

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Civil Action No. 2008-CP-40-8425  
Opinion No. 2013-UP-125 (S.C. Ct. App. Filed March 27, 2013)

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**S.C. Supreme Court**

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

v.

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

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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**Attorneys for Respondent South Carolina  
Electric and Gas Company**

Respondent South Carolina Electric & Gas Company (“SCE&G”) respectfully submits its Return in Opposition to the Petition for a Writ of Certiorari. The Petition fails to present any issue which warrants the issuance of a Writ of Certiorari, and accordingly, SCE&G requests that the Petition be denied.

### **STATEMENT OF THE CASE**

This action arises out of the cutting of certain trees along Turkey Farm Road in November 2005 by a subcontractor working for SCE&G. On November 26, 2008, the Petitioners, Caroline H. LeGrande, Paul LeGrande, Jr., and Marion LeGrande Mancini, filed a Complaint against SCE&G in the Richland County Court of Common Pleas, asserting causes of action for trespass, conversion, and two separate statutory claims for destruction of trees and destruction of a fence. (R.pp.68-73). The statutory claim for destruction of a fence was later stricken by order of the circuit court. (R. p. 45).

Petitioners’ Complaint alleges that in connection with a project to upgrade overhead electrical power lines along Turkey Farm Road, SCE&G’s subcontractor damaged a fence and cut down certain trees, which Petitioners believed to be on their property. (R.pp.68-73). SCE&G filed an Answer asserting various defenses including failure to state a cause of action, estoppel, waiver, statute of limitations, and that SCE&G had the legal authority to cut the trees at issue. (R.pp.74-78).

On May 13, 2010, the Petitioners filed a separate, declaratory judgment action against the South Carolina Department of Transportation (“SCDOT”), seeking to enjoin SCDOT from widening Turkey Farm Road. (R.pp.123-27). Richland School District Two was subsequently brought into that case as a third

party defendant. (R.pp.128-34). At this time, Turkey Farm Road was to be widened to accommodate increased vehicle traffic, including school buses, incident to the construction of Westwood High School, across the road from the Petitioners' property. (Id.). In their lawsuit against SCDOT, Petitioners alleged that the widening of Turkey Farm Road would cause the road to extend onto their property. (Id.). SCDOT countered that it owned a 66 foot wide strip of land along Turkey Farm Road (33 feet wide on each side of the road measured from the existing center line) and that any improvements to Turkey Farm Road would take place within this 66 foot wide strip. (R.p.47). By Order of Appointment dated June 24, 2010, the matters in dispute were referred to the Richland County Master-in-Equity, Joseph M. Strickland. (R.p.67). The reference to the Master occurred with the consent of all parties to the two actions (i.e., LeGrande v. SCDOT and LeGrande v. SCE&G) and with the recognition by all parties that there were common factual and legal issues involved in both cases regarding the existence and parameters of SCDOT's right of way and whether the trees that were cut were in the right of way. (Appellants' Brief p.8). Circuit Judge Alison Renee Lee issued an Order staying the trial of Petitioners' case against SCE&G until the Master issued a decision in the Petitioners' action against SCDOT.

Following a non-jury trial on August 8-9, 2010, the Master issued a Final Order on March 30, 2011, in which he concluded that SCDOT owns a 66 foot wide right of way on Turkey Farm Road adjacent to the Petitioners' property. (R.pp.46-65). The Master ruled that SCDOT was not barred from asserting its title to the right of way. (R.pp.62, 64). The Master found that SCDOT's predecessor in interest, the South Carolina State Highway Department

(“Department”), through its eminent domain powers, condemned and took ownership of a 66 foot wide right of way through the property then owned by the Petitioners’ father, Hazel P. LeGrande. (R.p.58). He also found that the cut trees and fence at issue were located within SCDOT’s right-of-way. (R.p.57). Petitioners did not perfect an appeal as to the Master’s Final Order.

Thereafter, in the present case, SCE&G filed a Motion for Summary Judgment on several alternative grounds, including that the cut trees and fence were located within the 66 foot wide strip of land owned by SCDOT, and therefore, Petitioners could not recover for trespass, destruction of trees, damage to a fence, or conversion as to property they never owned. (R.pp.79-122). A hearing on the summary judgment motion was held before Judge Lee on October 31, 2011, and the matter was taken “under advisement.” (R.pp.3-33). The following day, with counsel present, Judge Lee announced her decision on the record, granting summary judgment in favor of SCE&G. (R.pp.33-43). Judge Lee noted that the Master’s Final Order had determined that SCDOT owns the 66 foot wide strip of land along Turkey Farm Road and that the trees cut and fence allegedly damaged by SCE&G’s subcontractor were within this land owned by SCDOT. (R.p.38, lines 1-12). Accordingly, she concluded summary judgment was appropriate on Petitioners’ claims against SCE&G because Petitioners sought to recover damages for the cutting of trees and alleged damage to a fence within a 66 foot wide strip of land that they do not own. (R.p.38 line 25- p. 39, line 12, R.p. 40, lines 10-17). A “Form 4” Order granting SCE&G’s motion for summary judgment was subsequently entered. (R.p.1).

Petitioners filed a Notice of Appeal on November 22, 2011, and the instant appeal ensued. The Court of Appeals issued an order on March 27, 2013 and denied rehearing on May 21, 2013.

### ARGUMENT

#### **I. The issues raised by the Petitioners do not warrant the issuance of a Writ of Certiorari.**

Pursuant to Rule 242(b), SCACR, a Writ of Certiorari is unwarranted in this case. First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion. Second, the decision of the Court of Appeals is unpublished, and as a result, it does not establish or alter any precedent. Moreover, the decision of the Court of Appeals does not conflict with any existing decisions of this Court. Finally, this case does not involve any issue of first impression nor any issue of great public interest, importance, or of any Constitutional significance.

#### **II. The Master's Order conclusively establishes that SCDOT owns the land where the fence and trees were located.**

As referenced above, on May 13, 2010, the Petitioners filed the SCDOT Action, wherein the Petitioners sought a declaratory judgment as to "the nature, scope and extent of the parties' interests in the subject property" and sought damages and a permanent injunction with regard to "the road widening project as the same relates to the subject property . . ." (R.pp.123-26). The SCDOT Action was tried before Judge Strickland on August 8-9, 2010. (R.p.46). On March 30, 2011, Judge Strickland issued his Final Order (R.pp.46-65).

Judge Strickland made specific findings of fact and conclusions of law in his Final Order. Among them, the Court ruled that:

- “Luther A. Lown, a registered land surveyor, testified that he has been practicing land surveying since 1974. He reviewed the right of way documents for Turkey Farm Road on file at SCDOT, including the Official Plan Sheets. He testified that the documents show that **SCDOT owns a 66 foot wide right of way through and along Petitioners’ property**. He conducted a field survey adjacent to the Petitioners’ property to determine the location of the as built road in reference to the 1967 documents and plans. His findings are summarized and delineated on a “Sketch Plan of Turkey Farm Road, S-1694, as built for the South Carolina Department of Transportation,” dated June 22, 2010, a copy of which was admitted into evidence as Defendant’s Exhibit 24. **He concluded that the cedar stumps adjacent to the Petitioners’ property between approximate survey stations 75 and 86 are located within the 66 foot wide right of way.** There are uncut cedar trees still standing along a fence which is located within the 66 foot wide right of way between approximate survey stations 49 and 76. This is the area of the right of way was relocated in 1967.” (R.p.57) (emphasis added).
- “Based upon not only the 1967 condemnation action, but also, the 1967 Right of Way Easement, **SCDOT owns a 66 foot wide right of way** for Turkey Farm Road (S-1694) adjacent to [Petitioners’ property].” (R.p.59) (emphasis added).
- “[Petitioners] are **estopped** from claiming that Turkey Farm Road is not a 66-foot wide right-of-way by reason of their execution of deeds which referenced plats showing the road as a 66-foot wide right-of-way.” (R.p.61) (emphasis added).
- SCDOT is not prevented by laches from **asserting its title** to the 66-foot wide right-of-way for Turkey Farm Road along the Plaintiffs’ property. (R. p. 62) (emphasis added).
- “Because SCDOT acquired a 66-foot wide right-of-way for Turkey Farm Road from [Petitioners’] father, and they are in privity of estate with him, they are **estopped** to deny this conveyance.” (R.p.64) (emphasis added).

No appeal was perfected by Petitioners as to this Final Order. Therefore, based upon the Record before this Court, the following dispositive matters are uncontroverted as a matter of law:

1. On March 22, 1967, the SCDOT acquired by eminent domain a 66-foot wide right-of-way, which included a portion of the land owned by

the Petitioners' father, their predecessor in interest.

2. The land acquired by the SCDOT by eminent domain on March 22, 1967 encompassed the area where SCE&G's poles, the subject trees and fence are located. In other words, the trees cut and fence allegedly damaged by SCE&G's contractor in 2005, **never** belonged to the Petitioners. As of March 22, 1967, the trees, fence and strip of land about which Petitioners complain were owned by SCDOT.

“Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action.” Stone v. Roadway Express, et al.; 367 S.C. 575, 580, 627 S.E.2d 695, 700 (2006); Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003). The Petitioners are collaterally estopped from relitigating issues regarding ownership and title to the right of way because those issues were ruled upon in the Master's Final Order. Judge Lee correctly found that the Final Order conclusively established that Petitioners never owned the strip of land where the trees and fence were located. The Final Order is dispositive of the Petitioners' claims in the present matter because the Petitioners cannot recover for trespass, destruction of trees, or conversion as to land, trees and a fence which the Petitioners never owned.

A party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was “(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

Here, all of these required elements for applying collateral estoppel are met. First, Petitioners filed the declaratory judgment action against SCDOT seeking a determination as to the ownership of the subject property along Turkey Farm Road. Petitioners had a full and fair opportunity to litigate all issues in their action against SCDOT. Ownership of the parcel was a central issue during the trial before the Master. The Final Order states, “[Petitioners] have asked this court to construe the terms of the 1967 Easement and issue a Declaratory Judgment determining the rights of the parties in regard to the right of way.” (R. p. 47). Second, the Master directly determined the issue of ownership by ruling that SCDOT owns, and may assert its title to, the right of way. Third, the Master’s determination as to ownership of the right of way was necessary to support the prior judgment since practically all of the claims and defenses asserted by the parties therein hinged on whether SCDOT owns the right of way.<sup>1</sup>

The Master’s Final Order has a binding effect in the present action, and as Judge Lee properly held, there is no genuine issue of material fact as to ownership or title to the 66 foot wide right of way. Under the doctrine of collateral estoppel, the unchallenged ruling of Judge Strickland as to SCDOT’s ownership of, and right to assert title to, the 66 foot wide strip of land is dispositive on the issue of whether Petitioners own this parcel. If Petitioners did not agree with Judge Strickland’s ruling, they could have perfected an appeal of his Final Order to challenge his conclusions; however, Petitioners chose not to do so. See Johnson v. Board of Com'rs of Police Ins. & Annuity Fund of State, 221 S.C. 23, 68 S.E.2d

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<sup>1</sup> Under a standard issue preclusion analysis, “even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it.” Carolina Renewal, 385 S.C. at 555, 684 S.E.2d at 782. Here, there are no considerations of equity, efficiency, or public policy that weigh against the use of collateral estoppel.

629 (1952) (The rulings in a case, whether they are right or wrong, become the law of the case and res judicata).

Respondents respectfully submit the Court of Appeals did not err in its analysis of the issue. Nonetheless, if there was any error in the Court of Appeals' analysis, such error was of no consequence because Petitioners do not own the land whereupon they claim the destruction of the trees and a fence occurred and there is no relief that could be granted to them.

**III. The Court of Appeals' reading of S.C. Code Ann. § 58-9-2020 is not too expansive.**

Petitioners argue the Court of Appeals' holding gives too expansive a reading of S.C. Code Ann. § 58-9-2020, which grants a telegraph or telephone company with broad authority to construct, maintain, and operate its line though, upon, or over and under the public lands of this state, under over, along, and upon the highways or public roads of this state, and on, over, and under the lands of any person in this State. This right is available provided "such line is constructed so as not to endanger the safety of persons or to interfere with the use of such highways or public roads . . . and that just compensation" is first paid to landowners. S.C. Code Ann. § 58-27-130 extends these same rights, powers, and privileges to electric lighting and power companies incorporated under the laws of this State.

Contrary to Petitioners' assertion, section 58-9-2020 grants power companies only specific enumerated rights—to construct and maintain power lines. Implicit in this right to maintain lines is the right to remove trees and other obstructions that could interfere with the safe operation of the power lines. SCE&G, through

its subcontractor, lawfully trimmed and cut trees in accordance with its statutory right to maintain its power lines. Further, SCE&G was maintaining the power lines on property owned by SCDOT, not Petitioners.

Moreover, Petitioners have misapprehended the Seabrook opinion, which is clearly distinguishable from the case *sub judice*. Petitioners have cited a portion of Seabrook related to trees not being destroyed for the building of a power line for the proposition that trees should never be cut for power lines. (See Pet.p.4.) However, the circumstances of Seabrook are easily distinguishable and, such a holding, even if accurate, is not applicable here. The statute, as written at the time of Seabrook, required a showing of “reasonable necessity” before condemning a particular piece of property for the installation of a telephone line. Here, SCE&G need not have shown “reasonable necessity” because it did not condemn Petitioners’ property to maintain the power lines. The trees that were cut were on the property belonging to SCDOT.

Further, even if the trees were located on Petitioners’ property, and a demonstration of “reasonable necessity” was required, the Record is devoid of any information to support Petitioners’ contention that the cutting was unnecessary. To the contrary, there is evidence in the Record which establishes the cutting of the trees was reasonably necessary. Eddie McWhirter of SCE&G, who authorized the cutting of the trees, gave uncontradicted testimony establishing that there was a reasonable need to cut the trees so they would not interfere with the safe operation of the power lines. Mr. McWhirter testified that power outages had occurred on Turkey Farm Road and the trees that were cut were the kinds of trees which could produce future power outages. (R.p.201, lines

4-p.202, line 2). Mr. McWhirter also testified that continued trimming of trees introduces rot, which over time weakens and destroys a tree. (R.p.198, lines 6-23). Finally, Mr. McWhirter testified that trimming only results in the trees continuing to grow into the power line and in this situation, removing a tree provides more long-term reliability for the safe operation of the power lines. (R.p.198, lines 19-23).

Based on the foregoing, Respondent respectfully submits the Court of Appeals properly applied section 58-9-2020 in the context of the broad authority provided to telegraph (and electric companies via the application of section 58-27-130) to maintain their utility lines.

**IV. There is evidence in the Record regarding the 1936 Easement between the parties' predecessors in interest.**

Even if the land in question did not belong to SCDOT, Petitioners are incorrect that the record is devoid of evidence with regard to the 1936 Easement such that the Court of Appeals could rely on said Easement to support its ruling. First, the 1936 Easement demonstrates F.J. Howell gave an easement/right-of-way to Broad River Power Company. (R.p.97). Respondents' Memorandum in Support of the Motion for Summary Judgment establishes Broad River Power Company was the predecessor in interest to SCE&G. (R.pp.81-82). Pursuant to the 1936 Easement, Broad River Power Company, SCE&G's predecessor in interest, had "the right, privilege and authority to cut or trim trees along said line necessary to keep the wires thereof clear . . . ." (R.p.97). The 1936 Easement also precipitated the construction of the utility poles and power lines along Turkey Farm Road. As testified to by SCE&G employee Jeff Holley, these utility poles

and power lines were already present when SCDOT acquired the 66-foot wide right-of-way on March 22, 1967.

**Holley Dep.**

Q. On Page 129, document control number 129, again, the statement is, "This line was already existing when the SCDOT acquired the 66-foot right-of-way in 1967." Now, can you recall for me, Mr. Holley, what the source of that information was?

A. A set of highway plans that we have that shows when they acquired the right-of-way and did the – I guess the paving of the road. It already had our pole locations surveyed on that drawing as being existing.

Q. All right. So you were actually able to look at some plans –

A. Yes.

Q. -- that showed that overhead line on Turkey Farm Road on the south side of the road –

A. That's correct.

Q. -- that's out there today –

A. That's correct.

Q. -- that that line was already in place when the DOT paved the road?

A. That's correct.

(R.p.94). Therefore, SCE&G's utility poles were located within the SCDOT owned right-of-way for decades before Petitioners purchased the property adjacent to this right-of-way in 1995.

Even if this were not the case, Petitioners' concede SCE&G's maintenance of the lines was approved by their predecessor in interest by stating in their Complaint that their predecessor in interest gave SCE&G "express permission" to place the poles along Turkey Farm Road and "likewise permitted [Respondents]

to periodically trim the branches of certain trees beneath and near the small poles and power lines.” (R.p.69).

With regard to Petitioners being the successors in interest to F.J. Howell, Petitioners are likewise mistaken regarding the evidence in the Record. Petitioners acquired their property from their mother, Caroline T. LeGrande. (R.p.220). The Deed of Distribution to Caroline T. LeGrande describes the property distributed as “All that certain piece, parcel or tract of land with improvements thereon, situate, lying, and being on both sides of South Carolina Road 40-1694 . . . being shown and designated as Tract 3 on Plat of Lands of the Estate of Rebecca J. Smith . . . and **being more fully shown on plat of property of F.J. Howell . . .**” (R.p.218) (emphasis added). Caroline T. LeGrande’s Deed of Distribution conclusively establishes F.J. Howell was her, and thus Petitioners’, predecessor in interest to the property.

Finally, Petitioners mischaracterize the Court of Appeals’ holding. The Court did not hold the 1936 Easement gave SCE&G the “right to destroy trees;” rather, the Court correctly determined the Easement gave Broad River Power Company, and by extension SCE&G, the right to cut and trim trees to keep the overhead power lines clear of obstruction. Even if the property where the trees and fence were located was owned by the Petitioners and not SCDOT, the Easement given by F.J. Howell, Petitioners’ predecessor in interest, to Broad River Power Company, SCE&G’s predecessor in interest, gave the right to cut and trim the trees necessary to maintain the power lines.

V. **The Court of Appeals correctly utilizes the language from the 1967 Right-of-Way Easement to define the scope of the powers granted to SCE&G.**

First, Petitioners have abandoned this argument for failing to cite any authority to support this issue. See Broom v. Jennifer J., 403 S.C. 96, 115, 742 S.E.2d 382 (2013) (“Issues raised in a brief not supported by authority may be deemed abandoned and not considered on appeal); Transportation Ins. Co. and Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010) (finding an issue was abandoned when the party failed to cite any authority for its position); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issue deemed abandoned where Petitioners failed to provide arguments or supporting authority for his assertion); Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) (“[S]hort conclusory statements without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.”).

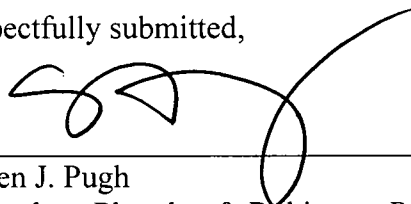
Regardless, Petitioners’ contentions are without merit. The Court of Appeals correctly applied the language of the 1967 Easement. Trespass is “any intentional invasion of the plaintiff’s interest in the exclusive possession of his property.” Hawkins v. City of Greenville, 356 S.C. 280, 296, 594 S.E.2d 557, 556 (Ct. App. 2004). “In order to prevail in a conversion action, the plaintiff must prove either title or right to possession of the property at the time of the conversion.” Oxford Finance Co., Inc. v. Burgess, 303 S.C. 534, 539, 402 S.E.2d 480, 482 (1991). Simply put, the Petitioners cannot successfully state a claim for trespass or conversion as to property they never owned.

## CONCLUSION

Petitioners failed to perfect an appeal of Judge Strickland's Order declaring SCDOT's ownership of the area in which Respondent's subcontractor cut the trees and allegedly damaged a fence. Therefore, that Order is the law of the case. Accordingly, Petitioners cannot recover for trespass, destruction of trees, or conversion upon land which they **NEVER** owned. The Court of Appeals did not err in its analysis. The Court's reading of S.C. Code Ann. § 58-9-2020 is not too expansive, nor did the Court improperly construe the Record regarding the 1936 Easement, or incorrectly apply the language in the 1967 Right of Way Easement.

Based on the foregoing, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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**ATTORNEYS FOR RESPONDENT SOUTH  
CAROLINA ELECTRIC AND  
GAS COMPANY.**

Columbia, South Carolina  
August 8, 2013

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., attorneys for Respondent South Carolina Electric and Gas Company, do hereby certify that I have this date served the foregoing Return to Petition for a Writ of Certiorari, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the following:

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Leventis & Ransom  
Post Office Box 11067  
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Daisy F. Bonds

Dated: August 8, 2013