standard Fire v. Marine Contracting, 301 SC 418, 421, 392 S.E.460 (1990). Berkeley Electric simply contended that the maps were not inconsistent.

As set forth above, petitioner presented sufficient disputed facts in the Record and applicable authority for this Court to grant his Petition for Writ of Certiorari . There is no evidence of an express easement across TMS 135 for any power line. There is a lack of specificity in the record as to both the time and location of Berkeley Electric's line across TMS 135 so that no prescriptive easement should have been granted as matter of law. Finally, the record contains substantial evidence of facts in dispute to provide the scintilla required to defeat summary judgment regarding a prescriptive easement across TMS 498.

Petitioner contends that the Court did not apply the appropriate standard in evaluating it, namely to consider all of the inferences that may reasonably be drawn there from viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).

In summary, there was evidence which raised a dispute of fact which precluded the granting of summary judgment. The Court of Appeals weighed the evidence instead of simply deciding whether there was a dispute of fact. The Courts conclusions are subjective evaluations of the evidence which the Court should not have undertaken at this stage of the proceedings. They are not supported by the motion record and exceed the scope of the Court's duty to determine whether summary judgment was proper. The Court of Appeals failed to follow established law and allow all reasonable inferences to favor the petitioner. Therefore, petitioner respectfully requests that the Court grant his Petition for Writ of Certiorari as to Berkeley Electric.

II. THE STANDARD FOR ESTABLISING A CLAIM OF RIGHT SHOULD BE ADDRESSED

Petitioner urges this Court to grant his petition as to St. John's Water Company in order to consider an issue it has not previously addressed: what constitutes proof of a claim of right as a basis for a prescriptive easement; and when does it accrue if the encroachment is underground. In Horry County v. Laychur,315 S.C. 364, 434 S.E.2d 259 (1993), this Court referred to the general elements necessary for a prescriptive easement to arise: (1) a continued and uninterrupted use or enjoyment for the statutory period; (2) the identity of the thing enjoyed; (3) the use must have been adverse or under a claim of right. 315 S.C. at 367, 434 S.E. 2d 261. However, the Court has not dealt with the specific elements of a claim of right and when it accrues. This Court should consider both issues as they are necessary to a complete resolution of the law on this subject.

A. Belief as a basis for acclaim of right

There are several reported cases from the Court of Appeals holding that a party claiming a prescriptive easement under a claim of right " must demonstrate a substantial belief that he had the right to use the parcel based upon the totality of the circumstances surrounding his use." Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct.App.2003); Matthews v. Dennis, 365 S.C. 245, 250, 616 S.E.2d 437, 440 (Ct.App.2005); Loftis v. South Carolina Elec. and Gas Co., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004). However, this definition has not been uniformly applied.

In Morrow v. Dyches, 328 S.C. 522, 528, 492 S.E.2d 420, 423-424 (Ct. App. 1997), the court held that a mere belief by a property owner that he assumed he had the right to use an adjacent abandoned railroad property for parking based upon many years

of use by customers was insufficient to establish an easement by prescription. However, in Revis v. Barrett, 321 S.C. 206, 209, 467 S.E.2d 460, 462 (Ct. App. 1996) the Court of Appeals held that a party's belief that she had a right to use a road based upon her parents' use of the roadway could establish a claim of right. In Loftis v. South Carolina Elec. and Gas Co., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004), the Court of Appeals said that a mistaken belief could be the basis for a claim of right. 604 S.E. 2d at 717. Here the Court of Appeals relying on Loftis found that St. Johns had a mistaken belief based upon an encroachment permit that it could install its water line under TMS 498. App. at 11.

Petitioner contends that the Court should consider whether a mistaken belief without any explanation as to how the mistake occurred can be the basis for a claim of right. St John's relied entirely on the county encroachment permit authorizing a water line along Kitford Road. The encroachment permit does not support a mistaken belief since it authorizes encroachment only along Kitford Road. The Court of Appeals rejected the Master in Equity's finding that St. John's had an express easement for its line under TMS 498. It is undisputed that St. Johns did not introduce any affidavits to explain why it " mistakenly" located a water line under private property.

The Master found that the encroachment permit to install water lines under Kitford Road " included a portion of the road extending north from the main portion of Kitford Road to residences along said roadway" . R. p. 11. The conclusion that Kitford Road extended to the north was based upon the description by St. John's counsel at the motion hearing that the dirt road on TMS 498 was Kitford Road. See R. p . 216 line 1-3. Factual statements by attorneys during oral argument may not be considered in

determining whether a material issue of fact exists. Trivelas v. S.C. Dept of Trans., 348 SC 125,558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v MUSC, 326 SC 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997).

The Court of Appeals found that the encroachment permit together with the U 25 created a " claim of right. App. at 11. Even if U 25 is considered, St. Johns cannot establish how it had a "substantial belief" that it could cross TMS 498 with a water line. U 25 shows Kitford Road and Main Road. U 25 contains no identification of any lot line or property designation, in other words nothing to indentify the location as being across appellant's property. R. p. 245. The party seeking to establish a prescriptive easement must show the identity of the thing enjoyed. Horry County v. Laychur, 315 SC 364, 367 (1993). Therefore, U 25 cannot establish a claim of right to cross TMS 498 since there is no way to reference the location of TMS 498 on U 25.

The encroachment permit allows the water line to be installed " along Kitford Road" . R. p. 67. St. Johns is in the business of serving the public. It is in the business of using surveys and obtaining easements from property owners. It is inconceivable that St. Johns could not have properly identified who owned the property where it water line was being installed. Therefore, there is nothing in the encroachment permit or U 25 to support a "substantial belief" that the water line could cross TMS 498.

Petitioner urges this Court to grant this writ and consider whether a mistaken belief without an explanation as to the basis for a mistake can constitute a substantial belief upon which to base a claim of right.

B. Accrual of the claim of right for a prescriptive easement

The second novel issue with respect to the claim of right is when does it accrue if the encroachment is underground. Petitioner asserted that St. Johns did not establish the requisite 20 years of use, prior to 2005 when he first found the water line on TMS 135 and that St. Johns own customer records indicate that the customers to the north were first served in 1986. Appellant's Brief at page 39-40.

St. John's claims that the line constructed in 1978 is the same line under the TMS 498 and this is evidence of first use. Resp. Brief at pages 9-10. However, St. Johns admitted that "once an individual customer applies for service, the smaller gauge water line is connected to the main line. Id. Petitioner contends that he did not have constructive notice of the installation of the water line under TMS 498 until the customers to the north first received service in 1986 ; therefore St. John's did not establish the requisite 20 year period.

Petitioner asserted that there was a dispute of fact that St. Johns use of TMS 498 for a water line was open and notorious, as a basis for a prescriptive easement. Appellant's Brief at page 39. In response, St. Johns asserts that it had a claim of right and need not establish an adverse use. Resp. Brief at page 7. Accordingly, Petitioner requests that this Court consider when a claim of right accrues for the purpose of the statutory period of use in the case whether the encroachment is underground.

Horry County v. Laychur, supra, contains the elements needed for a prescriptive easement including the 20 years of continuous use. In either case of adverse use or claim of right , 20 years of use is required. When the claim of right creates an encroachment that is hidden, the person whose property is affected has no way of knowing that his

interested is affected. Moreover, the claim of right may be based upon the trespasser's reasonable belief or mistake or some lost document of which the affected property owner has no knowledge. It is fundamentally unfair to burden a property owner with a prescriptive easement when he had no actual or constructive notice of it. Petitioner request that this Court grant his petition as to St. Johns for this additional reason: in order to determine when a claim for a prescriptive easement accrues based upon a hidden encroachment.

In summary, the Miley affidavit, encroachment permit and U25 do not support a substantial basis for a reasonable belief in a claim of right which is the standard used by the Court of Appeals in other cases. The Court of Appeals here found that there was a mistaken belief relying on Loftis. This Court should decide the proper standard of proof.

In addition, this Court should decide when a claim of right accrues for an underground encroachment, based on the installation of the encroachment as alleged by St. Johns or when there was an actual use as alleged by Petitioner?

CONCLUSION

Petitioner respectfully requests for the reasons set forth herein that this Court grant his Petition for Writ of Certiorari from the Court of Appeals decision affirming the Master in Equity's decision granting summary judgment to Berkeley Electric. Petitioner also requests that this Court grant his Petition for Writ of Certiorari from the Court of Appeals decision affirming the Master in Equity's order granting summary judgment to St. Johns as to a prescriptive easement for a waterline under TMS 498.

Respectfully submitted,

Edward A. Bertele
Attorney for Appellant

July 8, 2013

CERTIFICATION OF COUNSEL

I hereby certify that the petitioner has filed a petition for rehearing and the Court of Appeals has denied rehearing by order dated June 6, 2013.

Edward A. Bertele

July 8, 2013

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July 8, 2013

Ms. V. Claire Allen, Deputy Clerk
Court of Appeals
1015 Sumter St.
PO Box 11629
Columbia, SC 29211

Re: Simmons v. Berkeley Electric Cooperative, Inc. and St. John's Water Company, Inc., Case No. 2011192409

Dear Ms. Allen:

I am enclosing for filing the following: a copy of appellant Roosevelt Simmons' Petition for Writ of Certiorari and Certification of Service. If you have any questions, please do not hesitate to call. Thank you for your kind assistance.

Very truly yours,

Edward A. Bertele

Encl:
CC: John B. Williams, Esq.
Gaines W. Smith, Esq.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE COURT OF COMMON PLEAS
Hon. Mikell Scarborough, Master in Equity

ROOSEVELT SIMMONS)
Plaintiff, Appellant)
)
Vs.)
BERKELEY ELECTRIC)
COOPERATIVE, INC. and)
ST. JOHNS WATER COMPANY, INC.)
Defendants, Respondents)

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the appellant's Petition for Writ of Certiorari and Appendix was served upon the defendants' attorneys, John Williams, Esq. and Gaines Smith, Esq. by regular mail postage prepaid at their last known mailing address; and a true copy of the petition was served on the Clerk of the Court of Appeals by regular mail postage prepaid.

Edward A. Bertele, Esq.

July 8, 2013
Charleston, SC