

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Case No. 2008 - CP -10 - 1983
Hon. Mikell Scarborough, Master in Equity

ROOSEVELT SIMMONS)
Plaintiff, Appellant)
)
Vs.)
BERKELEY ELECTRIC)
COOPERATIVE, INC. and)
ST. JOHN'S WATER COMPANY, INC.)
Defendants, Respondents)

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SC Court of Appeals

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities	2
Statement of Issues on Appeal	3
Statement of the Case	5
Facts relating to the issues on Appeal	8
Argument	19
Conclusion	42

TABLE OF AUTHORITIES

Cases

B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004)	20
Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000)	20, 29
Davis v. Monteith, 289 S.C. 176, 345 S.E.2d 724 (1986)	34, 41
Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990)	35
Graniteville Co. v. Williams, 209 S.C. 112, 39 S.E.2d 202 (1946)	41
Horry County v. Laychur, 315 S.C. 364, 434 S.E.259 (1993)	34, 38
Loyd's Inc. v. Good, 306 S.C. 450, 412 S.E.441 (Ct. App. 1991)	26
Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004)	20, 31
Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672(2000)	29, 35
Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005)	19
Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005)	20
Smith v. Comm.'s of Pub. Works of City of Charleston, 312 S.C. 460, 441 S.E.2d 331 (Ct.App.1994)	24
Standard Fire v. Marine Contracting, 301 S.C. 418, 392 S.E.460 (1990)	31

Ten Woodruff Oaks, LLC v. Point Development, LLC, 385 S.C. 174, 685 S.E. 510 (Ct. App. 2009)	24
Trivelas v. S.C. Dept. of Transp., 348 S.C. 125, 558 S.E. 2d 271(Ct. App. 2001)	22,31, 32
Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997)	21, 35
Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999)	29, 33
Watters v. Terminix Service, Inc. 376 S.C.632, 658 S.E. 2d 110 (Ct. App. 2008)	31
Williamson v. Abbott, 107 S.C. 397, 93 S.E.15 (1917)	40, 41

Rules

Rule 56(c), SCRCP	19,26,37
Rule 59(e), SCRCP	15,18,19,22

Other Authorities

25 Am.Jur.2d Easements § 18 (2004)	21, 25
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STATEMENT OF ISSUES ON APPEAL

1. Did the Master in Equity err in granting summary judgment to Berkeley Electric on express easements which were not part of its summary judgment motion and contrary to the Order of Reference?
2. Did the Master in Equity err in granting summary judgment to Berkeley Electric that it did not exceed the scope of its express easements because that was not

part of its summary judgment motion and contrary to the Order of Reference and not based upon evidence in the record?

3. Did the Master in Equity err in granting summary judgment to Berkeley Electric that it did not exceed the scope of its express easements because there were disputed issues of fact regarding the scope of the easements?
4. Did the Master in Equity err in granting summary judgment to Berkeley Electric that it did not exceed the scope of its express easements because it relied on an affidavit that was not properly before the court?
5. Did the Master in Equity err in granting summary judgment to Berkeley Electric on a prescriptive easement because there were there disputed issues of fact?
6. Did the Master in Equity err in granting summary judgment to Berkeley Electric because it improperly weighed the evidence instead of finding that there were disputes of material fact?
7. Did the Master in Equity err in granting summary judgment to Berkeley Electric on a prescriptive easement because of the lack of clear and convincing evidence?
8. Did the Master in Equity err by granting summary judgment to St. John's Water Company on an express easement based on no evidence and when not requested by St. John's in its motion?
9. Did the Master in Equity err as a matter of law in granting summary judgment to St. Johns on a prescriptive easement on the basis that claim of right could be based upon an encroachment permit?
10. Did the Master in Equity err in granting summary judgment to St. Johns on a prescriptive easement on the basis that buried water lines were open and notorious

use for the statutory period based on the evidence?

11. Did the Master in Equity err in granting summary judgment to St. John's on a prescriptive easement based upon customer affidavits not in the record?
12. Did the Master in Equity err in granting summary judgment to St. John's on a prescriptive easement because there was a lack of clear and convincing evidence and a dispute of material fact?

STATEMENT OF THE CASE

Roosevelt Simmons filed a three count Complaint on April 9, 2008 seeking unspecified money damages for trespass and unjust enrichment and declaratory relief against Berkeley Electric Cooperative Inc. (Berkeley Electric) and St. John's Water Company, Inc. (St. John's). R. p. 24. The complaint alleged that Simmons was the record owner of two parcels of real property (TMS 283-00-00-498 and TMS 283-00-00-136) adjacent to Kitford Road, Johns Island on which Berkeley Electric and St. Johns had trespassed by installing and maintaining electric power and water lines. R. p. 24, para. 1 to p. 25, para. 10. The complaint demanded a jury trial. R. p. 26, para. 21. Simmons filed an Amended Complaint in substantially the same form shortly thereafter. R. pp.28-31. Simmons filed a Second Amended Complaint in September 24, 2008 in which all references to TMS 283-00-00-136 were replaced by TMS 282-00-00-135 because of a mis-identification of one of the properties. R. p. 32, para. 1, R. p. 33, para. 6. St. John's filed an Answer to the Second Amended Complaint on August 11, 2008 in which it asserted as an affirmative defense that it had a prescriptive easement because its water line had been on Simmons property for twenty years and that Simmons had known of its

existence. R. p. 38, para. 18. Berkeley Electric filed a First Amended Answer on October 6, 2008 in which it alleged that Simmons rights were subject to written easements given to Berkeley Electric and that it had a prescriptive easement across Simmons property. R. p. 41, para.13.

On May 7, 2009, Berkeley Electric filed a motion for summary judgment on the basis that it was entitled to a prescriptive easement across TMS 283-00-00-498 because their utility lines had been existence for at least 20 years. R. pp. 43 - 44. Simmons filed an affidavit on July 2, 2009 denying the existence of the line for 20 years. While this motion was pending, on September 15, 2009, Berkeley Electric filed a motion for an Order of Reference to the Master in Equity. R. p. 55. A Consent Order of Reference was entered on October 13, 2009. R. pp. 3-7. The Order specifically reserved Simmons right to return to the jury trial roster to pursue his damages claims upon the Master's determination. R. pp. 3-4.

After the case was transferred to the Master in Equity, St. John's filed a motion for summary judgment on June 4, 2010 on the basis that it had a prescriptive easement for its water lines. R. p. 57 at para. 2. Simmons filed an opposition and affidavit in support on August 5, 2010. While the motion was pending, the Master in Equity entered a Scheduling Order for the completion of discovery and set November 12, 2010 as the deadline for the filing of any other dispositive motions. R. p. 8.

On November 10, 2010, St. John's filed a motion to dismiss on the grounds that Simmons no longer owned one of the parcels, TMS 283-00-00-498. R 79. Berkeley Electric filed an amended motion for summary judgment again asserting a prescriptive easement across TMS 283-00-00-498 and that Simmons no longer owned it. R. pp. 81-

82. On November 22, 2010, Simmons filed opposition and affidavits in support. R. pp. 105-153.

The motions were heard on November 22, 2010. The court found that there were express and prescriptive easements as to both defendants and that Simmons lacked standing to assert any damages as to TMS 283-00-00-498 except for the time he had owned it. R. p. 221, line 23 - p. 222, line 16. A short form order granting summary judgment was filed on November 24, 2010. R. p. 9. Simmons filed a timely motion for reconsideration under R 59(e), SCRCP on December 20, 2010. R. p. 158. In the interim, St John's counsel submitted a detailed order which was entered by the court and filed December 22, 2010. R. p. 10. Simmons filed a motion for reconsideration of the December 22nd order on January 25, 2011. R. p. 167. Berkeley Electric's counsel submitted a detailed order which was entered by the court and filed on January 18, 2011. R. p. 13. Simmons filed a motion for reconsideration of the January 18th order on February 8, 2011. R. p. 174. Neither defendant filed any response. The Master in Equity heard both motions on April 11, 2011 and denied both motions. R 242, lines 20-23. The court entered short form orders denying both motions which were filed on April 11 and 18, 2011. R. p. 22, 23.

A combined Notice of Appeal from both decisions was served on May 13, 2011. This appeal concerns the existence of express and prescriptive easements as to both defendants on both parcels and whether the Master in Equity's decision correctly dealt with the extent of those easements.

FACTS RELATING TO THE ISSUES ON APPEAL

A. The subject properties.

Simmons acquired the two parcels involved in this suit in 2003 although his family had owned them since the 1960's. R. p. 49, para. 2. The subject properties are undeveloped although there are homes in the area. Id. TMS 283-00-00-498 is bordered by Kitford Road to the south, the abandoned Seaboard Coastline Railroad right of way to the east and TMS 283-00-00-118 owned by Gordon and TMS 283-00-00-319 owned by Frasier to the north. R. p. 52. TMS 282-00-00-135 is bordered by the Seaboard Coastline Railroad right of way to the west, TMS 282-00-00-136 owned by Andersen to the north and TMS 282-00-00-138 where Simmons resides to the east. R. p. 75, para. 2.

B. Power lines affecting the subject properties.

In 1956 the estate of Edward Heyward granted Berkeley Electric a 75' wide easement across land known as lot 27 ½ of the California tract to construct and maintain an electric transmission line. R. p. 131. In 1972, Edward Brown granted Berkeley Electric an easement of unspecified width to construct and maintain a distribution line on property described as consisting of 4.7 acres bounded on the east by the lands of the Seaboard Coast Line Railroad. R. p. 132.

In 2005, Simmons hired Richard Lacey, a licensed surveyor, to prepare a plat of the property he acquired in 2003. R. p. 49, para. 3. Lacey prepared a plat dated May 12, 2005 of part of Simmons property consisting of 3.257 acres west of the Seaboard Coastline Railroad right of way. R. p. 52. When the plat was prepared, the part of Edward Brown's 4.7 acres not owned by Simmons was owned by Christopher Brown. R. p. 52. The plat locates the Berkeley Electric transmission line crossing TMS 282-00-00-

135 and TMS 283-00-00-498 and the Berkeley Electric distribution line crossing TMS 283-00-00-498. The Lacey plat also shows that the distribution line is attached to a power pole on property in the name of Frazier, TMS 283-00-00-319 to the north of TMS 283-00-00-498, which is in a 20' easement created by a 1981 subdivision plat. R. p. 52. The Lacey plat also shows power poles and lines located to the south and west along Kitford Road on property that was the subject of the 1972 easement by Edward Brown. R. p. 52. The subdivision plat referenced in the Lacey plat was done on October 7, 1981 for the Frazier property and shows the existence of the transmission line located across the Frazier property (TMS 283-00-00-117) but not any power pole or distribution line attached to it. R. p. 53. Lacey was asked to return to the site to determine the location of any other power lines affecting Simmons property. R. p. 118, para.3. Lacey supplemented the plat on September 22, 2010 to show Berkeley Electric's distribution lines traversing TMS 282-00-00-135 in two places. R. p. 130. The revised plat shows the power line running from the main transmission line where it crosses TMS 282-00-00-135 over Simmons driveway out to Kitford Road and ending at the pole in front of the Turner residence on the south side of Kitford Road. R. p. 119. Simmons contends that this line running over his driveway has been used by Berkeley Electric for many years to service its customers on the south side of Kitford Road and that there have even been cable TV lines running along this same route and thus Berkeley Electric's use of a line across TMS 283-00-00-498 has not been continuous. R Id.

In discovery, Berkeley Electric produced documents in response to Simmons request for the location of its power lines affecting Simmons property from 1980 to the present. One of these was a plat dated November 8, 1983 of TMS 283-00-00-118, to the

north of TMS 283-00-00-498, and west of the Frazier property which located the 75' transmission line easement but did not show any power pole or distribution line on that property or on TMS 283-00-00-498 to the south. R. p. 134. Berkeley also produced two "system maps", the earliest of which was dated 1995, which contained different locations for the distribution line that allegedly was constructed over TMS 283-00-00-498 before 1980. R. pp. 135, 136. No system map for the 1980s or any previous period was ever produced.

Simmons also determined from third party discovery that in October 2002, Berkeley Electric granted Comcast Cablevision of Carolina, Inc. a license to attach its TV cables to Berkeley Electric's power poles. R. p. 138. This "pole sharing" agreement provided for the payment of a royalty of \$12.94 per pole shared. R. p. 150. Comcast's map of its cable lines dated May 1, 2007 shows them extending to the end of Kitford Road on Berkeley Electric poles. R. pp.152,153.

It is undisputed that at some time in the past, Berkeley Electric installed power poles on property to the north of TMS 283-00-00-498 and to the south on Kitford Road and a power line traversing TMS 283-00-00-498 and that its power lines follow its poles along Kitford Road east across the Seaboard Coastline Railroad right of way to Simmons property TMS 282-00-00-135 to the east. Simmons contended that Berkeley Electric is making an unreasonable use of the easements given in 1956 and 1972 crossing his property four times, twice across TMS 283-00-00-498 on the east and on the west and twice across TMS 282-00-00-135, on the north and on the south. Simmons contended that this unreasonable use has affected his ability to use or sell this property; that trees he planted to harvest and other vegetation have been destroyed and his property

value adversely affected without any permission or compensation given. R. p. 119, para.4, 5.

C. Berkeley Electric's motion for summary judgment

In its 2009 motion for summary judgment on a prescriptive easement, Berkeley Electric relied solely upon the affidavits of two employees Richard Frank and Thomas Seeny. R. pp. 45-48. Both employees assert (in identical language) that they are familiar with a utility line located at 3507 Kitford Road. R. p. 45, para. 3, R. p. 47, para.3. According to its own system maps, the Berkeley Electric power line at 3507 Kitford Road is in front of property owned by Ivory Turner, R. p. 136, and across the street from Simmons property, TMS 283-00-00-498. R. p. 130. Both Berkeley Electric employees claim that the line has been in existence since "at least 1980" although the poles on which the line is located contain "birthmarks" indicating they were installed in 1984 and 1986. R. p. 45, para.4 ; R. p. 47, para. 4. Nothing contained within Berkeley Electric's 2009 motion or the amended motion filed in 2010, its brief or affidavits referenced Simmons trespass claim concerning TMS 282-00-00-135.

Simmons opposed Berkeley Electric's motion on the basis that there were disputed issues of fact regarding any claim of a prescriptive easement across TMS 283-00-00-498. Simmons contended that Berkeley Electric employees' statements were contradicted by two different plats of adjacent properties, neither of which indicated any poles or wires where they were supposed to be. Simmons also argued out that there was no evidence of any written easement across TMS 282-00-00-135 for any distribution lines since the 1956 easement allowed the installation of a transmission line and the 1972 easement given by Brown only applied up to the Seaboard Coastline Railroad right

of way and TMS 292-00-00-135 was to the east to that. Simmons contended that the Berkeley Electric line connecting power to Andersen was trespassing across TMS 282-00-00-135 and Berkeley Electric had not addressed this claim. Finally Simmons contended that the Master In Equity must hold a hearing to consider all of the circumstances to determine whether Berkeley Electric was exceeding the scope of its written easements in accordance with the terms of the Order of Reference. R. pp. 110-119.

At the motion hearing, counsel for Berkeley Electric confirmed that its motion was for a prescriptive easement and that it was relying upon the 1972 easement for its claim of right. R. p. 193, line 6-7. He conceded that Simmons could recover damages for trespass during the time he owned TMS 283-00-00-498. R. p. 194, line 9-12. In response to Simmons claims about its failure to address TMS 282-00-00-135 at all in its motion papers, Berkeley Electric's counsel attempted to introduce an affidavit from Robert Bradley which allegedly asserted that Berkeley Electric lines to the Anderson property were within the 75' easement granted in 1956 and did not cross TMS 282 -00-00-135 outside the easement. R. p. 195, line 8-20. Berkeley Electric's counsel contended that Simmons had conceded that he did not object to the 75' transmission line and that Berkeley Electric could get to the Anderson property from that easement without crossing Simmons land. R. p. 196, line 21 - p.197, line 4. Simmons counsel objected to the Bradley affidavit on the basis that it introduced new matter; should have been submitted as part of their original motion not as a reply and was not appropriate for the court to consider, R. p. 199, line 24 – p. 200, line 6; and that R 56, SCRCF doesn't permit replies to opposition to summary judgment. R. p. 212, line 24 to p. 213, line 3. The court did

not indicate then whether it would consider upon the affidavit. Simmons counsel asserted that Berkeley Electric hadn't named an expert to opine about the location of its lines across TMS 282-00-00-135 and Bradley was not qualified to give an opinion. R. p. 213, line 4 -13. Simmons counsel also asserted that there was another Berkeley Electric power line that crossed TMS 282-00-00-135 from the transmission line which ran to the west down Kitford Road, in addition to the line that ran to the Anderson property. R. p. 198, line 10-21, R. p. 213, line 13 -18; that the Lacey survey shows its location and that it is connected to the same pole that the line across TMS 283-00-00-498 is connected to. R. p. 202, line 4-10. Counsel also asserted that the 1972 Brown easement did not extend to TMS 282-00-00-135 since it was expressly limited to lands to the west of the Seaboard Coastline Railroad right of way and TMS 282-00-00-135 was to the east. R. p. 204, line 6 – p.205, line 9.

During the motion hearing, the court inquired about the lack of specifics in the 1972 easement and Simmons counsel contended that it was vague in its language and raised questions of fact as to its implementation. R. p. 204, line 13 - p. 205, line 15. Therefore, counsel argued, it had to be reasonably interpreted. Counsel proffered that Brown's subdivision in 1972 (which the court had encountered in another case) extended Kitford Road through his property and that Kitford Road as extended was the appropriate location for Berkeley Electric power lines. Counsel urged that these were issues properly the subject of a hearing pursuant to the Order of Reference. R. p. 202, line 25 – p.203, line 20. Finally counsel requested that the court deny summary judgment in order to consider the effects of the Berkeley Electric easements on Simmons property. Simmons counsel proffered an expert report which would show that the two power lines

crossing TMS 283-00-00-498 which contained 1.375 acres, effectively reduced its use to a third of an acre. R. p. 206, line 9-21.

During rebuttal, the court asked Berkeley Electric's counsel about the scope of the 1972 easement. He asserted that it was left general because property owners back then didn't want to pay for surveys. R. p. 207, line 6-24. Berkeley Electric submitted no evidence in its motion to support this allegation. Berkeley Electric's counsel also claimed that they had work orders to show that a power line was brought across TMS 283-00-00-498 in 1972 to serve property owned by Chris Brown, R. p. 208, line 4-9, but these were not part of the motion record. Simmons counsel contended that these records indicated only that a power line was brought to the Brown property but didn't prove it crossed TMS 283-00-00-498. R. p. 211, line 9-13. Simmons counsel contended that Berkeley Electric had not refuted Simmons assertions or the Lacey survey that it had run power lines west from TMS 282-00-00-135 along Kitford Road. Simmons counsel contended that based upon the undisputed facts, Berkeley Electric could have used that line to serve the Chris Brown property at some time in the past instead of crossing TMS 283-00-00-498. R. p. 212, line 7- 18.

At the end of the hearing, the court granted Berkeley Electric's motion for summary judgment and found that Simmons would have been entitled to damages during the time he owned the property but had no claim . R. p. 222, line 13-16.

D. The Order granting summary judgment to Berkeley Electric

The Court subsequently entered an Order Granting Summary Judgment to Berkeley Electric filed January 18, 2011, containing findings of fact and conclusions of law. R. p. 13. The court found that Berkeley Electric had written easements for its utility

lines to cross both of Simmons properties; that the plats Simmons offered to dispute the testimony of Berkeley Electric employees did not raise an issue of fact as to the existence of a prescriptive easement across TMS 283-00-00-498. The Order referred to another document, an easement granted by the heirs of William Andersen in 1956 which was not submitted with Berkeley Electric 's motion for summary judgment. R. p. 15 para 3. Simmons filed a timely motion pursuant to R 59(e), SCRCP for reconsideration on the basis that Berkeley Electric had not requested relief for any express easement, the written easement did not allow it to cross TMS 282-00-00-135 several times; that the evidence as to the location of a power line across TMS 283-00-00-498 was conflicting and that the court need to evaluate the easements to determine whether Berkeley had unreasonably exceed their scope as required by the Order of Reference. Simmons also renewed his objection to the Bradley Affidavit and requested that the court give him the opportunity to address the claims made in the Bradley Affidavit since the court appeared to rely upon it in its decision. Since the order contained reference to the Anderson easement which was not part of the motion record , Simmons asserted that the order should not contain any reference to it. R. pp. 162-166, 175-186. Berkeley Electric did not file any opposition papers.

At the motion hearing, the court denied Simmons motion without opinion. R. p. 242, line 15-21. The short form order which was entered did not address any of the issues Simmons raised in his R 59(e) motion.

E. Water lines affecting the subject property.

In February 1977, St John's obtained an encroachment permit from Charleston County. Under the terms of the permit, St John's was to "install water mains . . . along

Kitford Road as shown on sheet U 25.” R. pp. 67, 69. According to the engineer in charge of the installation, “ the first construction project began in 1977 and included the installation of a water line in and along Kitford Road.” R. p. 59, para. 3. St John’s business records indicate that water service was not connected to its customers to the north of TMS 283-00-00-498 until 1986 (Gordon) and 1987 (Frazier) and to the north of TMS 282-00-00-135 until 1987 (Anderson). R. p. 65. Simmons lived to the east of Kitford Road on an unimproved private road and had well water as did many of the other property owners in the area. R. p. 75, para. 2. Simmons was unaware of St John’s water lines until he accidentally discovered a St. John’s water meter on TMS 282-00-00-135 in 2005 while he was planting trees. R. p. 75, para. 3, p. 76, para.5 . Simmons questioned Ava Robichaux, the St. John’s general manager on Johns Island about the water meter on this parcel and told them to remove it. Id at p. 1. Robichaux sent Simmons a letter saying that the water line had been there for 20 years. R. p. 77.

At the request of Simmons prior attorney, Ayesha Washington, Esq., St. John’s marked the location of their water lines with blue flags; these showed that St John’s water lines had crossed both TMS 282-00-00-135 and TMS 283-00-00-498. R. p. 76, para. 4. This was the first that Simmons knew that there were water lines across both parcels. Id. A survey was prepared for St. John’s showing the location of its water line across TMS 283-00-00-498 under a dirt road. R. p. 78. Both properties are undeveloped and TMS 282-00-00-135 is heavily wooded. R. p. 76, para. 5.

Simmons contends that St John’s never obtained an easement to cross his property to connect its water line to the Andersen property to the north or to the property owners to the rear of TMS 283-00-00-498. Simmons asserts that he had no reason to

know that St John's was providing water service to property owners using his land for access because St John's never marked the location of their lines or asked his permission or told him about the location of their lines until he asked Ms. Robichaux about the water meter on TMS 282-00-00-135 in April 2005. R. p. 76, para. 6.

F. St John's motion for summary judgment

In its summary judgment motion brief, St John's relied on the encroachment permit from Charleston County to install a water line along Kitford Road in 1977 under Simmons property. R. pp. 62-63. St Johns contended that "a minimum amount of diligence would have revealed the fact that plaintiff's neighbors received their water from St Johns Water Company. This fact establishes the plaintiff's constructive notice of St. Johns use of the easement." R. p. 63. The only evidence that St. Johns submitted to support its contention that it had a right to install its lines under TMS 283-00-00-498 and TMS 282-00-00-135 was an affidavit of Hugh Miley, Jr., the engineer in charge of the installation who states that the water main was installed in 1977-78 in and around Kitford Road R ; it doesn't locate where the work was done or that it was done on either parcel owned by Simmons. R. p. 59, para. 3, p. 62. St John's brief also included a copy of the encroachment permit but not the map referred to in the permit; and list of its customers on Kitford Road provided in discovery. R. pp. 65-69.

Simmons denied that there was any written easement allowing water lines across his property, asserted that the encroachment permit was limited to Kitford Road, that St John's customer lists indicated that the water lines to the customers served by the lines under Simmons property were installed in 1986-87; that both lines were underground

and not obvious and that he did discover the existence of one of the lines , crossing TMS 282-00-135 until 2005. R. p. 71, p. 75, para. 3 - p. 76, para.6.

During oral argument, St John’s counsel contended that there was a the dirt road extending from Kitford Road which Charleston County considered to be part of Kitford Road. R. p. 217, line 8-17. He referred to a map that was not part of the motion record. R. p. 215, line 24 – p. 216, line 3. However, there was nothing in the encroachment permit to support this contention. R. pp. 67-69. Simmons counsel pointed out that the Miley affidavit didn’t identify where the encroachment permit allowed St Johns to install its water main or where the water lines were located, R. p. 218, line 2-14; and that the only evidence of water use showed it commenced in 1986 &1987. R. p.218, line 14 - p. 219, line 12.

G. The Order granting summary judgment to St John’s

The Court entered an Order Granting Summary Judgment to St. Johns Water Company filed December 21, 2010. R. p. 10. The Order states that St. John’s Water Company obtained an express easement to install water lines along Kitford Road “which included a portion of the road extending north from the main portion of Kitford Road to residences along said roadway”. R. p. 11. The order states that St John’s use has been open and notorious under the encroachment permit and without the use of any wells; and to the extent that the express easement is silent as to the specific location, St. Johns holds a prescriptive easement. Id. The order further states that there are affidavits from customers to attest to twenty years of uninterrupted use in the motion record. Id.

Simmons filed a timely motion pursuant to R 59 (e), SCRCF to alter and amend the order. Simmons contended that the decision was not supported by the motion record

and encompasses legal claims which were not asserted in St. John's summary judgment motion. R. pp 159- 162, p.167-173. At the motion hearing, the court denied Simmons motion without opinion. R. p. 242, line 15-21. The short form order which was entered did not address any of the issues Simmons raised in his R 59(e), SCRCF motion.

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO BERKELEY ELECTRIC

Simmons contends that the court erred by granting summary judgment to Berkeley Electric based upon the evidence submitted. Berkeley Electric's motion for summary judgment was limited to its claim of a prescriptive easement as to TMS 283-00-00-498 but the court granted it summary judgments as to express easements for which it had not requested. Simmons contends that court improperly granted summary judgment to Berkeley as to the scope of its express easements when it had not requested such relief and not based upon evidence in the record which established that Berkeley Electric exceeded the terms of the express easements in crossing TMS 282-00-00-135 and 283-00-00-498 multiple times with its power lines. In so doing, the court relied upon an affidavit that was not part of the motion record and not before the court. Simmons contends that the court improperly granted summary judgment to Berkeley Electric on a prescriptive because the court weighed the evidence instead of finding that there were material issues of disputed fact. Lastly, the court erred because Berkeley Electric failed to meet its burden to produce clear and convincing evidence of open and continuous use for the prescribed period.

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn there from must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).

A. There was no basis for the court to grant summary judgment on express easements that were not brought before the court by Berkeley Electric

Simmons contends that the court erred by granting summary judgment to Berkeley Electric on express easements that it did not request in its motion. The only issue on which Berkeley Electric sought summary judgment was on a prescriptive easement. Rule 56, SCRPC requires notice and an opportunity to respond. Absent compliance with the rule, Berkeley Electric was not entitled to relief that it never requested and for which Simmons had not opportunity to respond.

Simmons had introduced the express easements to establish that there were disputed issues of fact surrounding them since Berkeley Electric had relied upon the express easements for a claim of right. Simmons counsel discussed the express easements in that

context and asserted that the parties consented to an Order of Reference in order to determine whether Berkeley Electric had exceeded the scope of the written easements granted to it by plaintiff's predecessors in title in 1956 and 1972. He further pointed out that the language of the 1972 easement was non specific as to location and magnitude. " If the language [of an easement] is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect." 25 Am.Jur.2d Easements § 18, at 516 (2004). Therefore, the purpose for consideration of the express easements was to indicate that the record needed to be developed and not to argue the merits of granting summary judgment on express easements.

Berkeley Electric was attempting to limit the issues contrary to what the parties intended by the Consent Order of Reference. The matter was originally on the jury list and the parties agreed to an Order of Reference to the Master in Equity because the extent of an easement is a question to be resolved by an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). By skirting the express easements, Berkeley Electric tried to avoid doing what was supposed to be done. Therefore, the court erred in granting relief to Berkeley Electric that was never requested in compliance with the Rules of Civil Procedure and contrary to the Order of Reference.

B. There was no basis for the court to grant summary judgment on the scope of the express easements that were not brought before the court by Berkeley Electric

Similarly the court granted summary judgment to Berkeley Electric that it had not exceeded the scope of its express easements, relief that it had not requested. Since the

issue of the express easements was not properly before the court, it should not have reached any decision concerning the scope of these easements as well. Moreover, Simmons contends that the evidence does not support this conclusion, see Section C below.

In determining that Berkeley Electric did not exceed the scope of the easements, the court found as matter of law that the 1972 easement was vague as to location because property owners then didn't want to incur the cost of surveys. R. p. 18. This conclusion is not based upon the record but upon a comment made by Berkeley Electric's counsel about the indefinite nature of the 1972 easement. R. p. 207, line 20-24. Simmons R 59 (e), SCRCP motion asserted that this conclusion of law was unsupported in the record and should result in reconsideration. The court did not address this or any issue in its denial of this motion. Simmons contends that the court erred as matter of law because this conclusion is unsupported in the motion record. Berkeley Electric did not offer any testimony from any property owners about this. The court simply relied upon the representation of Berkeley Electric's counsel at the hearing in the absence of any facts. Arguments of counsel do not provide the factual basis for summary judgment. Trivelas v. South Carolina Dept. of Transp., 348 SC 125,141,558 SE 2d 271,279 (Ct.App.2001). The Court also referred to the Anderson easement in its decision but that too was not part of the record and thus cannot be a basis for any finding. Therefore, the court erred by adopting assertions of counsel or facts not in the record as a basis for a legal conclusion.

The scope of the 1972 easement was in dispute. Simmons contended that a hearing was required in order for the court to understand the full circumstances. Simmons counsel proffered some of the pertinent facts surrounding the grant of the easement. The

court had no reason to accept Berkeley Electric's counsel opinion surrounding the events of the 1972 easement instead of Simmons counsel since neither were evidence. The Court had to rely upon competent evidence in the record and since there was none , it should have determined not to grant summary judgment as to the scope of the 1972 easement. Since the court's conclusion of law is unsupported in the record, the court erred by granting summary judgment instead of conducting a hearing concerning the scope of the 1972 easement.

C. There were disputed issues of fact as to whether the easements were exceeded

Because Berkeley Electric had asserted that the express easements created a claim of right for a prescriptive easement, Simmons introduced extensive evidence that Berkeley Electric had exceeded the scope of both the 1956 and 1972 grants.

1. Berkeley Electric exceeded the 1952 easement across TMS 282-00-00-135

It is not disputed that the 1956 Heyward easement allowed Berkeley Electric to erect a transmission line through TMS 282-00-00-135 and 283-00-00-498; or that the 1972 Brown easement allowed Berkeley electric to cross TMS 283-00-00-498. However, Simmons contended and the evidence established that the 1972 Brown easement extended only up to the Seaboard Coastline Railroad right of way and that TMS 282-00-00-135 is to the east of that right of way. The Lacey plat shows that Berkeley Electric power lines run from the transmission line beyond the 75' easement west toward Kitford Road and east to the Anderson property. Berkeley Electric did not submit any evidence concerning its claim for any easement on TMS 282-00-00-135; its motion was addressed solely to its claim of a prescriptive easement across TMS 283-00-00-498. The express easements were introduced in Simmons reply papers to show that

Berkeley Electric had exceeded the written easements and that any potential prescriptive easements which Berkeley might claim were unreasonable.

After Simmons raised the lack of evidence pertaining to any prescriptive easement on TMS 282-00-00-135, Berkeley attempted to respond, inappropriately Simmons contends, by submitting an affidavit from an employee claiming that its power lines to Anderson were not on Simmons property but on Anderson's. Berkeley Electric did not address whatsoever, Simmons other claim to the encroachment across TMS 282-00-00-135 to the west. Therefore, Simmons claim that an encroachment to the west of the 75' easement exceeds the scope of the 1956 easement and is not included in the scope of the 1972 easement is undisputed in the record.

2. Berkeley Electric exceed the scope of the 1972 easement

Simmons also contended that Berkeley Electric exceeded the scope of the 1972 written easement by installing power lines across TMS 283-00-00-498 and onto TMS 282-00-00135 to serve residents on both sides of Kitford Road from multiple locations. During the motion hearing, Simmons counsel proffered that that the 1972 easement was vague in its language and as to its implementation ; therefore counsel argued, it had to be reasonably interpreted. "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention." Smith v. Comm.'s of Pub. Works of City of Charleston, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct.App.1994); Ten Woodruff Oaks, LLC v. Point Development, LLC, 385 S.C. 174, 181 (Ct. App. 2009). Neither of the easements contains a definite location where the power line is to be located. " If the language is

uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect.” 25 Am.Jur.2d Easements § 18, at 516 (2004).”

Although Berkeley Electric obtained two separate easements to install power lines across the Simmons property, it used these easements to justify crossing the Simmons property in four separate locations. Simmons contended that Berkeley Electric unreasonably implemented these easements and granted pole sharing rights over multiple locations across Simmons land for a fee to serve its purposes without regard to Simmons property rights or the effect of its actions upon them. Simmons contends that there is an alternative to crossing TMS 283-00-00-498, i.e. the route which Berkeley Electric has used in the past which would less severely impact his property, i.e. over his driveway along the south side of Kitford Road. Simmons’ surveyor will testify consistent with his supplemented plat that the total area of TMS 283-00-00-498 (1.375 acres) is effectively reduced to .342 acres due to the existence of Berkeley electric’s two overhead power lines. Simmons contends that the court had to consider the totality of the circumstances surrounding the express easement in order to determine the scope and intent of the parties. Since Berkeley Electric did not offer any evidence regarding the scope or intent of either easement, the court had no basis to determine whether they were exceeded.

D. The Bradley Affidavit was not properly before the court and was not the basis for finding that the easements were not exceeded.

Simmons appeals the court’s order as to express easements on the additional ground that the Bradley affidavit upon which the court may have relied was not properly

before the court and should not have been considered. Simmons initially objected to Berkeley Electric's counsel submitting the Bradley Affidavit and after the court granted summary judgment, renewed his objection and requested an opportunity to respond in a motion for reconsideration. That motion was denied.

The Bradley Affidavit should have been part of the Berkeley Electric's original motion since it relates to their defenses to the allegations of the Second Amended Complaint asserting trespass on TMS 282-00-00-135. The court's Scheduling Order required all dispositive motions to be filed by November 12 and this affidavit was not part of it. Summary judgment motion materials must have been filed. Loyd's Inc. v. Good, 306 S.C. 450, 412 S.E.441,443 (Ct. App. 1991). Rule 56, SCRCP provides only that an adverse party to a summary judgment motion may serve a reply within 2 days of the hearing. Simmons counsel served his responsive brief and affidavits in a timely manner. R 56, SCRCP does not provide for any further reply.

Obviously Berkeley Electric's counsel received Simmons opposing papers before the motion hearing and realized that the lack of evidence as to TMS 282-00-00-135 needed to be addressed. Obviously, they crafted a last minute affidavit by a Berkeley Electric employee attempting to interpret the boundary line between Simmons and Andersen property and saying that the offending power line is totally on Andersen's property. Berkeley Electric did not name any experts in their responses to discovery requests and the Bradley affidavit is an expert opinion in interpreting the Simmons and Anderson boundary lines. Simmons had no notice or opportunity to respond. Therefore his affidavit attempting to express an expert opinion should be rejected for that reason also.

In summary, to the extent that the court's Order relies on the Bradley affidavit and opinions asserted therein, which were not properly before the Court, Simmons contends that the court erred in granting summary judgment.

E. There were disputed issues of fact as to the existence a prescriptive easement across TMS 283-00-00-498 and TMS 282-00-00-135

Berkeley Electric's motion for summary judgment on prescriptive easement was limited to TMS 283-00-00-498 because the two affidavits of employees submitted only referred to a single line in the vicinity TMS 283-00-00-498 (although the witnesses did not refer to it specifically) which they claimed had been there since before 1980. Simmons contends that the two plats he submitted together with other Berkeley Electric documents were sufficient to create a dispute of fact so that the court should not have granted summary judgment as to that parcel. Berkeley Electric introduced no facts as to the existence of a prescriptive easement on TMS 282-00-00-135 so there was no basis for the court to find in its favor.

1. The Gaillard and Schuler plats do not contain any poles for a power line from Simmons property

The court found that two plats of adjacent property prepared in 1981(Gaillard) and 1983 (Schuler) were not supportive of Simmons claims that Berkeley Electric power line did not cross the westerly portion of TMS 498 until after the date of these surveys. The Court found that these plats were not of Simmons property and did not contradict the testimony of Berkeley Electric supervisors Seeny and Frank. R. pp.19- 20.

Simmons contends that the court improperly weighed the evidence instead of merely accepting it as creating a dispute of fact.

The Gaillard plat purports to create an easement for a road and shows the location of the Berkeley Electric transmission line across TMS 283-00-00-117 and the transmission line as well as a dirt road across TMS 283-00-00-498 to which that proposed road is to connect. The Schuler plat was purportedly done to establish the area under easement on TMS 283-00-00-319 and indicated the location of the transmission line across TMS 283-00-00-498 (then designated as part of TMS 283-00-00-115) as well.

Even though these plats were prepared for other purposes, the court had no basis to find that the details shown on them were inaccurate or incomplete. Neither plat shows another power line or pole on the plat being surveyed even though that that was where the poles birth marked 1984 or 1986 were located according to Berkeley Electric employees. Simmons offered these plats to show that there was no power line across TMS 283-00-00-498 when Berkeley Electric said it was there. If the poles on the property where the line connects are not shown on plats of those properties , how can the line supposedly attached to those poles have actually been there? The Lacey survey includes details of surrounding properties including those properties shown on the Gaillard and Schuler plats. The Lacey plat locates the power poles on those properties to which the line across TMS 283-00-00-498 was attached. The court had only to recognize the inconsistency shown on these plats and not try to resolve any inconsistencies.

The role of the Court is to determine whether a dispute of material fact exists, not whether one party's evidence is better than the others. Both plats are evidential of the

condition and existence (or not) of a power line situated on a pole to the north of TMS 498 since both plats show that area. The explanation in the Order that the plat was not of Simmons property is an inadequate explanation for the discrepancy and should have been rejected. These plat raise a question of fact as to when the power line was installed because it contradicts Berkeley Electric employees' testimony.

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Simmons contends that these plats and the reasonable inferences drawn from them raise a question of fact which precludes the granting of summary judgment. There is no evidence in the record to provide any explanation of these plats which would enable the Court to disregard them. The Order contains factual findings and a conclusion of law disregarding the evidential value of these plats. These findings and conclusion are not based upon the record, are not supported by any reasonable inferences drawn from the record and are not a proper basis for the granting of summary judgment.

Therefore, these findings cannot support a conclusion of law rejecting evidence that contradicts BEC's supervisors' testimony.

2. Berkeley Electric's system maps contradicted its employees' testimony

Simmons also contends that the court erred by finding that the Berkeley Electric system maps did not create a dispute of fact regarding Berkeley Electric's contention that the power line across TMS 283-00-00-498 had not been moved for the last thirty years. The court found that the system maps do not conflict with its employees testimony concerning the location of its power lines because Simmons did not provide any testimony as to how these maps should be interpreted. Simmons contends that the court erred by weighing evidence instead of recognizing that it created a dispute of fact. Simmons contends that Berkeley Electric produced conflicting system maps regarding the location of the power line that allegedly crossed TMS 283-00-00-498. The System Map prepared by Southern Engineering dated 4/12/95 shows a power line across Kitford Road but does not indicate whether it encroaches on TMS 283-00-00-498. R 135. The current Berkeley Electric System Map shows the same power line in a substantially different location. R 136. Berkeley Electric did not produce any system map showing the location of its power line across TMS 283-00-00-498 prior to 1995 and after 1980 although plaintiff requested it to produce this in discovery.

Simmons contends that he and the court were entitled to rely upon them as "maps" since Berkeley Electric was requested to produce all "maps showing the location of the disputed power line from 1980 to the present" in discovery. These documents were provided in response. Maps are by definition intended to be accurate. They are shown on a drawing with a scale indicated thereon. The Court has only to refer

to them to see that they cannot be consistent since they show different locations for the subject power line across TMS 498 in 1995 and the present.

It is reasonable to conclude from the inconsistent system maps that the power line was moved between 1995 and the present; otherwise the two system maps would be identical. Therefore, the documentary evidence supports the conclusion that there was no power line crossing TMS 283-00-00-488 at the end of 1983; and that the location of the power line changed from 1995 to the present based upon system maps prepared at different times. The evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004) Under the summary judgment standard, the court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Service, Inc. 376 S.C.632, 635, 658 S.E. 2d 110,111 (Ct. App. 2008).If the court determined that the maps required further explanation to determine if they established an issue of fact it should have denied summary judgment instead of rejecting them. Summary judgment is appropriate only if the moving party can establish that inquiry into the facts is not desirable to clarify the application of the law. Standard Fire v. Marine Contracting, 301 SC 418, 421, 392 S.E.460 (1990).

3. Berkeley Electric submitted no evidence of prescriptive easements across TMS 282- 00-00-135

Berkeley Electric failed to establish it is entitled to a prescriptive easement across TMS 282-00-00-135 because the only evidence it has provided in its Amended Motion for Summary Judgment relates only to the installation of its utility poles for a line across TMS 283-00-00-498. Simmons asserts that there were no facts other than what it

introduced as to TMS 282-00-00-135 and that they do not establish that Berkeley electric is entitled to a prescriptive easement as matter of law. Berkeley Electric's counsel attempted to rebut those at the hearing but arguments of counsel are no basis for granting summary judgment. Arguments of counsel are not the basis for summary judgment. Trivelas v. S.C. Dept. of Transp. 348 SC 125,141, 558 S.E. 2d 271,279 (Ct. App. 2001)

F. The Court improperly weighed the evidence and ignored the existence of numerous material disputed facts

Simmons contends that the court did not properly apply the standard for summary judgment in deciding to grant summary judgment to Berkeley Electric on a prescriptive easement. The Court's role is to examine the record to determine whether there are material issues of disputed fact and if there are none, to decide whether the moving party is entitled to judgment as matter of law. The Court's role is not to balance and interpret the evidence to determine which side should prevail. Here the record contains numerous instances of facts in dispute which should have caused the Court to deny its motion . The Court's Order however, contains findings which weigh the evidence and which the Court should not perform at this stage of the proceedings.

Simmons submitted two plats which do not contain any Berkeley electric power poles at a time when it contends they were in place. The court rejected this because the plats were not of Simmons property. Simmons Berkeley electric system maps which were not consistent as to the location of a line across TMS 283-00-00-498. The court said it couldn't interpret these and disregarded them . Simmons submitted an affidavit in which he asserted that Berkeley Electric used a different route in the past along his driveway across TMS 135 for its power lines and cable lines to service

customers on Kitford Road and not across TMS 283-00-00-498. The court ignored this completely.

The motion record does not support the granting of summary judgment because Simmons assertions create a disputed issue of fact as to continuous use for twenty years. Simmons assertion that power to customers along Kitford Road was provided in the past by a line from the main distribution line crossing TMS 282-00-00-135 under the 1956 easement down to Kitford Road is consistent with other evidence. The power pole on the south side of Kitford Road birth marked "1986" could just as well have been used at this location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. Similarly, the pole on TMS 283-00-00-118 to the north of TMS 283-00-00-498 and birth marked "1984" could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. The date of the birthmarks on the poles may signify when the pole was installed but without other corroborating evidence which BEC never provided, they are not conclusive as when the power line across TMS 283-00-00-498 was installed between those poles.

The Court must view the evidence and all inferences which can be reasonably drawn there from in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Surveys done in 1981 and 1983 do not show the existence of a power line across TMS 498 which Berkeley Electric alleges was there in 1980. Two Berkeley Electric system power surveys show the power line in different locations. Birthmarks on power poles are

not conclusive evidence that a power line ran between them. Berkeley Electric's own documents contradict the sworn testimony of its employees, Seeny and Frank upon which its allegation of continuous use rests. The Court should not have accepted the employee testimony as conclusive proof of continuous use when it was contradicted by the documentary evidence and Simmons testimony.

In summary, the record contained disputed issues of fact which preclude the granting of summary judgment. The Court attempted to weigh and interpret the evidence instead of simply deciding whether there was a dispute of fact. The Findings and Conclusions of Law 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 this motion.

G. Berkeley Electric failed to establish any prescriptive easements by clear and convincing evidence

In order 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 (1993). The claimant must show by "clear and convincing" evidence he has met the requirements for adverse possession. Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986).

Simmons contends that the court erred in granting summary judgment because Berkeley Electric failed to satisfy its burden its burden of proof on the issue of a prescriptive easement.

Simmons contends Berkeley Electric did not provide any evidence of an express easement to cross TMS 135 beyond the terms of the 1956 transmission line easement which it indisputably exceeded. Thus, there is no evidence to support a prescriptive easement based upon some claim of right. As far as any outright adverse use for 20 years, Berkeley Electric did not submit any evidence of when it first installed the power line to the Andersen property from the transmission line crossing TMS 282-00-00-135 or the other line which is to the west. Therefore, Berkeley electric has failed to establish any right to a prescriptive easement across TMS 282-00-00-135 and summary judgment as to that issue should have been denied.

Simmons also contends that Berkeley Electric failed to meet its burden of proof of clear and convincing evidence as to a prescriptive easement as to TMS283-00-00-498. Simmons contended that Berkeley Electric's employees testimony that the line was installed before 1980 was contradicted by its own business records. Even if the court disagreed with Simmons contention as to the significance of the facts, disagreement as to the conclusion to be drawn from the facts requires that it should have denied summary judgment. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990).

Further, plaintiff contends that the age of the "birthmarks" on the poles to which the power lines are attached (1984 & 1986) does not confirm when the power line was installed. Simmons contends that power to customers along Kitford Road was provided in the past by a line from the main distribution line crossing TMS 282-00-00-135 over his driveway down to Kitford Road. See Simmons Supplemental Affidavit. The pole on the

south side of Kitford Road birth marked “1986” could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. Similarly, the pole on TMS 283-00-00-118 to the north of TMS 283-00-00-498 and birth marked “1984” could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. The date of the birthmarks on the poles may signify when the pole was installed but without other corroborating evidence, they are not conclusive as when the power line across TMS 283-00-00-498 was installed between those poles.

Simmons contends that Berkeley Electric has used a different route down his driveway for its power lines and cable lines in the past to service customers on Kitford Road and not the line across TMS 283-00-00-498.

II. THE COURT ERRED BY GRANTING SUMMARY JUDGMENT TO ST JOHN’S

Simmons contends that the December 22nd Order granting summary judgment to St John’s is not supported by the motion record ; that the court granted legal claims which were not asserted in St. John’s summary judgment motion; and that an express easement to install water lines along Kitford Road “which included a portion of the road extending north from the main portion of Kitford Road to residences along said roadway” was based on no evidence. Simmons contends that the county encroachment permit granted to St John’s does not rise to the level of a claim of right and there was no evidence in the record to support the court’s decision to create a prescriptive easement founded upon it. The court’s finding that St John’s water lines were open and notorious

for the statutory period is not supported in the record of its customer use on Kitford since St John's records established that service to the closest customers to Simmons was installed in 1986 and 1987 that Simmons demanded that St John's remove its water line in 2005. Alleged evidence of earlier use in the form of customer affidavits was not in the record. Finally the court did not find the existence of a prescriptive easement by clear and convincing evidence and there were disputed issues of fact.

A. The court improperly granted summary judgment on an express easement

St. John's motion for summary judgment was limited to the imposition of a prescriptive easement. R. p. 61. St. John's motion for a prescriptive easement was based on an encroachment permit it received in 1977 from Charleston County to extend its water line from Main Road down Kitford Road. R 63. St Johns asserted that the encroachment permit represented a "claim of right". Id. During oral argument, counsel for St. Johns claimed that a dirt drive over Simmons property was part of Kitford Road and thus included in the encroachment permit. R. p. 214, line 21- p. 215, line 3; R. p. 217, line 13-21. However the encroachment permit states on its face that it applies only to construction on a "right of way of county road or street". R. p. 67. The encroachment permit refers to a drawing (designated as U-25) which St. John's did not include as not part of the motion record. R. p. 69. There was not even any evidence in the motion record where this express easement was located. There was no evidence in the motion record that this dirt drive across Simmons property was ever a county road or street or that it was ever maintained by Charleston County. Thus the court only had the assertions of counsel that St Johns had the right to traverse Simmons property across an unspecified dirt road allegedly maintained by the county. Because St. Johns motion failed to request summary

judgment on an express easement, Simmons was denied the right to rebut the unsubstantiated allegations of an express easement and demonstrate the existence of disputed issues of fact. (In fact the Lacey plat submitted in opposition to Berkeley Electric's motion for summary judgment shows that the public portion of Kitford Road ends at the Seaboard Coastline Railroad right of way and thereafter becomes a private road. R. p. 130. R 56, SCRCRCP (as well as the court's scheduling order) precluded St. John's from asserting a new basis for summary judgment, i.e. an express easement as the basis for its motion. Thus the court erred in granting summary judgment on an express easement as a matter of law.

B. St. Johns failed to establish a claim of right under the encroachment permit

The court's order further states that to the extent that the express easement is silent as to the specific location across Simmons property, St. Johns holds a prescriptive easement. R. p. 11. In order 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.259 (1993). Simmons contends that the county encroachment permit could not establish a claim of right to support a prescriptive easement and that the use was not open and notorious for the statutory period. See Section C below. The county encroachment permit on its face allows St John's to install its water mains on county roads or streets. It does not create a claim of right to encroach on private property. St. Johns obtained an encroachment permit for the purpose of installing water lines along Kitford Road. St. John's did not present evidence to establish that it could have reasonably relied on the

encroachment permit for such a purpose as installing water lines on private property. The ownership of the property and the lot descriptions are a matter of public record in the Charleston Recorder of Mesne Conveyance and the tax assessor. St. John's could have easily determined whether the property it was about to enter was public or private. St. John's motion for summary judgment did not include the map referred to in the encroachment permit or any other map on which it could have allegedly relied. Thus the court had no basis to find that the encroachment permit created a claim of right. Therefore, the court should not have granted summary judgment on a prescriptive easement because St. John failed to establish any claim of right to cross either TMS 283-00-00-498 or TMS 282-00-00-135.

C. There was a dispute of fact that the use was open and notorious

The court found that there had been continuous water service without the use of any wells. R. p. 11. Simmons contends that the motion record does not support the court's finding that there was a prescriptive easement based on an open and notorious use. The motion record is limited. It contains the affidavit of Hugh Miley, the project engineer who stated that "the first construction project began in 1977 and included the installation of a water line in and along Kitford Road." R. p. 59 . Mr. Miley does not identify the location of the water line as crossing either Simmons parcel or refer to any maps or drawings which indicate its exact location. Hugh Miley's affidavit is vague and inconclusive.

The motion record also contains St. John's customer list for Kitford Road with the dates of service and addresses. St John's contended that this was evidence of twenty years of open and notorious use. R. pp. 63, 65. All but two of these customers received

their service after 1986. R. p. 65. The list shows that one of the pre 1896 customers received service on Kitford Road in 1975, before St John's had even constructed the water line on Kitford Road according to Mr. Miley's affidavit. Therefore, St John's customer list establishes only that St John's had a single customer on Kitford Road as of 1979.

All of the other customers on St John's list received service after 1986. For example, water service was connected to the Andersen property (across TMS 282-00-00-135) in August 1987 and to Frazier and Gordon, property owners to the rear of TMS 283-00-00-498 in July 1986 and August 1987 respectively. Therefore, the earliest that Simmons could have had constructive notice of the existence of water service across his property would be July 1986. He objected to St John's water lines in 2005 and tolled the statutory period.

Simmons does not concede that this was sufficient to constitute constructive notice. St. Johns must show "a distinct and positive assertion of a right hostile to the owner, and brought home to him for the statutory twenty year period". Williamson v. Abbott, 107 S.C. 397, 93 S.E. 15 (1917). Instead, the facts on the motion record presented a question of fact that prevented the court from granting summary judgment. Simmons stated: "I have well water and so do many other homes in this area. I had no reason to know that St John's was providing water service to property owners using my land for access." R. p. 76, para. 6. Thus, the issue of whether the use was open and notorious was a question of fact that prevented the court from granting summary judgment on a prescriptive easement.

D. Customer affidavits of earlier use were not in the record

The order refers to affidavits of St. John's customers attesting to twenty years of uninterrupted use. However, there were no affidavits submitted with St John's motion and accordingly the motion record does not support this finding.

E. The motion record does not support a finding of prescriptive easement by clear and convincing evidence.

Simmons contends that the court should not have granted summary judgment on a prescriptive easement because of the lack of clear and convincing evidence. Each element of a prescriptive easement must be demonstrated by clear and convincing evidence. Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986). Graniteville Co. v. Williams, 209 S.C. 112, 120-21 (1946); Williamson v. Abbott, 107 SC 397, 93 S.E. 15 (1917). There was no evidence of an express easement. The existence of a prescriptive easement was not established by clear and convincing evidence. The claim of right could not be established on the face of the encroachment permit or by reference to any drawing in the record. The first use was not established by Hugh Miley's affidavit because it was not specific as to Simmons property. The customer list is not evidence of a first use pre 1985 since the two customers were not served by a water line on the property that Simmons or his predecessor in title owned. The post 1985 customers on the list do not establish twenty years of adverse use since Simmons complained about St. John's possible encroachment in 2005. Thus, all of the material facts necessary for St. Johns to establish a prescriptive easement were disputed by competent evidence including St John's own business records.

The undisputed facts also support Simmons position. The water lines were underground beneath both properties. St John's never marked the lines or told Simmons of their existence before he complained in 2005. Simmons did not receive any notice and had no reason to know that water service was being provided to owners in the rear of his property since well water was available in the area.

Therefore, Simmons contends that the court should not have granted grant summary judgment on a prescriptive easement due to the lack of clear and convincing evidence that its use was open and notorious for twenty years.

CONCLUSION

For the reasons expressed above, Simmons respectfully requests that this court reverse the January 18th Order granting summary to Berkeley Electric and remand the matter to the Master in Equity for further proceedings. Simmons further requests that the Court reverse the December 22nd order granting summary judgment to St. Johns and remand for a trial before the Circuit Court as to damages.

Respectfully submitted,

Edward A. Bertele
Attorney for Appellant

April 17, 2012
Charleston, SC

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

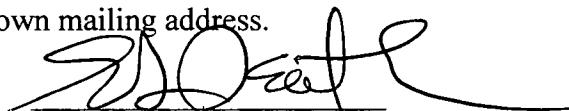
APPEAL FROM THE COURT OF COMMON PLEAS
OF CHARLESTON COUNTY
Case No. 2008 - CP -10 - 1983
Hon. Mikell Scarborough, Master in Equity

ROOSEVELT SIMMONS)
Plaintiff, Appellant)
)
Vs.)
BERKELEY ELECTRIC)
COOPERATIVE, INC. and)
ST. JOHNS WATER COMPANY, INC.)
Defendants, Respondents)

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CERTIFICATION OF SERVICE

I hereby certify that a true copy of the final Brief of Appellant and Reply Brief of Appellant 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.

April 26, 2012

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April 26, 2012

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**Re: Simmons v. Berkeley Electric Cooperative, Inc.
and St. John's Water Company, Inc.,
Case No. 2011192409**

Dear Ms. Allen:

I am enclosing for filing the following: 15 copies of the Record on Appeal and 15 copies of each of the final Brief of Appellant and Reply Brief of Appellant and the original Certification of Service of the Brief of Appellant and Reply Brief of Appellant. If you have any questions, please do not hesitate to call. Thank you for your kind assistance.

Very truly yours

Edward A. Bertele

Encl:
CC: John B. Williams, Esq. w/encl
Gaines W. Smith, Esq. “

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