

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

RECEIVED

APR 21 2015

S.C. Supreme Court

Roosevelt Simmons.....Petitioner

Vs.

Berkeley Electric Cooperative, Inc.

and

St. John's Water Company, Inc.....Respondents

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**BRIEF OF PETITIONER**

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**TABLE OF CONTENTS**

Table of Authorities..... 2  
Questions presented for review.....5  
Statement of the Case.....5  
Argument .....17  
Conclusion.....46

**TABLE OF AUTHORITIES**

**Cases**

Andersen v Augusta Chronicle, 355 S.C. 461, 585 S.E.2d 506 (Ct.App.2003).....30  
Atlanta & C. A. L. Ry. v. Limestone-Globe Land Co, 109 S.C. 444, 96 S.E.188( 1918).41  
Atl. Coast Line R.R. Co. v. Searson, 137 S.C. 468, 135 S.E. 567 (1926).....40  
Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457( 1951).....39,40  
Boyd v. Bellsouth Telephone, 369 S.C. 41, 633 S.E.2d 136 ( 2006).....39  
Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).....21,28  
Carolina Land Company v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975).....19  
County of Westchester v. Town of Greenwich, 793 F. Supp. 1195 (S.D.N.Y. 1992).....42  
Darlington County v. Perkins, 239 S.E.2d 69, 269 S.C. 572 ( 1977).....40  
David v. McLeod Regional Medical Center, 367 S.C. 242, 626 S.E.2d 1 (2006).....13  
Davis v. Monteith, 289 S.C. 176, 345 S.E.2d 724 (1986).....24,36,42.  
Froneberger v. Kirkland Dale Smith, Janel Elizabeth Smith, Euro Mortg. Bankers, Inc.,  
406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013).....31  
Graniteville Co. v. Williams, 209 S.C. 112, 120-21 (1946).....24,36,42

<u>Hancock v. Mid-South Mgmt. Co.</u> , 381 S.C. 326, 673 S.E.2d 801 (2009).....	29
<u>Hartley v. John Wesley United Methodist Church</u> , 355 S.C. 145, 584 S.E.2d 386 (Ct. App. 2003).....	33
<u>Higgins v MUSC</u> , 326 SC 592, 486 S.E.2d 269(Ct. App. 1997).....	36
<u>Hill v. Carolina Power &amp; Light Co.</u> , 204 S.C. 83, 28 S.E. 2d 545 (1942).....	19
<u>Horry County v. Laychur</u> , 315 SC 364, 434 S.E. 2d 259 (1993).....	24,36,39,40
<u>Jacobs v. Service Merchandise Co.</u> , 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988).....	19
<u>Jones v. Daley</u> , 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005).....	34
<u>Kelley v. Snyder</u> , 396 S.C. 564, 722 S.E.2d 813(Ct. App. 2012).....	34
<u>Lanham v. Blue Cross &amp; Blue Shield of S.C.</u> , 349 S.C. 356, 563 S.E.2d 331(2002)..	21,28
<u>Loftis v. S.C.E.&amp; G.</u> , 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004).....	33,34
<u>Madison ex rel. Bryant v. Babcock Ctr., Inc.</u> , 371 S.C. 123, 638 S.E.2d 650 (2006).....	32
<u>Matthews v. Dennis</u> , 365 S.C. 245, 616 S.E.2d 437(Ct.App.2005).....	34
<u>Medical Univ. of South Carolina v. Arnaud</u> , 360 S.C. 615, 602 S.E.2d 747 (2004)....	16,27
<u>Morrow v. Dyches</u> , 328 S.C. 522, 492 S.E.2d 420 (Ct. App. 1997).....	34
<u>Murphy v. Tyndall</u> , 681 S.E.2d 28 (Ct. App. 2009).....	30
<u>Nelums v. Cousins</u> , 304 S.C. 306, 403 S.E.2d 681 (Ct.App.1991).....	40
<u>Paine Gayle Props., LLC v. CSX Transp., Inc.</u> , 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012).....	34
<u>Polson v. Ingram</u> , 22 S.C. 541, 545 ( 1885).....	24,36,42
<u>Revis v. Barrett</u> , 321 S.C. 206, 467 S.E.2d 460 ( Ct. App. 1996 ).....	34
<u>Sandy Island Corp. v. Ragsdale</u> , 246 S.C. 414, 143 S.E. 2d 833 ( 1965).....	19
<u>S.C. Pub. Serv. Auth. v. Ocean Forest, Inc.</u> , 275 S.C. 552, 273 S.E.2d 773 (1981).....	17

<u>Shia v. Pendergrass</u> , 222 S.C. 342, 72 S.E.2d 699 (1952).....	40
<u>Smith v. Commissioners of Public Works of City of Charleston</u> , 312 S.C. 460, 441S.E.2d 331 (Ct. App. 1993).....	20
<u>State v. Tyler</u> , 54 S. C. 294, 32 S. E. 422,424 (1899).....	40
<u>Taylor v. Atlantic Coast Line Ry.</u> , 78 S.C. 552, 59 S. E. 641 (1907).....	29
<u>Townes Assocs., Ltd. v. City of Greenville</u> , 266 S.C. 81, 221 S.E.2d 773 (1976).....	17
<u>Trivelas v. S.C. Dept of Trans.</u> , 348 SC 125,558 S.E.2d 271,279 (Ct. App. 2001).....	36
<u>Tupper v. Dorchester County</u> , 326 S.C. 318, 487 S.E.2d 187 (1997).....	17
<u>Turner v. Am. Motorists Ins. Co.</u> , 176 S.C. 260, 180 S.E. 55 (1935).....	29
<u>Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.</u> , 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).....	33
<u>Watters v. Terminix Service, Inc.</u> 376 S.C.632, 658 S.E. 2d 110 (Ct. App. 2008).....	27
<u>Williamson v. Abbott</u> , 107 SC 397, 93 S.E. 15 (1917).....	24,36, 42
<u>Woodroffe v. Woodroffe</u> , __N.W.__ (Ct. App. Iowa 2015).....	41
<u>Zurich American Ins. Co. v. Tolbert</u> , 387 S.C. 280, 692 S.E.2d 523 (2010).....	31

**Other Authorities**

17 Am. Jur., Easements, 976, § 65.....	41
12 S.C. Juris. Easements § 20.....	19

## **QUESTIONS PRESENTED FOR REVIEW**

1. Did the Court of Appeals correctly apply the law in determining that Berkeley Electric did not exceed the scope of express easements?
2. Did the Court of Appeals improperly weigh the evidence in determining that Berkeley Electric was entitled to a prescriptive easement?
3. Was there more than a scintilla of evidence upon which to deny Berkeley Electric's claims of a prescriptive easement ?
4. Did St. John's Water Company establish that there was a reasonable basis for its belief that a claim of right arose from a county encroachment permit?
5. Does a claim of right to install a water line underground accrue when the water line is installed underground or when it is first used by the customers ?

## **STATEMENT OF THE CASE**

Petitioner contends that Respondents, Berkeley Electric Cooperative, Inc. ( Berkeley Electric) and St. John's Water Company, Inc. ( St. John's) violated his property rights by installing above ground electric lines and below ground water lines on two parcels he owned on Johns Island. R.pp. 32-35. The parcels are as TMS 283-00-00-498 and TMS 282-00-00-135 ( hereinafter referred to as TMS 498 and 135). R. p.32. TMS 498 is bordered by Kitford Road to the south, the abandoned Seaboard Coastline Railroad right of way to the east and property owned by Gordon (TMS 118) and by Frasier (TMS 319) to the north and Brown (TMS 116) to the west. R. p. 52. TMS 135 is bordered on the west by the Seaboard Coastline Railroad right of way, property owned by Andersen to the north (TMS 136) and property also owned by Petitioner TMS 138 to the

east where he has resided for many years. R. p. 75, Para. 2, p. 130. Both properties are undeveloped and TMS 135 is heavily wooded. R.p.76, para.5. The basis for these claims is the following.

In July 1956, Petitioner's predecessor in title, the Estate of Edward Heyward executed a written easement granting Berkeley Electric "a perpetual easement for the construction and maintenance of an electric transmission line or lines, towers, poles anchors and necessary fixtures and wires" across land known as lot 27 ½ of the California tract . R. p. 131. The easement granted Berkeley Electric the right to clear and maintain the 37 ½ ' on either side of the transmission line free of brush. Id. The Grantor reserved the right to use this land for agricultural purposes so as not to interfere with the transmission line. Id. According to Berkeley Electric, the purpose of this transmission line was to bring electric power to John's Island. Respondent Berkeley Electric's Brief at page 9. Thereafter, at a time never established by Respondent Berkeley Electric, it constructed an electric transmission line which traversed the property to the north of TMS 498, crossed the northeasterly corner of TMS 498, crossed the Seaboard Coastline Railroad abandoned right of way and then crossed TMS 135. R. p. 130.

In September 1972, Edward Brown executed a written easement to Berkeley Electric to "construct, operate, repair, maintain . . . an electric transmission or distribution line" on property consisting of 4.7 acres bounded on the east by the Seaboard Coast Line Railroad right of way. R. p. 132. This easement included lands of which TMS 498 was a part but not TMS 135. R. p. 130. Berkeley Electric contended that this easement was to bring power to Mr. Brown and that he subdivided this property later.

R. p. 207, line 20-22, p. 208, line 20-22. Thereafter Berkeley Electric installed distribution lines connected to that transmission line at times which are disputed.

In 1977, St. John's obtained an Encroachment Permit from Charleston County to allow it to install its water lines along Kitford Road. R. pp.67-69. According to the engineer in charge of the design and construction, the water line was completed along Kitford Road in 1978. R. p. 59-60, Paras. 2-5. The location of the line(s) is the subject of this action.

In 2003, Petitioner acquired title to TMS 115 (consisting of several lots of which TMS 498 was a part) and to TMS 135 which provided access to TMS 138 where he resided for many years. R. pp. 49, Para. 2, 126-127, 130. In 2005, Petitioner hired Richard Lacey, a licensed surveyor, to prepare a plat of all of his property. R. p. 49, Para. 3. The Lacey plat dated May 12, 2005 shows Petitioner's property situated west of the Seaboard Coastline Railroad right of way consisting of three parcels containing 3.257 acres of the original 4.7 acre Brown parcel. R. p. 52. The Lacey plat shows a transmission line crossing the northeasterly corner of TMS 498 ( shown as Lot C on the plat) and a distribution line attached to a power pole on TMS118 on property in the name of Andersen which crosses the westerly side of TMS 498 and connects to a power pole on Kitford Road. Id. The distribution line continues along Kitford Road to the east. R. p. 52.

Lacey supplemented the plat because he did not include all of the property that Simmons requested. R. p.119, Para. 3. The revised plat dated September 22, 2010 shows the continuation of Berkeley Electric's distribution lines on Kitford Road to the east crossing the Seaboard Coastline Railroad right of way and TMS 135. R. p. 130.

In 2005 Petitioner first discovered a water meter in some bushes on TMS 135 and when he complained to St. John's local manager, she told him that easements had been granted for its water line lines. R.p.75, Para. 3, p.77. St. John's then "blue flagged" its lines which were found to cross both TMS 498 and 135. R. p. 76, Para. 4. St. John's then obtained a survey to locate its line under TMS 498. R. p. 76, Para.5, p. 78. Petitioner relied upon well water as do many other home owners in the area and he had no reason to believe that St John's was providing water service to neighbors using his property for access. R. p. 76, Para. 6. Petitioner never gave St. John's any easements for water lines across TMS 498 or 135 and they never marked the location of their lines before they installed them. Id.

In April 2008, Petitioner filed a Complaint for unspecified damages against Respondents for trespass by their electric and water lines. R. pp. 24-27. The Complaint was amended first to correct a misidentification as to Respondent Berkeley Electric and then as to the identity of one of the parcels. R. pp. 28, 32-35. Respondent St. John's filed an Answer in August 2008 asserting that it had a prescriptive easement because its water line had been on Petitioner's property for twenty years and Petitioner knew of it. R. p. 38, Para. 18. Respondent Berkeley Electric filed an Answer in October 2008 in which it alleged that Petitioner's two parcels were subject to written easements and that it also had a prescriptive easement across these parcels. R. p. 41, para.13.

In May 2009, Berkeley Electric filed a motion for summary judgment for a prescriptive easement across Petitioner's property, relying upon the affidavits of two employees, Thomas Seeney and Richard Frank containing virtually identical statements. See R. pp.45-48. Each stated that there was a utility line at 3507 Kitford Road (Turner

residence) that had been located on and across the subject property since at least 1980. R. pp 46, Para.4, p.48, Para. 4. Both employees claimed 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. Both claimed that they thought there was some easement in effect since they were informed that this was the company’s normal practice. R. pp. 46,para. 5, 48, Para. 5. Neither affidavit contained any reference any lines across TMS 135.

In opposition, Petitioner who was then Pro Se disputed the location of the distribution line across TMS 498 as the basis for a prescriptive easement. R.pp.1,43,49-53. Petitioner asserted based on personal knowledge that this line was not there for 20 years. Also a recorded subdivision Plat prepared by William Galliard dated October 7, 1981 did not show any power line across TMS 498. R.p.50, Para. 3, p.53. The Galliard plat for the Frazier property to the north shows the location of Berkeley Electric transmission line but not any power pole or distribution line attached to it. R. p. 53. Petitioner obtained counsel thereafter .R. p. 54.

In September 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 provided that the Master was to “ make appropriate findings of fact and conclusions of law regarding the issues of easement, both prescriptive and express.” R.p.3. The Order preserved Petitioner’s right to return to the jury roster to pursue his damages claims upon the Master’s determination. R. pp. 3-4.

In response to Petitioner’s Document Demand for the location of its power lines affecting his property from 1980 to the present Berkeley Electric produced several

documents R. pp. 134-137. One of these was a plat dated November 8, 1983 of TMS 118, to the north of TMS 498, which located the Berkeley Electric 75' transmission line easement but did not show any power pole or distribution line on that property or on TMS 498 to the south. R. p. 134. Berkeley Electric also produced two "system maps" containing the 1995 location and the current location of its lines, which contained different locations for the distribution line that was constructed over TMS 498. R. pp. 121,135, 136.

On June 4, 2010, Respondent St. John's filed a motion for summary judgment on the basis that it had a prescriptive easement for its water lines. R. p. 57 at Para. 2. St. John's submitted the affidavit of Hugh Miley, Jr. who was in charge of the design and construction of the water line that was completed along Kitford Road in 1978. He stated that it line was in the place where it was originally installed and had been in continuous use for 20 years. R. p. 59-60, Paras. 2-5. St. John's also submitted the Encroachment Permit granted by Charleston County to allow it to install its water lines along Kitford Road but not the map U 25 referenced in the Encroachment permit . R. pp.67-69.

Petitioner filed an Affidavit in opposition in which he stated that St. John's water lines on his property were underground, that both parcels are undeveloped and TMS 135 was heavily wooded and that there was no sign that there any water lines had been there for 20 years. R.p.76, Para. 5. Petitioner 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. Petitioner was unaware of St John's water lines until he accidentally discovered a water meter on TMS 135 in 2005. R. p. 75, Para. 3, p. 76, para.5 . At his request, St. John's later marked the location of its water lines with blue

flags which indicated that the water lines had crossed both TMS135 and TMS 498. R. p. 76, Para. 4. This was the first time that Petitioner knew that there were water lines across both parcels. Id. Petitioner denied that there was any written easement allowing water lines across his property, asserted that the encroachment permit was limited to Kitford Road and was not any reasonable basis to locate a water line under TMS 498 or to TMS 135 which was not on Kitford Road; that the use was not open and notorious for 20 years since 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. R. p. 71- 76, 109-110. St John's business records indicate that water service was not connected to its customers to the north of TMS 498 until 1986 (Gordon) and 1987 (Frazier) and to the north of TMS 135 until 1987( Anderson). R. p. 65. Petitioner did not have notice of these lines because they were underground, hidden and not open or known in the area due to the use of well water. R. 75-76. The water meter on TMS 135 serving Andersen was hidden in the bushes. R. p. 76, Para. 5. The date of the installation and location of the lines and their actual use were material facts in dispute. R. p. 73-74. No claim of right could arise by clear and convincing evidence from the Miley Affidavit or the Encroachment Permit or any drawing in the record. R. p. 173.

On November 10, 2010, Respondent St. John's filed a Motion to Dismiss on the grounds that Petitioner no longer owned one of the parcels, TMS 498. R. pp.79-80. The property had been sold at a Sheriff sale due to the nonpayment of a user fee. R. p. 122,125. Petitioner filed opposition on the basis that he owned TMS at the start of the action and had suffered damages while he owned it. R. pp. 107-108.

On November 12, 2010, Petitioner Berkeley Electric filed an Amended Motion for summary judgment relying upon the same affidavits from Seeney and Frank that it had a prescriptive easement , R. pp. 101-104, and also asserted that Petitioner no longer owned TMS 498. R. p.82.

On November 22, 2010, Petitioner filed opposition to Respondent Berkeley Electric's Amended Motion including a Supplemental Affidavit asserting to his personal knowledge the line across TMS498 was not there in 1980. R. p. 118, Para.2. Petitioner asserted that in addition to the 1981 Galliard survey, a 1983 survey done by Schuler for Berkeley Electric of the area under easement on TMS 118 did not show any power poles or distribution line on that property crossing TMS 498. R. pp. 112, 134. Petitioner asserted that Berkeley Electric had not produced a single document in discovery showing the location of a distribution line across TMS 498 during the 1980s. R. p. 112. Berkeley Electric produced two system maps showing the line locations in 1995 and 2010 but these were inconsistent. R. pp. 135,136. Petitioner contended the line identified by Seeney and Frank had been used by Berkeley Electric to service its customers on the south side of Kitford Road. R. p. 119, Para. 4. The Berkeley Electric transmission line which crossed TMS 498 to the east already serviced customers to the north of Kitford Road, R. pp. 112, 119, Para. 4, 130, and the line across TMS 498 to the west was unnecessary and was an unreasonable use of the easement. Id.

Petitioner also contended that there was no evidence of any written easement across TMS135 for any distribution line. Petitioner asserted that Berkeley Electric's distribution line on Kitford Road ( mentioned by Seeney and Frank) continued east through the Seaboard Coastline Railroad right of way 135 and was trespassing across

TMS 135. R. pp. 110-119, 130. Petitioner further asserted that the distribution line servicing the Andersen property, TMS 136, also trespassed on TMS 135. Id.

Petitioner contended that Berkeley Electric had abused its authority under the written easements by exceeding their reasonable scope. R.pp.111,119. Petitioner asserted that Berkeley Electric's motion for summary judgment did not address this issue which was the reason for the Order of Reference. Id. Berkeley Electric was crossing his property from multiple directions and damaging his tree farming and decreasing the functionality of his lands. R. pp. 98-99, 116-117,119, 130.

Petitioner also submitted a License Agreement between Berkeley Electric and Comcast Cablevision under which Berkeley Electric received a fee for sharing its pole with the cable services provider. R. pp, 114, 138. Comcast 's system map shows their cable line crossing TMS 498 in 2010 to service customers to the north of Kitford Road. R.p.153. Petitioner stated that the cable line had been along Kitford Road in the past. R. p. 119, Para.4. Petitioner contended that there were material facts in dispute as to the existence of the distribution line for the requisite period across TMS 498 and 135 and that Berkeley electric had failed to establish its right to an easement by clear and convincing evidence. R. pp. 110-114.

At the motion hearing on November 22, 2010, Berkeley Electric submitted an Affidavit from another employee, Robert Bradley who opined that Berkeley Electric's distribution line to the Anderson property was within the 75' easement granted in 1956 and did not cross TMS 135 outside the easement. R. p. 195, line 8-20. Petitioner's 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. Petitioner’s counsel also asserted that Berkeley Electric hadn’t named an expert to opine about the location of its lines across TMS 135 and Bradley was not qualified to give an opinion. R. p. 213, line 4 -13. Petitioner’s counsel also asserted that there was another Berkeley Electric power line that crossed TMS 135 from the transmission line which ran to the west down Kitford Road, R. p. 198, line 10-21, R. p. 213, line 13 -18; that the 1972 Brown easement did not extend to TMS 135 since it was expressly limited to lands to the west of the Seaboard Coastline Railroad right of way and TMS 135 was to the east. R. p. 204, line 6 – p.205, line 9.

Petitioner’s counsel asserted that Brown had subdivided the 4.7 acres into lots in 1972 and had dedicated a portion of the land to the extension of Kitford Road so it was more reasonable for Berkeley Electric to bring its power line down Kitford Road than to cross TMS 498. R. p. 203, line 2-15. Berkeley Electric ‘s counsel conceded that this easement was to bring power to Mr. Brown and that he subdivided this property later. R. p. 207, line 20-22, p. 208, line 20-22.

During oral argument on Respondent St. John’s summary judgment motion, St John’s counsel contended that there was a dirt road extending from Kitford Road which Charleston County considered to be part of Kitford Road. R. p. 217, line 8-17. St. Johns asserts that during oral argument, a map designated as U 25 was shown to the Master. R. p. 215, line 24 to 216, line 9. The map was never served on Petitioner’s counsel or shown to him during oral argument or identified in the motion record. Appellant’s Brief at pages 16-17, 37-38.

At the conclusion of the hearing , the Master granted summary judgment as to both Respondents and also found that Petitioner had standing to pursue damages for the time he owned the property. R. pp. 221, lines 23 -222 line16. The Master granted summary judgment to Berkeley Electric on the basis that Berkeley Electric had not exceeded the scope of its written easements and had prescriptive easements for its lines to cross both 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 498. R. p. 17-19.

The Master granted summary judgment to St. Johns on the basis that it had both written and prescriptive easements to locate its water line under Petitioner's property. The Master found that the easement from Charleston County allowed it to install water lines along Kitford Road including the portion of the road to the north ( relying upon St. John's counsel description of TMS 498). R. p. 11, Para 2. The Master also found that the this use has been open and obvious due to the fact that there has been continuous water service without the use of any wells by those customers under a claim of right. R. p. 11.

In his Initial Brief to the Court of Appeals, Petitioner contended that St. Johns did not file or serve any map referenced in the Encroachment Permit as U 25 on Appellant with its motion for summary judgment or in response to his opposition, did not ever identify it in the motion record or show it to appellant's counsel during the motion hearing. Appellant's Brief at pages 16-17, 37-38. St. Johns did not deny these contentions in its initial Brief. Id. St. Johns admits that this map is necessary to establish the location of its easement under TMS 498. Respondent's Brief at page 8-9.

Petitioner moved to strike the map U 25 from St. John's Designation of Material on the basis that Petitioner was denied notice and an opportunity to respond to the last minute introduction of an unfiled, unserved, unidentified document. The Court of Appeals denied the motion and the Map U 25 is part of the Record on Appeal. R. p. 255.

The Court of Appeals affirmed the decision as to Berkeley Electric. App. 3-9. The Court of Appeals held that the express easements were broad and that the existence of the lines "for an extended period of time" was evidence that they did not exceed the scope of the intended easements. App. at 7. The Court of Appeals also found that the Bradley Affidavit established that the power line to Andersen did not go outside of the scope of the 75' wide transmission easement. App. at page 8. The Court of Appeals found that the Seeney and Frank Affidavits were not rebutted by the 1981 and 1983 plats since they were not of Petitioner's property and that Petitioner's Affidavit did not contradict their statements that the line had been there since 1980. Id.

The Court of Appeals reversed the Master's decision as to St. John's on the issue of an express easement.<sup>1</sup> The Court of Appeals held that St. John's did not have an express easement to cross TMS 498 with its water line based upon the Encroachment Permit issued by Charleston County because it did not apply to Petitioner's property. App. at page 10. The Court of Appeals affirmed the Master's decision as to the prescriptive easement across TMS 498 for a water main based upon a "mistaken belief" but not for any additional lines across TMS 498 or TMS 135 and remanded the case to determine further facts. App. at 11-12.

This Court granted Petitioner's Petition for Writ of Certiorari by Order dated March 19, 2015.

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<sup>1</sup> The Court of Appeals found that the parties had tried this issue by consent. App. at page 10.

## ARGUMENT

### I. SUMMARY DISMISSAL OF THE CLAIMS AGAINST BERKELEY ELECTRIC IS CONTRARY TO ESTABLISHED LAW

Petitioner asserts that the Court of Appeal's decision affirming summary dismissal of Petitioner's trespass claims against Berkeley Electric was contrary to established law. Petitioner contends that the Court of Appeals ( like the Master in Equity) improperly weighed the evidence instead of determining that a disputed issue of fact existed. In deciding whether any triable issue of fact exists, the court must consider all inferences which can reasonably be drawn from the evidence 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). Petitioner contends that the inferences to be drawn from all of the evidence is that Berkeley Electric exceeded the scope of its written easements. Petitioner further contends that the inferences to be drawn from all of the evidence is that Berkeley Electric failed to establish the existence of prescriptive easements by clear and convincing evidence. These arguments are set forth fully below.

#### A. The scope of the written easements

The Court of Appeals held as to both written easements that "the electric lines had been in their current configuration for an extended period of time. This demonstrates that the easement holder and the landowners' understanding that such configuration did not exceed the intended scope of the easements." App. at 7. Petitioner contends that the Court of Appeals did not apply the law correctly to the 1972 easement and determine whether Berkeley Electric made a reasonable use of the right granted to it. Further,

the Court of Appeals did not apply the correct analysis because it ignored the plain language of the 1956 easement and the conflicting evidence as to whether the two Berkeley Electric distribution lines within TMS 135 were included within that easement.

To determine the purpose of an easement, the Court must evaluate the intention of the parties when the easement was granted. In the absence of extrinsic evidence, the "[c]lear and unambiguous language in grants of easement[s] must be construed according to terms which parties have used, taken, and understood in their plain, ordinary, and popular sense." S.C. Pub. Serv. Auth. v. Ocean Forest, Inc., 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). Because determination of the extent of a grant of an easement is an action in equity, Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997), this Court may take its own view of the evidence on this issue. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

**1. The 1972 easement did not apply to TMS 135 and had to be used reasonably**

The 1972 Brown easement granted Berkeley Electric the right to “construct, operate, repair, maintain . . . an electric transmission or distribution line” on property consisting of 4.7 acres bounded on the east by the Seaboard Coast Line Railroad right of way. R. p. 132. Berkeley Electric asserted that the 1972 easement was intended to bring power to Brown and that he later subdivided his property. Petitioner agreed that this was the context of the easement. This easement did not grant Berkeley Electric any right for distribution lines over TMS 135 which was on the other side of the Seaboard Coastline Railroad right of way, outside the lands owned by the grantor. Petitioner’s Affidavit together with the Lacey plat and the exhibits to the Bradley Affidavit confirm that TMS 135 lies between its transmission line easement and the Seaboard Coastline Railroad right

of way. R. pp. 130, 156-157. Therefore, the Court of Appeals ignored the plain language of the 1972 easement in finding that Berkeley Electric did not exceed the scope of the 1972 easement since it did not extend to TMS 135. Berkeley Electric had to establish the existence of a prescriptive easement as to TMS 135 in order to obtain dismissal of the complaint. Petitioner contends that Berkeley Electric did not meet its burden of proof on that issue. See Section B.

Petitioner's main argument that Berkeley Electric exceeded the scope of the 1972 Brown easement by unreasonably extending its distribution line across the westerly side of TMS 498 while also maintaining another electric power distribution line along the south side of Kitford Road. Petitioner asserted that this distribution line had substantially affected the useable area of the parcel. Petitioner submitted the revised (2010) Lacey plat which indicated how the functional area of TMS 498 had been diminished by Berkeley Electric's transmission and distribution lines. R. p. 130. Petitioner also asserted that trees which he had planted for harvest on that side of the property had been destroyed due to Berkeley Electric's servicing of the line. R. p. 119, Para. 5. Petitioner submitted an expert report in discovery as to the amount of the loss. R. pp. 98-99.

Berkeley Electric's initial Motion for summary judgment did not include any reference to any written easement. R. pp. 43-48. Berkeley Electric's Amended Motion for summary judgment did not include any reference to the Brown easement. R. pp. 81-104. Even though Petitioner argued that Berkeley Electric exceeded the scope of the 1972 Brown easement by the line across the westerly side of TMS 498. Berkeley Electric did not address the issue in the Bradley Affidavit. R. pp. 154-157. Therefore, Berkeley Electric did not present any evidence as to the parties' intent about location of its

distribution line under the Brown easement. Nonetheless, Berkeley Electric concedes that the Brown easement was done in conjunction with Brown's subdivision of the 4.7 acres into lots in 1972. Petitioner contends that there would have been a dedication a portion of the land to the extension of Kitford Road so it was more reasonable for Berkeley Electric to bring its power line down Kitford Road than to cross TMS 498. R. p. 203, line 2-15.

The Master said during oral argument said that the Brown easement "It doesn't give me any specifics", R. p.204, line 15, but nonetheless ruled that Berkeley Electric did not exceed its scope. Petitioner contended that the record was not sufficient to enable the Court to determine the scope of the 1972 easement, such that summary judgment should be denied. R. p, 205, line 10 to 206, line 25. The Court of Appeals interpreted the general language of both easements as evidence that the parties did not intend the use to be restricted. App. at 7.

Petitioner asserts that the Court of Appeals did not apply the law correctly because the general language contained in the easement requires the grantee to do what is reasonable. In Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E.2d 545 (1944) this Court held that an unlocated easement must be interpreted in light of good faith, reasonableness and what was necessarily the intent of the parties to the agreement: "A grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the **servient** estate as possible for the use contemplated." (emphasis added). See Carolina Land Company v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975); Sandy Island Corp. v. Ragsdale, 246 S.C. 414,

143 S.E. 2d 833 ( 1965); Jacobs v. Service Merchandise Co., 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988); 12 S.C. Juris. Easements § 20.

Moreover, “If the language is uncertain or ambiguous in any respect, all surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court.” 23 Am.Jur.2d Easements and Licenses § 23 (1966). If, as Petitioner argued, the 1972 easement was given to bring power into a new subdivision and the grantor dedicated a portion of the 4.7 acres to extending Kitford Road, that circumstance should have been considered by the Court in determining the scope of the easement.

In Smith v. Commissioners of Public Works of City of Charleston, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1993) the Court of Appeals addressed the Master’s interpretation of an unlocated access easement from plaintiff’s across defendant’s land to a canal. The Master held that the grantee could access the grantor’s property at any point and frequently. 312 S.C. at 464, 441 S.E. 2d at 337. The Court of Appeals remanded the matter to the Master because the Master did not determine whether it was reasonably necessary for the grantee to have multiple access points. 312 S.C. at 469, 441 S.E. 2d at 337. Petitioner asserts that the Court’s analysis in Smith is applicable here.

Berkeley Electric never offered any reasonable interpretation of the 1972 easement to allow it to run a power line from the transmission line down Kitford Road then back across Kitford Road over TMS 498 back to the transmission line. Berkeley Electric has not offered any explanation of this “loop” in its power line which affects only Petitioner’s property.

Petitioner however, presented evidence that Berkeley's distribution line together with its transmission line was burdensome because it interfered with his tree farming and also reduced the useable size of the already small (1.32 acre) lot.

Based upon the evidence and the reasonable inferences, this Court should find that Berkeley Electric exceeded the scope of the 1972 easement. Alternatively, this Court should remand the case because the Master did not consider what type of access Berkeley Electric reasonably needed to enjoy its easement nor the burden upon petitioner's property from the extension of that line across it. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Lanham v. Blue Cross & Blue Shield of S.C., 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002); Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).

## **2. The 1956 easement was only for a transmission line**

The 1956 easement given to Berkeley Electric grants it "a perpetual easement [of 75' width] for the construction and maintenance of an electric transmission line or lines, towers, poles anchors and necessary fixtures and wires" across land known as lot 27 1/2 of the California tract. R. p. 131. The easement permitted a transmission line and only a transmission line (with poles, anchors etc. needed for its support) within the 75' wide cleared path.

Petitioner submitted the 2010 Lacey plat which indicates the location of the transmission line presumably constructed pursuant to the 1956 easement crossing TMS 135. The 2010 Lacey Plat also shows two electric distribution lines connected to the transmission line, one crossing TMS 135 westerly toward the Seaboard Coastline

Railroad right of way and the other crossing TMS135 easterly toward Andersen, TMS136.

There is nothing within the plain language of the easement which permits or suggests that a distribution line is also permitted. The 1972 easement specifically mentions an easement for a distribution line so Berkeley Electric could easily have included that in the easement if it intended to connect distribution line to its transmission line. Since it did not, the easement should not be interpreted to be broader than the plain language. The creation of an easement must be by clear and convincing language.

S.C. Pub. Serv. Auth. v. Ocean Forest, Inc., 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981).

Furthermore, the grantor reserved the right to conduct agricultural activities on the area under easement. The addition of distribution lines would further limit the rights of the grantor to farm because other poles wires, anchors etc would be installed on the ground. The agricultural reservation in the easement strongly suggests that no further electric lines could be installed.

The Court of Appeals did not examine the language of the easement but incorrectly relied upon the existence of the lines in their present position as evidence that they parties intended the lines to be where they were. However, there was no evidence when the distribution lines were installed so as to suggest that the grantor knew about them and approved. Petitioner described TMS 135 as “wooded and undeveloped”. There is no public road only a private dirt road. There is no evidence to support the conclusion that the distribution lines were installed there because that it what the grantor intended. The opposite conclusion is just as valid: that the Estate of Heyward was only willing to

allow a transmission line across its property but nothing more. Any further easements would have to be obtained thereafter.

The Court of Appeals also referenced the Affidavit of Robert Bradley, Berkeley Electric's right of way agent to support its conclusion that Berkeley Electric did not exceed the scope of its easements. App. 7. Petitioner had numerous objections to the allowance of the Affidavit but the Court of Appeals deemed it admissible. App. at 7-8. Bradley stated: it is my opinion that our service to their [Andersen] property does not encroach on the property of Roosevelt Simmons outside of the 75' wide easement." R. p. 154, Para. 4. Bradley concedes that the distribution line is on TMS135 but claims it is within the 75' width of the transmission easement. However, the maps and diagrams to which he refers do not locate the Andersen service line within the 75' easement. R. pp. 156,157. Petitioner contended that the line encroaches on TMS 135 R. p. 119. Para. 5. Therefore, there was a dispute of fact which prevented the Court from granting summary judgment.

Instead of relying upon the plain language of the 1956 easement that permitted only a transmission line, the Court weighed the evidence and gave credence to Bradley's unsupported opinion and held that a distribution line within the 75' easement did not exceed the scope of what was granted.

As to the second distribution line crossing TMS135 and running to the Seaboard Coastline Railroad right of way, it is undisputed that this line extended into TMS 135 beyond the 75' easement. Bradley's Affidavit did not mention this and the Lacey 2010 plat clearly locates it as an encroachment. R. p. 130. (highlighted) Absent an express easement, Berkeley Electric had to establish the existence of a prescriptive easement on

the distribution line crossing TMS 135. Petitioner asserts that the evidence did not support this finding. See Section B below.

**B. The prescriptive easement standard was not satisfied**

As demonstrated above, Berkeley Electric exceeded the scope of the 1972 Brown easement by crossing the westerly side of TMS 498 and TMS 135. Therefore, Berkeley Electric must establish the existence of a prescriptive easement across both parcels and demonstrate the lack of material facts in dispute to order to obtain summary judgment. Petitioner contends that the Court of Appeals failed to correctly apply the standards for summary judgment by overlooking the deficiencies in the evidence submitted by Berkeley Electric and discounting Petitioner's affidavit and other documents which refuted Berkeley Electric position as to the age of the distribution line.

The elements of a prescriptive easement claim are: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years ; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right.” Horry County v. Laychur, 315 SC 364, 367, 434 S. E. 2d 259 (1993). As the moving party Berkeley Electric had the burden of proof as to each of these elements by clear and convincing evidence. Each element of a prescriptive easement must be demonstrated by clear and convincing evidence. Polson v. Ingram, 22 S.C. 541, 545 (1885) (“One claiming an easement on the lands of another, must prove his right to it clearly. The law is jealous of such claim, and the right cannot be established by intendment or presumption.”). Cf. 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).

Berkeley Electric's initial Motion in June 2009 for a prescriptive easement relied upon the affidavits of its employees Seeney and Frank. R. pp. 43-48. However, both employee affidavits which are virtually identical refer to the utility line located at 3507 Kitford Road but do not make any reference to any part of Petitioner's property. R. pp. 45, 47. These Affidavits do not mention that the line at 3507 Kitford Road runs to the other side of the Seaboard Coastline Railroad right of way and crosses TMS 135. The Seeney and Frank Affidavits also refer to poles on the property which show "birthmarks of 1984 & 1986". R. pp. 44,46, Para. 4. Again there is no reference to what property they are referring to. When Berkeley Electric submitted its Amended Motion for summary judgment, it refiled the same affidavits from Seeney and Frank. R. pp. 101-104.

Berkeley Electric had the burden to establish by clear and convincing evidence all of the elements under Laychur. Petitioner contends that it failed to do so as to "the identity of the thing enjoyed". The Seeney and Frank affidavits are not specific as to the location of the line to which they refer and thus cannot be used to satisfy this requirement. Therefore, the Seeney and Frank affidavits cannot establish a prescriptive easement for Berkeley Electric's distribution line crossing TMS 498 or 135 because their affidavits do not say where their lines are located.

The 2010 Lacey plat which Petitioner submitted in opposition to the Amended Motion shows the location of the distribution line crossing TMS 135. The Bradley Affidavit which was addressed above regarding the 1956 easement, does not provide any basis to support a prescriptive easement across TMS 135 since Bradley only discusses the line to Andersen and does not mention any lines running to the west of the transmission line. Therefore, the Court of Appeals overlooked those deficiencies in

Berkeley Electric's Amended Motion that go to the heart of a prescriptive easement claim.

As to the requirement under Laychur for a “ continued and uninterrupted use or enjoyment of a right for a full period of twenty years” , Petitioner contends that there were disputed issues of fact. The Court of Appeals held that Petitioner had not provided “ the required scintilla of evidence to create a genuine issue of fact on this [ prescriptive easement] point.” App. at 9. Petitioner contends that the Court of Appeals was overly critical of his evidence and did not consider the reasonable inferences .

In response to the information provided by Berkeley Electric to support its summary judgment motion, Petitioner submitted his Affidavit based upon personal knowledge that the line across TMS 498 was not there in 1980. R. p. 118, Para. 2. Although Simmons acquired the subject property in 2003, his family had lived there since before the 1960s. R. p. 49, Para. 2. He also provided two plats, one by Gaillard done in 1981, R. p. 53, and the other by Schuler done in 1983. R.p.134. Both the Gaillard and Schuler plats show the Berkeley Electric transmission line but neither shows the poles or power line which Frank and Seeny claim were there from 1980. The Gaillard plat which creates an easement for a road across TMS 117 shows the location of the Berkeley Electric transmission line across TMS 498 as well as a dirt road on TMS 498 to which that proposed road is to connect. R. p. 53. (The property was still in the ownership of Edward Brown and was designated as TMS 115). The Schuler plat was commissioned by Berkeley Electric and provided to Petitioner in discovery. It shows the location of the transmission line on TMS 118 and also on TMS 498 ( then TMS 115) but no distribution line from the transmission line to TMS 498. The Lacey survey shows the distribution

line across TMS 498 extending to the north onto the property that was the subject of the Schuler plat where it attaches to a power pole near the transmission line. R. p. 130.

The Court of Appeals found that the Schuler and Gaillard plats were not of Petitioner's property and did not contradict the testimony of Seeny and Frank. App. at 9. However, the Court of Appeals should not have rejected them as irrelevant. Even though the Gaillard and Schuler plats were for TMS 118 and TMS 117 both of the plats show details of surrounding properties which are consistent with the Lacey plat. Both of the plats show the location of the transmission line. Both of the plats show a dirt road across TMS 498. They contain enough information about TMS 498 so that there is an inference that the surveyor would have indicated an overhead distribution line running to TMS 498 on his plat - if it was there. Furthermore, the Schuler plat was commissioned by Berkeley Electric. It calculates the area under power line easement. R. p. 134. Logically, the existence of a Berkeley Electric distribution line crossing that property ( TMS 118) would also be shown on this plat.

The Court of Appeals failed to recognize that the omission of the power line on two plats raised an inference that it was not there in 1983 as contended by Petitioner. The plats were relevant evidence because they displayed features of TMS 498 and did not show any distribution line on it as would reasonably be expected. Berkeley Electric did not submit any contrary evidence to explain why the 1983 Schuler plat did not indicate the distribution line. All inferences which can reasonably be drawn from the evidence 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). Furthermore, 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). Therefore, Petitioner contends that the Court of Appeals improperly weighed the evidence instead of accepting it as the basis for a dispute of fact, i.e. when was the line installed.

Petitioner further contends that the system maps Berkeley Electric produced in discovery also created a dispute of fact. Significantly, Berkeley Electric did not produce any system map showing the location of its power lines prior to 1995. Neither of the system maps produced by Berkeley Electric contains any identification of property lines. However, the 1995 map, R. p. 137, shows a power line across Kitford Road in a substantially different location than the current map, R. p. 136. An inference which can reasonably be drawn is that the power line was moved between 1995 and the present; otherwise the two system maps would be identical. Berkeley Electric's own documents indicate that the power line was moved to its present location after 1995 and create a dispute of fact as to when the line was installed. Berkeley Electric claimed at the Motion hearing that the maps are not inconsistent. However, that alone creates a dispute of material fact.

Even if the system maps do not create a dispute of fact, the Court of Appeals should not have affirmed the granting of summary judgment. Berkeley Electric never explained the variation between the maps except to argue that it was due to differences in "scale", which does not account for the change in direction. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Lanham v. Blue Cross & Blue Shield of S.C., 349 S.C. 356, 362,

563 S.E.2d 331, 333 (2002). Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).

Therefore, Petitioner contends that there were material issues of disputed fact as to the date when the distribution line was installed across TMS 498 precluding the granting of summary judgment.

### **C. The Scintilla rule was not correctly applied**

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In Taylor v. Atlantic Coast Line Ry., 78 S.C. 552, 556, 59 S.E. 641, 643 (1907), this Court said: "A scintilla of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." Petitioner contends that he submitted evidence more than sufficient to satisfy the scintilla rule.

The application of the scintilla rule depends upon the facts and evidence of the specific case. See e.g. Turner v. Am. Motorists Ins. Co., 176 S.C. 260, 180 S.E. 55 (1935) Accordingly, Petitioner urges this Court to consider the record before the Master in totality.

Berkeley Electric filed a motion for summary judgment not based upon the two written easements which it obtained previously but for a prescriptive easement. Berkeley Electric didn't submit any document showing that its distribution lines across the two parcels in issue have been in place since 1980 or before. It doesn't argue that any written easement allows them to be where they are. It submitted two affidavits from employees saying the same thing: that they remember that the line ( at an unspecified location) has

been there since 1980 although the poles to which it is attached show a later date of installation. They each stated that they believe there was a right of way because that was the company's custom, R. p. 46, para, 5, p.48, Para. 5. Petitioner denied that the age of the line was from 1980 and submitted the Galliard plat and Lacey survey showing the location of its lines along Kitford Road and onto TMS 135.

When it filed its Amended Motion, Berkeley Electric resubmitted the same non specific affidavits about where it claims its lines to be since 1980. Petitioner submitted a Supplemental Affidavit which states that based upon personal knowledge, the line across TMS 498 has not been there since 1980.R.p. 118, Para. 2. He also submitted Berkeley Electric's own plat for TMS 118 where the line across TMS was supposedly connected to a pole but it is not there in 1983, but it was in 2010 according to the Lacey plat. R. pp. 130,134. Other Berkeley Electric records show the line was moved in 1995 to where it is today. R. pp. 136-137.

Petitioner contends that the credibility of Seeney and Frank and the inferences to be drawn from the 1983 Schuler plat and the contradictory system maps are matters to be decided by the finder of fact-the Master in Equity. See Andersen v Augusta Chronicle, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct.App.2003) (credibility determinations and the drawing of legitimate inferences from the facts are jury functions). In Murphy v. Tyndall, 681 S.E.2d 28 (Ct. App. 2009) the Court of Appeals reversed summary judgment in an auto negligence case involving the status of the other driver as an employee. The Court of Appeals noted that " all the testimony corroborating its position is from E-Z Credit employees, E-Z Credit's owner, or Tyndall himself. Tyndall has admittedly done work for E-Z Credit through his headlight restoration business, and

Tyndall is a tenant in a home owned by Watts. Furthermore, Tyndall is receiving Social Security Disability and would benefit by appearing to have less income. With that in mind, a jury could reasonably infer bias on the part of the witnesses and find their testimonies to be less than credible.” 681 S.E. 2d at 31. Here all of the evidence is from Berkeley Electric’s employees. There are no written documents from Berkeley Electric which demonstrate that the line was in existence across TMS 498 in 1980.

Petitioner’s Affidavit that the line was not there in 1980 was sufficient as a mere scintilla of evidence alone. In Zurich American Ins. Co. v. Tolbert, 387 S.C. 280, 692 S.E.2d 523 ( 2010), this Court affirmed the Court of Appeals reversal of summary judgment on an issue of coverage for a substitute vehicle. The Court held that the insured’s affidavit alone stating that the vehicle being driven was a “substitute vehicle” was a scintilla of evidence sufficient to deny the insurer’s motion. 692 S.E. 2d at 525.

Petitioner contends that the Court of Appeals was wrong about his Affidavit by finding that his assertion about the line not being there in 1980 was not based upon personal knowledge. The Affidavit states: “ I have personal knowledge of the facts set forth herein.. . 2. The power line owned by Berkeley Electric Company which I objected to has not been located across TMS 283-00-00-498 since 1980 as their witnesses claim.” This could not be more clear. The Court is supposed to view the evidence in the light most favorable to the non moving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004). Instead the Court of Appeals tried to interpret this statement as something else than what it says.

In summary, Petitioner asserts that the Court of Appeals did not correctly apply the scintilla rule. The Court of Appeals misunderstood Petitioner’s Affidavit by

asserting that it was not based upon personal knowledge. The Court of Appeals disregarded the Galliard and Schuler plats by saying that they were not about Petitioner's property. The Court of Appeal gave no credence to the contradictory system maps. The Court of Appeals tried to weigh the evidence instead of merely recognizing that the evidence created a dispute of fact. Petitioner contends that this evidence considered in totality is more than sufficient to deny summary judgment based upon the scintilla rule.

**D. Berkeley Electric did not satisfy the summary judgment standard.**

Summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). As set forth above, Petitioner presented sufficient disputed facts in the Record and applicable authority for this Court to overturn the Court of Appeals' decision affirming summary judgment. The Court of Appeals did not correctly apply the law concerning the scope of unlocated easements to determine what was reasonable and ignored the damages sustained by Petitioner as a result of the easements location across TMS 498. Berkeley Electric failed to establish with specificity both the time of installation and location of Berkeley Electric's distribution line by clear and convincing evidence so that no prescriptive easement should have been granted as matter of law. Finally, the Record contains substantial evidence of facts in dispute to provide the scintilla required to defeat summary judgment regarding a prescriptive easement across TMS 498.

The Court of Appeals did not apply the appropriate standard in evaluating the evidence by considering all of the inferences that may reasonably be drawn therefrom viewed in the light most favorable to the nonmoving party. See Vermeer Carolina's, Inc.

v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). The Court of Appeals weighed the evidence instead of simply deciding whether there was a dispute of fact. The Court of Appeals' conclusions are subjective evaluations of the evidence which the Court should not have undertaken at this stage of the proceedings. They are not supported by the motion record and exceeded the scope of the Court's duty to determine whether summary judgment was proper. The Court of Appeals failed to follow established law and allow all reasonable inferences to favor the petitioner. Therefore, Petitioner respectfully requests that this Court reverse the Court of Appeals' decision as to Berkeley Electric and remand for a hearing as to the scope of the 1972 easement and the existence of prescriptive easements on TMS 498 and 135 for an electrical distribution line.

**II. A CLAIM OF RIGHT SHOULD BE BASED  
UPON A SUBSTANTIAL BELIEF  
AND BE OPEN AND NOTORIOUS**

Petitioner contends that the Court of Appeals' decision requires this Court to consider what constitutes proof of a claim of right as a basis for a prescriptive easement; and when does it accrue if the encroachment is hidden such as here where it was underground. The Court of Appeals held that the "Miley Affidavit demonstrates his belief that the encroachment permits (sic) obtained from Charleston County covered the installation of the water main as illustrated on the map [U 25]." App. at page 11. The Court of Appeals explained that the claim for a prescriptive easement may be based upon a mistaken belief, citing Lofts v S.C Electric & Gas Co., 361 S.C. 434, 604 S.E. 2d 714(Ct .App.2004). App. at page 11. Petitioner contends that the language in Loftis is a

departure from the “substantial belief test” most often cited by the Court of Appeals, creates confusion as to the correct standard for a claim of right and should be rejected.

**A. A Substantial Belief should be the basis for a claim of right**

The Court of Appeals has held in many reported cases that a party claiming a prescriptive easement under a claim of right “ must demonstrate a substantial belief that he had the right to use the parcel based upon the totality of the circumstances surrounding his use.” Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003). See e.g. Paine Gayle Props., LLC v. CSX Transp., Inc., 400 S.C. 568, 583, 735 S.E.2d 528, 536-537 (Ct. App. 2012); Kelley v. Snyder, 396 S.C. 564,574, 722 S.E.2d 813, 818 (Ct. App. 2012); Matthews v. Dennis, 365 S.C. 245, 250, 616 S.E.2d 437, 440 (Ct. App. 2005); Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005); Revis v Barrett, 321 S.C. 206,209-210, 467 S.E.2d 460, 462 ( Ct. App. 1996) However, this has not been uniformly applied.

In Morrow v. Dyches, 328 S.C. 522, 528, 492 S.E.2d 420, 423-424 (Ct. App. 1997), the court held that a mere belief by a property owner that he assumed he had the right to use an adjacent abandoned railroad property for parking based upon many years of use by customers was insufficient to establish an easement by prescription. And in Loftis v. South Carolina Elec. and Gas Co., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004), the Court of Appeals said that a “ mistaken belief ” could be the basis for a claim of right. 361 S.C. at 440, 604 S.E.2d at 717 However, the Loftis Court went on to discuss the basis for the utility company’s claim of right including its forty year history of service in the area, its service agreement that authorized and created a right of way for service and the acceptance of service by the prior owners. 361 S.C. at 440-441. The Court

of Appeals concluded that “ SCE&G had a substantial belief it had a right to use the property in the manner it did based upon the totality of the circumstances.” Id. at 441.

By relying upon the “mistaken belief” phrase in Loftis, Court of Appeals below appeared to adopt this as a separate test for a claim of right, apart from the “ substantial belief “ test. Petitioner argued that the Loftis Court followed the substantial belief test and that a mistake alone was not a basis for a substantial belief. Appellant’s Reply Brief at page 37. Furthermore Loftis was distinguishable because there was no history of water service on Kitford Road on which St. Johns could claim a “substantial belief.” The record establishes that water service was first brought to this area in 1978. Id.

There is no reported South Carolina case, apart from the Court of Appeals decision below that relies upon the “ mistaken belief” language in Loftis as the basis for a claim of right. Petitioner urges this Court to reject the “ mistaken belief “ test and remand the case to the Master for consideration of the totality of the circumstances under the substantial belief test. Petitioner contends that a “mistaken belief” without an explanation as to the basis for a mistake should not be considered as a “substantial belief based upon the totality of the circumstances “ upon which to base a claim of right.

This case presents the appropriate opportunity for this Court to address the “substantial belief ” standard for a claim of right. The evidence submitted by St John’s in support of its Motion for prescriptive easement consisted of the Miley Affidavit, R. p. 59-60, and the Encroachment Permit authorizing a water line along Kitford Road. R. pp. 66-70. Map U 25 was never served on Petitioner with the motion papers but submitted to the Master by Respondent’s counsel at the Motion Hearing without showing it to Petitioner’s counsel, or identifying it for the record or handing him with a copy.

Appellant's Brief at pages 16-17, 37-38. It became a part of the Record on Appeal, R. p. 255, over Petitioner's objection by Order of the Court of Appeals dated November 29, 2011.

The Encroachment Permit authorizes encroachment only along Kitford Road. In his Affidavit, Hugh Miley states that he was in charge of the construction and the water line "along Kitford Road was completed in 1978" and that it is currently in the same place as originally installed, R. p. 59. Para. 4; further, it has been in continuous operation since then. R.p.60, Para.5. Miley does not make any reference to the map. Miley does not make any reference to TMS 498. Miley does not explain why he thought that TMS 498 was part of Kitford or how a water line came to be installed on private property by mistake. Map U 25 only contains the identifications of Main Road and Kitford Road. R. p. 255. There are no property owner names or parcel (TMS) identification numbers. Id. There are two side roads diverging from Kitford Road but they are not identified. Id.

The party seeking to establish a prescriptive easement must show the identity of the thing enjoyed. Horry County v. Laychur, 315 SC 364, 367 (1993). 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). U 25 cannot establish a claim of right to cross TMS 498 since there is no way to reference the location of TMS 498 on U 25.

At the Motion Hearing, St. John's counsel told the Master that there was a dirt road on TMS 498 which was Kitford Road. See R. p. 216 lines 1-3. Factual statements

by attorneys during oral argument may not be considered in determining whether a material issue of fact exists. Trivelas v. S.C. Dept of Trans., 348 SC 125,558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v MUSC, 326 SC 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997). The Motion Hearing does not contain any reference to what is being discussed by St. John's counsel but the Court characterized it as the same plat as it had been considering on the Berkeley Electric motion, i.e. the Lacey plat (referred to as the highlighted plat), R. p. 219, line 9-17. However, the Master relied upon counsel's representation that the Encroachment Permit to install water lines under Kitford Road "included a portion of the road extending north from the main portion of Kitford Road to residences along said roadway". R. p. 11.

The Court of Appeals found that the Encroachment Permit together with the U 25 created a claim of right based upon a "mistaken belief". App. at 11. The Court of Appeals did not address how the Record established that a mistake was made. There are two potential explanations: if U 25 designated where the water line was to be installed, there a mistake in U25 which included private property as part of Kitford Road; or there a mistake by Miley who misconstrued U 25 by installing a water line under TMS 498 as part of Kitford Road instead of complying with U 25. In either case, there was no explanation by Miley or anyone else about what mistake had been made and why.

St. Johns is in the business of serving the public. It is in the business of using surveys and obtaining easements from property owners. It has not explained how its water line came to be installed on private property "under a substantial belief based upon all of the circumstances". It obviously was mistaken about where it located the water line it installed under an Encroachment Permit but a mistaken belief should not be elevated to

a reason for granting a prescriptive easement. This Court should reject the language in Loftis and remand the case to the Master to apply the correct standard the “substantial basis” test.

**B. Accrual of a claim of right for a prescriptive easement should be based on notice**

This Court has not dealt with the issue of when does a claim of right accrue if the use is hidden. That issue is presented here: i.e. whether a claim of right for a water line constructed underground in 1978 across Petitioner’s property can accrue if he had no actual or constructive notice of it until more than 20 years later. Petitioner established that the property is undeveloped, in an area of some homes where wells are used, that his own residence nearby is served by a well, that he did not see any evidence of underground water service until 2005 when he discovered St. John’s meter in the bushes. Petitioner asserted that St. Johns did not establish the requisite 20 years of use, prior to 2005 when he first found the water line on TMS 135 and that St. Johns own customer records indicate that the customers to the north were first served in 1986. Appellant’s Brief at page 39-40.

St. John’s claims that the line constructed in 1978 is the same line under the TMS 498 and this is evidence of first use. Resp. Brief at pages 9-10. However, St. Johns admitted that “once an individual customer applies for service, the smaller gauge water line is connected to the main line. Id. Petitioner contends that he did not have constructive notice of the installation of the water line under TMS 498 until the customers to the north first received service in 1986; therefore St. John’s did not establish the requisite 20 year period.

Petitioner asserted that there was a dispute of fact that St. Johns use of TMS 498 for a water line was open and notorious, as a basis for a prescriptive easement. Appellant's Brief at page 39. In response, St. Johns asserted that it had a claim of right and need not establish an adverse use. Resp. Brief at page 7. The Master found that the main water line was installed in 1978 and that the use was "open and obvious due to the fact that there had been continuous water service without the use of wells by those customers." R. p. 11, Para.4. The Court of Appeals did not address the notice issue despite Petitioner's uncontroverted statements about the lack of notice as the basis for denying summary judgment as to a claim of right. However, the Court of Appeals reversed because it was unsure about the location of service lines to customers and whether they were entitled to a prescriptive easement. R. pp. 11-12. Therefore, there is a necessity for this Court to address the notice requirement in connection with its review of the Court of Appeals decision.

Petitioner contends that the Court should apply the same standards to a claim of right as apply to an adverse use. 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 standards for a prescriptive easement by adverse use are also well established. "When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." Boyd v. Bellsouth Telephone, 369 S.C. 41, 633 S.E.2d 136,141 (2006). Therefore, Petitioner contends that the requirement for the claim of right to be "open and notorious" ( as well

as the other elements under Laychur should be imposed because it harmonizes the elements of adverse use and claim of right, provides consistency in their application and serves an important purpose by promoting fairness.

Our courts including the Court of Appeals below distinguished between the creation of a prescriptive easement by adverse use or by claim of right. App. at page 9. The implication is that there are different conditions needed for the easement to be recognized. However, if an adverse use easement is determined upon the claimant showing an open and notorious use ( along with all of the other Laychur elements) and the claim of right easement is determined solely upon the claimant showing only a “substantial belief” (along with the other Laychur elements), there is a disparity. The claim of right need not be based upon notice.

The issue of notice was a concern to this Court in Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457, 459 (1951). Although the Court in Babb recognized that an easement right by prescription may be created by adverse use or under claim of right, 220 S.C. 24-25, 66 S.E.2d at 458, the Court went on to state: “the possession . . . was not hostile, and nowhere in the case is there any evidence that plaintiff had any notice of any claim.” 220 S.C. at 25, 66 S.E.2d at 459. Petitioner contends that the Court in Babb considered the element of notice to be essential regardless of the type of use.

A subsequent statement of the prescriptive easement standard by this Court in Darlington County v. Perkins, 239 S.E.2d 69, 71, 269 S.C. 572, 577 (1977) resulted in the merging of the two elements: “It is well settled that the requirements necessary to establish a right by prescription are: . . . (3) the use must be adverse under claim of right.” This caused the Court of Appeals in Revis v. Barrett, 321 S.C. 206, 211 fn.1,

467 S.E.2d 460, 463 fn.1 (Ct. App. 1996) to comment in a footnote: “We recognize there are several cases that appear to require, in addition to the other elements, use that is both adverse and under a claim of right. See, e.g., County of Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977); Shia v. Pendergrass, 222 S.C. 342, 72 S.E.2d 699 (1952); Nelums v. Cousins, 304 S.C. 306, 403 S.E.2d 681 (Ct.App.1991). However, these cases ultimately relied upon, yet mis-quoted, Babb v. Harrison as authority for this proposition. Babb requires use that is either adverse or under a claim of right. Accordingly, in light of the later Supreme Court case of Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993), we believe Babb v. Harrison remains a correct statement of the law.”

Many instances of the use of the combined “adverse use and claim of right arise in adverse possession cases. In State v. Tyler, 54 S. C. 294, 32 S. E. 422,424 (1899), this Court said: “The general [jury] instruction that the use must not be permissive, but must be adverse and under claim of right, gave appellant the full benefit of the law applicable to establishing a private way by prescription.” See Atl. Coast Line R.R. Co. v. Seanson, 137 S.C. 468, 489, 135 S.E. 567, 573 (1926) (“The right of way of a railroad, having been acquired for a public purpose, cannot be lost by a prescriptive use or adverse possession, unless by the erection of a permanent structure, accompanied by notice to the railroad company of an intention to claim adversely to its right.”Atlanta & C. A. L. Ry. Co v. Limestone-Globe Land Co, 109 S.C. 444, 96 S.E. 188, 190 ( 1918)( “the rule [is]that a right of way of a railroad, having been acquired for a public purpose, cannot be lost by prescriptive use or adverse possession unless by the erection of a permanent structure, accompanied by notice to the railroad company of an intention to claim adversely to its right”). These earlier case emphasize the importance of a “structure” on

the affected land as creating the vehicle for notice and thus a claim of right as opposed to simple use such as by passage along a driveway. Petitioner contends that these cases are analogous and support his position that notice should be a requirement where an easement by claim of right is being asserted.

Petitioner's position is also supported in 17 Am. Jur., Easements, 976, § 65, where it is stated: "The foundation of the establishment of a right by prescription is the acquiescence on the part of the owner of the servient tenement in the acts which are relied upon to establish the easement by prescription. This makes it necessary that he know of those acts, or be charged with knowledge of them if he did not in fact know of them. . . . It is presumed, however, that every man knows the condition and status of his land; and if anyone enters into open and notorious possession of an easement therein under claim of right, the owner is charged with knowledge thereof."

The notice requirement has been followed by other jurisdictions. See, e.g. *Woodroffe v. Woodroffe*, \_\_N.W.\_\_, at page 10 (Ct. App. Iowa 2015) ("an easement by prescription is created when a person uses another's land under a claim of right or color of title, openly, notoriously, continuously, and hostilely. . . . It must also be established that the servient owner had express notice of the claim of right [which] may be actual or established by "known facts of such [a] nature as to impose a duty to make inquiry which would reveal [the] existence of an easement." (citations omitted)); *County of Westchester v. Town of Greenwich, Conn.*, 793 F. Supp. 1195, 1207 (S.D.N.Y. 1992) (applying Connecticut law) ("The first grouping of easement criteria define the physical nature of the use that places an owner on notice. These notice-oriented criteria include the requirements of adverse, open, and visible use under a claim of right. ")

Each element of a prescriptive easement must be demonstrated by clear and convincing evidence. Polson v. Ingram, 22 S.C. 541, 545 ( 1885)(“ One claiming an easement on the lands of another, must prove his right to it clearly. The law is jealous of such claim, and the right cannot be established by intendment or presumption.”). Cf. 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).

Under Horry County v. Laychur, supra, in either case of adverse use or claim of right , 20 years of use is required. When the claim of right creates an encroachment that is hidden, the person whose property is affected has no way of knowing that his interested is affected. Moreover, the claim of right may be based upon the trespasser’s reasonable belief or mistake or some lost document of which the affected property owner has no knowledge. It is fundamentally unfair to burden a property owner with a prescriptive easement when he had no actual or constructive notice of it.

Therefore Petitioner requests that this Court impose the same requirement of “open and notorious “ upon a claim of right as an adverse use, such that the owner of the servient estate has actual or constructive notice. This requirement will harmonize the elements of adverse use and claim of right, provides consistency in their application and serve an important purpose by promoting fairness. Petitioner contends that applying the open and notorious standard will require that the Court reverse the Court of Appeals decision as to the lack of notice.

If the Encroachment Permit and U 25 is the basis for a claim of right, then the installation of the water main in 1978 must be subject to the open and notorious standard.

TMS 498 is undeveloped. There was no evidence that any water line had been installed under it. The Master found that the use of the water line by customers made it open and obvious. However, the Master did not apply the statutory period to the date of service to these customers, but used the date of installation.

Petitioner contends that the open and notorious standard should be applied to the installation of the service lines as the basis for determining whether the claim of right for the water main has been established for the requisite period. This is in accord with the generally accepted rule:

“Where pipes or other conduits as to which easements are claimed are buried underground and their presence is not physically apparent throughout the prescriptive period, the courts generally conclude that there is insufficient notoriety of the user to permit prescription to run against the servient estate. This result is often reached where there is an absence of substantial evidence that the servient owner had any notice or information of the existence of the facility and its user. . . Imputed or constructive knowledge is the law's substitute for actual knowledge. It is a legally postulated notice of facts not otherwise perceived and recognized. Such notice may arise from . . . knowledge of certain facts which should impart notice of the ultimate fact in issue. . . . This is also in accord with the open-and-notorious element of prescriptive easement.”

25 AM.JUR.2d Easements and Licenses § 60, at 469 (1966)

See 1 Restatement (Third), Property, Servitudes §2.17, comment h p. 273

(2000)(“ Underground uses . . . are not open unless a reasonably diligent landowner would become aware of them. However, if the installation of underground utilities, either because actually known to the owner or widely known in the community, the prescriptive period will continue to run even though evidence of the use is subsequently buried. ”

Petitioner established he had no actual notice until 2005; that he had no constructive notice because there were wells in the area; and that St. John’s own records

indicated that the customers to the north of Kitford Road first received service in 1986 and 1987. Petitioner contends that the application of the open and notorious standard to the use of the water line requires a reversal of the Court of Appeal's decision on the issue of notice.

In summary, the Miley affidavit, Encroachment Permit and U25 do not support a substantial basis for a reasonable belief in a claim of right which is the standard used by the Court of Appeals in other cases. The "mistaken belief" relied upon by the Court of Appeals should be rejected and the matter remanded for application of the correct standard. In addition, this Court should remand and require that the Master determine constructive notice based upon the date that service was provided.

#### **CONCLUSION**

Petitioner respectfully requests for the reasons set forth herein that this Court reverse the decision of the Court of Appeals affirming the Master in Equity's dismissal of the Complaint on summary judgment as to Berkeley Electric. Petitioner also requests that this Court reverse that part of Court of Appeals decision as to St. John's because a mistaken belief cannot be the basis for a claim of right and as to the lack of notice for the statutory period.

Respectfully submitted,

Edward A. Bertele  
Attorney for Petitioner,  
Roosevelt Simmons

April 20, 2015

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

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

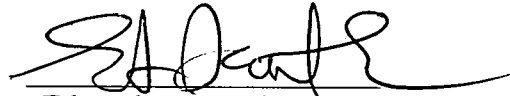
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APR 21 2015

S.C. Supreme Court

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Petitioner's Brief 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 20, 2015

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April 20, 2015

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Columbia, SC 29211

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APR 21 2015

**S.C. Supreme Court**

**Re: Simmons v. Berkeley Electric Cooperative, Inc.  
and St. John's Water Company, Inc.,  
Appellate Case No. 2013-001477**

Dear Mr. Shearouse:

I am enclosing for filing the following: fifteen (15) copies of Petitioner's Brief; thirteen (13) additional copies of the Appendix and the Certification of Service. If you have any questions, please do not hesitate to call. Thank you for your kind assistance.

Cordially  
  
Edward A. Bertele

CC: Jay Hulst, Esq.  
Gaines Smith, Esq.