

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-23-5245

Blue Ridge Electric Cooperative, Inc.Appellant/Respondent

vs.

Kathleen J. GreshamRespondent/Appellant

APPELLANT BLUE RIDGE ELECTRIC COOPERATIVE, INC.'S INITIAL BRIEF

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II. Respondent Kathleen Gresham did not establish with a preponderance of evidence that Blue Ridge placed an electric pole on her property outside the highway right-of-way since she presented no specific evidence or testimony on the actual distance of the existing right-of-way nor did she actually measure the specific distance from the center of Highway 11 to the Blue Ridge electric pole or guy line from the center of Highway 11 that she claims constitute a trespass and as a result, the jury had no lawful evidentiary basis to find trespass against Blue Ridge.....

III. Respondent Gresham made no effort to refute the SCDOT approved Blue Ridge Encroachment Permit entered into evidence as Exhibit 12 which depicted a 50-foot right-of-way in the scaled drawing applicable to the single electric pole challenged for trespass and identified in the Exhibit as “New Pole #10A” on staking sheet 2 of 12.....

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STATEMENT OF ISSUES ON APPEAL

1. Whether the lower court erred in denying Appellant Blue Ridge's timely Motion for Judgment NOV or for a New Trial Absolute when all the missing portions of the trial transcript covering the issue of the Blue Ridge appeal from a jury verdict of trespass by Blue Ridge do not exist and when Respondent Gresham varied her testimony at the transcript Reconstruction hearing?

2. Whether the lower court erred in denying Appellant Blue Ridge's Motion for Judgment NOV or for a New Trial Absolute on the jury award of one cent (\$.01) for trespass when Respondent Gresham offered no documentary evidence into the trial record to rebut the official state Encroachment Permit entered into the record as Hearing Exhibit 12 showing a 50 foot right-of-way in order to support Respondent Gresham's claim of trespass against Appellant Blue Ridge and instead testified that she "believed" there was a 20 foot right-of-way along her property on Highway 11 due to her previous experience?

3. Whether the lower court erred in denying Appellant Blue Ridge's timely Motion for Judgment NOV or for a New Trial Absolute on the Respondent Gresham's counter claim of trespass and jury award of one cent (\$.01) for trespass when Respondent Gresham failed to introduce any evidence into the trial record showing Appellant Blue Ridge's electric pole and guy wire extended beyond the 50 foot SCDOT highway right-of-way shown in the state Encroachment Permit secured by Appellant Blue Ridge and entered into evidence by Appellant Blue Ridge as Exhibit 12?

4. Whether the lower court erred in denying Appellant Blue Ridge's timely Motion for Judgment NOV or for a New Trial Absolute on the Respondent Gresham's counter claim of trespass and jury award of one cent (\$.01) for trespass when Respondent Gresham did not present any witness during trial that had actually measured the actual number of feet of distance from the center line of Highway 11 to the single electric pole and guy line placed by Appellant Blue Ridge and challenged as trespass and instead only estimated the distance?

5. Whether the lower court erred in denying Appellant Blue Ridge's timely Motion for Judgment NOV or for a New Trial Absolute on the Defendant claim of trespass and jury award of one cent (\$.01) for trespass when Respondent Kathleen Gresham did not present any witness at trial that had reviewed or examined a plat of the Defendant's property or reviewed and examined a plat of the highway right-of-way coming down Highway 11 along the side of Respondent Gresham's property.

7. Whether the lower court erred in denying Appellant Blue Ridge's timely Motion for Judgment NOV or for a New Trial Absolute on the jury award of one cent (\$.01) for trespass when the only unrefuted factual evidence entered into the trial record was offered by Appellant Blue Ridge's right-of-way employee who personally secured the official highway Encroachment Permit and testified he measured the placement of the electric pole and guy wire inside the 50 foot right-of-way as shown in the scale staking map drawing, page 2 of 12, attached to the state Encroachment Permit and entered into evidence as exhibit 12?

STATEMENT OF THE CASE

On July 15, 2008, Blue Ridge Electric Cooperative, Inc. (“Blue Ridge” or “Appellant Blue Ridge”) filed a Summons and Non-Jury Complaint against Kathleen J. Gresham and her husband, Steve Gresham, seeking judgment against them for monies which Blue Ridge alleged they owed for unpaid electricity that had been consumed on their property located at 1524 Highway 11, Landrum, Greenville County, South Carolina, during the period of June 25, 2003 through May 16, 2007, in the amount of EIGHT THOUSAND SIX HUNDRED SIXTY SEVEN AND 64/100 (\$8,667.64) DOLLARS.

Subsequently, on September 16, 2008, Steve Gresham, *pro se*, filed a Motion to Dismiss the action against him, in essence, claiming that the action was frivolous and without basis as to him and seeking certain damages/sanctions pursuant to **SCRPC, Rule 11**. He also filed his Answer and Counterclaim denying that any money was owed to Blue Ridge by either his wife or himself and asked for judgment against Blue Ridge on his Counterclaim which alleged that Blue Ridge had trespassed upon the property of his wife “Kathleen Jennings labeled as Kathleen J. Gresham” by installing a “support pole or other such pole” upon his wife’s land “without written permission or rental from her.” Additionally, he accused Blue Ridge of harassment in the bringing of the Complaint against him and requested damages and sanctions against Blue Ridge for same.

On October 9, 2008, Blue Ridge filed a Reply to Steve Gresham’s Pro Se Motion to Dismiss and for Costs and Sanctions along with its Reply to his Answer and Counterclaim denying the allegations contained therein, particularly as to the

trespass claim.

Thereafter, on September 30, 2008, Kathleen J. Gresham, a/k/a Kathleen Jennings, also acting *pro se*, filed her Answer and Counterclaim to the Complaint denying the alleged debt and seeking damages from Blue Ridge upon a claim that Blue Ridge was trespassing upon her land because it had placed “a support pole and guy wires” thereon without her express written authorization. She also levied other allegations against Blue Ridge and accused Blue Ridge of bringing the Complaint to harass her.

On October 28, 2008, Blue Ridge filed its Reply to the Answer and Counterclaim of Defendant, Kathleen J. Gresham, and denied the allegations or complaints against it concerning harassment and other such claims and particularly denied that it had trespassed upon her land.

On November 6, 2008, a hearing was held before the Honorable Larry R. Patterson upon the Motion of Steve Gresham to dismiss the Complaint as to him. Although the Motion was not specifically couched as such, Judge Patterson considered it a *12(b)(6) Motion* and denied the Motion by Order entered on November 6, 2008.

The case then proceeded to trial and was tried on August 26, 27 and 28, 2009, in the Court of Common Pleas, Greenville County, South Carolina, Judge R. Lawton McIntosh, presiding. At the close of Plaintiff's case on its claim for collection of monies owed to it, Blue Ridge voluntarily dismissed Defendant, Steve Gresham, but Blue Ridge's claim against Kathleen J. Gresham proceeded along with Defendant's claims against Blue Ridge.

After the Defendants' case was presented, Steve Gresham's Counterclaim was also dismissed and the case went to the jury on Blue Ridge's claim for the debt and the Defendant's, Kathleen J. Gresham's, claim of trespass relating to a single power pole and guy line that was located upon her property that Blue Ridge claimed was within the SCDOT right-of-way on S.C. Highway 11. At the close of Defendant's case, Blue Ridge moved for a directed verdict in its favor on the trespass claim, but Judge McIntosh denied the motion and the case went to the jury. Thereafter, on August 28, 2009, the jury rendered its verdict and denied Blue Ridge's claim for judgment on the debt but found for the Defendant, Kathleen J. Gresham, on the Counterclaim for trespass and awarded her \$0.01 actual damages.

Upon conclusion of the trial, the parties requested ten (10) days within which to file post-trial motions and the Trial Judge granted same.

Thereafter, on October 31, 2009, Judge McIntosh memorialized Blue Ridge's dismissal of its claim against Steve Gresham and the dismissal of Steve Gresham's Counterclaim against Blue Ridge by written Order. In the same Order, he also memorialized his granting to Blue Ridge and Defendant, Kathleen J. Gresham, ten (10) days to file post-trial motions.

Blue Ridge, thereafter, timely filed a Motion for Judgment NOV or, in the Alternative, for a New Trial Absolute, and Defendant, Kathleen Jennings filed, what she captioned "Motion to Court Following Jury Verdict for Defendant." Both Motions were subsequently denied by Judge McIntosh's Order entered on September 11, 2009.

On September 28, 2009, Blue Ridge filed a Notice of Appeal and ordered a

transcript in the case. However, after several substantial delays in the delivery of the complete trial transcript, the Court Reporter advised the Court and the parties that she could only provide a portion of the trial transcript as her equipment had failed and she had lost approximately one-half of the trial testimony and related proceedings. Blue Ridge then filed a Motion on October 6, 2010 with the Court of Appeals to remand the case to the Trial Court for reconstruction of the record or, in the alternative, grant a new trial. The Motion was granted by a Court of Appeals Order dated December 2, 2010. Several hearings were thereafter scheduled by Judge McIntosh and/or attempted to be scheduled by Judge McIntosh for that purpose, but Defendant, Kathleen Jennings, could never fit those available dates into her schedule and the matter was repetitively delayed. Finally, on April 15, 2013, Judge Few issued an Order requiring the hearing to be held within sixty (60) days. In accordance with that Order, Judge McIntosh held a hearing on April 29, 2013, in Anderson, South Carolina, to attempt to reconstruct the missing parts of the record. Testimony was taken from Defendant, Kathleen J. Gresham, and her witness Stephen Austin. Testimony was further taken from Ronnie Alexander, the right-of-way technician with Blue Ridge who had testified at trial as to the S.C. Highway 11 right-of-way in question, the SCDOT permit issued to Blue Ridge approving the placement of the pole in question and the fact that the pole was clearly within the SCDOT right-of-way for Highway 11. Judge McIntosh then sent the submissions of missing transcript of each of the parties, together with the testimony at the reconstruction hearing, to the Court of Appeals.

On July 3, 2013, the Court of Appeals sent a letter to the parties acknowledging

receipt of the transcript of the reconstruction hearing held on April 29, 2013 and instructing that Appellant Blue Ridges' Initial Briefs and Designations of Matter must be served and filed no more than thirty (30) days from date of the letter. As a result, this appeal is now before the Court upon a partial record of the trial of the case and the testimony and matters presented to the Court at the April 29, 2013 reconstruction hearing, together with details of missing testimony asserted by the parties in their prior filings with the Circuit Court.

STATEMENT OF FACTS

In or about early 2007, Blue Ridge decided to upgrade an existing power line running along S.C. Highway 11 in Greenville County, South Carolina, which was to begin at the intersection of S.C. Highway 11 and North Glassy Mountain Road and proceed north to the intersection of S.C. Highway 11 and Oak Grove Road. In the construction plan for the line upgrade, some poles already supporting the then existing line were to be used and some were to be merely changed out and some new poles were to be added. Prior to any work being done it was required, pursuant to South Carolina law, for Blue Ridge to submit its plans for the line upgrade to SCDOT through scale drawings showing what it wished to do within the highway right-of-way and to obtain permission from SCDOT to further burden the right-of-way with any new poles that were necessary to support the new upgraded line.

On April 12, 2007, Staking Sheets (scaled drawings) for the project that Blue Ridge intended to construct were rendered showing the location of the old or existing poles and guy wires that would be used or changed out and the new poles and guy wires that were to be installed within the South Carolina right-of-way with references to the location of the individual poles and guy wires from the centerline and the SCDOT right-of-way.

Thereafter, on September 28, 2007, Blue Ridge submitted to SCDOT its application for an Encroachment Permit to construct and maintain the proposed upgraded 7.2KV overhead power line along the right-of-way of S.C. Highway 11. **[P.Exh.#12]** The application was signed by Ronnie Alexander, Staking Supervisor for Blue Ridge, who personally supervised the development and preparation of the

Staking Sheets or drawings which were submitted to SCDOT as part of the permit application, as well as the actual location of the poles and guy wires that were subsequently constructed. The Blue Ridge permit was then approved by SCDOT on October 16, 2007 for the proposed maintenance and construction work as shown on Staking Sheets 1-5 which were attached to the permit and were an integral part of the approved application. Sheet 2 of the Staking Sheets showed pole #10A, the pole which Respondent, Kathleen Jennings, claimed was on her property without her permission and constituted a trespass, to be a stub or support pole for the electric distribution line installed on the south side of S.C. Highway 11. It also showed that pole #10A was to be placed on the north side of S.C. Highway 11, thirty-four (34') feet from the centerline of S.C. Highway 11 and well within the SCDOT right-of-way of fifty (50') feet from the centerline of the highway. The permit application, which was approved by SCDOT on October 16, 2007, specifically enumerated the new poles that were to be permitted as poles #5, #10, #10A, #11, #12, #13, #14, #15, #16, #17 and #17.5, for a total of eleven (11) poles to be located within the right-of-way of S.C. Highway 11.

At trial, Ronnie Alexander unequivocally testified that he had gone to the scene and had measured the distance of the pole and the guy wires from the center of S.C. Highway 11 and that the pole, #10A, when actually located, was twenty-seven (27') feet from the centerline and the guy wires extended another seventeen (17') feet, making the farthest point of the poles and guys from the centerline of S.C. Highway 11 to be approximately forty-four (44') feet. He further testified that the SCDOT right-of-way where pole #10A was located was, in fact, fifty (50') feet and that, in

the course of his job duties, he had personally confirmed the right-of-way with SCDOT when the Staking Sheets were drawn. This testimony was part of the lost transcript. However, Ronnie Alexander appeared and testified at the reconstruction hearing on April 29, 2013 to reaffirm his trial testimony that there was a fifty (50') foot right-of-way as shown on Staking Sheet 2 and that pole #10A, as well as the guy wires, were within the SCDOT right-of-way. Although, at time of trial, Mr. Alexander had testified to specific measurements, he testified at the reconstruction hearing that he could not recall his specific measurements but he vividly remembered that he measured the pole and guy wires and they were all located in accordance with the permit within fifty (50') feet of centerline of S.C. Highway 11 and well within the SCDOT right-of-way. It was upon that evidence -i.e., Plaintiff's Exhibit #12 and Mr. Alexander's testimony, that Blue Ridge based its Directed Verdict Motion at the close of Defendant's case prior to the jury being charged. Judge McIntosh refused to direct the verdict and sent the case to the jury, notwithstanding that there was no other credible evidence whatsoever in the record to refute Plaintiff's Exhibit #12 and Mr. Alexander's testimony or upon which the jury could have found that pole #10A and/or the guy wires were outside the SCDOT right-of-way and on Defendant's land without permission. There is no doubt that the right-of-way along S.C. Highway 11 is not a uniform fifty (50') feet along both sides of S.C. Highway 11 **at all points**, but, **at the location of pole #10A, the single point in issue, all of the evidence established the right-of-way was/is fifty (50') feet from the centerline of S.C. Highway 11.**

In order to attempt to prove her claim of trespass, Defendant Jennings offered her own testimony and that of her husband, Steve Gresham, and witness, Steve Austin, to try to show that the poles were, in fact, trespassing upon her land. Notably, not a single one of those witnesses knew the width of the right-of-way of S.C. Highway 11 at the location of pole #10A nor did any of them measure the exact distance of the pole or guys from the centerline of S.C. Highway 11. Defendant Jennings stated, at the reconstruction hearing on April 29, 2013, that the right-of-way varied along S.C. Highway 11 at different points and admitted that, at trial, she merely testified that **she thought** the right-of-way where the subject pole was located, to-wit: pole #10A, was twenty (20') feet; however, she never put into evidence any documents or called any witnesses to establish with any authority whatsoever that the right-of-way was anything other than as shown on the Staking Sheets and as testified to by Ronnie Alexander or that Blue Ridge was in violation of the permitted location of pole #10A within the right-of-way of S.C. Highway 11. Plaintiff's Exhibit #12 clearly permits pole #10A to be placed thirty-four (34') feet from the centerline of S.C. Highway 11 and shows that such placement is clearly within the SCDOT right-of-way, thereby conclusively refuting with authority Defendant's arbitrary claim that the right-of-way is a mere twenty (20') feet. Defendant, Kathleen Jennings, although claiming the right-of-way is only twenty (20') feet from centerline, admitted, at the reconstruction hearing, that she testified at trial that she **thought** it was twenty (20') feet, not that it was, in fact, twenty (20') feet. [Recon. T., p. 51, ll.13-24; p. 53, l.13] and she offered no other proof of her assertion as she did not think the right-of-way was the business of anybody's at the highway department and that her testimony alone was sufficient

to establish the right-of-way.

Steve Gresham, Kathleen Jennings's, husband testified, at trial, that the trespass question concerned the guy wire rather than the actual pole, admitted that he had not measured anything and offered no testimony whatsoever as to the actual distances of the pole or guy wires from the centerline of S.C. Highway 11. [**D.Exh.#5; Trial T., p. 234, ll.7-23; p. 220, l.22-p.221, l.16**]

Gresham witness, Steve Austin, also testified at trial that the pole and guy wires were on Ms. Jennings' land but he admitted that he had not measured any distances, and did not know the width of the right-of-way in issue, as he had never seen a plat of the highway right-of-way coming down S.C. Highway 11. [**Trial T., p. 251, l.19-p.252, l.3; p. 252, l.23-p.253, l.8; p.253, ll.21-25**]

Defendant, Kathleen Jennings, further testified, at the reconstruction hearing, that the pole and guy wires were about thirty-four (34') feet from the centerline of S.C. Highway 11 but that was an estimation as she had not actually measured it. Her estimation, however, shows that the pole was/is placed within the fifty (50') foot right-of-way and in accordance with the permit. [**P.Exh. #12; Recon. T., p. 38, ll.1-12**]

ARGUMENT

I. Based on existing Appellate rules and basic concepts of due process, Blue Ridge should not be placed in the position of being compelled to proceed with its appeal of an arbitrary jury verdict finding trespass, when the entire trial transcript maintaining all matters and testimony presented to the lower court and to the jury does not exist.

Appellate Blue Ridge, in order to be afforded all of its due process and Appellate rule rights to properly prepare and submit an effective and accurate appeal of matters presented during trial, must be provided with a full and complete certified trial transcript of the entire lower court trial proceedings. That is currently impossible with regard to the lower court proceedings. That is currently impossible with regard to the lower court proceedings on the issue of trespass. In fairness to the lower court, the Blue Ridge Motion that included a request for NOV Trial Absolute was timely filed after the trial and before the lower court or any party knew that a major portion of the trial transcript involving the claim of trespass could not be provided by the Court Reporter to the parties or to the Court of Appeals.

The Reconstruction hearing transcript confirms that Respondent Gresham had made no independent effort to discover what the actual SCDOT right-of way distance was along her property on Highway 11. The Reconstruction hearing transcript and the final portion of the available trial court confirm that the Respondent Gresham's claim of trespass was without factual or evidentiary support and was a product of surmise, conjecture and speculation. Despite those clear and fatal evidentiary defects, the lower court denied the Blue Ridge Motion for Judgment NOV and allowed the jury to proceed to issue a verdict of trespass against Blue Ridge. Blue Ridge, which maintains hundreds of miles of electric service lines in its

assigned service territory, is now confronted with the spectrum of other individuals claiming trespass despite SCDOT express approval of its construction plans and pole location staking plats showing a pole within a SCDOT right-of-way. In this case, the arbitrary and speculative “belief” by Respondent Gresham that the applicable right-of-way was somehow limited to 20 feet regardless of the SCDOT of the Blue Ridge Encroachment Permit and the specific testimony of the Blue Ridge veteran right-of-way employee who actually measured the distance as within the SCDOT right-of-way led to a jury verdict of trespass. The entire state and court approved rulings on the proper use of SCDOT right-of-ways now stands in jeopardy to the simple “belief” of an individual landowner that electric poles installed as approved by SCDOT constitute a trespass and thus support a claim for damages. The known facts and testimony in this case cannot serve a verdict of trespass. If the court had any inclination to affirm the lower court jury verdict on trespass, it should do so only on the solid foundation of a full and complete lower court trial transcript. The grant of a new trial on the trespass issue would serve the interests of justice, confirm the policy that lower court decisions must be properly rendered and restrict jury verdicts to ascertainable facts needed to support a verdict rather than a claim of “belief.” The submission of evidence of an ascertainable fact cannot withstand any due process or procedural review.

II. Respondent Kathleen Gresham did not establish with a preponderance of evidence that Blue Ridge placed an electric pole on her property outside the highway right-of-way since she presented no specific evidence or testimony on the actual distance of the existing right-of-way nor did she actually measure the specific distance from the center of Highway 11 to the Blue Ridge electric pole or guy line from the center of Highway 11 that she claims constitute a trespass and as a result, the jury had no lawful evidentiary basis to find trespass against Blue Ridge.

The South Carolina Supreme Court has established clear standards on the rights of utilities to utilize existing highway right-of-way to install utility poles and lines without having to seek adjacent landowner approval. The Supreme Court ruled in 2006 that utilities may be located and placed within highway rights-of-way with the permission of SCDOT and does not require permission of the property to do so. *Gressette v. S.C. Electric & Gas*, 370 S.C. 377, 655 S.E. 2d 538 (S. Ct. 2006). The actions taken by Blue Ridge regarding its installation of an 7.2 KV electric line were fully consistent with the *Gressette* ruling.

On September 28, 2007, Appellant Blue Ridge Electric Cooperative (“Blue Ridge”) submitted an application to the South Carolina Department of Transportation (“SCDOT”) for an Encroachment Permit to construct a 7.2 KV overhead power line along a portion of Highway 11 in Greenville County within the limits of the highway right-of-way. As instructed by SCDOT, the Blue Ridge permit application included the required scale drawing staking sheets identifying the proposed location of the electric poles that would carry the 7.2 KV power line along Highway 11. The staking sheets, as required by the SCDOT application for the Encroachment Permit, included scale drawings of the right-of-way width applicable to the location for each proposed pole. On October 16, 2007, SCDOT approved the

Encroachment Permit sought by Blue Ridge. Thereafter, Blue Ridge proceeded to construct the 7.2 KV line in accordance with the SCDOT permit.

Respondent Gresham now seeks to uphold a jury verdict in which the jury found for Gresham on her counterclaim for trespass and awarded her damages of \$0.01 regarding a single electric pole and guy line that the SCDOT Encroachment Permit authorized Blue Ridge to construct within the existing SCDOT right-of-way. Respondent Gresham's testimony at trial and at the transcript reconstruction hearing was based on "belief" regarding the specific SCDOT right-of-way distance in feet that applied to the single Blue Ridge pole and guy line she claimed constituted an unlawful trespass on her property. Since the original transcript does not exist, Respondent Gresham testified to several different right-of-way distances during the April 29, 2013, Transcript Reconstruction Hearing. She first testified that her "belief" was that the right-of-way from the center line of Highway 11 along her property was 20 feet:

And that the right-of-way from the center of Highway 11 to --- for the right-of-way was twenty feet in my testimony and that I was totally convinced of it, absolutely certain of it, not only because of my vast experience working with right-of-ways and Highway 11 and Blue Ridge when I was establishing my fencing and the highway department, that was without a doubt a twenty-foot right-of-way, and the pole was over on my right-of way.

[Reconstruction Transcript at 38, lines 1-9.] Respondent Gresham then testified that the pole or guy line was perhaps 30 or possibly 34 feet from the highway. She made no effort to provide the jury with any specific evidence and measurements of the actual location of the Blue Ridge electric pole or guy line.

Let's see. I think it was some thirty—it was thirty-something feet, thirty-four or something like that feet. The guy wire especially was."

[Reconstruction Transcript at 38, line 10-12]. Notably, Respondent Gresham confirmed in the transcript Reconstruction hearing that she did not offer any testimony or evidence during trial confirming the factual basis supporting her personal “belief” that the right-of-way was actually 20 feet.

A. Did I put up anybody from the highway department? No.

Q. Did you put up anything that said that staking sheet—the pole wasn’t where the staking sheet had it?

A. I put up my testimony about what I knew my right-of-way was that I’ve had since the ‘80s as a property owner. Did I put up anybody from the highway department? **I don’t think it’s anybody in the highway department’s business.** It was my testimony of what the right-of-way was.

[Reconstruction Hearing Transcript p.53, line 8-13] (emphasis added).

When asked during the Transcript Reconstruction hearing, Respondent Gresham did not recall presenting any documentary evidence that she relied upon to support her testimony regarding her personal belief as to the 20 foot right-of-way she testified to at trial. [Reconstruction Hearing Tr.p.53, lines 22-25.]

The pictures of the Blue Ridge pole and guy line placed into evidence by Respondent Gresham as Exhibit 5 do not contain any information as to the actual distance or location of the Blue Ridge pole or guy line in relation to the center line of Highway 11. As a result, they cannot serve as probative evidence to support a jury verdict of trespass.

Respondent Gresham called her husband as a witness during trial. He testified that he did not know what the highway right-of way was in front of their property on Highway 11. [Trial Tr.p.233, line 9-21]. He also confirmed he had not measured the

specific distance from the center of Highway 11 to the Blue Ridge pole and guy line that his wife asserted was on her property and beyond the existing right-of-way. [Trial Tr.p.234, lines 9-23].

Respondent Gresham also called Steve Austin to testify on the location of the Blue Ridge power pole. Under cross-examination, Mr. Austin admitted he had never seen a plat of the Gresham property or a plat of the highway right-of-way coming down Highway 11. [Trial Tr.p.251, lines 19-24]. Mr. Austin also testified he did not know what the actual highway right-of-way was along Gresham's property. He also testified he had not measured the distance from the center of Highway 11 to the single contested Blue Ridge pole or the guy line; but had merely "estimated" that distance. [Trial Tr.p.254, lines 1-3.]

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). However, Respondent Gresham presented no evidence that Blue Ridge intentionally invaded her property. To the contrary, the evidence conclusively establishes the poles were constructed within SCDOT's right of way.

III. Respondent Gresham made no effort to refute the SCDOT approved Blue Ridge Encroachment Permit entered into evidence as Exhibit 12 which depicted a 50-foot right-of-way in the scaled drawing applicable to the single electric pole challenged for trespass and identified in the Exhibit as “New Pole #10A” on staking sheet 2 of 12.

Respondent Gresham’s entire claim of trespass against Blue Ridge was solely based on her personal “belief” that the single electric pole and guy line that she challenged for trespass exceeded her personal and arbitrary claim that the SCDOT right-of-way was limited to 20 feet. Neither Respondent Gresham nor the other two witnesses she called to testify knew what the actual SCDOT right-of-way was along Highway 11 next to her property. Respondent Gresham relied solely on her “belief” that it was 20 feet. In addition, Respondent Gresham offered no specific evidence regarding the actual measured distance from the center line of Highway 11 to the Blue Ridge Electric pole or the guy line. Instead, Respondent Gresham offered the jury only surmise, conjecture, and speculation regarding what she “thought” the actual measured distance to the electric pole was from the center line of Highway 11. The South Carolina Supreme Court has recognized that opinions and assertions, to be accorded any weight or reliability, must have a factual foundation. Hamm v. South Carolina Pub. Svs. Comm’n, 298 S.C. 309, 312, 380 S.E.2d 428, 430 (1989). No witness presented by Respondent Gresham met the established Supreme Court standard and requirement. See Weston v. Hillyer, 160 S.C. 541, 159 S.E. 390 (1931) (“Verdict cannot rest upon guess or conjecture;” it is the duty of the plaintiff to affirmatively prove her allegations); Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997) (stating verdicts may not rest upon surmise, conjecture, or speculation).

In contrast, Blue Ridge offered the testimony of its thirty-five year right-of-way employee, Ronnie Alexander, who prepared and submitted the Blue Ridge application for Encroachment Permit to SCDOT for the Highway 11 7.2 KV overhead electric power line construction project. The entire Blue Ridge SCDOT application for Encroachment Permit for the Highway 11 project, with attached staking maps, was placed into evidence as Blue Ridge Exhibit #12. [Reconstructed Hearing Tr. p.52, lines 5-15.]

Section 1 of the page one of the SCDOT “Permit Application for Construction and Maintenance Public Service Utility Line Along State Highway” expressly references that Blue Ridge was seeking to “construct and maintain a public service utility line . . . **within the limits of a highway right of way.** . . .” Exhibit # 12, page 1, section 1. Eighteen days after submitting its application, SCDOT approved the Blue Ridge application on October 16, 2007.

Blue Ridge witness Alexander testified at the trial that the single electric pole identified by Respondent Gresham was included in the Blue Ridge Encroachment Permit marked as hearing Exhibit 12. [Reconstruction Hearing Tr.p.73, lines 17-23.] He testified that the scale drawing which included the single contested Blue Ridge pole was located at a point along Highway 11 where the SCDOT right-of-way was 50 feet. [Reconstruction Hearing Tr.p.73, lines 24-25; p. 74, lines 1-6.]

Blue Ridge witness Alexander provided the only sworn testimony based on facts and not on conjecture or surmise during trial that he had personally measured the actual distance between the center line of Highway 11 to the single electric pole and guy line challenged by Respondent Gresham. He testified that the electric pole and

guy wire were inside the highway right-of-way and not located on any private property. [Reconstruction Hearing Tr.p.76, line 8-p.77, line 13.] Respondent Gresham offered no witness who refuted the testimony of Mr. Alexander regarding his personal measurements from the center of Highway 11 to the Blue Ridge pole and guy line. No witness challenged his testimony that both the pole and guy line were inside the highway right of way as shown in Exhibit 12 and the attached staking sheets. [Reconstruction Hearing Tr.p.77, lines 9-13].

IV. Despite the instructions of the trial court to the jury on the specific issue of trespass, the jury entered a verdict of trespass against Blue Ridge based on surmise, conjecture, or speculation since no witness offered by Respondent Gresham provided testimony supported by factual information to establish the SCDOT right-of-way was limited to 20 feet.

At the conclusion of trial, the trial court instructed the jury on the issue of trespass. The judge instructed:

You may only find plaintiff committed trespass on Defendant's property if you find that Plaintiff's pole or guy wire was erected on Defendant's property outside of the State's highway right-of-way

Court Exhibit # 3, Reconstruct Hearing Tr. p. ____, line ____).

Respondent Gresham provided no factual basis for her claim that the SCDOT right-of-way was limited to 20 feet along Highway 11 where Blue Ridge placed the pole and guy line at the SCDOT approved pole location. Blue Ridge witness Alexander testified he submitted the Blue Ridge Application for Encroachment Permit to SCDOT and that the attached staking maps to the Application were drawn to scale. Blue Ridge witness Alexander testified that the SCDOT right-of-way was 50 feet based upon his 35-years of experience working with SCDOT on right-of-way matters and on his discussions with SCDOT in obtaining approval for the Blue Ridge Encroachment Permit [Transcript cite ____]. He testified that the 50 foot right-of-way was accurately depicted in the drawn to scale staking map which identified pole 10A, shown on Blue Ridge SCDOT Encroachment Permit, Exhibit 12 Staking Map, page 2 of 12, as the single pole challenged by Respondent Gresham. That staking map shows pole 10A as being located inside the SCDOT 50 foot right-of-way. Blue Ridge witness Alexander was the only witness to testify during trial that he had personally gone to the Gresham property and measured the actual distance from the

center line of Highway 11 to the challenged pole and guy line. Based on his personal measurements and his 35-years of right-of-way experience, he testified and both were placed by Blue Ridge inside the 50 foot SCDOT right-of-way at that location.

Notwithstanding the Blue Ridge witness Alexander's fact-based testimony and personal measurements that both the pole and guy line were inside the SCDOT right-of-way, the jury still entered a verdict of trespass against Blue Ridge. The jury had no factual basis to render any verdict of trespass against Blue Ridge since the record confirms that Blue Ridge conformed to the SCDOT Encroachment Permit with regard to pole 10A shown in the page 2 of 12 of Exhibit 12.

The trial court committed reversible error in not granting the Blue Ridge Motion for Judgment NOV at close of Defendant's trespass counter claim case. In addition, the trial court committed reversible error in not granting the Blue Ridge Motion for Judgment NOV at close of Blue Ridge's case in reply to the trespass counter claim of Respondent Gresham. The trial court committed reversible error in not granting the Blue Ridge Motion for Judgment NOV or New Trial Absolute after the jury rendered its verdict when the jury was provided no factual evidence by Respondent Gresham regarding any specific right of way distance nor did any Respondent Gresham witness even measure the actual distance from the center line of Highway 11 to the Blue Ridge pole or guy line.

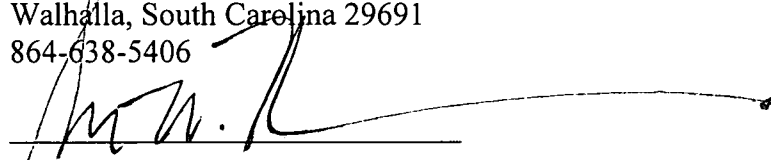
CONCLUSION

Based upon the absence of the entire trial transcript, Appellant Blue Ridge Electric Cooperative, Inc. respectfully requests that the Respondent claim of trespass be addressed in a new trial below.

To the extent the Court determines that the available portions of the trial transcript and the hearing Reconstruction transcript provided the Court with the required testimony and evidence to establish that Blue Ridge proceeded to properly obtain and comply with the required SCDOT Encroachment Permit to construct its 7.2 KV electric line in the highway right-of-way along Highway 11 adjacent to the property of Respondent Gresham, Blue Ridge respectfully requests the Court to issue an Order reversing the jury award of trespass and rule that the lower court erred when it failed to grant the Blue Ridge Motion for Judgment NOV or for a New Trial Absolute.



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Electric Cooperative, Inc.*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-23-5245

Blue Ridge Electric Cooperative, Inc. **Appellant,**

vs.

Kathleen J. Gresham **Respondent.**

**APPELLANT'S
DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Appellant designates the following matters to be included in the Record on

Appeal:

I. Orders

- a) Court of Appeals letter Order acknowledging receipt of transcript of reconstruction hearing held on 04/29/2013 and instructing that Appellants' Briefs and Designations of Matter must be served and filed no more than thirty (30) days from date of the letter;
- b) Court of Appeals Order, dated 04/15/2013, ordering that hearing regarding reconstruction of record be held within sixty (60) days;

- c) Court of Appeals Order, dated 10/06/2010, granting Blue Ridge's Motion to Remand Case to Trial Court for Reconstruction of Record, or, in the Alternative, Grant a New Trial;
- d) Order, dated 09/10/2009 and entered on 09/11/2009, denying Blue Ridge's Motion for Judgment NOV or, in the Alternative, for a New Trial Absolute and denying Defendant's Motion to Court following Jury Verdict for Defendant;
- e) Order entered on 08/31/2009 dismissing Blue Ridge's claim against Defendant, Steve Gresham, and Defendant, Steve Gresham's Counterclaim against Plaintiff and granting Plaintiff and Defendant, Kathleen Gresham, ten (10) days to file post-trial motions;
- f) Jury Verdict forms, dated 08/28/2009, finding for Defendant, Kathleen Gresham, against Plaintiff, Blue Ridge, on her Counterclaim for trespass in the amount of \$0.01 actual damages;
- g) Order, dated 11/05/2008 and filed 11/16/2008, denying the Motion of Defendant, Steve Gresham, to dismiss Blue Ridge's action against him;

II. Post-Trial Motions

- a) Blue Ridge's Motion to Remand the Case to the Trial Court for Reconstruction of the Record or, in the Alternative, Grant a New Trial dated 10/06/2010;
- b) Blue Ridge's Motion for a Judgment NOV or, in the Alternative, for a New Trial Absolute dated 09/04/2009;

III. Pleadings

- a) Blue Ridge's Non-Jury Complaint filed 07/15/2008;
- b) Defendant, Stephen Gresham's, Answer and Counterclaim filed 09/16/2008 demanding jury trial;
- c) Defendant, Kathleen Jennings Gresham's, Answer and Counterclaim dated 09/29/2008 and filed 09/30/2008 demanding jury trial;

- d) Blue Ridge's Reply to Counterclaim of Defendant, Kathleen Jennings Gresham, dated 10/13/2008 and filed 10/28/2008;
- e) Blue Ridge's Reply to Counterclaim of Defendant, Stephen Gresham, dated 10/07/2008 and filed 10/09/2008;

IV. Pre-Trial Motion

- a) Motion of Defendant, Stephen Gresham, to dismiss Plaintiff's Complaint as to him and for costs and sanctions dated 09/15/2008 and filed 09/16/2008;

Reply to Pre-Trial Motion

- a) Blue Ridge's Reply to Defendant, Stephen Gresham's, Motion to Dismiss and for Costs and Sanctions dated 10/09/2008;

V. Trial Transcript

Pages: 3-4; 37; 120-122; 125;

Testimony of Witnesses:

Stephen Gresham

(pp. 220-221; 224; 234-235);

Steve Austin

(pp. 243; 251-254);

VI. Reconstruction Hearing Transcript 04/29/2013

Testimony of Witnesses:

Kathleen Gresham

(pp. 24-25; p.34, ll.9-13; p.34, l.17-p.39, l.7; p.49, l.5-p.53; 56-60);

Steven Austin

(p.61, l.21-p.63, l.19; p.68, ll.13-18; p.69, l.16-p.70, l.16);

Ronnie Alexander

(p.72, l.11-p.78,l.11);

Court's discussion with attorneys
(pp. 79-105);

VII. Court Exhibits (Reconstruction Hearing)

- #1 Email 11/15/2012;
- #2 Plaintiff's submission of missing testimony/evidence in reconstruction of record dated 11/16/2012;
- #3 Undated submission of "crafted record due to partial missing transcript" from Defendant, Kathleen Gresham;
- #4 Trial Judge's jury charge;
- #5 Trial Judge's civil - general charge jury instructions;
- #6 Trial Judge's handwritten jury charge regarding Plaintiff's trespass on highway right-of-way;

VIII. Trial Exhibits

Plaintiff's Exhibits

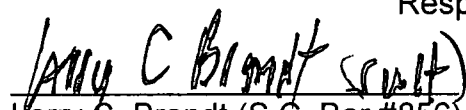
- #12 SCDOT permit issued to Plaintiff, Blue Ridge Electric Cooperative, Inc. for the portion of line on Defendant's property together with staking sheets upon which permit was issued;

Defendant's Exhibits

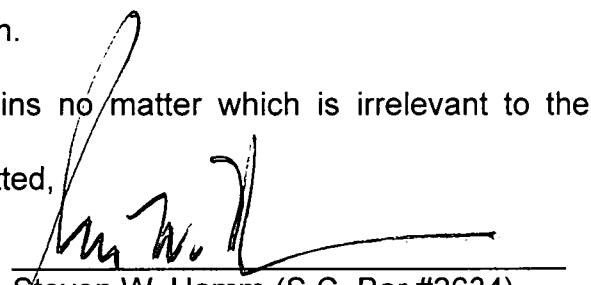
- #5 Pictures of pole in question.

We certify that this Designation contains no matter which is irrelevant to the appeal.

Respectfully submitted,



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August 2, 2013



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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
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R. Lawton McIntosh, Circuit Court Judge

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Blue Ridge Electric Cooperative, Inc. **Appellant,**


vs.

Kathleen J. Gresham **Respondent.**

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SC Court of Appeals

PROOF OF SERVICE

I certify that I have served ***Appellant's Designation of Matter to be Included in the Record on Appeal*** upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, on Aug. 2, 2013, to ***Kathleen Jennings Gresham, 1524 Highway 11, Landrum, South Carolina 29356.***

By: 

August 2, 2013

Honorable Kitchings:

A courier attempted to deliver this envelope at 3 minutes to 5:00 pm on Friday, August 2, 2013, but the doors were closed. An affidavit will be submitted to this effect on Monday, August 5, 2013.

RECEIVED

AUG 06 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-23-5245

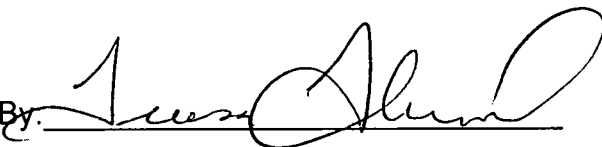
Blue Ridge Electric Cooperative, Inc. **Appellant,**

vs.

Kathleen J. Gresham **Respondent.**

PROOF OF SERVICE

I certify that I have served **Appellant's Initial Brief** upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, on August 2, 2013, to **Kathleen Jennings Gresham, 1524 Highway 11, Landrum, South Carolina 29356.**

By:  _____

August 2, 2013