

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Hon. Mikell Scarborough, Master in Equity

Appellate Case. No. 2013-001477

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SEP 19 2013

S.C. Supreme Court

Roosevelt Simmons..... Petitioner

Vs.

Berkeley Electric Cooperative, Inc.

and

St. John's Water Company,

Inc..... Respondents

PETITIONER'S REPLY TO RETURN OF ST. JOHN'S WATER COMPANY, INC.

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REPLY TO STATEMENT OF CASE

Petitioner objects to assertions made by respondent, St John’s Water Company, Inc. (St. John’s) about the historical development of water service on Johns Island since it is not part of the Record. St. John’s proofs in support of summary judgment were limited to the Miley affidavit and encroachment permit, later supplemented with the map, U 25. None of these documents describe events that St. Johns asserts in its Return. In particular, Petitioner objects to the assertion that the main water line “ is to turn northeast and extend

across the subject property was considered part of Kitford Road.” Return at page 4. This assertion has no citation to the Record and it is entirely conclusory and an argument of counsel.

REPLY ARGUMENT

I. A STANDARD BASIS FOR ESTABLISHING A CLAIM OF RIGHT SHOULD BE ADDRESSED

In his Petition, Petitioner urged this Court to consider whether St John’s has to establish a reasonable basis for its belief in order to establish a claim of right for a prescriptive easement. St. John’s does not deny that this issue has not been previously determined by this Court. Petitioner contended that the Court of Appeals had adopted a “substantial belief” as the basis for a claim of right but that this definition has not been uniformly applied and subject to variation or exception, i.e. the “mistaken belief”. Petitioner urges this Court to adopt a workable standard, such as “reasonable”.

St. John’s asserts that the applicable requirement for a claim of right is a “substantial belief”. Return at page 7. St. John’s denies that this standard has not been uniformly applied. Id at page 7-8. Petitioner pointed to 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) and Loftis v. S.C.E.& G., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004) as examples. St. John’s asserts that Morrow and Revis involve different facts to which this standard is applied. Return at page 7-8. St. Johns contends that the different application of the substantial belief standard is justified because the Morrow case involved “tacking” of the statutory period and Revis did not. Return at page 8. St. John’s contention is wrong. Both Morrow and Revis involved owners who did not own the subject property

for the statutory period. In Revis, the plaintiff received title from her mother in 1989 and filed suit in 1994. Revis v. Barrett, supra, 321 SC at 208, 467 S. E. 2d at 461-462. In both cases the plaintiff “thought ” that they had a claim of right based upon prior use by their predecessor in title. In the Morrow case, the prior use consisted of almost 50 years of parking on the subject property: “Evidently, a gas station was operated on the Morrrows’ tract from 1937 to 1958, and a grocery store has operated on the tract from 1958 to the present. Throughout this time, the store’s customers used the CSX tract for parking, and large tractor-trailers used the CSX tract to access the rear door of the store for deliveries.” Morrow v. Dyches, supra, 328 S.C. at 528, 492 S.E.2d at 423-424. Yet the Court of Appeals did not consider this to be the basis for a “substantial belief” to support a claim of right. The inconsistencies between those cases are obvious.

Petitioner contends that the Court of Appeals in this case did not apply the “significant belief” standard because its decision is unclear. The Court of Appeals did not discuss how a map prepared by a public utility which does not contain any identification or description of plaintiff’s property can be the basis for a “substantial belief”. The Court of Appeals did not discuss how an encroachment permit to install a water line “along Kitford Road” can be the basis for a “substantial belief” by a public utility to install a water line which encroaches on private property. The Court of Appeals did not discuss how an affidavit that only states that the water line is where the map says it is can be the basis for a “substantial belief”. The only reasonable conclusion for the lack of any discussion is that the Court of Appeals believed that the map was a mistake. This conclusion is in fact acknowledged by the Court: The fact that the claim may have been based on a mistake does not negate the claim....” Appendix at page 11. There is no other

explanation but that the Court of Appeals applied the “mistaken belief” exception to the substantial belief rule.

That variation was first raised in Loftis v. South Carolina Elec. and Gas Co., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004). When the landowner asserted that the utility could not establish a prescriptive easement because its use was not adverse, the Court of Appeals said: “Appellants ignore that a prescriptive easement can also be established under a “claim of right,” or, in other words, under the very mistaken belief Appellants admit drove SCE&G's actions.” 361 S.C. at 440, 604 S.E.2d at 717. Loftis does not cite to any authority for the proposition that a “mistaken belief” can be a substantial belief. Moreover, the Court of Appeals here does not discuss how a “mistaken belief” can be a “substantial belief” as well. There are no standards under which the Loftis Court and the Court of Appeal below have applied the “mistaken belief” exception.

St. John's argues that its belief is “substantial” based upon the totality of the circumstances. Return at page 9. But the totality of the circumstances that it presented is the Miley Affidavit, encroachment permit and map. The Miley affidavit does not say that the water line was to be constructed across petitioner's property, the encroachment permit does not say that and the map does not indicate that. Therefore there is no basis for a substantial belief that the water line was intended to cross petitioner's property.

When challenged to identify where the map shows that the water line was to cross petitioner's property, St John's asserts that that conclusion can be “reasonably based on the Miley affidavit and the map.” Return at page 9. However, the map does not identify any property by TMS or other identification process. St. John's further states that the residences to the north of petitioner's property all have Kitford Road addresses thereby

supporting its contention that the dirt road across petitioner's property was part of Kitford Road. Return at page 9. However, there is no evidence when these mail boxes were installed, whether they were present when the map was drawn, or that St. John's relied upon them to obtain an encroachment permit.

In its Argument, St. John's recites the history of its activities to provide water service on John's island. Return at page 10. This does not provide any basis to support its encroachment onto petitioner's property and is also not part of the record.

St. John's also asserts that Petitioner's own evidence supports the location of the water line under his property. Return at page 10. The citation to the record upon which St. John's relies is a survey performed by St. John's after Petitioner objected to a water line he found on TMS 135, not 498. R. p. 76, paragraphs 4 74, 78. The survey identifies the property under which the water line is located as being at the intersection of Kitford and Brunson Road. R. p. 78. Apparently the surveyor thought that the dirt road across TMS 498 was Brunson Road and not part of Kitford Road. This further supports Petitioner's contention that there was a mistake originally made by St. John's which was never explained by St. John's and thus cannot be a basis for a "substantial belief".

St. John's asserts that there was no mistake, Return at page 10, but cannot identify a single fact in the Record to support its contention that the dirt road across TMS 498 was "part of Kitford Road" which is the only reason that the encroachment permit would have allowed St. John's to cross Petitioner's property. St. John's cannot refute the undisputed facts: that it installed a water line according to a map that does not identify petitioner's property based upon an encroachment permit which does not identify petitioner's property and its counsel's assertion that the turn in the water line was

intended to follow the course of Kitford Road which turned to the north , is without any facts in the Record to support that contention.

Petitioner contends that the Court should consider whether a mistaken belief without any explanation as to how the mistake occurred can be the basis for a claim of right. St John's relied entirely on the county encroachment permit authorizing a water line along Kitford Road. The encroachment permit does not support a mistaken belief since it authorizes encroachment only along Kitford Road. The Court of Appeals rejected the Master in Equity's finding that St. John's had an express easement for its line under TMS 498. Appendix at page 10. It is undisputed that St. Johns did not introduce any affidavits to explain why it "mistakenly" located a water line under private property.

The Court of Appeals did not explain how the encroachment permit together with the U 25 created a "claim of right. Appendix at 11. U 25 contains no identification of any lot line or property designation, in other words nothing to identify the location as being across appellant's property. R. p. 255. The party seeking to establish a prescriptive easement must show the identity of the thing enjoyed. Horry County v. Laychur, 315 SC 364, 367 (1993). Therefore, U 25 cannot establish a substantial belief in a claim of right to cross TMS 498 since there is no way to reference the location of TMS 498 on U 25.

Petitioner has asserted throughout this case that St. John's use of a map that has no reference to or description of petitioner's property does not meet the standard for a "substantial belief" of a claim of right. In its Return St. John's does not rebut that argument, it merely refers again to the Miley Affidavit and U 25. In other words, according to St. John's, the map and affidavit prove the location of the water line across petitioner's property because the map and affidavit prove the location. However, there is

nothing on the map which identifies petitioner's property. St. John's argument is circulatory.

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 basis upon which to base a claim of right. The Miley affidavit, encroachment permit and U25 do not support a "substantial belief" for a claim of right which is the standard used by the Court of Appeals in other cases. The Court of Appeals here found that there was a mistaken belief relying on Loftis. This Court should decide the proper standard of proof .

II. THE COURT SHOULD ADDRESS WHETHER A CLAIM OF RIGHT MUST ACCRUE BASED UPON NOTICE

Petitioner also requested that this Court consider whether a claim of right accrues when an underground water line is installed or when it is first used by customers. The Court of Appeals held that the prescriptive easement arose in 1977 or 1978 when the water line was installed. Appendix at page 12. There is no evidence in the Record that petitioner or his predecessor in title had actual notice of the installation of the water line in 1977. The only evidence of actual notice in the Record is that Petitioner saw a water meter on TMS 135 in 2005 , then objected to St. John's local office manager. R. pp. 75, paragraph 3, 77. Petitioner contended and it was not rebutted that he and other property owners in the area had well water so that he had no reason to know, absent actual notice, that there was an underground water line under TMS 498. R. p. 76, paragraph 6. Based upon a lack of actual notice, Petitioner asserted that St. Johns did not establish the requisite 20 years of use.

The Record contains evidence that St. John's first served customers to the north of TMS 498 in 1986 and 1987. R. p. 65. Even it is assumed that constructive notice accrued when this service was first provided instead of when Petitioner first found the water line on TMS 135, St. John's own customer records establish that there was not 20 years of use. St. John's asserts that the Record shows a prior use, Return at page 13, but that customer, Elijah Commodore, is across Kitford Road from TMS 498, not to the north. R. p. 130. Petitioner would not have notice that a water line ran under TMS 498 by knowing that Elijah Commodore had water service on the opposite side of Kitford Road. St. John's has not refuted petitioner's statement that many property owners still relied on wells so that there is no presumption that service was brought to all property owners on both sides of Kitford Road. St. Johns offers other arguments that the water line under TMS 498 must have been there since 1977 since it would install a main water line first and the line under Kitford Road is the same gauge as that under Kitford Road. Return at page 14. St. John's cites to the Miley affidavit, R. p. 60, but the affidavit does not say that.

St. John's contends that the prescriptive 20 year period begins upon installation of its water line and that constructive notice is an aspect of adverse possession and not part of determining whether there is an easement based upon a claim of right. Return at page 12. St. John's asserts that the constructive notice requirement does not appear in any prior decisions involving a claim of right including Horry County v. Laychur, 315 SC 364, 434 S.E. 2d 259 (1993); Matthews v. Dennis, 365 S.C. 245, 616 S.E.2d 437 (Ct.App.2005); Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 584 S.E.2d 386 (Ct. App. 2003) as well as Morrow and Revis. Return at page 11-12.

However, Horry was not based upon a claim of right but upon a claim of adverse possession. See 315 SC at 367, 434 S.E. 2d 261. Therefore this Court has not considered whether the same standard for adverse possession should apply to a claim of right, i.e. that the claim accrues based upon actual of constructive notice.

Furthermore, the Court of Appeals in Loftis v. South Carolina Elec. and Gas Co., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004) did consider this issue. “ Finally, we address Appellants' contention that since they never requested electrical service from SCE&G, they are not bound by SCE&G's easement. . . no matter what theory [adverse possession or claim of right] supports the easement's establishment. A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. In order to charge the purchaser of a servient estate with notice of an unrecorded easement, the marks of the servitude must be open and visible.” 361 S.C. at 440 , 604 S.E.2d at 717-718. (Citations omitted) . Although Loftis dealt with an above ground encroachment, power poles, which were in plain view to the landowner, it does implicitly support petitioner's argument that notice is required.

The fact that no other reported case has dealt with this issue is probably because all of the encroachments have been visible, such as the power poles in Loftis and the parked cars in Morrow. St. John's claims that Jones v Daley, 363 S.C. 310, 609 S.E. 2d 597 (Ct. App. 2005) makes clear that the elements for a prescriptive easement based upon adverse use does not require any element of notice but the case does not say that. Jones dealt with a trail that plaintiff's had maintained for many years and not an underground water line and the Court of Appeals did not have to address the issue of

whether notice was necessary. Therefore, the decision in Horry County v. Laychur, supra, and all of the other cases that St. John's argues do not contain any requirement of notice are not pertinent. There is nothing in any of these cases that is inconsistent with the requirement of actual and constructive notice of an underground encroachment which is unrecorded.

The case law does not support St. John's argument that constructive notice has not been required since there are no cases of underground encroachments. Loftis supports the argument for constructive notice based upon general principles governing servient estates that the property owner must have some way of knowing his property has been affected, either actual or constructive.

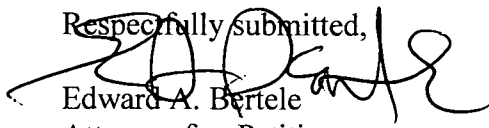
Fundamental fairness justifies this same result. It is fundamentally unfair to burden a property owner with a prescriptive easement when he had no actual or constructive notice of an encroachment that is hidden, and where as here it is based upon a mistake. Therefore, petitioner urges this Court to consider this argument.

CONCLUSION

Petitioner respectfully requests for the reasons set forth herein that this Court grant his Petition for Writ of Certiorari from the Court of Appeals decision affirming the Master in Equity's order granting summary judgment to St. Johns as to a prescriptive easement for a water line under TMS 498. The standards for a substantial belief upon which a claim of right can be based should be clarified. The Court should consider

whether notice is an element of a claim of right when the encroachment is underground.

Both issues justify the granting of this petition.

Respectfully submitted,

Edward A. Bertele
Attorney for Petitioner

September 16, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Hon. Mikell Scarborough, Master in Equity

Appellate Case. No. 2013-001477

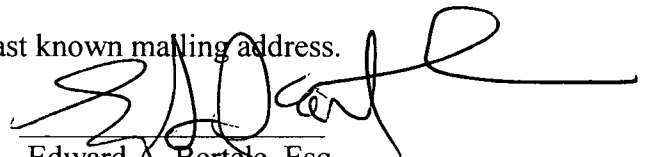
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CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Petitioner's Reply to Return of St. John's Water Company, Inc. was served upon the defendants' attorneys, John Williams, Esq. and Gaines Smith, Esq. by regular mail postage prepaid at their last known mailing address.


Edward A. Bertele, Esq.

September 16, 2013
Charleston, SC

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