IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Opinion No. 2013-UP-125 (S.C. Ct. App. filed March 27, 2013)

Caroline LeGrande, H. Paul Legrande, Jr., and
Marion Mancini, ... Petitioners,

vs.

South Carolina Electric & Gas Company, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on March 27, 2013. Counsel for the Petitioner certifies that he filed the Petition for Rehearing on April 11, 2013. The Court denied the Petition for Rehearing on May 21, 2013.

QUESTIONS PRESENTED

1. Does S.C. Code Ann. §58-9-2020 (1976) provide SCE&G an unlimited right to destroy trees and a fence located within a Department of Transportation right-of-way, regardless of whether the right-of-way constitutes merely an easement or the entire fee; and regardless of whether the destruction of the trees and fence is reasonably necessary to the operation, maintenance or use of an overhead power line?
2. Does an easement granted to the Broad River Power Company in 1936 authorize SCE&G to destroy the trees and fence at issue in this case?
3. Does limiting language in a 1967 Right-of-Way Easement authorize SCE&G's destruction of trees and a fence within the easement?

STATEMENT OF THE CASE

In or about 1935, a long row of cedar trees was planted along a two-track dirt road in what is now Blythewood , South Carolina. The dirt road was adjacent to a farm which was purchased in 1953 by Petitioners' father and predecessor in title. RA p. 216. The farm was called Cedar Lane Farm in honor of the cedar trees. In 1967, the Highway Department condemned a right-of-way in order to improve the dirt road. RA p. 210. The cedar trees and a fence were located within this 1967 right-of-way. The dirt road was subsequently paved and named Turkey Farm Road. Utility poles

and power lines were later erected within the 1967 right-of-way by SCE&G. Over the course of time, the cedar trees were topped and trimmed to accommodate the power lines but the trees and fence were never destroyed.

In 2005, SCE&G determined to upgrade the power lines along Turkey Farm Road. First, taller utility poles were erected along Turkey Farm Road placing the power lines well above the cedar trees. RA pp. 139 - 141. Some months later, SCE&G sent a contractor out to clear cut the cedar trees to stumps. During this work, a wire fence running along the tree line was also destroyed.

The Petitioners filed suit against the Respondent in Circuit Court seeking compensation for the destruction of their trees and fence. RA p. 68. During the pendency of this action, the Master-in-Equity ruled in a separate but related action that the Highway Department's 1967 right-of-way had not been abandoned and was effective as against the Petitioners. RA pp. 46 - 65. Relying upon this ruling, the Respondent asked the Circuit Court to grant summary judgment on the grounds that the Master's decision meant the Petitioners never owned the trees and fence so they could not recover compensation for their destruction. The Circuit Court granted the Respondent's motion for summary judgment. RA pp. 33 - 43. The Petitioners duly filed a notice of appeal. The Court of Appeals affirmed the Circuit Court in an unpublished opinion issued on March 27, 2013. A Petition for Rehearing was filed on April 11, 2013 and denied by Order issued May 21,2013.

ARGUMENTS

1. The Court of Appeals gives too expansive a reading to S.C. Code Ann. §58-9-2020

The Court of Appeals held this case is controlled by S.C. Code Ann. §58-9-2020 (1976), which provides in pertinent part:

> Any telephone or telegraph company . . . may construct, maintain and operate its line . . . under, over, along and upon any of the highways or public roads of this State.[1]

The implication of the Court of Appeals' ruling is that §58-9-2020 grants power companies the unlimited right to alter and destroy anything and everything within a Highway Department right-of-way, regardless of whether the right-of-way constitutes fee simple ownership by the Department or merely an easement; and regardless of whether the alteration and destruction are reasonably necessary to the operation of a power line.

The statutory language grants no explicit right to alter or destroy anything. The Court of Appeals therefore erred in giving §58-9-2020 an unduly expansive reading.

Moreover, the Court of Appeals' decision conflicts with the holding in Seabrook v. Carolina Power & Light Company, 159 S.C. 1, 4 S.E.2d 1 (1930), wherein the South Carolina Supreme Court made the following observation:

> At this time, I may properly say this much: That beautiful, stately, and protecting shade trees, around and about the home of a citizen, should not be wantonly destroyed for even the great object of building a power line, *unless it appears that the law of "reasonable necessity" demands such destruction* (emphasis added.)

In Seabrook, the Supreme Court upheld an injunction issued by the circuit court prohibiting a power company from taking certain actions pursuant to statutory powers granted by a predecessor statute to §58-9-2020. The Supreme Court was careful to note at several points in its opinion that the statutory power at issue was not unlimited and could not be exercised in an unreasonable fashion amounting to an arbitrary and oppressive deprivation of private property. *Accord*, Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961)(noting the exercise of similar

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[1] As correctly recognized by the Court of Appeals, these same rights, powers and privileges are extended to "electric lighting and power companies" by S.C. Code Ann. §58-27-130 (Supp. 2012).

statutory power is circumscribed by what is reasonably necessary under the circumstances of the case).

Of particular note, in the instant case the Court of Appeals was asked to determine whether a Right-of-Way Easement obtained by the Department of Transportation in 1967 was limited to an easement or amounted to ownership of the entire fee. Its ruling was that the extent of the Department's interest simply does not matter. This ruling overlooks the fundamental fact that if the trees and fence are not owned by the Department, then §58-9-2020 cannot grant SCE&G an unlimited right to destroy them. *See*, Leppard v. Central Carolina Telephone, 205 S.C. 1, 30 S.E.2d 755, 757 (1944)("[T]he acquisition by the public of an easement in land for the construction of a public highway, gives no right to another and different easement subversive of its proper use.") As Petitioners argued in the Court of Appeals, the 1967 Right-of-Way Easement can only be found to constitute an easement rather than fee simple ownership.

Because there is no evidence in the record that SCE&G's destruction of the trees and fence was reasonably necessary for the construction, maintenance or operation of an overhead power line, the Court of Appeals erred in affirming the trial court's grant of summary judgment.

2. There is no factual basis for the Court of Appeals to rely upon a 1936 easement to the Broad River Power Company

The Court of Appeals held that SCE&G's conduct was authorized by an easement granted to the Broad River Power Company by a Mrs. F. J. Howell in 1936. RA pp. 97 - 98. There is no evidence in the record that SCE&G is the successor in interest to Broad River Power Company. There is no evidence in the record that the Petitioners are the successors in interest to Mrs. F. J. Howell. There is no evidence in the record that the 1936 easement encompasses the area where the

Petitioners' trees and fence were located. The 1936 easement explicitly requires compensation to be paid for any damage to a fence. Lastly, the 1936 easement does not contain any language suggesting it was intended to be appurtenant to the land as opposed to merely an easement in gross which would not run with the land and be binding on Petitioners or anyone else. *See*, Windham v. Riddle, 381 S.C. 192, 672 S.E.2d 578 (2008)(distinguishing an appurtenant easement from an easement in gross). The Court of Appeals therefore erred in finding that the 1936 easement gives SCE&G the right to destroy the Petitioners' trees and fence.

3. The Court of Appeals improperly uses limiting language to increase the scope of the powers granted by a 1967 Right-of-Way Easement

The Court of Appeals' recites limiting language in the 1967 Right-of-Way Easement and uses it to expand the scope of the use conveyed. What the 1967 Right-of-Way Easement says is that no buildings or fences will be erected within the right-of-way and that any existing buildings or fences will be removed at the Department's expense. RA at 210. The Court of Appeals misinterpreted this language to grant SCE&G the unlimited right to destroy anything and everything within the right-of-way. The language recited by the Court of Appeals simply cannot be understood to grant such unlimited power.

CONCLUSION

The effect of the Court of Appeals' decision is this: If trees or fencing are found along any public street or roadway anywhere in the State of South Carolina, a power company can obliterate them for any reason or no reason at all. In essence, power companies now simply own everything within the public rights-of-way within this State. Beautiful, stately trees along tens of thousands of miles of public roadway are in jeopardy because §58-9-2020 conveys title to the electrical power

industry.

Such unlimited power cannot possibly be read into the language of §58-9-2020 because it runs directly contrary to the principles discussed in Seabrook v. Carolina Power & Light Company, *supra.* Nor can such unlimited power be extracted from limiting language in the 1967 Right-of-Way Easement. Nor is there any factual basis for finding such unlimited power in a 1936 easement in gross to Broad River Power Company. The Petitioners therefore respectfully ask this Court to save millions of trees along the public highways and byways of this State by exercising its discretion to accept review of the Court of Appeals' decision.

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JUL 12 2013
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PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on South Carolina Electric & Gas Company by hand delivering a copy of the same to its attorney of record, Steven J. Pugh, Esq., at 1900 Barnwell Street, Columbia, South Carolina 29201; and by hand delivering a copy of the same to the Clerk of the South Carolina Court of Appeals at 1205 Pendleton Street, Columbia, South Carolina.

July 12 2012

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