

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

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

Appellate Case. No. 2013-001477

Roosevelt Simmons..... Petitioner

Vs.

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

PETITIONER'S REPLY TO RETURN OF
BERKELEY ELECTRIC COOPERATIVE, INC.

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TABLE OF CONTENTS

Table of Authorities.....2
Reply to Statement of the Case.....2
Reply Argument.....3
Conclusion.....11

TABLE OF AUTHORITIES

Cases

Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).....11
Boyd v. Bellsouth Tel. & Tele. Co., Inc., 369 S.C. 410, 633 S.E.2d 136 (2006).....7
David v. McLeod Regional Medical Center, 367 S.C. 242, 626 S.E.2d 1 (2006).....10,11
Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E. 2d 545 (1942).....10
Horry County v. Laychur, 315 SC 364, 434 S.E. 2d 259(1993).....7
Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984).....11
Pendarvis v. Cook, 391 S.C. 528, 526, 706 S.E.2d 520, 539 (Ct. App. 2011).....10
Piedmont Engineers, Architects and Planners, Inc. v. First Hartford Realty Corp.,.....11
Pittman v. Lowther, 363 S.C. 47, 610 S.E.2d 479 (2005).....7

Rules

Rule 242(b), SCACR.....6
Rule 901(b)(1), SCRE.....12

REPLY TO STATEMENT OF CASE

Berkeley Electric Cooperative, Inc. (Berkeley Electric) has omitted material facts in its Statement of the Case in order to fashion an argument against the Petition based on evidential issues not raised before the Master in Equity. Petitioner therefore respectfully refers this Court to the Record on Appeal for the following. Berkeley Electric filed its initial motion for summary judgment on May 7, 2009, R. p. 43, the day after petitioner's initial counsel had been relieved. R. p. 1-2. Berkeley Electric's motion sought summary judgment based upon a claim of prescriptive easement and was only supported by the affidavits of Seeney and Frank. R. p 45-48. When Petitioner filed an affidavit in opposition to Berkeley Electric's motion on July 2, 2009, R. p. 49, he was pro se. Present counsel did not enter an appearance until July 23, 2009. R. p. 54. Petitioner's affidavit referenced the original Lacey plat (May 12, 2005), R. p. 49-50,52 which addressed the Berkeley electric distribution line across TMS 498 based upon the Seeney and Frank affidavits. R. p. 118-119, paragraph 3. Berkeley Electric did not file a further reply and the case was then submitted to the Master in Equity under a Consent Order in October 2009. R. p. 3.

On November 9, 2010, Berkeley Electric filed an Amended Notice of Motion, again for summary judgment based upon a prescriptive easement. R. p. 82. Berkeley Electric submitted the same affidavits from Seeney and Frank in support of its earlier motion, and bearing the May 2009 filing date of its earlier motion. R. p. 101-104. Berkeley Electric also included a copy of the original (2005) Lacey plat, R. p. 94-95, and a Charleston County Tax Map indicating that TMS 135 borders the Seaboard

Coastline railway right of way to the east, R. p. 96. Neither of the affidavits mentioned the Lacey Plat. R. p. 101-104.

In opposition to the Amended Motion, Petitioner filed a Supplemental Affidavit referring to the revised Lacey plat. R. p. 118. Petitioner stated that the revised Lacey plat shows the Berkeley Electric line across TMS 135 and running down Kitford Road. Id. at paragraph 4. See R. p. 130. In its Return to this Petition, Berkeley Electric asserted that this affidavit and the revised Lacey plat was “filed” on the morning of the motion hearing, Return at page 3, but Berkeley Electric admitted in its Respondent’s Brief at page 28 that it received the Supplemental affidavit on November 19th. Berkeley Electric did not object to this affidavit being considered at the motion hearing. Berkeley Electric raised an objection for the first time on appeal. Respondent’s Brief at page 28. Berkeley Electric also admitted in its Respondent’s at Brief at page 7 that it prepared an affidavit by Robert Bradley, R. p. 154, in response to Petitioner’s Supplemental affidavit. The purpose of this affidavit was to attempt to rebut Petitioner’s assertions that Berkeley Electric lines cross TMS135. Return at page 7. See R. p. 110-111. The Bradley Affidavit offers an “opinion” that the distribution line to the east of the transmission line does not cross petitioner’s property, TMS 135. R. p. 154, paragraph 3. Bradley says his opinion is based not upon personal knowledge but upon a sketch of the area without any identification of the creator or source. The Bradley affidavit does not refer to the distribution line running down Kitford Road across TMS 135 to Berkeley Electric’s transmission line. Id. At the motion hearing, Petitioner objected to the consideration of the Bradley affidavit since it presented new matter and an opinion that was not previously disclosed in discovery. R. p. 200, lines 1-6, 212, lines 25 to 213, line 18. Berkeley

Electric never raised any objection to the Master considering the Petitioner's supplemental affidavit, the Lacey plat or any other documents submitted by Petitioner.

Berkeley Electric raised various evidential objections to the documents included in Petitioner's opposition to its Amended Motion for the first time on appeal. Respondent's Brief at pages 31-33. The Court of Appeals did not address these objections. Berkeley Electric raises them again here and they are addressed below.

REPLY ARGUMENT

In his Petition, Petitioner asserted that the Court of Appeal's decision affirming summary judgment for Berkeley Electric was contrary to established law. In its Return Berkeley Electric has raised several objections to the Petition which are addressed below. None of these arguments overcome the fundamental weakness of its position. Berkeley Electric's motion relied upon affidavits of two employees who do not identify where the power line(s) were that they claim to have been in existence for 20 years. Another Berkeley Electric employee opines that the location of another line based is on property owned by Andersen based upon unidentified drawings. The lower Courts' decisions indicates that in spite of the lack of critical facts in these affidavits, that Berkeley Electric had met its burden of proof and Petitioner then had to establish the existence of a genuine issue of fact.

However, the Record contains petitioner's affidavits authenticating a plat by a licensed surveyor showing exactly where the power lines were and his statements based on personal knowledge that they were not there for the requisite period and encroached on his land. The lower Courts found that Petitioner's affidavits and maps were not sufficient to raise a genuine issue of fact even though they were more precise and reliable

than anything Berkeley Electric had presented to support its motion. Berkeley electric repeatedly relies upon the Lacy Plat to support its lack of credible evidence . Return at pages 18, 19, 21. Respondents failed to mention that the Bradley affidavit which states that there is no encroachment on TMS 135 is based on a “ sketch” by an unknown author. The conclusion is inescapable: there was a “ weighing” of the evidence which was improper and an overlooking of the “scintilla standard” by which the Court should have denied summary judgment. Therefore the petition should be granted for this reason as well as those set forth below.

A. The R 242(b), SCACR standard

Berkeley Electric claims that the Questions Presented for Review, i.e. “ weighing of evidence” and applying the “scintilla standard” are not one of the enumerated reasons for the granting of a Petition for Writ of Certiorari. Return at page 6-7. However, R. 242(b), SCACR plainly states that those listed reasons are merely “ indicative” of when the Supreme Court will exercise discretion and are not exhaustive. There have not been recent cases involving the issue of prescriptive decided by this Court. In the most recent Boyd v. Bellsouth Telephone Telegraph Co., Inc., 369 S.C. 410, 415, 633 S.E.2d 136,138 (2006) this Court granted certiorari to review the Court of Appeals' decision concerning the easement implied by prior use and equitable estoppel. In Pittman v. Lowther, 363 S.C. 47, 610 S.E.2d 479 (2005) this Court granted certiorari to review the Court of Appeals' decision reversing the trial court's order granting a private easement by way of prescription. Therefore, Berkeley Electric’s opposition to the Petition is not well founded based upon the language of SCACR 242(b) and this Court’s own rulings on Petitions such as this.

B. Deficiencies in the lower courts opinions

Berkeley Electric claims that Petitioner misunderstands the Master in Equity and the Court of Appeals rulings so that there is no issue to be decided by this Court. Return at page 9. In his Petition, Petitioner has elaborated on both decisions to demonstrate how both courts failed to address the encroachment on TMS 135 by Berkeley Electric's power lines, which are not authorized by any written easement. As to those additional lines (running east and west from the transmission line) Berkeley Electric must prove the two elements of a prescriptive easement: adverse use/substantial belief and the use for the statutory period. To establish a prescriptive easement, a party must show (1) the continued and uninterrupted use or enjoyment of a 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." Horry County v. Laychur, 315 SC 364, 367, 434 S. E. 2d 259 (1993). There is no evidence in the record of either. Neither Seeney, Frank nor Bradley identified that the line crossed TMS 135 or stated the basis upon which they believed that there was an easement to cross TMS 135 or that their lines had been there for the requisite period. Bradley merely opined that the power line running to the east was not on TMS 135 but never mentioned the line to the west.

Both courts were vague in their discussion of this issue. The Court of Appeals held that the Bradley affidavit supported a finding that Berkeley Electric had not exceeded the scope of its 1956 easement. Appendix at page 8. However, Bradley never addressed the power line to the west only the line to the east running to the Andersen property. R. p. 154. In its discussion of prescriptive easements, the Court of Appeals never discussed the basis for a prescriptive easement to cross TMS 135 but focused on

Petitioner's other claim that the line across TMS 498 was not installed for the requisite period. See Appendix at page 9. This omission of any discussion justifies Petitioner's position that the Court missed the point and erred as a matter of law in not applying the prescriptive easement standard to all of the power lines.

Berkeley Electric argues that there is no issue because both Courts decided the issue of prescriptive easement. Return at page 9. Petitioner contends that he has demonstrated that the applicable standards for prescriptive easements were not followed below; and that if this Court reviews the basis for those decisions, it will agree.

C. The scope of the 1972 easement

The issues of the scope of the 1972 easement and prescriptive easements are interrelated. To the extent that Berkeley Electric has exceeded the scope of a written easement, it must establish its right to an encroachment by satisfying the criteria for a prescriptive easement. The rationale of the Court of Appeals for affirming the Master in Equity's decision that Berkeley Electric did not exceed the scope of its 1972 easement was that: "the electric lines had been in their current configuration for an extended period of time. This demonstrates that the easement holder and the landowners' understanding that such configuration did not exceed the intended scope of the easements." App. at 7. Also it accepted at face value, the statement of Berkeley Electric's employee Bradley that its power lines did not exceed the scope of the easement." Id. The Court disregarded Petitioner's statements, the Lacey plat and the Charleston County tax maps all showing that TMS 135 borders the Seaboard Coastline Railroad right of way. Berkeley Electric also misstates Petitioner's statement to imply that the power line is not on his property when it does not say that. Return at page 11. The affidavit states "The revised [Lacey]

plat . . . shows another line running from the power distribution lien where it crosses TMS135 over my driveway out to Kitford Road.” R. p. 119.a. 4. Moreover Bradley’s affidavit only refers to the property adjacent to the Andersen property to the north, R. p. 154, para. 3; there is no mention of the power line to the west. Therefore, the evidence is clear that Berkeley Electric exceeded the scope of the 1972 easement by extending its power lines across TMS 135 to the east and west.

Berkeley Electric concedes that it has no easement across TMS 135 for those lines, Return at page 11, but that the Court found it had an prescriptive easement. However, the Court relied upon the Seeny and Frank affidavits and overlooked their patent deficiencies that they did not identify where the lines were located.

Berkeley Electric contends that there was no evidence to support Petitioner’s contention 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. Return at page 12. The Lacey plat establishes the location of two Berkeley Electric’s power lines across TMS 498 and the power line down Kitford Road to the east. The Heyward easement in 1956 allowed Berkeley Electric to construct a distribution system across his property . However, when Brown granted the easement in 1972 it would not have been reasonable to assume that he agreed to allow Berkeley Electric to cross his property twice from two different places on the same transmission line- one from the northeast and the other from the east. A grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated. Hill v. Carolina Power & Light Co., et al., 204 S.C. 83, 28 S.E. 2d 545

(1942). The easement should be construed to permit only what is reasonably necessary for its purposes. *Id.* A reasonable assumption is that the 1972 easement was given so that Berkeley Electric could bring power from its transmission line down Kitford Road.

The Court of Appeals decision that the grantor must have intended that the lines be where they are is conclusory and only one inference that could arise from the facts.

Petitioner urged the Master and the Court of Appeals that his interpretation of the easement was a reasonable one based upon its general terms and the facts surrounding the grant.

The scope of an easement is a question in equity as to which " an appellate court may find facts in accordance with its own view of the preponderance of the evidence." Pendarvis v. Cook, 391 S.C. 528, 526, 706 S.E.2d 520, 539 (Ct. App. 2011) There were different interpretations of the evidence. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. David v. McLeod Regional Medical Center, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusions to be drawn from those facts. Piedmont Engineers, Architects and Planners, Inc. v. First Hartford Realty Corp., 278 S.C. 195, 196, 293 S.E.2d 706, 707 (1982).

D. Genuine issues of material fact

Berkeley Electric asserts, Return at page 9, that there are no " genuine" issues of fact to justify the denial of summary judgment citing Main v. Corley, 316 S.E.2d 406, 407 281 S.C. 525, 527 (1984). That case dealt with a suit to enforce a written real estate

contract in which plaintiff also submitted evidence of a course of conduct reflecting this sale. In affirming summary judgment, the Court of Appeals said there was no “genuine” issue of fact because: “ In this case, the seller did not introduce any evidence, such as an affidavit by the seller herself that the signature [on the contract] was not hers, that created a genuine issue of fact.” Main v. Corley does not apply here since Petitioner’s evidence consisted of his sworn statements based upon personal knowledge of the parcels involved, a survey by licensed surveyor and documents produced by Berkeley Electric. These created a dispute of material fact as to whether two (2) Berkeley Electric’s power lines were located on TMS 135, whether the power line across TMS 498 had been in existence since 1980 and whether Berkeley Electric’s line across TMS 498 exceed the scope of the 1972 Brown easement .

Berkeley Electric further asserts that it never claimed that the 1972 Brown easement extended to TMS 135 and thus there is not genuine issue of fact. Return at page 11. However, there is a genuine issue of fact as to whether Berkeley Electric has a prescriptive easement to cross TMS 135, which Berkeley Electric never addressed in its motion papers. Further, existence of a power line across TMS 135 connecting to the transmission line creates another genuine issue of fact: whether Berkeley electric exceeded the scope of the 1972 easement by unnecessarily running power lines across TMS 498 when those customers receiving power were immediately adjacent to its transmission line.

As this Court has held in Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991): “ We review first, as we must, the pleadings, affidavits, and

exhibits in the light most favorable to the nonmoving party.” Petitioner contends that the Petitioner’s evidence was more than sufficient to raise a genuine issue of material fact.

1. The Lacey Plat

Berkeley Electric objects to the Lacey plat because it is unsigned and has no foundation and is not admissible evidence. Return at page 10. Berkeley Electric does not cite any case Rule of Evidence or other authority for its objection and the Court of Appeals made no such finding. The plat was identified by Petitioner as being what he commissioned and as representing the location of the lines in question. See Rule 901(b)(1), SCRE. The Plat bears the license number and seal of Richard Lacey. The Lacey plat is the most detailed document in the Record. Berkeley Electric had nothing to offer in evidence of any such detail and repeatedly relies upon it. Return at pages 18, 19, 21. Berkeley Electric’s only other objection is that it does not show TMS 135. Return at page 10. However petitioner’s affidavit establishes conclusively that Berkeley Electric’s power line shown on the Lacey plat as running east past the Seaboard Coastline Railroad right of way crosses onto TMS135.

Berkeley Electric makes allegations regarding what does or doesn’t appear on the Lacey plat , Return at pages 13, n 5 but these are not subject to any confirmation in the Record.

2. Schuler and Gaillard plats

The Schuler and Gaillard plats also created a reasonable inference of a genuine issue of fact. The Schuler plat was prepare for Berkeley electric, is entitled “Area under power line easement, was prepared in 1983 and shows only the power line under the 1952 easement. R. p. 134. Berkeley Electric did not submit any affidavit in response to

this plat but has contended that its own document is incomplete; i.e. did not show all that was there. Return at page 20-21. The Court of Appeals said that “ this [Shuler] plat. . . does not purport to establish the location of all power lines.” Appendix at page 9. Petitioner contends that this conclusion is not supported by the facts on the face of the plat , its source, title and date of issuance, all of which are relevant to the issues at hand. Further, the fact that plat is not “ of ” petitioner’s property does not address the issue because the power poles which supported the power line crossing TMS 498 were not on petitioner’s property but ,as shown on the Lacey plat, on property to the north. See R. p. 52 , 130. The Seeny and Frank affidavits specifically mention power poles bearing “ birthmarks” of 1984 and 1986 but claim that the line has been there since 1980. They never mention where the poles with the birthmarks are located. Therefore Berkeley Electric has no basis to rebut the petitioner’s evidence, i.e. the Lacey plat that the poles were on adjacent property and that the plats of those properties did not show these poles in 1980 and 1983.

Both the Schuler and Gaillard plats show details of TMS 498 including the westerly boundary and a dirt road. (It is not disputed TMS 498 was then designated as TMS 115). These plats are consistent with the Lacey plat. Taken together, the Lacey, Schuler and Gaillard plats raised a genuine issue of fact which the Court of Appeals failed to recognize. Instead, the Court of Appeals gave undue deference to the Seeny and Franks affidavits, reading into them something that they did not say, i.e. where the poles were located that they claim existed since 1980 although their “ birthmarks” are dated 1984 and 1986.

In contrast to its criticism of the Lacey plat on other issues , Berkeley Electric now relies upon it to “establish the location of the thing enjoyed” i.e. the power lien easement across TMS 498. Return at page 18-19. However, neither Frank nor Seeney specifically mentioned or adopted the Lacy plat in their affidavits even though Petitioner had submitted it a year earlier in his initial opposition.

4. Berkeley Electric system maps

Petitioner submitted Berkeley Electric system maps for 1995 and 2010 to show variations in the location of the power line running from the transmission line north of TMS 498. R. p. 135,136. This was offered to rebut the statements by Seeney and Frank that the line had never been moved. This provided Berkeley Electric with another opportunity to refute the validity of its own documents by claiming that the maps are on a different scale, etc. and thus not a reliable indication of the exact location of its poles. Return at page 23. However, these maps are another instance where Berkeley Electric has failed to establish by its own records where its power lines are located. It did not produce a single document by show what it claims to have been in existence since 1980. The lower courts should have drawn reasonable inferences from Berkeley Electric’s failure to produce reliable documents as well as the inconsistent system maps as a basis for denying its motion.

In summary, there was evidence which raised a dispute of fact which precluded the granting of summary judgment. The Court of Appeals weighed the evidence instead of simply deciding whether there was a dispute of fact. The Court’s conclusions are subjective evaluations of the evidence which the Court should not have undertaken at this stage of the proceedings. They are not supported by the motion record and exceed the

scope of the Court's duty to determine whether summary judgment was proper. The Court of Appeals failed to follow established law and allow all reasonable inferences to favor the petitioner. Therefore, Petitioner respectfully requests that the Court grant his Petition for Writ of Certiorari as to Berkeley Electric.

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

Respectfully submitted,

Edward A. Bertele
Attorney for Petitioner

September 19, 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 Motion for extension and/or leave to file Reply to Return of Berkeley Electric Cooperative, Inc. and Reply to Return of Berkeley Electric Cooperative, Inc. was served upon the respondents' attorneys, John Williams, Esq. and Gaines Smith, Esq. by regular mail postage prepaid at their last known mailing address.



Edward A. Bertele, Esq.

September 19, 2013
Charleston, SC