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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2008-CP-23-5245  
Appellate Case No.: 2009-141246

**RECEIVED**

FEB 09 2015

**SC Court of Appeals**

Blue Ridge Electric Cooperative, Inc. ....Appellant

v.

Kathleen J. Gresham .....Respondent.

PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rules 219 and 221, SCACR, Appellant Blue Ridge Electric Cooperative, Inc. (“BREC”) hereby respectfully submits its Petition for Rehearing and Suggestion that the matter be heard *en banc*. This case presents a matter of exceptional importance.

**PROCEDURAL HISTORY**

This matter was initially brought by BREC to collect an unpaid utility bill owed by Respondent Kathleen Gresham (“Ms. Gresham”) and her husband, Defendant Steve Gresham. Respondent counter-claimed, raising allegations of trespass related to the installation and position of a single utility pole and guy wire on her property. At trial, the jury found in favor of Ms. Gresham as to the debt collection and as to the trespass claim. The jury awarded Ms. Gresham a nominal amount of \$ 0.01 for trespass. BREC and Ms. Gresham timely filed post-

trial motions, which were summarily denied.

BREC timely filed a notice of appeal and attempted to order a transcript. There were significant delays in obtaining the transcript and it was eventually discovered that substantial portions of the trial testimony related to the claim of trespass were lost.<sup>1</sup> A reconstruction hearing was ordered. Following further delays in the scheduling of the reconstruction hearing, a reconstruction hearing was finally conducted. Thereafter, this Court heard the appeal without oral argument from counsel. This Petition for Rehearing follows.

### **RELEVANT FACTS**

BREC's final brief to this court enumerated the facts of this matter; however, a brief recitation to underscore the exceptional circumstances and adverse impact of this Court's Opinion is warranted. The South Carolina Department of Transportation ("SCDOT") has obtained thousands of right-of-way easements from property owners in order to construct, operate, and maintain the roads and highways of the state. The law provides that within these right-of-way easements, SCDOT is authorized to award encroachment permits to utility providers such that the utilities may construct and maintain instrumentalities necessary for the provision of utility services to South Carolina residents. When a utility seeks to construct instrumentalities within the SCDOT right-of-ways, it must first apply to the SCDOT for an encroachment permit by submitting detailed scale drawings and plans establishing their intended use and location within the SCDOT right-of-way.

BREC is a South Carolina electric cooperative that serves members in Greenville County, Pickens County, Oconee County, and Anderson County, South Carolina. In 2007, BREC sought SCDOT approval to upgrade existing power lines along S.C. Highway 11 in Greenville County. As required by law, BREC submitted its detailed line and pole installation plans for the electric

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<sup>1</sup> It was discovered that the Court Reporter lost the tapes.

line upgrade to SCDOT because it was seeking approval to build within the SCDOT right-of-way. BREC submitted scale drawings showing where it would construct within SCDOT's right-of-way—which extended out from the center line of the highway fifty (50) feet—and to obtain express permission from SCDOT to further burden the right-of-way with any new poles that were necessary to support the upgraded line. SCDOT approved BREC's plans. (**R.pp.192-201**). Importantly, because BREC was operating service instrumentalities within the SCDOT right-of-way in this matter, it was operating within the easement obtained by SCDOT. BREC was not required to obtain prior approval from the landowner and should not have been subject to claims of trespass. *See Gressette v. South Carolina Electric and Gas Co.*, 370 S.C. 377, 635 S.E. 2d 538 (2006)

At trial, BREC presented testimony and documentary evidence that the single pole and guy wire at issue were installed within SCDOT's right-of-way, as previously approved by SCDOT on October 16, 2007. (**Id.**) In order to support her claim of trespass, Ms. Gresham offered only her own personal opinion testimony, the personal opinion testimony of her husband Steve Gresham, and the personal opinion testimony of a witness, Steve Austin, in order to claim that the BREC pole and guy wire were erected upon her land without her express permission. Importantly, neither Ms. Gresham nor her two witnesses presented any specific testimony or documentary evidence as to the exact location of SCDOT's right-of-way or the exact position of the utility pole and guy wire installed by BREC. [**R.p.87, lines 13-24; p.89, line 13**]. The opinion testimony from Respondent's witnesses established that it was only their respective beliefs that BREC pole and guy wire were trespassing on Ms. Gresham's property.<sup>2</sup> [**Id.; p.67, line 22-p.68, line 16; p.70, lines 7-23; p.73, line 19-p.74, line 3; p.74, line 23-p.75, line 8**;

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<sup>2</sup> Importantly, Ms. Gresham's own testimony as to the location of the pole and guy wire at issue also establishes that the instrumentalities at issue were within the SCDOT right-of-way.

p.75, lines 21-25; pp.202-206]. Stated differently, Respondent’s opinions and beliefs were unsupported by any factual basis or specific measurements, and were contradicted by the specific SCDOT documentary evidence, including the encroachment permit to construct issued by SCDOT. *See Hamm v. South Carolina Pub. Svs. Comm’n*, 298 S.C. 309, 312, 380 S.E.2d 428, 430 (1989) (recognizing that opinions and assertions, to be accorded any weight or reliability, must have a factual foundation). Despite the fact that BREC obtained the required SCDOT encroachment permit prior to commencing any work on the Highway 11 project, the jury returned a verdict of trespass and the trial judge declined BREC’s post-trial motions for new trial and Judgment Notwithstanding the Verdict (“JNOV”).

### ARGUMENT

#### **I. THIS MATTER PRESENTS AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE NECESSITATING REHEARING *EN BANC*.**

As discussed more fully below, this Court’s Opinion misapprehends the law and overlooks key portions of the trial transcript addressing the claim of trespass that are missing and not in existence. More importantly, however, is the long-term impact that this Opinion has on BREC and the utility industry. Based on the procedural posture of this case, the evidence presented, and the ruling of the trial court and this Court, a South Carolina resident now need only “say” they “believe” a utility is trespassing on their property, despite an express written permit duly approved by SCDOT to construct instrumentalities within the SCDOT easement, for the utility to be subject to a potential verdict of trespassing on the resident’s property. This disturbing result has been fully sanctioned by this Court in its recent Opinion, despite the utility—here BREC—presenting uncontroverted, documentary evidence in the trial record, without objection, regarding the position of the pole and guy wire at issue as fully within the SCDOT fifty (50) foot right-of-way. This evidence included exact measurements and testimony from a

thirty-five-year BREC employee who actually conducted the measurements as part of filing for and obtaining prior approval from SCDOT to proceed with upgrading the instrumentalities within SCDOT's easement. The Opinion in this matter, if allowed to stand, has unprecedented and serious implications and potential liability for utility providers regardless of whether they properly act and construct within the scope of SCDOT permits issued to the affected utility. This verdict of trespass marks the first time in BREC's almost seventy-five year history where there is a Court ruling that it had engaged in an intentional invasion of private property amounting to a trespass when it had complied with all applicable SCDOT easement rules and guidelines. Accordingly, BREC respectfully suggests that this matter be reheard *en banc* and that oral argument be had on this issue of exceptional statewide importance.

**II. THE OPINION IN THIS MATTER OVERLOOKS THE IMPORTANCE OF THE MISSING TRANSCRIPT.**

The Opinion in this matter filed pursuant to Rule 220, SCACR, and supporting authorities, denies BREC's request for a reversal of the jury verdict on trespass or for a new trial based on an incomplete record. Specifically, and of import, this Court cited *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273, for the proposition that, "[b]efore a defendant can establish that he is entitled to a new trial on the basis of an inadequately reconstructed record, he must identify a specific appellate claim that this court would be unable to review effectively using the reconstructed record;" and *Sweat v. Crawford*, 292 S.C. 324, 327, 356 S.E.2d 147, 149 (Ct. App. 1987), for the proposition that omissions from the record do not prejudice the appellant because the evidence included in the record sufficiently supported the findings of fact made by the referee.

However, this Court completely misapprehended the importance of the missing trial transcript and inadvertently created an internally inconsistent opinion. An appellate review of

the new trial motion and the JNOV motion requires a review of the evidence adduced at trial, the testimony and factual basis for that testimony, and the reasonable inferences to be drawn therefrom. *See Brinkley v. S.C. Dep't of Corrections*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). Given the fact that the transcript of the trial is incomplete in that all of the trespass claim testimony adduced at trial was lost by the court reporter; respectfully, this Court could not have adequately assessed whether the trial court erred in denying the post-trial motions. The missing trial transcript testimony deals specifically with the trespass claim—the single subject of BREC's post-trial motions. For that reason, BREC respectfully requests this Court rehear this matter related to the necessity for a new trial based on a missing trial transcript focusing on the claim of trespass, and order a new trial in this matter.

**III. REHEARING IS WARRANTED BECAUSE THE TRIAL COURT ERRED AS A MATTER OF LAW IN DECLINING TO GRANT BREC'S POST-TRIAL MOTIONS.**

At the close of the trial, BREC timely made two post-trial motions, a motion for a new trial, and a motion for JNOV. Both motions were summarily denied by the trial judge. Respectfully, the trial judge's rulings to approve a jury verdict of trespass based solely on respondent's opinion testimony, which itself was based upon surmise, conjecture, and speculation, were wholly unsupported by any fact-based evidence and controlled by an error of law. This Court misapprehended the evidence in the Record; more specifically, the lack of any factually-based evidence needed to support the trespass verdict. This Court's ruling improperly affirmed the trial court's denial of BREC's motion for a new trial and its JNOV Motion despite the fact that BREC placed in the trial record the only factually-based evidence – the SCDOT permit approval for the placement of the specific electrical pole and guy wire within the SCDOT right-of-way in dispute as to the trespass claim.

**A. THE TRIAL COURT ERRED IN FAILING TO GRANT THE JNOV.**

The trial court erred in failing to grant BREC's motion for JNOV. The standard for the denial of a JNOV motion is "if the evidence yields more than one reasonable inference or its inference is in doubt." *Strange v. S.C. Dep't. of Highways and Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). Thus, a motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

The evidence adduced at trial cannot yield more than one inference based upon the uncontroverted fact that BREC obtained express SCDOT approval and an encroachment permit to construct and upgrade electric instrumentalities within the fifty-foot right-of-way **prior to** commencing any work on its lines and poles along Highway 11. BREC presented the only specific evidence as to the exact location of the pole and guy wire and the existence of a SCDOT right-of-way. Ms. Gresham testified she "thought" the offending pole and wire were between twenty and thirty-four feet from the center of the highway. (**R.p.38, lines 1-12; p.89, lines 8-25**). Even if Ms. Gresham's testimony as to where she "thought" the pole and guy wire were ultimately placed were true, such testimony does **not** contradict BREC's evidence regarding the placement of the pole and guy wire as being within the existing fifty-foot right-of-way. Stated differently, Ms. Gresham's opinion testimony as to the placement of the poles—even taken as true—still places the pole and guy wire firmly in the SCDOT fifty-foot right-of-way and thus not subject to a claim of trespass. Moreover, if the right-of-way were limited in the way Ms. Gresham "believed," SCDOT would have had to reject BREC's encroachment permit application because SCDOT would have no authority to approve the construction of utility instrumentalities beyond its authorized easement and thus on private property. SCDOT's approval of the

encroachment permit confirms that BREC's planned and constructed facilities near Ms. Gresham's property were not on property of which Ms. Gresham had sole and exclusive possession and control, but in the SCDOT right-of-way.

Accordingly, there can be no fact-based evidence that a jury could have used to support a jury verdict of trespass by BREC. There is only one reasonable inference from the evidence presented at trial—the pole and guy wire were constructed within the SCDOT right-of-way for which BREC obtained a SCDOT encroachment permit. Therefore, there was no evidence which could support a jury verdict that BREC was trespassing when it was constructing within the existing SCDOT right-of-way on Ms. Gresham's property. Therefore, the trial judge erred in failing to grant the JNOV.

**B. THE TRIAL COURT ERRED IN FAILING TO GRANT BREC A NEW TRIAL.**

As this Court noted in the opinion on this matter, a “trial court's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence or the conclusion reached was controlled by an error of law.” *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). Simply put, the trial judge's summary denial of the post-trial motion for a new trial on the verdict of trespass, given that BREC had previously obtained express written SCDOT-approval to construct within the SCDOT easement, was wholly unsupported by the evidence and is controlled by an error of law. The Court's Opinion, as currently worded, appears to condone a jury verdict that ignores uncontroverted evidence that SCDOT expressly approved the BREC construction of its upgraded instrumentalities within the SCDOT established fifty-foot right-of-way.

**The Trial Judge's Order is Wholly Unsupported by the Evidence**

There exists no credible evidence upon which a trespass could be found. A “trespass”

occurs when there is an intentional invasion of the plaintiff's interest in the exclusive possession of his property. *See Hawkins v. City of Greenville*, 356 S.C. 280, 296, 594 S.E.2d 557, 556 (Ct. App. 2004). The record is devoid of any credible evidence to support a finding that BREC, operating under the express construction placement terms approved by the SCDOT to construct within the SCDOT right-of-way, could have intentionally invaded Ms. Gresham's interest in the exclusive possession of her property, especially in light of the fact that Ms. Gresham had no exclusive interest due to the existing SCDOT right-of-way easement. To the contrary, the evidence admitted at trial indicated that Ms. Gresham's property was subject to an existing SCDOT right-of-way; therefore, as an initial matter, Ms. Gresham did not have exclusive possession to that portion of her property subject to the SCDOT right-of-way. Additionally, the evidence adduced at trial was that the single pole and guy wire complained of by Respondent was well within the SCDOT fifty (50) foot right-of-way. (**R.pp.192-201**). The SCDOT encroachment permit issued to BREC, which conclusively demonstrated that the BREC utility pole and guy wire were installed within the SCDOT fifty (50) foot right-of-way was entered into evidence without objection. (**Id.**). Various individuals with personal, fact-based knowledge related to the placement of the BREC marking stakes, the application for and approval by the SCDOT to issue BREC the encroachment permit, and the individual that personally measured the actual location of the utility pole and guy wire in relation to the SCDOT right-of-way and Ms. Gresham's property, testified at the trial. (**R.pp.101-107**). Given these facts, there is absolutely no factual basis for the jury to use or apply in order to reach a verdict that a trespass—an intentional invasion of Ms. Gresham's exclusive interest in her own property—occurred. Therefore, the jury verdict has no proper evidentiary basis or foundation, is unlawful and should not be permitted to stand by this Court.

Notwithstanding the foregoing, the jury's verdict is clearly erroneous and unsupported by the evidence in the record. A closer reading of the Court's cited case, *Brinkley v. South Carolina Dept. of Corrections*, 386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009) is instructive here. There, the South Carolina Department of Corrections ("SCDC") filed a motion for a new trial regarding a jury verdict in favor of an inmate alleging gross negligence, assault and battery, and intentional infliction of emotional distress. *Id.* After a hearing, the circuit court granted the motion for a new trial and the inmate appealed. *Id.* Although this Court agreed with the appellant that the record contained some evidence to support a verdict against SCDC, mainly appellant's testimony and the testimony of two inmates who claimed to have witnessed the assault, this court noted **"that is not the lens through which an appellate court must view a circuit court's [ruling] on a new trial."** *Id.* (emphasis added). Rather, this Court focused on the fact that the appellant did not introduce any medical records tending to show the effects of the alleged assault—i.e. the damages element of his claims. *Id.* Ultimately, this Court affirmed the trial court's grant of a new trial because it was clear the jury's findings were not supported by evidence in the record. The same result applies to the instant case. Respondent never provided the jury with any fact-based evidence to support her belief and personal opinion that the SCDOT right-of-way was limited to twenty-feet. Respondent only provided the jury with her opinion which was based solely on surmise, conjecture and speculation. *See Weston v. Hillyer*, 160 S.C. 541, 159 S.E. 390 (1931) ("Verdict cannot rest upon guess or conjecture;" it is the duty of the Plaintiff to affirmatively prove her allegations); *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 494 S.E. 2d 835 (Ct. App. 1997) (stating verdicts may not rest upon surmise, conjecture, or speculation).

Similarly, the trial court herein should have granted a new trial. The jury was presented with uncontroverted evidence that SCDOT's right-of-way was fifty (50) feet. (**R.pp.192-201**).

The jury was also presented with uncontroverted evidence that Ms. Gresham’s property was subject to an SCDOT right-of-way. The SCDOT right-of-way encroachment permit did not forbid commencing any construction by utility companies. BREC previously applied for and was awarded an encroachment permit and then installed its power poles and guy wires strictly in accordance with the SCDOT-awarded encroachment permit. Notably, even Ms. Gresham’s “estimation” of where the BREC pole and guy wire were installed places them within the fifty (50) feet right-of-way. Ms. Gresham testified she believed or thought the pole and guy wire were between twenty and thirty-four feet from the center of the highway—all distances entirely within SCDOT’s fifty (50) feet right-of-way established by the fact-based evidence offered by BREC in this matter. **(R.p.38, lines 1-12; p.89, lines 8-25).**

**The Trial Judge’s Ruling is Controlled By an Error of Law**

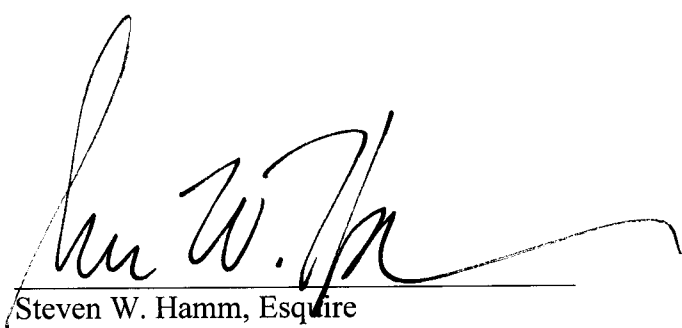
The trial judge’s ruling was also controlled by an error of law. As cited in our final brief, in *Gressette v. South Carolina Electric and Gas Co.*, 370 S.C. 377, 635 S.E.2d 538 (2006), the South Carolina Supreme Court ruled that utility instrumentalities, such as lines and poles, may be located and placed within highway rights-of-way with the express permission of SCDOT. Further, the *Gressette* opinion does **NOT** require permission of the property owner to construct utility instrumentalities inside an existing SCDOT right-of-way. The jury’s verdict—and subsequent ruling by the trial judge related to the post-trial motions—serves to vitiate the *Gressette* opinion. BREC sought and received express permission from SCDOT to install utility lines before commencing work, but the jury verdict now imposes a new and restrictive requirement on BREC, and other utilities, to seek direct permission to construct in the SCDOT right-of-way from the landowner, regardless of the fact that BREC obtained prior approval to place instrumentalities specifically within the SCDOT right-of-way. Thus, the trial judge’s

failure to grant the new trial—in the face of the established law of this state which determines that there can be no trespass to the property owner when the utility fixture is placed in the SCDOT right-of-way pursuant to an approved encroachment permit—is an error of law.

Based on the only factual evidence in the record addressing the claim of trespass, including the SCDOT-approved BREC encroachment permit, the trial judge’s decision to deny the grant of a new trial on the issue of trespass was wholly unsupported by the evidence in the record and controlled by an error of law. Accordingly, BREC respectfully requests this Court issue an order for a new trial which would reverse the trial court’s denial of the motion for a new trial.

#### CONCLUSION

As a result of the trial court’s rulings and the Opinion issued by this Court, BREC now has a jury verdict of trespass on record in Greenville County, in spite of following the exact procedure in seeking and securing an encroachment permit from SCDOT. The testimony and factual evidence at trial confirmed that BREC constructed within the SCDOT right-of-way in accordance with the permit awarded to it. BREC is now faced with the potential of other trespass claims from property owners who “believe” BREC may somehow be trespassing on their property despite specific SCDOT approval to construct in its right-of-way and exact measurements that such construction was in the SCDOT right-of-way. The vital protections afforded to a public utility like BREC under *Gressette* have been denied to BREC by the trial court’s order and by the Opinion of this Court. Accordingly, BREC respectfully requests that this matter be reconsidered and strongly suggests and requests that it be reheard *en banc* (with oral argument) if the Court so determines. Upon rehearing, BREC respectfully seeks a new trial; or, in the alternative, a reversal of the trial judge’s denial of the motion for JNOV.

A handwritten signature in black ink, appearing to read "Steven W. Hamm", is written over a horizontal line.

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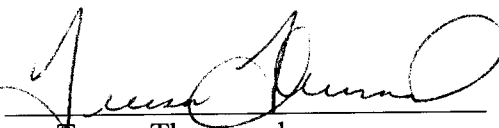
v.

Kathleen J. Gresham . . . . . Respondent.

PROOF OF SERVICE  
(Appellant's Petition for Rehearing)

I certify that I have served the *Appellant's Petition for Rehearing* upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 29, 2015, to *Kathleen Jennings Gresham, 1524 Highway 11, Landrum, South Carolina 29356.*

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By   
Teresa Thurmond

February 9, 2015

February 9, 2015

**Via Hand Delivery**

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Edgar Brown Building  
1205 Pendleton Street  
Columbia, SC 29201

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**SC Court of Appeals**

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v. Kathleen J. Gresham, Respondent  
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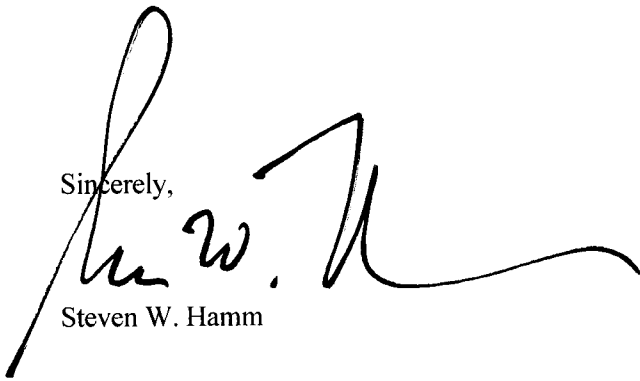
Dear Ms. Kitchings:

Pursuant to the Appellate Court Rules and as counsel for the Appellant, Blue Ridge Electric Cooperative, Inc., I am filing this *Petition for Rehearing and Suggestion for Rehearing En Banc*. Enclosed please find the original and seven (7) copies per the Appellate Court Rules and directions of this Court. I am enclosing an additional copy and I would request that it be file stamped and returned to our courier. I have also enclosed a \$25.00 check for the filing fee.

By copy of this letter I am serving Kathleen Jennings Gresham, pro se, with a copy of the Appellant's Final Brief.

Thank you for your assistance.

Sincerely,

  
Steven W. Hamm

SWH\smb  
Enclosures

cc: Kathleen Jennings Gresham  
Larry Brandt, Esq. (with enclosures)