

RECEIVED

THE STATE OF SOUTH CAROLINA
In the Supreme Court

SEP 10 2013

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Mikell Scarborough, Master-In-Equity

Appellate Case No.: 2013-001477

Roosevelt Simmons.....Petitioner

v.

Berkeley Electric Cooperative, Inc.
& St. John's Water Company, Inc.,.....Respondents

RETRUN OF RESPONDENT BERKELEY ELECTRIC COOPERATIVE, INC.

John B. Williams
J. Jay Hulst
Williams & Hulst, LLC
P.O. Box 1288
(843) 761-8232
jbw@williamsandhulst.com
jjh@ williamsandhulst.com
Attorneys for the Respondent,
Berkeley Electric Cooperative,
Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
QUESTIONS PRESENTED FOR REVIEW.....	v
STATEMENT OF THE CASE.....	1
ARGUMENT.....	6
I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE MASTER’S RULING THAT SIMMONS FAILED TO ESTABLISH BERKELEY ELECTRIC’S USE EXCEEDED THE SCOPE OF THE EXPRESS EASEMENTS.....	8
A. Simmons Misconstrues the Nature of the Rulings Below Regarding the Applicability and Extent of The Express Easements.....	8
B. Simmons Failed to Establish Facts Showing that Berkeley Electric’s Distribution Lines Encroach on TMS 135.....	10
C. There is No Evidence that Berkeley Electric’s Use of TMS 498 Exceeded the Scope of the 1972 Easement.....	12
II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE MASTER’S RULING THAT BERKELEY ELECTRIC’S LINES WERE AUTHORIZED BY A PRESCRIPTIVE EASEMENT	17
A. Berkeley Electric Established the Identity of the Thing Enjoyed for a Prescriptive Easement.....	18
B. The Plats and Maps Submitted by Simmons Fail to Establish any Material Facts.....	19
CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

1.	<i>Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn</i> , 348 S.C. 58, 558 S.E.2d 902, 906-907 (Ct. App. 2001).....	15
2.	<i>David v. McLeod Reg'l Med. Ctr.</i> , 367 S.C. 242, 250, 626 S.E. 2d 1, 5 (2006).....	24
3.	<i>Englert, Inc. v. The Netherlands Ins. Co.</i> , 315 S.C. 300, 304, 433 S.E. 2d 871, 873 (Ct. App.1993).....	10
4.	<i>Germann v. New York Life Ins. Co.</i> , 286 S.C. 34, 38, 331 S.E. 2d 385, 388 (Ct. App. 1985).....	15, 24
5.	<i>Hill v. Carolina Power & Light Co.</i> , 204 S.C. 83, 96, 28 S.E. 2d 545, 549 (1943).....	16
6.	<i>Hoard v. Roper Hospital, Inc.</i> , 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010).....	19
7.	<i>Kelly v. Snyder</i> , 396 S.C. 564, at 572, 722 S.E. 2d 813, at 817 (Ct. App. 2012).....	18
8.	<i>Main v. Corley</i> , 281 S.C. 525, at 527, 316 S.E. 2d 406, at 407 (1984).....	7
9.	<i>Moss v. Porter Bros., Inc.</i> 292 S.C. 444 at 446, 357 S.E. 2d 25, at 27 (Ct. App. 1987).....	16
10.	<i>Plott v. Justin Enters.</i> , 374 S.C. 504, at 514, 649 S.E. 2d 92 at 97 (Ct. App. 2007).....	16
11.	<i>Shuler v. Tuomey Regional Medical Center</i> , 313 S.C. 225, 227, 437 S.E. 2d 128, 130 (Ct. App. 1993).....	22
12.	<i>Watershed Cons. Dist, of Fountain Inn</i> , 348 S.C. 58, 558 S.E. 2d 902, 907 (Ct. App. 2001).....	16

RULES

13.	Rule 52 (e), SCRCF.....	19
14.	Rule 56 SCRCF.....	7, 9, 17, 24
15.	Rule 56 (c), SCRCF.....	7, 10, 14
16.	Rule 56 (e), SCRCF.....	7, 20
17.	Rule 242 (b), SCACR.....	8
18.	Rule 242 (d) (2), SCACR.....	12

QUESTIONS PRESENTED FOR REVIEW

1. Did Petitioner produce admissible evidence establishing a genuine issue of fact as to whether Berkeley Electric Cooperative exceeded the scope of its express easements? No.
2. Did Petitioner produce admissible evidence establishing a genuine issue of fact regarding Berkeley Electric Cooperative's claim of a prescriptive easement? No.

STATEMENT OF THE CASE

Petitioner Roosevelt Simmons (“Simmons”) seeks review of the Court of Appeals’ decision affirming a grant of summary judgment in favor of Berkeley Electric Cooperative, Inc.

In April of 2009, Simmons filed a complaint alleging that Berkeley Electric trespassed on his property by “constructing, placing and/or maintaining unauthorized power lines” and was using these “unauthorized easements without paying reasonable fair market value.” R. 24, 32-34. Simmons’ complaint sought a declaration that Berkeley Electric had “no property interests or rights in TMS Nos. 283-00-00-498 and 282-00-00-135” and asked for actual, treble, and punitive damages. R. 34-35.

The two parcels at issue in this case, TMS 283-00-00-498 (“TMS 498”) and TMS 282-00-00-135 (“TMS 135”), have been in Simmons’ family “since before the 1960’s.” R. 49, ¶ 2. TMS 498 is one of three parcels Simmons subdivided from a larger tract he owned—TMS 115. R. 118, ¶ 3. Simmons acquired title to TMS 115 and TMS 135 from family members in 2003. R. 118, ¶ 3; 126.

In May of 2009, Berkeley Electric moved for summary judgment on the grounds that its lines were authorized by a prescriptive easement. R. 43-48. In support of its motion, Berkeley Electric submitted the affidavits of Thomas Seeney and Richard Frank, the then current and previous district superintendents for the Johns Island District. R. 45-48. According to Seeney and Frank, the power line

extending over TMS 498 and branching out along Kitford Road was open, obvious and had provided power to customers in the area for over 20 years. R. 45-48.

In July of 2009, Simmons filed the first of two affidavits that he submitted in opposition to Berkeley Electric's motion. R. 49-51. Attached to this affidavit was an unsigned plat prepared by Richard Lacey in May of 2005. There is no supporting affidavit or testimony from Lacey regarding this plat. R. 52.

According to Simmons:

The plat shows a Berkeley Electric power line easement located along the easterly side of my property 25' wide which was given by a prior owner in 1972. The power line about which I filed this suit is shown on the westerly side of my property and no easement was ever given.

R. 49-50. The power line referenced by Simmons runs from the transmission line down the western side of the parcel identified on Lacey's plat as Lot C, TMS 115—now TMS 498—and extends along Kitford Road. R. 52. Simmons does not mention the other property at issue, TMS 135, anywhere in this affidavit. R. 49-50. TMS 135 is not identified anywhere on this plat. R. 52.

Also attached to Simmons' affidavit was a 1981 plat prepared by W. L. Gaillard. R. 53. The Gaillard plat depicts a proposed subdivision of a piece of property neighboring what was to become TMS 498. *Id.* There is no affidavit or testimony from Gaillard regarding the plat.

Simmons asserted that the Gaillard plat

...shows the location of the Berkeley Electric Easement crossing the subject property then in the name of Edward Brown but does not show any other power lines.

R. 50. Simmons concluded that Gaillard's plat establishes Berkeley Electric's power lines were not on his property in 1981 and contradicts the affidavits of Berkeley Electric's employees. *Id.*

After filing its motion, Berkeley Electric was able to locate and produce two express easements covering Simmons' property. In 1956 the Estate of Edward Heyward granted Berkeley Electric a seventy-five foot wide easement for the "construction and maintenance of an electric transmission line or lines, towers, poles, anchors and necessary fixtures and wires attached thereto...." R. 92-93. According to Simmons, "it is not disputed that this easement encompasses both TMS 498 and 135." Petition for Certiorari ("Petition,") p. 4. In 1972 Edward C. Brown granted Berkeley Electric an easement "to place, construct, operate, repair, maintain, relocate, and replace thereon in or upon all streets, roads, or highways abutting said lands and electric transmission or distribution line or system...." R. 132. According to Simmons "it is undisputed that this easement included land of which TMS 498 was a part." Petition, p. 5.

Berkeley Electric's motion for summary judgment was heard on November 22, 2010. The morning of the hearing, Simmons filed a "Supplemental Affidavit" adding new claims regarding the power lines on his property. R. 118-119. In this affidavit, Simmons explains that he hired Lacey to prepare a plat of "all his property," but the original plat only showed TMS 115:

Because this plat did not indicate all of the power lines which were affecting my property, Mr. Lacey was asked to return to the site to determine the location of any other power lines.

R. 118-119, ¶3. No plat was attached to Simmons' supplemental affidavit. R. 118-119. Instead, Lacey's revised plat was attached to an affidavit filed that same morning by Simmons' attorney. R. 120, ¶ 4. The revised plat is unsigned. R. 130. There is no affidavit or testimony from Lacey regarding the plat or its revisions.

Lacey's revised plat is titled:

EXHIBIT [*sic*] SHOWING
LOT A (1.139 ACRES)
LOT B (0.743 ACRES)
LOT C (1.375 ACRES)
CONTAINING 3.257 ACRES
PROPERTY OF
ROOSEVELT SIMMONS.

R. 130. TMS 135 is not shown anywhere on the revised plat. *Id.* In his affidavit,

Simmons states:

The revised plat which [Lacey] prepared dated September 22, 2010 shows another line running from the power distribution line where it crosses TMS 282-00-00-135 over my driveway out to Kitford Road and ending in a pole in front of the Turner residence on the south side of Kitford Road.

R. 119 ¶ 4. Lacey's revised plat shows a line crossing over what is identified as a "gravel road" extending from Kitford Road. R. 130. The gravel road splits into two driveways. *Id.* The line continues across the northernmost driveway. *Id.* The line crosses the gravel road and driveway within the Seaboard Coastline

Railroad right of way. *Id.* The Seaboard Coastline property does not belong to Simmons and it is not TMS 135. R. 52, 118, 130.

Also attached to the affidavit of Simmons' attorney was a 1983 plat prepared by James Shuler depicting "system maps" of Berkeley Electric power lines.¹ R. 120-121, pp. 131-137. Simmons makes no reference to these materials in his affidavits. R. 49-51, pp. 118-119. There are no affidavits or testimony regarding the purpose of these drawings, the features depicted, or the fairness and accuracy of the depictions.

The Shuler plat depicts another neighboring parcel to TMS 115. Simmons argued that the Shuler plat contradicted the Seeney and Frank affidavits because it did not show any distribution lines extending over Simmons' property R. 205:25-206:3. According to Simmons, the two system maps are "substantially different" and therefore inconsistent with Berkeley Electric's claim that its lines had been in place for over twenty years. R. 206:3-8.

The Honorable Mikell Scarborough, Master in Equity for Charleston County, granted summary judgment to Berkeley Electric at the close of the hearing. R. 221:23-222:3. The Master ruled that Berkeley Electric's power lines on Simmons' property were authorized by express easements and that Simmons had failed to establish that the company had exceeded its authority under those

¹ Simmons' claim on page 6 of his Petition that Berkeley Electric produced the system maps "in response to petitioner's request for the location of its power lines affecting petitioner's property from 1980 to the present" is not substantiated by any reference to the record and is not true.

easements. R. 17-18. The Master further ruled that to the extent the express easements failed to authorize any particular line or poles configured on Simmons' property, Berkeley Electric had acquired a prescriptive easement. R. 18.

Simmons appealed the ruling, contending that the Master erred in granting summary judgment to Berkeley Electric based on express and prescriptive easements. The Court of Appeals affirmed, finding that the Master properly considered the existence of the express easements and upheld the Master's ruling that Berkeley Electric did not exceed the scope of its easements and that its use of Simmons' property was authorized under a prescriptive easement. Appendix, pp. 6-9. Simmons petitioned for rehearing, asking the Court of Appeals to reconsider whether Berkeley Electric's express easements applied to TMS 135, whether Berkeley Electric had established grounds for imposing a prescriptive easement over TMS 135, and whether there was an issue regarding the existence of a prescriptive easement over TMS 135. Appendix, pp. 13-21. The Court of Appeals denied Simmons' request for a rehearing. Appendix, p. 26. This petition followed.

ARGUMENT

Simmons contends that the Court of Appeals improperly weighed the evidence in ruling that Berkeley Electric did not exceed the scope of its express easements and that the company's use of his property was authorized under a prescriptive easement. Simmons complains that in reaching its decision, the Court failed to view the evidence in the light most favorable to him and that, if the Court

disagreed with his “contention as to the significance of the facts,” it was required to deny summary judgment. Petition, P. 11. Simmons misapprehends Rule 56 of the South Carolina Rules of Civil Procedure and its application in this case.

Rule 56(c) provides that summary judgment

...shall be rendered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(e) further provides:

Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, and shall affirmatively show that the affiant is competent to testify as to the matters stated therein. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.

SCRCR Rule 56(c) and (e).

Simmons’ claims of error in this case are based on allegations and argument, not facts. Inferences must be based on the facts established by the evidence. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *Main v. Corley*, 281 S.C. 525, at 527, 316 S.E.2d 406, at 407 (1984). The inferences Simmons draws from the evidence are not based on fact and are not reasonable.

Furthermore, the issues raised in this petition do not warrant certiorari. The case does not involve any novel questions of law; there was no dissenting opinion; the decision does not conflict with a prior decision of the Supreme Court; there are

no constitutional issues involved; and the case does not involve a federal question.

See SCACR Rule 242(b). Accordingly, Simmons' petition should be denied.

I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE MASTER'S RULING THAT SIMMONS FAILED TO ESTABLISH BERKELEY ELECTRIC'S USE EXCEEDED THE SCOPE OF THE EXPRESS EASEMENTS.

Berkeley Electric's transmission line over TMS 498 and TMS 135 is authorized by the 1956 easement. Petition, p. 4. Berkeley Electric's distribution line over TMS 498 and branching out along Kitford Road are authorized by the 1972 easement and a prescriptive easement. Petition, p. 5. To the extent Berkeley Electric's distribution line extending along Kitford Road and through the Seaboard Coastline Railroad right-of-way encroaches on TMS 135, the lines are authorized by a prescriptive easement. R. 45-48, 52; 119, ¶ 4; 130. Based on this, the Master Granted summary judgment to Berkeley Electric. R. 13-21.

A. Simmons Misconstrues the Nature of the Rulings Below Regarding the Applicability and Extent of the Express Easements.

Simmons argues that the Court of Appeals erred in finding that Berkeley Electric did not exceed the scope of its 1972 easement. He contends:

Berkeley Electric exceeded the scope of the 1972 Brown easement by crossing TMS 498 to serve a customer on the north side of Kitford Road while using another line to serve customers on the south side of Kitford Road.

Petition, p. 11. Simmons continues:

The easement did not grant Berkeley Electric any right for distribution lines over TMS 135 which was on the other side of the Seaboard Coastline Railroad right-of-way, outside the lands owned by the grantor.... Therefore, the Court of Appeals plainly erred in

finding that Berkeley Electric did not exceed the scope of the 1972 easement as to TMS 135 since it did not extend to TMS 135.

Id., p. 12.

Simmons misrepresents the Master's ruling granting summary judgment to Berkeley Electric and the Court of Appeals' decision affirming that ruling. In his order, the Master ruled that Simmons failed to establish that Berkeley Electric's power lines exceeded the authority granted under its express easements. R. 18. The Master's order granting summary judgment did not specifically identify which power lines extending over TMS 048 or which lines extending over TMS 135, if any, were authorized under the express easements because:

Even if the express easements failed to authorize any particular power lines and poles as presently located and configured on Simmons' property, BEC has acquired a prescriptive easement for that equipment.

R. 18. The Court of Appeals affirmed this ruling, holding that the Master did not err in granting summary judgment to Berkeley Electric on grounds that its use was authorized under the express easements and/or a prescriptive easement. Appendix, pp. 5- 9.

Had the Court of Appeals determined—as Simmons insists it did—that all of the power lines were authorized by and within the scope of Berkeley Electric's express easements, there would have been no reason for it to consider and affirm the Master's finding of a prescriptive easement. Simmons challenges a ruling that was never made in this case. This is not a genuine issue as required by Rule 56 SCRCF.

B. Simmons Failed to Establish Facts Showing that Berkeley Electric's Distribution Lines Encroach on TMS 135.

Simmons' argument that Berkeley Electric exceeded the scope of the 1972 easement as to TMS 135 is premised on his contention that Berkeley Electric's lines actually cross TMS 135. Simmons failed to establish this allegation. The factual basis for his claim that Berkeley Electric's lines cross TMS 135 is what he asserts is "shown" on Lacey's revised plat. R. 119. Simmons' unsubstantiated assertion regarding what he thinks Lacey's revised plat depicts is argument, not fact. Both of Lacey's plats are unsigned. Simmons failed to provide any kind of foundation for the drawings or any affidavit or testimony from Lacey regarding the properties and features depicted on his plats. A genuine issue of fact can be created only by evidence which would be admissible at trial. *See* SCRCR Rule 56(c); *See Englert, Inc. v. The Netherlands Ins. Co.*, 315 S.C. 300, 304, 433 S.E.2d 871, 873 (Ct. App.1993).

Even if we assume, for the purposes of argument, that Lacey's plats were admissible without any kind of foundation or supporting testimony, neither plat shows the location or configuration of TMS 135. R. 52, 118. The boundaries of TMS 135 are not marked anywhere on Lacey's plats. *Id.* Simmons asserts that Lacey's revised plat shows a line "where it crosses TMS 282-00-00-135 over my driveway out to Kitford Road." R. 119, ¶ 4. In fact, Lacey's revised plat depicts a line crossing what is identified as a "gravel road" located in the Seaboard Coastline Railroad right-of-way. R. 130. The Seaboard Coastline Railroad

property is not TMS 135 and there is no evidence that Simmons owns that property.² According to Simmons' sworn statement, the line crosses his driveway on property that is owned by somebody else. R. 119, ¶ 4. Simmons' mischaracterization of the facts does not create a genuine issue of fact.

The 1972 easement grants Berkley Electric the right to place a distribution *line or system* on or over a 4.7 acre tract bounded on the east by the Seaboard Coastline Railroad. R. 132. The 4.7 acre tract encompassed all of the property shown as TMS 115 on Lacey's plat. Petition, pp. 4-5; R. 52, 130. The easement also includes "all streets, roads, and highways abutting such lands." R. 132. Berkeley Electric's distribution line or system extends across TMS 498 (originally part of TMS 115) and branches out in both directions down Kitford Road. Berkeley Electric's lines "east of the Seaboard Coastline Railroad" are authorized by the plain terms of the 1972 easement. R. 132.

Berkeley Electric has never claimed that the 1972 easement authorizes any lines to the west of the Seaboard Coastline Railroad property. The Master ruled that to the extent Berkeley Electric's lines were not covered by the terms of an express easement, its lines and poles as configured were covered by a prescriptive easement. R. 18. The Court of Appeals affirmed that ruling. Appendix, pp. 8-9. Based on the foregoing, Simmons' claim that the 1972 easement does not extend to TMS 135 is not genuine and ultimately irrelevant.

² According to Charleston County's public records, the Seaboard Coastline Railroad property (TMS 250-00-00-001) is still owned by the railroad company.

C. There is No Evidence that Berkeley Electric's Use of TMS 498 Exceeded the Scope of the 1972 Easement.

Simmons argues that Berkeley Electric exceeded the scope of the 1972 easement by crossing TMS 498 from the north when it had already installed its distribution line across Kitford Road to the South.³ Petition, p. 12. Simmons claims that Lacey's revised plat shows

...another line running from the power distribution line where it crosses TMS 282-00-00-135 over my driveway out to Kitford Road and ending at the power pole in front of the Turner residence on the south side of Kitford Road.

R. 119, ¶ 4. Simmons failed to provide any testimony from Lacey regarding the accuracy of his plat, or the features shown or not shown. Simmons' confused claim of "another line running from the power distribution line" makes no sense and only demonstrates that he is incompetent to interpret the plat.

Apparently, Berkeley Electric's authorized use of TMS 498 under the 1972 easement fails because Simmons vaguely claims it operated another line—the line running over his driveway—to service customers on Kitford Road. *Id.* But Simmons also contends that Berkeley Electric's use of this other line is unauthorized. *See* Section B, *supra*. Such circular logic must be rejected.

The 1972 easement granted by Brown authorizes Berkeley Electric to

³ Simmons failed to raise this argument in his petition for rehearing. "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2). The issue has not been preserved.

... place, construct, operate, repair, maintain, relocate, and replace thereon, or upon all streets, roads, or highways abutting said lands an electric transmission or distribution line or system....

R. 132. The 1972 easement authorizes the construction and maintenance of a “distribution line or system” on Brown’s property. R. 132 (emphasis added.) The easement further grants Berkeley Electric the right to relocate its line or system. *Id.* Simmons concedes that there is no dispute that this easement applies to TMS 498. Petition, p. 5. Likewise, there is no dispute that Berkeley Electric’s distribution line crosses TMS 498 once. R. 52.

Berkeley Electric’s distribution line extends from the transmission line down the western side of TMS 498 (Lot C of TMS 115) and crosses to a power pole (labeled “C4” on Lacey’s plats) on the opposite side of Kitford Road in front of the Turner residence. R. 52, 119, ¶4. From this central power pole, the distribution line or system branches out in both directions along Kitford Road. R. 52, 130. The street address for the Turner property (i.e., Lot A, TMS 115 on Lacey’s plat) is 3507 Kitford Road. According to Thomas Seeney and Richard Frank, Berkeley Electric’s current and former District Supervisors for Johns Island, the line located at 3507 Kitford Road –the Turner residence—is clearly visible from the road and obvious to anyone inspecting the property. R. 45, ¶ 3; 47, ¶ 3. The line has always been used to provide power to residents in the area. R. 45, ¶4; 47, ¶ 4. Lacey’s revised plat does not, as claimed by Simmons, show *another* power distribution line; the line extending through the Seaboard Coastline

right-of-way and along Kitford Road is just one section of the entire distribution line or system. R. 130.

Simmons continues:

The line running over my driveway has been used by Berkeley Electric to my knowledge for many years to service its customers on the south side of Kitford Road. There have even been cable TV lines running along the same route. I question why Berkeley Electric had to add another power line across TMS 283-00-00-498 which is connected to the same pole on the south side of Kitford Road when it already had a route to service the same customers.

R. 119, ¶ 4. Simmons fails to identify the factual basis for his statement that the line has been used “for many years.”⁴ He fails to indicate when he first noticed the line, how long it has been there, or identify which properties on the south side of Kitford Road this line allegedly serviced. Simmons fails to provide facts establishing when Berkeley Electric purportedly added “another power line” across TMS 498 or that the lines “service the same customers.” There are no facts establishing that this line running across Simmons’ driveway is even tied into the transmission line.⁵ Affidavits must state specific facts and affirmatively show that the affiant is competent to testify as to the matters stated therein. Rule 56(c) SCRCF. Conclusory statements as to the ultimate issues in a case are not sufficient to create a genuine issue of fact for purposes of resisting summary

⁴ Simmons acquired title to TMS 115 and 135 in 2003. Petition, p. 5.

⁵ No power pole is depicted at the point where the line from Simmons’ driveway intersects with the transmission line. R. p. 130. Thus the lines cannot connect at that point and there is no “loop” as claimed by Simmons. See Petition, p. 13.

judgment. *Germann v. New York Life Ins. Co.*, 286 S.C. 34, 38, 331 S.E.2d 385, 388 (Ct. App.1985).

Based on his unsupported claims regarding the existence of “another line,”

Simmons next argues:

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

Petition, p. 13. Simmons failed to provide any facts establishing what Brown intended when he granted the 1972 easement. Brown obviously wanted power distributed throughout his 4.7 acre tract. However, there are no facts supporting Simmons’ assumption that Brown planned to limit Berkeley Electric’s use to a single distribution line extending from a single location on the transmission line.

On the contrary, as observed by the Court of Appeals:

The evidence presented established that the electric lines had been in their current configuration for an extended period of time. This demonstrates the easement holder and landowners’ understanding that such configuration did not exceed the intended scope of the easements.

Appendix, p. 7.

As noted by the Court of Appeals, the language of an easement determines its extent. *Id.* Clear and unambiguous language in grants of an easement must be construed according to terms which parties have used, taken, and understood in the plain, ordinary, and popular sense. *Binkley v. Rabon Creek Watershed Cons. Dist.*,

of *Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902, 907 (Ct. App. 2001). The general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it. *Plott v. Justin Enters.*, 374 S.C. 504, at 514, 649 S.E.2d 92, at 97 (Ct. App. 2007).

Simmons bears the burden of proof on whether Berkeley Electric exceeded the scope of the 1972 easement. Even if we assume, for the purpose of argument, that Berkeley Electric “had already used the easement to run its power line down Kitford Road,” Simmons failed to establish any facts showing that its distribution line across TMS 498 was not reasonably necessary to Berkeley Electric’s operations. *See Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 96, 28 S.E.2d 545, 549 (1943)(“The unrestricted grant of an easement conveys all such rights as are incident or necessary to its reasonable and proper enjoyment.”)

Simmons’ contention that Berkeley’s use of TMS 498 exceeded the scope of the 1972 easement is not supported by a plain reading of the terms of the easement. The clear and unambiguous language of the easement is for the Court to construe. *See Moss v. Porter Bros., Inc.*, 292 S.C. 444, at 446, 357 S.E.2d 25, at 27 (Ct. App. 1987) (The question is one of law if the language employed by the instrument is plain and unambiguous.) No facts support Simmons’ contention that Berkeley Electric’s use under the 1972 easement is limited to a single line extending from a single connection on the transmission line. The easement authorizes an entire distribution system across all of Brown’s 4.7 acres west of the Seaboard Coastline Railroad property. R. 132. There is no evidence that the

parties understood or applied the terms of the easement differently. Simmons narrow interpretation of the easement ignores the terms plainly stated in the grant.

Id.

Simmons' assumptions regarding Brown's intentions are not reasonable and are not based on specific facts established by admissible evidence as required by Rule 56 SCRPC. Simmons failed to establish a genuine issue of material fact showing that Berkeley Electric's distribution line across TMS 498 exceeded the scope of the 1972 easement. Accordingly, the Court of Appeals did not err in affirming the Master's grant of summary judgment to Berkeley Electric.

II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE MASTER'S RULING THAT BERKELEY ELECTRIC'S LINES WERE AUTHORIZED BY A PRESCRIPTIVE EASEMENT.

Simmons opens his argument on prescriptive easements by asserting:

If, as Petitioner contends, there was no express easement to cross TMS 498 twice, then Berkeley Electric must establish the existence of a prescriptive easement....

Petition, p. 14. Simmons does not dispute that the 1956 Heyward easement encompassed both TMS 498 and 135. Petition, p. 4. Likewise, Simmons does not dispute that the 1972 Brown easement included TMS 498. *Id.*, p. 5. Thus, Berkeley Electric's express easements *did* authorize it to cross TMS 498 *twice*—once with its transmission line under the 1956 easement and once with its distribution line under the 1972 easement. According to Simmons, Berkeley Electric does not need to establish the existence of a prescriptive easement.

A. Berkeley Electric Established the Identity of the Thing Enjoyed for a Prescriptive Easement.

Simmons argues that Berkeley Electric failed to establish one of the elements required for a prescriptive easement—the identity of the thing enjoyed. *See Kelly v. Snyder*, 396 S.C. 564, at 572, 722 S.E.2d 813, at 817 (Ct. App. 2012). Simmons claims that “neither the Seeney or Frank affidavits are specific as to the location of the line to which they refer....” Petition, p. 15.

The Seeney and Frank affidavits describe Berkeley Electric’s distribution line located at 3507 Kitford Road. R. 44, ¶ 3; 47, ¶ 3. 3507 Kitford Road is the physical address of the property identified as “Lot A, TMS 115” on Lacey’s original and revised plats. R. 52, 130. According to Simmons, this property is owned by the Turners. R. 119, ¶4. As shown on Lacey’s plats, Berkeley Electric’s distribution line extends down from the transmission line over the western side of “Lot C, TMS 115” (TMS 498) and across Kitford Road to a pole marked “C4” in front of the Turner property R. 52; 119, ¶4; 130. From there, the line branches out along the road in both directions. R. 52, 130. The line extends along the entire length of Lot A, TMS 115—i.e., 3507 Kitford Road. R. 52, 130. On Lacey’s revised plat, the line is shown extending through the Seaboard Coastline Easement and across the transmission line.⁶ R. 130. Seeney and Frank

⁶ Citing Lacey’s revised plat, Simmons claims that “the record is clear that Kitford Road ends in front of the Seaboard Coastline Railroad right of way. Petition, p. 14. Actually, Lacey’s revised plat shows that where the paved portion of Kitford Road ends, a “gravel road” continues through the Seaboard Coastline property and beyond. R. 130.

testify that the line at 3507 Kitford Road is clearly visible from the road, obvious, and has been used to provide power to residents in the area since at least 1980. R. 44, ¶ 3-46, ¶ 4; 47, ¶ 3-48 ¶ 4.

This evidence shows the identity of the thing enjoyed by Berkeley Electric—the power line extending over TMS 498 and branching out down Kitford Road. Simmons simply denies Berkeley Electric’s claim, essentially arguing that Seeney and Frank are not to be believed. One cannot avoid summary judgment by suggesting that the finder-of-fact may disbelieve uncontradicted evidence. *See Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, at 549, 694 S.E.2d 1, at 6 (2010.) Simmons failed to set forth specific facts showing a genuine issue of fact for trial on this issue.⁷ *Id.*, Rule 52(e) SCRPC. The Court of Appeal did not err in affirming the Master’s finding of a prescriptive easement.

B. The Plats and Maps Submitted by Simmons Fail to Establish any Material Facts.

Simmons claims that he “asserted based on personal knowledge that the line across TMS 498 was not there in 1980.” Petition, p. 15. This is what Simmons actually states in his supplemental affidavit:

The power line owned by Berkeley Electric Company which I objected to has not been located across TMS 283-00-00-498 since 1980 as their witnesses claim. In my previous affidavit, I referred to a plat dated October 7, 1981 prepared by W. L. Gaillard which shows the location of the Berkeley Electric distribution line easement crossing the property but does not show the other power line which Berkeley Electric claims was there then.

⁷ Simmons never raised this issue before the Master and the issue has not been preserved.

R. 118, ¶ 2. According to his affidavit, Simmons claim was based on the Gaillard plat.⁸ *Id.* He provides no facts demonstrating any personal recollection, understanding, or knowledge regarding his claim that Berkeley Electric's line over TMS 498 was not there in 1980. Affidavits must be based on personal knowledge and must show affirmatively that the affiant is competent to testify to the matters stated in his affidavit. Rule 56(e) SCRCP.

Simmons argues that the Gaillard and Shuler plats do not show Berkeley Electric's power lines, and that this raised an inference that the lines were not there when the surveys were performed. Petition, p. 16. The Court of Appeals rejected this logic, ruling that the Gaillard and Shuler plats were not surveys of Simmons' property and did not purport to establish the location of all power lines. Appendix, p. 9. The Court of Appeals agreed that the plats did not provide contradictory evidence to the Berkeley Electric employee affidavits. *Id.* Simmons complains that "the Court of Appeals had no basis to find that the details (or lack thereof) could be ignored." Petition, p. 16.

Simmons provided no testimony from Gaillard, Shuler, or Lacey regarding the features shown or not shown on the plats. Without a proper foundation, the plats are not admissible evidence. Even if the plats were somehow admissible on their own, the plats themselves are not fact. Plats are merely drawings which visually represent the findings and calculations of the surveyor. Simmons

⁸ The Gaillard plat depicts Berkeley Electric's transmission line. The plat does not show any distribution lines as stated by Simmons in his Affidavit. R. p. 53.

provided no facts showing that surveyors necessarily include every power line situated on the properties shown in their plats. The level of detail is determined by the requirements of the property owner. Additional features require more work by the surveyor and, accordingly, extra expense.

A feature depicted on a plat might, with the proper foundation, provide the basis for a conclusion that the feature existed when the survey was performed. However, the lack of a feature on a plat does not establish that the feature did not exist on the property at the time of the survey. The surveyor who prepared the plat—or somebody else with the requisite competency—would need to establish such a fact.

The fallacy of Simmons' argument—that he can infer that a feature does not exist on a property because it is not shown on a plat—is demonstrated by comparing Lacey's initial and revised plats.⁹ Lacey's original plat shows Berkeley Electric's power line extending along Kitford Road and terminating in the abandoned Seaboard Coastline Railroad right-of-way. R. 52. Lacey's "revised" plat shows the line extending through the railroad right-of-way, across Berkeley Electric's 75' foot transmission line easement, into unspecified territory. R. 130. According to Simmons' logic, we can infer from these plats that the line along Kitford Road did not extend across the abandoned railroad right-of-way when the plat was originally prepared in 2005. We can infer that Berkeley Electric's

⁹ This argument, if accepted, would open the floodgates for litigation based on features not shown in plats.

transmission line easement increased in width by fifty feet between 2005 and 2010. R. 52; p. 130. We could infer that the water line and setbacks identified on “Lot C” in Lacey’s revised plat did not exist in 2005 when the original plat was prepared. R. 52; p. 130. Without more, such baseless inferences are not reasonable.

The inferences Simmons seeks to draw from the Gaillard and Shuler plats are not based on facts established by admissible evidence and are not reasonable. As observed by both the Master and the Court of Appeals, the Gaillard and Shuler plats are for other properties, not Simmons’ property. (R. 19-20, Appendix, p. 9.) Simmons failed to submit anything from either Gaillard or Shuler—or any other surveyor—to support his claims. Neither plat shows any distribution lines anywhere, even to the structures depicted on the property. R. 53, 34.

Simmons failed to provide any foundation for the plats or any facts to support his inferences based on alleged omissions in the Gaillard and Shuler plats. To be reasonable, inferences must be based on facts established by admissible evidence. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *Shuler v. Tuomey Regional Medical Center*, 313 S.C. 225, 227, 437 S.E.2d 128, 130 (Ct. App. 1993). The Court of Appeals did not err in its ruling that the Gaillard and Shuler plats did not provide contradictory evidence to the Berkeley Electric employee affidavits. Appendix, p. 9.

Simmons argues that Berkeley Electric's "system maps" created a dispute of fact that precluded summary judgment. Petition, p. 16. Simmons contends that these two maps contradict Berkeley Electric's claim of a prescriptive easement over TMS 498 because they show the same power line in substantially different locations.¹⁰ *Id.* From this argument, Simmons concludes that the power line over TMS 498 had been moved sometime after 1995 and, incredibly, that "this additional documentary evidence supports the conclusion that there was no power line crossing TMS 498 at the end of 1993." Petition, p. 17.

The maps were simply attached to an affidavit submitted by Simmons' attorney on the day of the hearing. R. 21, ¶ 9. Simmons failed to provide any kind of foundation for the maps and, without more, the documents do not constitute admissible evidence. Simmons did not mention the system maps in his affidavits. Simmons failed to provide any facts or testimony establishing what these drawings depict, the level of accuracy and reliability, and how they are to be interpreted. If the system maps appear different in any way, it is because the drawings are different in terms of scale, perspective, and level of detail. R. 135-136. There is no basis for Simmons' claim that the maps show the lines over TMS 498 in substantially different locations—other than his attorney's argument that the maps are different.

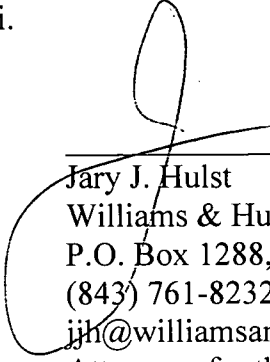
¹⁰ This issue is moot. Simmons has conceded that the 1956 easement and the 1972 easement authorize Berkeley Electric to run its lines over TMS 498. Petition, pp. 4-5.

Simmons' claim that the maps show Berkeley Electric's line in substantially different locations is not based on facts established by admissible evidence.¹¹ Simmons' inference that the lines have been moved is based on argument, not on facts established by admissible evidence. Conclusory statements regarding ultimate issues in a case do not create genuine issues of fact. *See Germann v. New York Life Ins. Co., supra.* The Court of Appeals did not err in affirming the Master's decision.

CONCLUSION

Simmons failed to set forth detailed facts established by admissible evidence. Simmons' inferences were not based on fact and were not reasonable. Summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). Based on all of the foregoing, Berkeley Electric respectfully asks that the Court deny Simmons' petition for certiorari.

September 6, 2013



Jary J. Hulst
Williams & Hulst, LLC
P.O. Box 1288, Moncks Corner, SC 29461
(843) 761-8232 Phone
jjh@williamsandhulst.com
Attorneys for the Respondent
Berkeley Electric Cooperative, Inc.

¹¹ Simmons' claim of a "substantial difference" between the plats is a gross mischaracterization. Both maps show the line extending from BEC's transmission line to a point located across Kitford Road. R. 135, 136. A disputed issue of fact must be genuine. Rule 56, SCRPC.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Mikell Scarborough, Master-In-Equity

Appellate Case No.: 2013-001477

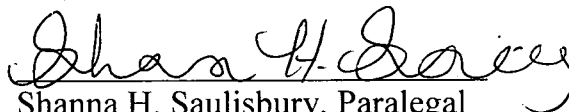
Roosevelt Simmons.....Petitioner

v.

Berkeley Electric Cooperative, Inc.
& St. John's Water Company, Inc.,.....Respondents

CERTIFICATE OF SERVICE

I certify that I have served a copy of Berkeley Electric Cooperative, Inc.'s Return to Petition for Writ of Certiorari with regard to the above cited matter on all parties by depositing a copy of said Return to Petition for Writ of Certiorari in the United States Mail, postage prepaid, on September 6, 2013, addressed to the attorney for the Petitioner, Edward A. Bertele, 1812 Pierce Street, Charleston, SC 29492 and to the attorney for St. John's Water Company, Inc., Gaines Smith, 720 St. Andrews Boulevard, Charleston, South Carolina, 29407.


Shanna H. Saulisbury, Paralegal
Williams and Hulst, LLC
209 East Main Street
Moncks Corner, SC 29461
(843) 761-8232 / 899-5834 FAX

September 6, 2013