

IN THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM THE COURT OF COMMON PLEAS  
OF CHARLESTON COUNTY

Case No: 2008-CP-10-1983

Hon. Mikell Scarborough, Master-in-Equity

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ROOSEVELT SIMMONS..... Appellant,

v.

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

**RECEIVED**

SEP - 6 2013

**S.C. Supreme Court**

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**RESPONDENT ST. JOHN'S WATER COMPANY, INC.'S  
RETURN TO PETITION FOR WRIT OF CERTIORARI**

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Gaines W. Smith, Esq.  
720 St. Andrews Blvd.  
Charleston, SC 29407  
843-722-7773

ATTORNEY FOR RESPONDENT  
ST. JOHN'S WATER COMPANY, INC.

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**I. QUESTIONS PRESENTED FOR REVIEW**

1. Did the Court of Appeals improperly weigh the evidence in determining that Berkeley Electric did not exceed the scope of an express easement?
2. Did the Court of Appeals improperly weigh the evidence in determining that Berkeley Electric was entitled to a prescriptive easement?
3. Was there more than a scintilla of evidence upon which to deny Berkeley Electric's claims of a prescriptive easement and non violation of the express easements?
4. Does St. John's Water Company have to establish that there was a reasonable belief that a claim of right arose from a county encroachment permit?
5. Does a claim of right to install a water line underground accrue when the water line is installed underground or when it is first used by customers?

**II. STATEMENT OF THE CASE**

Roosevelt Simmons, the Petitioner herein, acquired a parcel of property (hereinafter "subject property") along Kitford Road in Johns Island SC, with TMS# 283-00-00-498, in 1992 as trustee. Full legal title vested in Petitioner in 2003 as the result of an inter-family transaction. According to Petitioner, he subsequently discovered a water meter located on the subject property, and upon further inspection, determined that it belonged to St. John's Water Company, Inc, one of the Respondents herein (hereinafter St. Johns).

Over twenty years prior to Petitioner acquiring title to the subject property, St. Johns obtained the right to install water lines along Kitford Road via an Encroachment Permit. St. Johns originally acquired an entire series of Encroachment Permits to install water lines in

and around John's Island in the later part of the 1970s (R. p. 66-69.) These permits were granted by the County of Charleston, and covered areas all over the rural island. Until the time that St. Johns began installing these lines, the only way for residents to receive water was through the use of wells and pumps. One of the permits granted St. Johns the right to install water lines “[a]long Kitford Road as shown on sheet U25” (R. p. 67) The corresponding map U25 (dated 1977) shows a then-unpaved Kitford Road and the planned locations of the water lines to be placed around that road (R. p. 245.) At the end of Kitford Road, the map indicates that a spur of the main water line is to turn roughly northeast and extend under what is now the subject property. (R. p. 245.) At that time, the dirt road that currently extends across the subject property was considered part of Kitford Road.

According to the affidavit of Hugh Miley, the engineer who oversaw the original construction project, the line was begun in 1977 and completed in 1978, at which time the water line under the subject property was functioning and operational (R. p. 59-60.) Since that time, St. Johns has never stopped using that line (R. p. 60) and has supplied water to the residences located along Kitford Road and to the north of the subject property via the same water line that was installed as a result of the construction project commenced in 1977. No other lines have been installed by St. Johns along Kitford Road, and there is no other way for the residences on Kitford Road to receive municipal water except via that water line, a portion of which currently runs under the subject property. In the thirty years between the end of that construction and the filing of this action, St. Johns has maintained and used the original main water line installed along Kitford Road and under the subject property with no interruption of use whatsoever. (R. p. 59-60.)

In 2008, Petitioner filed an action for trespass and conversion. After all pleadings were filed and discovery was completed, Respondents filed a motion for summary judgment.

The motion hearing was held on November 22, 2010, at which time the motion for summary judgment was granted. Petitioner filed a timely motion to reconsider, which was heard on April 11, 2011. The Master-in-Equity denied the motion to reconsider, and an appeal was filed with the Court of Appeals. The Court of Appeals issued a decision on March 30, 2013 affirming in part, reversing in part, and remanding in part.

Petitioner contends that there is a map which is improperly included in the Record on Appeal. The basis of the contention is the allegation that counsel for St. Johns did not properly introduce the map at the motion hearing. In rebuttal of this position, St Johns presented the transcript of the motion hearing, which shows that the Master viewed a map in conjunction with the encroachment permit at the motion hearing. Additionally, the Encroachment Permit specifically references the map that Petitioner objects to. This issue was also brought before the Court of Appeals, which determined that the map was properly included in the Record on Appeal.

Of the five questions submitted for review by the Petitioner, Questions one, two, and three pertain exclusively to co-respondent Berkeley Electric Company, Inc., while questions four and five pertain exclusively to St. Johns. Accordingly, the argument hereinafter shall only address the two questions that pertain to St. Johns.

### **III. ARGUMENT**

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002). To establish an easement by prescription, a claimant must show (1) the continued and uninterrupted use or enjoyment of the 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. Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005).

Even when the facts were viewed in the light most favorable to Petitioner, it is clear that Respondent holds an easement by prescription to run and maintain water lines under the subject property. St. Johns contends that the Court of Appeals did not err in its decision, and there is no reason for the Court to grant Petitioner's Writ for Certiorari.

The Court of Appeals correctly determined the issue of the prescriptive easement, including St. Johns' demonstration that it has a substantial belief that it had the right to use the property in the manner in which it is used. It is worth noting at the outset that St. Johns disagrees with Petitioner's statement that "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 lines under TMS 498." (Pet. 20.) The text of the decision does not support that reading. The exact language of the Court's decision is, "Furthermore, St. John's Water established the water main was installed under a claim of right. Miley's affidavit demonstrates his belief that the encroachment permits obtained from Charleston County covered the installation of the water main as illustrated on the map. The fact that the claim *may have been based on a mistake* does not negate the claim of right required to establish a prescriptive easement." (App. 11) (emphasis added) This is not a finding that the belief was mistaken as Petitioner suggests. Regardless, case law is clear that a mistaken belief is not fatal to a claim of a prescriptive easement, as is fully discussed below.

**A. The standard required to demonstrate a substantial belief of a claim of right is well established, and was met by St. Johns.**

The issue of a "claim of right" is at the heart of many claims of a prescriptive easement. South Carolina courts have consistently required the party claiming an easement

to demonstrate “either a justifiable claim of right *or* adverse and hostile use.” Jones, 363 S.C. at 316, 609 S.E.2d at 600. The Court in Loftis v. South Carolina Electric and Gas Company stated, “[o]ur courts have held that a party may earn a prescriptive easement under a claim of right if 'he demonstrate[s] a substantial belief that he had the right to use' the property in a manner consistent with the alleged easement.” Loftis v. South Carolina Electric and Gas Company, 361 S.C. 434, 604 S.E.2d 714, 717 (2004) (quoting Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003)). This is an exceedingly clear definition which has been applied consistently by appellate courts.

Petitioner would have the Court believe that this section of the law needs further clarification, as the “definition has not been uniformly applied.” (Pet. 19.) Petitioner cites two cases as illustrative: Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (Ct. App. 1997) and Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996). These two cases had different circumstances which justified different conclusions, and actually illustrate that courts already apply a consistent standard when analyzing claims for a prescriptive easement.

In 1997, Michael Morrow sought a prescriptive easement on a parcel of property that he acquired title to in 1992, contending that it had been used for many years as a parking lot. Morrow, 328 S.C. at 522, 492 S.E.2d at 422. Since he did not have title for the required twenty years, he therefore attempted to “tack” onto the ownership of his predecessor-in-interest, Raymond Still. Id. at 528, 492 S.E.2d at 424. The only evidence produced to support Morrow's belief that a right-of-way existed was his own testimony regarding various “assumptions” that he had made concerning the character of the property. Id. There was, of course, no evidence before the court concerning the mindset of Still. Id. The dispositive

issue was not merely whether Morrow had a substantial belief that he could use the property, but rather what belief was held by his predecessor-in-interest. Id. at 529, 492 S.E.2d at 424. Morrow's claim failed primarily due to the fact that he could not demonstrate the mentality of the prior owner, rendering it impossible to “tack” and therefore impossible to show use for twenty years. Id. In spite of the fact that the only evidence before the court regarding his claim of right was Morrow's own testimony regarding certain “assumptions” he had made, the court nevertheless noted “[i]t possibly could be contended that Morrow's belief that he had a right-of-way was sufficient for a prescriptive easement pursuant to a 'claim of right'.” Id. at 528, 492 S.E.2d at 424.

The relevant facts in Revis are in no way similar to Morrow. Jane Revis sought a prescriptive easement over a road running between the parties' property. Revis, 321 S.C. at 206, 467 S.E.2d at 461. To support her claim, Revis provided testimony concerning her belief that she had the right to use the road. Id. Her subjective belief was supported by objective evidence, including the fact that the road used to be a state road; she knew her parents used the road to access their property since the public road had been moved; the existence of a former lawsuit concerning the road; and her own use of the road since she moved to the property. Id. at 209, 467 S.E.2d at 462. The court stated, “[c]learly, Revis was under the impression that she had a continuing right to use the road . . . There was certainly ample evidence to support the master's finding Revis' belief about her right to use the road flowed from a claim of right...” Id. at 210, 467 S.E.2d at 462.

The definition and application of the standard are already clear. “[O]ur courts have held in order for a party to earn a prescriptive easement under claim of right he must demonstrate a substantial belief that he had the right to use the parcel or road based upon the totality of circumstances surrounding his use. Hartley, at 145, 584 S.E.2d at 389. The cases

cited by Petitioner to show that the standard has not been "uniformly applied" demonstrate that the courts fully understand what is required of a claimant. In both cases, the courts examined the evidence that supported the claimant's belief that a claim of right existed and ruled accordingly.

The Court of Appeals correctly applied the standard and determined that St. Johns' substantial belief is reasonable based on the totality of the circumstances. The court agreed that Miley's affidavit established that St. Johns believed it had the right to use the subject property to run their water line. (App. 11.) This belief is supported by objective evidence: the permit granting the right, and the map showing the location of the planned water line.

Petitioner argues that the permit does not authorize encroachment over Appellant's parcel. However, as was ruled on by the Master and the Court of Appeals, the permit authorized the placement of the water line in precisely the location that it is found today. The permit authorized the placement of water lines "[a]long Kitford Rd. as shown on sheet U25." (R. p. 69.) Sheet U25 shows Kitford Road and the placement of the water line. (R. p. 245.) Near the end of Kitford Road, the water line turns ninety degrees towards the northeast, and continues until it terminates several hundred yards further on. (R. p. 245.) It is this spur that currently runs under Petitioner's property. While Petitioner suggests "[t]he conclusion that Kitford Road extended to the north was based on the description by St. John's counsel at the motion hearing that the dirt road on TMS 498 was Kitford Road," (Pet. 20) such a conclusion can be reasonably based on the Miley Affidavit and Map U25, and is not dependent solely on further clarification by counsel. Moreover, the residences to the north of Petitioner's tract all bear addresses on Kitford Road, further bolstering St. Johns' assertion that the dirt road extending over the subject property was once considered part of Kitford Road. (R. p. 65.)

At the time the permits were issued in the late 1970's, St. Johns was installing its lines all over Johns Island. The encroachment permits issued by Charleston County covered many different roads and many different properties, and were granted only after the county had determined that it had the authority to allow St. Johns to encroach. The permits show that St. Johns applied for the permits in February of 1977, and the county granted the request the following month. (R. p. 67.) St. Johns subsequently installed the water main under the subject property while following the exact plans that had been submitted to and approved by the county. St Johns used and maintained that line without interruption or complaint until Petitioner initiated the original action.

Petitioner also takes issue with the consistent finding that the original location and the current location of the water line are one in the same, "since there is no way to reference the location of 498 on U25." (Pet. 21.) Petitioner needs only to examine the totality of the circumstances to come to the correct conclusion, just as both lower courts did. The original map shows the location of the water line along Kitford Road as it was approved and installed in 1977. (R. p. 245.) Miley's affidavit establishes that the line has not been moved since its original installation. (R. p. 59-60.) Petitioner's own evidence and allegations show that a water line runs beneath the subject property. (R. p. 78.) There are no other water companies on Johns Island who might have installed a line where the current line is. It is obvious that the line there now is the same line that was installed in 1977.

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." (Pet. 21.) First, there is not a mistaken belief on the part of St. Johns. The evidence supports the contention that St. Johns had a valid claim of right to install the water line in its current position, and St. Johns maintains that it obtained the right

to install its water lines where they currently are from Charleston County in 1977. Second, St. Johns has provided an “explanation as to the basis for” its substantial belief that it had a valid claim of right, namely the permitting process, the encroachment permits themselves, and Map U25. Further, even if St. Johns' belief was mistaken, Loftis shows that a mistaken belief is not fatal, provided that there was a substantial belief that the right existed. Loftis, at 440, 604 S.E.2d at 717. St. Johns has provided justification for its substantial belief: the issuance of encroachment permits and accompanying maps granting permission to install the line in the exact position where it is located today.

The standard required of one seeking a prescriptive easement based on a claim of right is clear, and there is no need for further clarification of this issue, which has been decided consistently by the lower courts. The Court of Appeals correctly affirmed the Master's ruling regarding the main line under the subject property, and the decision should be left intact.

**B. The twenty-year period required for a prescriptive easement begins to run at the time of the claimant's first use of the property in accordance with the alleged claim of right, and St. Johns has demonstrated that first use occurred in 1978.**

Petitioner requests that this Court address the issue of when St. Johns' claim of right accrued, contending that “he did not have constructive notice of the installation of the water line under TMS 498...” (Pet. 22.) Petitioner seeks to import the elements required of a claimant proceeding under a use that is adverse to those required of a claimant proceeding under a claim of right. The requirement of “constructive notice” does not appear in any of the case law dealing with a claim of right. See Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993); Crystal Pines Homeowners Association, Inc. v. Phillips, 394 S.C. 527, 716 S.E.2d 682 (Ct. App. 2011); Matthews v. Dennis, 365 S.C. 245, 616 S.E.2d 437 (Ct.

App. 2005); Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005); Loftis v. South Carolina Electric and Gas Company, 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004); Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 584 S.E.2d 386 (Ct. App. 2003); Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (Ct. App. 1997); Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996). Instead, the case law is consistent, and provides that to obtain a prescriptive easement, one must show (1) the continued and uninterrupted use or enjoyment of the 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. Jones at 316, 609 S.E.2d at 600-601.

Constructive notice is an aspect of adverse possession, and has no place in the determination of whether or not a prescriptive easement exists when a claim of right is the basis for the original use of the property. St. Johns knows of no South Carolina case that has required a claimant to show constructive notice in conjunction with a claim of right. While there are a few South Carolina cases that deal with an easement based on adverse use, they are inapplicable in this matter, as the decision in Jones makes it clear that the the third prong of the test for a prescriptive easement may be fulfilled by "either a justifiable claim of right *or* adverse and hostile use." Id. In a situation where a claimant is proceeding under a use that is adverse, it is arguable that constructive notice may be applicable, but not where the use is under a claim of right.

The gist of Petitioner's argument here is that the requisite twenty year period has not been shown. However, both lower courts found that it has been shown. As indicated in the affidavit of the head engineer of the original construction project, the water line in question was installed well over twenty years ago. (R. p. 59-60.) The construction project which installed the water line under the subject property began in 1977 and was completed in 1978.

(R. p. 59-60.) The line is “currently in the same place and location as originally installed during this period of time.” (R. p. 60.) The line has been used continuously ever since that time, and there has been no interruption of service whatsoever. (R. p. 60.)

Petitioner suggests that the first use did not commence until 1986 (Pet. 22.) This contention is based on selected customer records of St. Johns which indicate the dates on which service was established at individual residences immediately to the north of the subject property. However, in his brief to the Court of Appeals, Petitioner admitted that St. Johns had a customer on Kitford Road as early as 1979 (Appellant's Br. 40) and the Record reflects the same. (R. p. 65.) There was only one main water line constructed on Kitford Road, and no other main lines have been installed since its construction in 1977-78. That main line includes the line that runs under the subject property now. The only way for any customer on Kitford Road to receive municipal water is through that single water main. By Petitioner's own admission, St. Johns had a customer on Kitford Road in 1979, thus establishing that the water main was used to provide service to customers at least as early as then. There has been no interruption of water service since that time, and there was no evidence before the court to suggest that service has ever been interrupted.

As was further presented to the Court of Appeals, the customer records are not the only way to determine the date of first use, nor are they even the most accurate. The Miley affidavit establishes that St. Johns completed installation of the water line on Kitford Road in 1978, and has continuously used it to deliver water to customers on Kitford Road since that time. (App. 11; R. p. 59-60.) This affidavit is sufficient to definitively show that St. Johns' first use occurred in 1978, some twenty-seven years before Petitioner's first complaint, which occurred sometime in 2005. At that time, construction was completed and the line was operational. It stands to reason that before a water company can service

customers it must first install a large-gauge main line, which is pressurized with water at the time that it is placed into service. Once an individual customer applies for service, smaller gauge lines are tapped into the main line and installed under the customer's property. The line under the subject property is the same large-gauge main line that was installed along Kitford Road in 1978 (R. p. 60.) There are simply no other water lines under the subject property. This is further confirmed by a map submitted by Petitioner in conjunction with his Affidavit, which shows the 2.5 inch main line running under the property until it meets the first of two water meters servicing the parcels located to the north of Petitioner's parcel. (R. p. 78.)

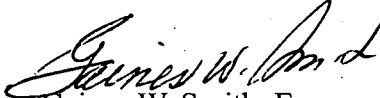
The statutory period of twenty years began to run when St. Johns completed construction of the water line and placed it in service in 1978. Petitioner's first complaint to St. Johns came twenty-seven years later in 2005, and he didn't file any legal action until 2008. The Master's ruling on this issue was affirmed by the Court of Appeals, and that decision should be upheld.

#### **IV. CONCLUSION**

Petitioner presents nothing to the Court that would justify granting a writ of certiorari. This case concerns aspects of the law that have been clearly defined and uniformly applied, as shown in a long line of cases. St. Johns presented ample evidence to the Master to support summary judgment at the trial level, and the Court of Appeals agreed that all of the requirements necessary to prove an easement by prescription were shown by the Respondents. There is no genuine issue of material fact, even when the facts are viewed in a light most favorable to Petitioner. The affidavit of Hugh Miley is evidence that the line began operation in 1978, twenty-seven years before Petitioner's first complaint. The admission of the Petitioner himself establishes that the line was used to service a customer

on Kitford Road 1979, twenty-six years prior to Petitioner's first complaint. There has been no interruption in service whatsoever, and Petitioner presented no evidence to suggest that there ever has been. St. Johns identified the thing enjoyed, namely the right to maintain the lines and provide municipal water to customers along Kitford Road. Finally, the original encroachment permit and accompanying map support St. Johns' substantial belief that it had a valid claim of right to enter the property and install and maintain its water lines in their current position. The survey map attached to Petitioner's affidavit further establishes the line's location, and when considered with the Miley affidavit attesting to the fact that the line has not been moved, it becomes clear that the line has been under the subject property and in use since its installation in 1978. All three prongs of the test for a prescriptive easement were satisfied. The decision of the Court of Appeals was proper and does not require further review, and there are no novel questions of law that justify the Petitioner's request of this Court. For these reasons, St. John's Water Company Inc. respectfully requests that the Supreme Court deny Petitioner's Petition for Certiorari.

Respectfully submitted,  
LEGARE, HARE & SMITH

  
Gaines W. Smith, Esq.  
Bar # 5167

Dated: Sept 4, 2013  
Charleston, SC

IN THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPEAL FROM THE COURT OF COMMON PLEAS  
OF CHARLESTON COUNTY

Case No: 2008-CP-10-1983

Hon. Mikell Scarborough, Master-in-Equity

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ROOSEVELT SIMMONS..... Appellant,

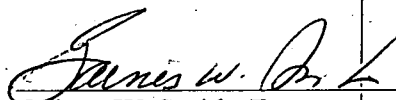
**S.C. SUPREME COURT**

v.

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

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Respondent St. Johns Water Company Inc.'s Return to Petition for Writ of Certiorari was served upon Appellant's attorney, Edward A. Bertele, and Respondent Berkeley Electric Cooperative, Inc.'s attorney, John B. Williams, by regular mail postage prepaid to their last known mailing addresses.



Gaines W. Smith, Esq.  
ATTORNEY FOR RESPONDENT  
ST. JOHN'S WATER COMPANY, INC.

Dated: Sept 4, 2013  
Charleston, SC