

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

Hon. Mikell Scarborough, Master-In-Equity

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Appellate Case No.: 2013-001477

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Roosevelt Simmons.....Petitioner

v.

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

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BRIEF OF RESPONDENT BERKELEY ELECTRIC COOPERATIVE, INC.

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## STATEMENT OF THE CASE

Petitioner Roosevelt Simmons (“Simmons”) seeks review of the Court of Appeals’ decision affirming a grant of summary judgment in favor of Berkeley Electric Cooperative, Inc. (“BEC.”)

On April 9, 2008, Simmons commenced this action by filing a complaint alleging that BEC and St. Johns Water Company (“St. Johns”) had trespassed on his property by constructing, placing and/or maintaining “unauthorized” power and water lines. R. p. 25, ¶¶ 5-10. Simmons also claimed that the defendants had been “furnished with a non-gratuitous and valuable benefit without paying for its reasonable value” and that it was inequitable “to use the unauthorized easements without paying reasonable fair market value.” R. pp. 25-26, ¶¶ 11-16. Simmons sought a declaratory judgment that Berkeley Electric had “no property interests or rights in TMS Nos. 283-00-00-498 and 282-00-00-135” and asked for actual, treble, and punitive damages. R. pp. 34-35.

The two parcels at issue, TMS 283-00-00-498 (“TMS 498”) and TMS 282-00-00-135 (“TMS 135”), have been in Simmons’ family “since before the 1960’s.” R. p. 49, ¶ 2. TMS 498 is one of three lots (Lot C) subdivided out of a larger tract—TMS 115. R. pp. 118, ¶ 3; 52; 202, lines 12-19. Simmons acquired legal title to TMS 115 as a trustee in 1992. R. p. 211, line 21- p. 212, line 2. He gained full title to TMS 115 and TMS 135 via a quitclaim deed in 2003. R. pp. 118, ¶ 3, 126.

In October of 2008, BEC filed its answer denying Simmons' claims of trespass and unjust enrichment and asserting a number of affirmative defenses. R. pp. 40-42. In particular, BEC alleged that Simmons' rights in his property, if any, were subject to and limited by the terms of written easements and/or were subject to and limited by a prescriptive easement held by BEC. R. p. 41, ¶¶ 12-13.

Seven months later, on May 7, 2009, BEC filed a motion for summary judgment on all of Simmons' claims on the grounds that it had "a prescriptive easement to maintain its power lines on and over Plaintiff's property." R. p. 43. In support of its motion, BEC submitted affidavits from Thomas Seeney and Richard Frank. Seeney was the current District Supervisor for BEC's operations in the Johns Island District and was responsible for construction and maintenance of BEC's lines in the Johns Island area. R. p. 45, ¶ 2. Frank served as BEC's District Supervisor for the Johns Island District prior to Seeney. R. p. 47, ¶ 2. Seeney and Frank each state that they were familiar with the age, configuration, and characteristics of the power line located at 3507 Kitford Road, that to the best of their recollections the line had never been moved, that the power poles for the line have birthmarks of 1984 and 1986, and that they believed the line has been located across the subject property since at least 1980. R. pp. 101-102, ¶¶ 3-4. Seeney and Frank believed BEC had an easement for the power line and they entered Simmons' property to maintain the line believing that they had a legitimate right to do so. R. pp. 102, ¶ 5; 104, ¶ 5.

On July 2, 2009, Simmons filed and served an affidavit and attachments in opposition to BEC's motion. R. pp. 49-50, ¶¶ 1-4. Attached to his affidavit was an unsigned plat prepared by Richard Lacey dated May 12, 2005. R. p. 52. The plat is entitled:

PLAT SHOWING  
LOT A (1.139 ACRES)  
LOT B (0.743 ACRES)  
LOT C (1.375 ACRES)  
CONTAINING 3.257 ACRES  
PROPERTY OF  
ROOSEVELT SIMMONS

According to Simmons,

The plat shows a Berkeley power line easement located along the easterly side of my property 25' wide which was given by a prior owner in 1972. The power line about which I filed this suit is on the westerly side of my property and no easement was ever given.

R. pp. 49-50, ¶ 3. Also attached to Simmons' affidavit was a plat by W.L. Gaillard dated October 7, 1981. R. p. 50, ¶ 3. Simmons asserts that the Gaillard plat "shows the location of the Berkeley Electric Easement crossing the subject property then in the name of Edward Brown but does not show any other power lines." *Id.* Simmons concludes that the sworn statements of Seeney and Frank "are contradicted by Mr. Gaillard's plat." *Id.*

During discovery BEC located two express easements covering Simmons' property. In 1956 the Estate of Edward Heyward granted BEC a seventy-five foot wide easement for the

construction and maintenance of an electric transmission line or lines, towers, poles, anchors and necessary fixtures and wires

attached thereto, counterpoise underground wires, and all structures and appliances necessary and convenient therewith, together with all rights and privileges incident to the use and enjoyment thereof ....

R. p. 92. According to Simmons, “it is not disputed that this easement encompasses both TMS 498 and 135.” Petition for Certiorari (“Petition,”) p. 4. In 1972 E. C. Brown granted BEC an easement to

place, construct, operate, repair, maintain, relocate, and replace thereon in or upon all streets, roads, or highways abutting said lands an electric transmission or distribution line or system, and to cut down trees and shrubbery to the extent necessary to keep them clear of said electric line or system....

R. p. 132. According to Simmons “it is undisputed that this easement included land of which TMS 498 was a part.” Petition, p. 5.

On October 7, 2009, the action was referred by consent of the parties to the Master in Equity for Charleston County “to make appropriate findings of fact and conclusions of law regarding the issues of easements, both prescriptive and express, across the lands of Plaintiff.” R. p. 3. Simmons reserved the right to return to the jury roster for the purpose of pursuing the question of damages. R. p. 4.

On February 9, 2010, Simmons lost title to TMS 498. R. pp. 122-125. The property was sold by the Sheriff of Charleston County to satisfy a judgement obtained by the Charleston County Business License/User fee Department. *Id.* Title to TMS 498 was deeded by the County to Mase and Company, LLC. *Id.*

A scheduling conference was held on August 9, 2010. R. p. 8. The Master set deadlines for amending the pleadings, discovery, and dispositive motions. *Id.*

BEC and St. Johns' pending motions for summary judgment were scheduled for November 22, 2010. *Id.* A pre-trial hearing was also scheduled on that date. *Id.*

On November 9, 2010, BEC served an amended motion for summary judgment along with a copy of the 1956 easement and other supporting documentation. R. pp. 81-82; 83-86; 87-104. BEC's amended motion renewed its claim of a prescriptive easement and added a claim that Simmons lacked standing to pursue his claim to TMS 498 since he no longer owned the property. R. pp. 80-82. St. Johns filed a motion to dismiss based on the same grounds on November 10, 2010. R. pp. 79-80.

On November 19, 2010—the Friday before the hearing on Monday—Simmons' counsel served BEC with a supplemental affidavit from Simmons. R. pp. 118-119. In the new affidavit, Simmons states that he hired surveyor Lacey to prepare a plat of all his property but the plat showed only his property to the west of the Seaboard Coastline Railroad Right-of-Way. R. p. 3. Simmons further states that because Lacey's 2005 plat did not indicate all of the power lines affecting his property, the surveyor was asked to return and determine the location of any other power lines. R. p. 119.

Simmons contends that Lacey's revised plat “shows another line running from the power distribution line where it crosses TMS 282-00-00-135 over my driveway out to Kitford Road and ending at the pole in front of the Turner residence on the south side of Kitford Road.” R. p. 119, ¶ 4. The revised plat is not attached to Simmons' supplemental affidavit. R. pp. 118-119. Simmons

contends that the line running over his driveway has been used by Berkeley Electric for many years to service its customers on the south side of Kitford Road. *Id.* He claims that BEC is using the Heyward and Brown easements to cross his property four times, twice across TMS 498 on the east and on the west and twice across TMS 135 on the north and on the south. *Id.*

In addition to his supplemental affidavit, Simmons served an affidavit submitted by his attorney. R. pp. 120-121. Attached to his attorney's affidavit are copies of the revised plat prepared by Lacey on September 21, 2010, the 1972 Brown and 1956 Estate of Heyward easements, and an assortment of deeds, surveys, maps, drawings, and agreements. R. pp. 120-153. Lacey's revised plat is entitled:

EXHIBIT [*sic*] SHOWING  
LOT A (1.139 ACRES)  
LOT B (0.743 ACRES)  
LOT C (1.375 ACRES)  
CONTAINING 3.257 ACRES  
PROPERTY OF  
ROOSEVELT SIMMONS

R. p. 130. According to its title, the plat only "shows" Simmons' property west of the Seaboard Coastline Railroad Right-of-Way. *Id.* The revised plat does not depict the boundaries or location of TMS 135. *Id.* There is no testimony from Lacey regarding the plat or its features.

The summary judgment motions were heard as scheduled on November 22, 2010. R. pp. 9, 13. At the hearing, BEC served Simmons with an affidavit from Robert Bradley, Right-of-Way Agent for BEC. R. pp. 154-157, 244. Bradley's

affidavit states that BEC's line does not encroach on the Simmons' property and that it extends from a pole located within BEC's 75' wide easement directly onto the neighboring Anderson property. R. p. 154, ¶¶ 3-4.

At the close of argument, the Honorable Mikell R. Scarborough, Master in Equity for Charleston County, granted BEC's and St. John's motions for summary judgment. R. pp. 220, lines 22-222, line 10. On January 18, 2011, the Master issued an order setting forth the basis for his ruling. R. pp. 13-21. The Master ruled that BEC's power lines on Simmons' property were authorized by express easements and that Simmons had failed to establish that the company had exceeded its authority under the terms of those easements. R. pp. 17-18. The Master ruled that even if the express easements did not specifically authorize particular lines or poles as configured on Simmons' property, BEC had established, by clear and convincing evidence, continued and uninterrupted use of its lines on Simmons' property under a claim of right property for the requisite 20 years. R. pp. 18-20. The Master ruled that Simmons' claims were not based on fact, that his evidence lacked foundation and that the inference he attempted to draw was unreasonable. R. pp. 18-20.

Simmons moved to alter or amend the Master's order on February 7, 2011 and the motion was heard on April, 11, 2011. R. p. 174. Simmons argued that BEC had failed to produce evidence of an express or prescriptive easement across TMS 135. R. pp. 175-178. Simmons further argued that the Master's findings and conclusions of law regarding the plats of adjacent properties was not supported by

the record. R. pp. 178-179. Simmons contended that BEC's "system maps" contradicted the sworn statements of Seeney and Frank. R. pp. 181-182. Simmons claimed the Master improperly weighed the evidence and ignored the existence of numerous disputed facts. R. pp. 182-185. Finally, Simmons requested that the Master consider all of the circumstances surrounding the easement grants. R. pp. 185-186. The Master denied Simmons' motion for reconsideration. R. p. 242, lines 14-23. The form order denying Simmons' motion to reconsider was entered the same day and served April 13, 2011. R. p. 22.

Simmons filed and served a Notice of Appeal on May 13, 2011. On appeal, Simmons argued that the Master erred in granting summary judgment to BEC on the express easements because the easements were not part of its motion, the order was contrary to the order of reference, not based on evidence in the record, and because there were disputed issues of fact regarding the scope of the easements. Brief of Appellant, pp. 3-4.<sup>1</sup> He further argued that the Master erred in granting summary judgment on the issue of prescriptive easements because there were disputed issues of fact, because he improperly weighed the evidence, and because there was a lack of clear and convincing evidence. *Id.*

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<sup>1</sup> The index to the Appendix to Petition for Writ of Certiorari indicates that Simmons' brief to the Court of Appeals ("Brief of Petitioner") was provided to the Court under "separate cover." BEC has not received any copies under separate cover and therefore cites to Petitioner's brief to the Court of Appeals and to the other briefs designated as under "separate cover" by their original title and original page number.

The Court of Appeals affirmed, finding that the Master properly considered the existence of the express easements, that the Master did not err in ruling that BEC did not exceed the scope of its express easements, that the Master did not err in considering the Bradley affidavit, and that the Master did not err in ruling that BEC's use of Simmons' property was authorized under a prescriptive easement. Appendix, pp. 6-9, 12. Simmons petitioned for rehearing, asking the Court of Appeals to reconsider whether BEC's express easements applied to TMS 135, whether BEC had established grounds for imposing a prescriptive easement over TMS 135, and whether there was an issue regarding the existence of a prescriptive easement over TMS 135. App. pp. 13-21. The Court of Appeals denied Simmons' request for a rehearing. App. p. 26.

Simmons filed a Petition for Writ of Certiorari on July 8, 2013. This Court granted Simmons' petition on March 19, 2015.

### **ARGUMENT**

BEC's argument is straightforward: There is no dispute that the express easement granted by the Estate of Heyward in 1956 to BEC "encompassed both TMS 498 and TMS 135" and "allowed the company to erect a transmission line through each of those properties." Petition for Writ of Certiorari, p. 4; Brief of Appellant, p. 23. According to Simmons, BEC's 75 foot wide transmission line easement runs north-south across the eastern corner of TMS 498, through the Seaboard Coastline Railroad Right-of-Way, across the Anderson property, and through TMS 135. R. pp. 52, 130. Simmons admits that he does not have "any

issue” with the transmission line and that his complaint is not about that easement. R. p 198, lines 10-15, lines 22-25. Accordingly, there is no triable issue regarding the existence or scope of the 1956 express easement on either TMS 498 or TMS 135.

Simmons asserted in his original affidavit that his lawsuit was about BEC’s power line running across the western side of TMS 498 because “no easement was ever given.” R. pp. 49-50, ¶3. There is now no dispute that the easement granted by Brown in 1972 “included lands of which TMS 498 was a part” and that the easement “allowed BEC to cross TMS 498.” Petition for Writ of Certiorari, p. 5; Brief of Appellant, p. 23. There is no dispute that BEC’s distribution line crosses TMS 498 *once* to a pole in front of “Lot A” (the Turner property) at 3507 Kitford Road and, according to Lacey’s plat, it then extends along roadbed in either direction. R. p. 52. There is no triable issue regarding the existence or scope of the 1972 easement as to TMS 498.

According to Seeney and Frank, BEC’s then current and former district supervisors for Johns Island, the line extending over TMS 498 and across and along Kitford Road was clearly visible and obvious and had been continuously operated in the same configuration for in excess of 20 years under a claim of right. R. pp. 45-48; 52. Therefore, in addition to the express easement for its power line across TMS 498, BEC also had a prescriptive easement for the power line described in their affidavits and marked on Lacey’s plat. *Id.* There is no triable issue regarding BEC’s distribution line over TMS 498

On the eve of Summary Judgment, Simmons served BEC with a supplemental affidavit referencing a revised plat which he claims “shows another line running from the power distribution line where it crosses TMS 282-00-00-135 over my driveway out to Kitford Road and ending at the pole in front of the Turner residence on the south side of Kitford Road.” R. p. 119 ¶ 4. Lacey’s revised plat dated September 22, 2010 was attached as an exhibit to an affidavit of Simmons’ counsel and was also served at that time. R. p. 120, ¶ 4.

This “other line” running over Simmons’ driveway and along Kitford Road to the pole (marked “C4”) in front of “Lot A” (the Turner residence) is shown as an extension of the same line at 3507 Kitford Road identified by Seeney and Frank in their affidavits. R. pp. 45-48, 52, 130. According to their testimony, the line is clearly visible, and has been maintained under a claim of right for at least 20 years, and is therefore authorized by a prescriptive easement. R. pp. 45-48; 52; 119, ¶ 4; 130. BEC does *not* claim that the 1972 easement from Brown authorizes the line once it enters the Seaboard Coastline Railway Right-of-Way. BEC claims a prescriptive easement for the line shown on the Lacey plat as extending southwest from Kitford Road into and through the Seaboard Coastline Railroad Right-of-Way. R. p. 130. Once its power line enters the 75 foot wide right-of-way of the 1956 easement, BEC’s use would again be covered by the express easement as well as its prescriptive easement. *Id.*

Simmons complains that the Court of Appeals, “improperly weighed the evidence instead of determining that a disputed fact existed.” *Id.* Simmons is

incorrect. The Court of Appeals did not weigh the evidence; rather, it agreed with the Master that Simmons had failed to raise a genuine issue of fact to defeat BEC's motion. App. pp. 7, 9. The court is not required to agree with Simmons' unfounded theories or accept his baseless speculation.

Citing *Medical University of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004), Simmons accuses the Court of Appeals of failing to consider the inferences that light most favorable to him. In Simmons' view, "the inferences to be drawn from all the evidence is that Berkeley Electric exceeded the scope of its written easements" and "that Berkeley Electric failed to establish the existence of prescriptive easements by clear and convincing evidence." Brief of Respondent, p 17. Again, Simmons is incorrect. As discussed in further detail below, Simmons' inferences were not reasonable. It is not sufficient for a party to create an inference that is not reasonable or an issue that is not genuine. *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S.E.2d 161, 162 (2013). Moreover, the "evidence" Simmons relies on to support his inferences lacks any foundation and is inadmissible. A genuine issue of fact can be created only by evidence which would be admissible at trial *Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994). *See also, Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657(Ct.App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgement must be those which would be admissible in evidence.").

Simmons' reliance on *Medical University v. Arnaud, supra*, is misplaced. Like Simmons, the plaintiff in *Medical University* claimed that the lower court erred in granting summary judgment because it ignored disputed issues of fact. *Medical University of South Carolina, supra, Id.*, 619. This Court found Arnaud's claim to be without merit because the disputed issues were due to his own inconsistent statements and his bare assertions were insufficient to defeat summary judgment. *Id.* A party opposing summary judgment may not rest on mere allegations, but must respond with specific facts showing a genuine issue. *Id.*, citing *City of Columbia v. Irmo*, 316 S.C. 193, 447 S.E.2d 855 (1994); see also Rule 56(e) SCRPC.

As discussed below, the disputed issues claimed by Simmons are the result of his own inconsistencies and his failure to understand and comply with the basic requirements of Rule 56 SCRPC. Simmons' statements fail to provide specific facts establishing a genuine issue for trial. His bare allegations and conclusory statements are insufficient to defeat summary judgment. See, i.e., *Shupe v. Settle*, 315 S.C. 510, 516-517, 445 S.E.2d 651, 655 (Ct.App. 1994); *Thompkins v. Festival Centre Group*, 306 S.C. 193, 194, 410 S.E.2d 593, 594-595 (Ct.App. 1991) ["Even if we were to accept appellants' contention that, because their answer was verified, it should be treated as if it were an affidavit, the rule still requires the response set forth specific facts showing that there is a genuine issue for trial."]

## I. STANDARD OF REVIEW

Rule 56(b) of the South Carolina Rules of Civil Procedure provides:

A party against whom a claim, counterclaim, cross-claim, or to obtain a declaratory judgment may, at any time, move with or without supporting affidavits for a summary judgment as to all or any part thereof.

Pursuant to Rule 56(c)

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the hearing. The judgment sought shall be rendered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(e) further provides:

Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, and shall affirmatively show that the affiant is competent to testify as to the matters stated therein.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.

An appellate court reviews the granting of a summary judgment under the same standard applied by the trial court under Rule 56(c). *Sea Cove Development LLC, v. Harbordale Community Bank*, 387 S.C. 95, 101, 691 S.E2d 158, 161 (2010).

## **II. THE COURT OF APPEALS CORRECTLY APPLIED THE LAW IN AFFIRMING THE MASTER'S RULING ON THE SCOPE OF THE EXPRESS EASEMENTS.**

Simmons argues 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.” Brief of Respondent, p. 18. It was not the task of the Court of Appeals to determine whether Berkeley Electric made a reasonable use of the broad easements granted in 1956 and 1972. Rather, it was the Court of Appeals task to determine whether the Master erred in finding that Simmons failed to establish a disputed issue of fact the BEC had exceeded the scope of its express easements. R. p. 18, App. p. 7. The Court of Appeals affirmed the Master’s finding. App. p. 7.

Simmons further contends that ‘the Court of Appeals did apply the correct analysis because it ignored the plain language of the 1956 easement and the conflicting evidence as to whether the two distribution lines within TMS 135 were included within that easement.’ First of all, Simmons admitted that his complaint was not about the 1956 easement granted by the Estate of Heyward. R. p. 198, lines 10-15, 22-25. His complaint as to BEC was about an alleged trespass along the western side TMS 498. R. pp. 49-50, ¶ 3. Second, none of Simmons’ evidence shows the boundaries of TMS 135, much less “two distribution lines within TMS 135” and any supposed “conflict” in the evidence is due to Simmons’ own inconsistencies. Third, the Court of Appeals did not ignore the language of the 1956 easement. It observed that *both* easements were broad and that the

parties could have used more specificity had they intended the use to be more restricted. App. p. 7.

**A. Simmons Failed to Raise a Disputed Issue of Fact that BEC Exceeded the Scope of the 1972 Easement from Brown.**

The 1972 express easement from Edmund C. Brown granted BEC the right to

place, construct, operate, repair, maintain, relocate, and replace thereon in or upon all streets, roads, or highways abutting said lands *an electric transmission or distribution line or system*, and to cut down trees and shrubbery to the extent necessary to keep them clear of *said electric line or system*....

R. p. 132, emphasis added. “It is undisputed that this easement included land of which TMS 498 was a part.” Petition for Writ of Certiorari, p. 5. The easement was recorded in September of 1972. R. p. 133.

Simmons first argues that the Court of Appeals ignored the plain language of the 1972 easement because it did not extend to TMS 135. Brief of Respondent, p. 19. But the Court of Appeals did not rule that the 1972 easement applied to TMS 135. In the “Facts/Procedural History” section of its decision, the Court recited the language of the 1972 easement and stated that “this easement gave permission to again cross -498.” App. p. 4. There is nothing in the opinion stating that the 1972 easement gave BEC permission to cross TMS 135. *Id.* The Master ruled that Simmons failed to establish that BEC’s power lines exceeded the authority granted under the express easements. R. p. 18. The Court affirmed the Master’s ruling. App. pp. 7, 12.

Simmons' "main argument" is that BEC exceeded the scope of the 1972 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."<sup>2</sup> Brief of Petitioner, p. 19. He contends that the revised plat prepared by Lacey "indicated how the functional area of TMS 498 had been diminished by BEC's transmission and distribution lines." *Id.* Simmons claims that the trees he "planted for harvest on that side of the property had been destroyed due to BEC's servicing of the line." *Id.* He references an expert report showing a total loss of \$164.76. *Id.* R. pp. 98-99. Finally, Simmons argues that BEC did not present any evidence as to the parties' intent about the location of its distribution line under the 1972 easement. Brief of Petitioner, p. 20.

Simmons has the burden of proof on his claims of trespass. Therefore, Simmons bears the burden of establishing that BEC's line over the western side of TMS 498 exceeded the scope of the 1972 easement. In seeking summary judgment on this issue, BEC was not required to produce any affidavits in support of its motion. 56(b) SCRCR. Both sides submitted copies of the express easements in support of their motions and BEC argued that those express easements authorized its use of Simmons' property.<sup>3</sup> R. pp. 193, lines 6-14.

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<sup>2</sup> Simmons failed to raise this argument in his petition for rehearing. Rule 242(d)(2) SCACR. The issue has not been preserved.

<sup>3</sup> Simmons argued the scope of the express easements at summary judgment and the Court of Appeals ruled that issue was tried by consent. App. p. 6. Simmons has not sought review of that ruling here and it is the law of the case.

Therefore, it was up to Simmons to set forth specific facts establishing a genuine issue that BEC's line over TMS 498 was unreasonable under the terms of the 1972 easement. *See* Rule 56(e) SCRCF.

The terms of the 1972 easement broadly authorize the installation and maintenance of a transmission line or distribution line or system. R. p. 132. The terms in no way limit the number of lines BEC can install on or over Browns 4.7 acres. *Id.* The terms of the easement do not regulate the amount of voltage the power lines must carry. *Id.* The 1972 easement expressly authorizes the placement of power lines in or upon all streets and highways abutting his property. *Id.*

BEC's distribution line extends across TMS 498 once, crosses Kitford Road to a pole in front of the Turner property and then extends in the public right-of way along Kitford Road. R. pp. 45-48, 130. BEC's use is authorized by the express terms of Brown's easement. R. p. 132. BEC's single distribution line across the west side of TMS 498 does not exceed the scope of the 1972 easement as a matter of law.

Simmons' bare assertion that "another line" running over his driveway has been used by BEC "for many years to service its customers on the south side of Kitford Road" fails to state specific facts as require by Rule 56 SCRCF. R. p. 119 ¶2. This is nothing more than an allegation, not fact, and is insufficient to defeat summary judgment. Rule 56(e) SCRCF. Simmons must show affirmatively that he is competent to testify regarding BEC's electrical service to customers along

Kitford Road. *Id.* Simmons fails to provide any facts regarding when the line was installed “over his driveway,” what kind of line it was, its purpose, whether it was energized, or even that it is actually a power line belonging to BEC. There are no facts supporting his bare assertion that this other line “services” BEC’s customers on the south side of Kitford Road, or what kind of service this line provided or what customers it serviced and when. Simmons fails to provide any facts showing that this “other” line ties into and draws power from BEC’s transmission line. Simmons statement is merely an allegation, and allegations are insufficient under Rule 56(e).

Lacey’s original plat shows a line extending from the end of Kitford Road into the Seaboard Coastline Railroad Right-of-Way. The line is marked with a “P” and according to the legend on the plat, such lines are “overhead power lines.” R. p. 52. On Lacey’s revised plat, the line has been extended through the Seaboard Coastline Right-of-Way and is now identified as “OHL.” R. p. 130. According to the legend on that plat, “OHL” means “overhead line.” *Id.* Lines on the revised plat marked with “P” are overhead power lines. *Id.* According to Lacey’s revised plat, the line running from the pole in front of the Turner property along Kitford Road and extending through the Seaboard Coastline Railroad Right-of-Way is not an overhead power line. *Id.* Simmons’ own evidence conflicts with his claim that there is another power distribution line used by BEC for many years to service its customers on the south side of Kitford Road.

In addition to Simmons' failure to provide specific facts establishing a genuine issue for trial, the inferences he attempts to draw from his allegations and conclusions are unreasonable. Based on his unsupported allegation of "another power distribution line" running from BEC's transmission line through the Seaboard Coastline Right-of-Way and down Kitford Road, Simmons infers that BEC's line is not necessary and therefore unreasonable.

There is no evidence establishing a factual basis to draw such an inference. Simmons offered no evidence regarding BEC's operations and how the company determines which facilities are sufficient to meet its present and future power needs. There is no evidence whatsoever that BEC's distribution line across TMS 498 is not reasonably necessary and convenient for the use contemplated by the parties in 1972. *See Hill v. Carolina Power and Light*, 204 S.C. 83, 96, 28 S.E.2d 545, 549 (1943). There is no evidence, other than Simmons' opinion, that BEC's line over TMS 498 was overly burdensome for the use contemplated by the parties. Simmons' opinion that it would have been "more reasonable for BEC to bring its power line down Kitford Road" is not fact, is not based on any facts, and his allegation that some other route is "more reasonable" does not support any inference that BEC's chosen route across TMS 498 was unreasonable. Brief of Petitioner, p. 20.

Simmons further argues:

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 had not offered any explanation of this “loop” in its power line which affects only Petitioner’s property.<sup>4</sup>

Brief of Petitioner, p. 21. There is no dispute that the 1972 easement authorizes installation and maintenance of a transmission or distribution line or system on or over TMS 498. Having pointed this out, BEC does not have to offer any further interpretation or explanation of its use. 56(b) SCRPC. Simmons bears the burden of proof that BEC’s line over TMS 498 exceeds the scope of the 1972 easement. Simmons must present specific facts showing that BEC’s use of this line was unreasonable. Rule 56(c). Viewing Simmons’ characterization of the configuration of BEC’s lines in the best light, there are no facts establishing that the alleged “loop” in BEC’s system, if it exists, somehow renders BEC’s distribution line over TMS 498 was superfluous or unreasonable. Simmons’ inferences regarding the alleged “loop” are baseless and not reasonable.

Simmons claims he is entitled to a trial on whether BEC’s line over TMS 498 exceeded the scope of the 1972 easement because he “presented evidence that Berkeley’s distribution line together with its transmission line was burdensome because it interfered with his tree farming and also reduces the size of the already small (1.32 acre) lot.”<sup>5</sup> Petitioner’s Brief, p. 22. All easements burden the servient

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<sup>4</sup> By this statement, Simmons concedes that there are not, as he otherwise contends throughout his brief, *two* separate power distribution lines affecting his property.

<sup>5</sup> Simmons forgets that his claim is that BEC’s distribution line over TMS 498 exceeds the scope of the 1972 easement, not the 1956 easement.

estate. The purpose of an easement is to enable the dominant estate to burden the servient estate.

There is no dispute that the 1972 easement granted by Brown and the 1956 easement granted by the Estate of Heyward impact Simmons' ability to utilize TMS 498 to some extent. Those easements were granted by his predecessors in interest and were of record long before Simmons came into title. R. pp. 131-133. The express easements are not exclusive and Simmons can use his property within BEC's right-of-way easement as he wishes as long as it does not interfere with BEC's use. *Id.* However, both easements grant BEC the right to clear trees and shrubs from property under the easement. *Id.* The power lines are open and obvious, and Simmons' decision to operate the property as a tree farm is an unfortunate choice. Accordingly, Simmons' claim that BEC's use of TMS 498 was burdensome fails to raise a reasonable inference that BEC's use exceeded the scope of its express easement.

Moreover, the evidence offered by Simmons to show that BEC's use of TMS 498 was burdensome was not admissible as required by Rule 56(e) SCRPC. *See also David v. McLeod Regional Medical Center*, 367 S.C. 242, 247, 626 S.E.2d 1, 3. (2006). Rule 56(e) SCRPC provides that supporting and opposing affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify as to the matters stated therein. *See also, Hall v. Fedor, supra*, 349 S.C. 169, 175. 561 S.E.2d 654, 655.

Simmons' expert report from Adkins Forestry Services, LLC, evaluating the damage to his trees was not attached to any of the affidavits submitted in opposition to the motion for summary judgment.<sup>6</sup> R. pp. 49-53; 118-119; 120-153. Simmons fails to provide any foundation for the report or its substance, opinions, and conclusions and the document is full of multiple levels of hearsay. As such, this report would not be admissible in evidence.

Simmons also relies on the revised Lacey plat as evidence of the burden of BEC's use of TMS 498. That plat is attached as an exhibit to an affidavit submitted by Simmons' attorney. R. pp. 120, ¶4; 130. The affidavit merely asserts that "Exhibit D is a true copy of a Plat dated May 12, 2005 and supplemented September 22, 2010 prepared by Richard Lacey, PE." Simmons failed to provide any foundational testimony from Lacey authenticating this plat. Demonstrative evidence is authenticated by a showing that the demonstration of illustration is an accurate representation of the thing it is to demonstrate or illustrate and is helpful to the trier of fact. Danny R. Collins, Esq., *South Carolina Evidence*, § 13.15(A) (2d Ed. 2000). There is no testimony from anyone that the plat accurately depicts the property and features shown. *See Lucious v. Du Bose*, 114 S.C. 375, 103 S.E. 759, 760 (1920); *see also State v. Crocker*, 49 S.C. 242, 27 S.E. 49, 49-50 (1897). (Owner cannot testify as to significance of features placed on a plat at his direction.) As such, the plat is not admissible evidence.

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<sup>6</sup> The report misidentifies BEC's service as belonging to Simmons. R. p. 97. The property belongs to the Andersons (TMS 189). *Id.*

Simmons failed to establish a triable issue of fact that BEC's line over TMS 498 exceeded the scope of the 1972 easement granted by Brown. The Master correctly granted summary judgment on this issue and the Court of Appeals did not err in affirming the Master's ruling. Simmons must do more than show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine need for trial. *See Hedgepath v. AT&T*, 348 S.C. 340, at 354, 559 S.E.2d 327, at 336 (Ct. App. 2001). Summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

**B. Simmons Failed to Establish a Genuine Issue of Fact that BEC's Lines Exceeded the Scope of Express Easement Granted by the Estate of Heyward in 1956.**

Simmons contends the Court of Appeals failed to examine the language of the 1956 easement in affirming the Master's grant of summary judgment to BEC. Simmons argues that the easement permitted only a transmission line and that Lacey's revised plat shows "two distribution lines connected to the transmission line"—one extending west over TMS 135 toward the Seaboard Coastline Railroad Right-of-Way and the other extending east over TMS 135 toward the neighboring Anderson property. Brief of Petitioner, p. 22.

During the hearing on BEC's motion for summary judgment, Simmons' counsel asserted that he "did not have an issue" with the easement granted by the

Estate of Heyward in 1956. R. p. 198, lines 10-15. The Master confirmed Simmons' position:

THE COURT: So you've got---the Complaint is not as to the granted easement of the 75 foot, which goes across the property in a North South direction.

MR. BERTELE: Yes.

R. p. 198, lines 22-25. Simmons has waived any claim that BEC's use exceeded the scope of the 1956 easement.

Moreover, Simmons is simply incorrect in claiming that nothing in the plain language of the 1956 easement permits distribution lines. The language of the 1956 easement grants BEC

... a perpetual easement for the construction and maintenance of an electric transmission line or lines, *towers, poles, anchors and necessary fixtures and wires attached thereto*, counterpoise underground wires, *and all structures and appliances necessary and convenient therewith*, together with all rights and privileges incident to the use and enjoyment thereof ....

R. p. 92, emphasis added. In order to deliver electric power to area residents, distribution lines necessarily connect to and draw from transmission lines. Distribution lines are "necessary fixtures and wires" attached to transmission lines. They are "structures and appliances necessary and convenient" to the transmission line. As long as the connecting distribution lines are within the easement granted, they are authorized by the express terms of the easement. The 1956 easement specifies no minimum or maximum voltage that the lines must carry within the 75 foot wide right-of-way. It is unreasonable to argue that the parties would agree to

a transmission line that could only carry power to and throughout Johns Island but could not be accessed by BEC within the easement to distribute power to its inhabitants. The plain language of the 1956 easement does not support Simmons' restrictive interpretation.

The language of an easement determines its extent. *Plott v. Justin Enters.*, 374 S.C. 504, at 514, 649 S.E.2d 92, at 97 (Ct. App. 2007). Clear and unambiguous language in grants of an easement must be construed according to terms which parties have used, taken, and understood in the plain, ordinary, and popular sense. *Binkley v. Rabon Creek Watershed Cons. Dist. of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902, 907 (Ct. App. 2001). The general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it. *Plott v. Justin Enters.*, *supra*, 96. The unrestricted grant of an easement conveys all such rights as are incident or necessary to its reasonable and proper enjoyment. *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 96, 28 S.E.2d 545, 549 (1943).

As observed by the Court of Appeals in affirming the Master's grant of summary judgment, "the express easements to Berkeley Electric were broad," but "the original parties to the easements could have used more specificity had they intended the use to be more restricted." App. p. 7. The Court went on:

The evidence demonstrated that the electric lines had been in their current configuration for an extended period of time. This demonstrates the easement holder and the landowners' understanding that such configuration did not exceed the intended scope of the easements.

*Id.* Even if the language of the grant was determined to be uncertain or ambiguous, Simmons concedes that the Court may inquire into and consider the surrounding circumstances of the grant, “including the construction which the parties have placed on the language.” Brief of Petitioner, p. 23, citing 23 *Am. Jur. 2d, Easements and Licenses* §23 (1966). The Court of Appeals properly construed the grant of the 1956 easement according to the terms the parties had used, understood, and taken over five decades.

Simmons fails to establish that *two* electric distribution lines connect to the transmission line on TMS 135.<sup>7</sup> In his supplemental affidavit, Simmons alleges that Lacey’s revised plat shows “another line” running over his driveway. R. p. 119, ¶ 4. He does not mention two distribution lines connected to the transmission line. *Id.* As discussed in Section I(A), *supra*, Simmons failed to authenticate the plat. The plat is unsigned and unrecorded. R. pp. 52, 130. Simmons does not claim to be a surveyor and he is not competent or qualified to testify about what Lacey’s plat shows. *State v. Crocker*, 49 S.C. 242, 27 S.E. 49, at 49-50 (1897). A genuine issue of fact can be created only by evidence which would be admissible at trial. *See* Rule 56(c) SCRPC; *See Englert, Inc. v. The Netherlands Ins. Co.*, 315 S.C. 300, 304, 433 S.E.2d 871, 873 (Ct. App.1993).

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<sup>7</sup> Simmons previously argued that only one line extended from the 1956 easement across TMS 135. His claim that two power distribution lines encroach on TMS 135 is new matter that Simmons failed to raise with the Master. The claim is not subject to review.

Simmons claims that the line over his driveway was used by BEC “for many years to service its customers on the south side of Kitford Road.” R. p. 119, ¶ 4. As previously discussed, Simmons’ vague conclusion fails to state specific facts as required by Rule 56(e) SCRPC. *Id.* Conclusory statements as to the ultimate issues in a case are not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. *Germann v. New York Life Ins. Co.*, 286 S.C. 34, 38, 331 S.E.2d 385, 388 (Ct. App.1985).

Simmons alleges that Lacey’s revised plat

“shows another line running from the power distribution line were it crosses TMS 282-00-00-135 over my driveway out to Kitford Road and ending at the pole in front of the Turner residence on the south side of Kitford Road.”

R. p. 119, ¶4. Lacey’s revised plat is entitled:

EXHIBIT [*sic*] SHOWING  
LOT A (1.139 ACRES)  
LOT B (0.743 ACRES)  
LOT C (1.375 ACRES)  
CONTAINING 3.257 ACRES  
PROPERTY OF  
ROOSEVELT SIMMONS

R. p. 130. The plat, by its terms, is an exhibit of Simmons’ property *east* of the Seaboard Coastline Railroad Right-of-Way. *Id.* TMS 135 is west of the Seaboard Coastline Right-of-Way. R. p. 205, lines 4-8. Lacey’s revised plat does not show TMS 135. R. p. 130.

The revised plat depicts a line marked “OHL” extending northeast from BEC’s service drop to the Anderson residence. *Id.* Lacey’s revised plat shows

where the paved section of Kitford Road ends and the gravel section continues into the Seaboard Coastline Railroad Right-of-Way. *Id.* The plat depicts Kitford Road splitting into two gravel roads within the Seaboard Coastline Right-of-Way. R. pp. 96-97, 100, 130. The plat shows one of these roads extending generally to the east and the other road extending generally to the south from the Seaboard Coastline Right-of-Way. R. p. 130. The road running south from the Seaboard Coastline Right-of-Way is Simmons' driveway to his residence on TMS 138. R. pp. 96-97, 100. According to Simmons, Lacey's plat "shows another line running from the power distribution line where it *crosses TMS 282-00-00-135 over my driveway out to Kitford Road.*" R. pp. 119, ¶ 4; 130 (emphasis added). Lacey's plat clearly shows the "OHL" line crossing Simmons' driveway *within* the Seaboard Coastline Railroad Right-of-Way. *Id.* That property is not part of TMS 135 and does not belong to Simmons.<sup>8</sup>

Lacey's revised plat contradicts Simmons' claim of another line extending from the power distribution line *across* TMS 135. Simmons' claim of "another line" in his supplemental affidavit contradicts his argument that "two electric power distribution lines" connect to the transmission line on TMS 135. R. p. 119, ¶ 4; Brief of Petitioner, pp. 22-23. Simmons' assertions regarding what Lacey's plat shows are contradicted by what is actually depicted on Lacey's revised plat.

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<sup>8</sup> According to the Charleston Register of Deeds Office, title to the Seaboard Coastline Railway Right-of-Way is still in the name of Seaboard Coastline Railroad Co. That company has since changed its name to CSX Transportation, Inc.

R. pp. 119, ¶ 4; 130. Lacey's revised plat contradicts his original plat and neither plat shows TMS 135. R. pp. 52, 130. The court may disregard attempts to raise a disputed issue of fact by contradicting prior factual representations with subsequent affidavits. *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629, 633 (2004).

Simmons speculates that the language in the 1956 easement reserving the right of the grantor to conduct agricultural activities "strongly suggests that no further electric lines could be installed" because "other poles, wires, anchors, etc.," "would further limit the rights of the grantor to farm." Brief of Petitioner, P. 23. Simmons cites no evidence to support this claim. The easement specifically limits grantor's agricultural rights "for purposes of such nature as will not interfere with the construction, operation, patrol, and maintenance of the transmission lines or lines." R. p. 131. Connecting to the poles, wires, fixtures, structures, and appliances which distribute power is necessary and convenient to the operation of a transmission line and permitted under the plain language of the grant. R. p. 131. That is indeed how the parties have taken, used, and construed the easement from 1956 until Simmons brought suit in 2008.

Simmons argues that "there is no evidence when the distribution lines were installed so as to suggest that the grantor knew about them and approved." Brief of Petitioner, p. 23. In his supplemental affidavit, Simmons contends that the line over his driveway has been in use for many years. R. p. 119, ¶4. Seeney and Frank stated that the power lines they worked on had been in place in excess of 20

years. R. pp. 45-46, ¶ 4; 47-48, ¶ 4. The easement was granted and recorded in 1956 providing constructive notice.<sup>9</sup> R. p. 131. Simmons bears the burden of proving that BEC's use exceeded the terms of the 1956 easement. It is his burden to establish facts showing that the lines had not been there for many years and that grantor did not know about the lines or did not approve the lines. Simmons' contention that TMS 135 is "wooded and undeveloped" and that this somehow prevented the grantors and their successors from observing the power lines is nonsense. The power lines are open and obvious. This is not a genuine issue and is not supported by any evidence.

Simmons attacks the propriety, meaning, and effect of the affidavit submitted by BEC's Right-of-Way agent, Robert Bradley. Bradley simply states that BEC's service line extends from a pole located within the 1956 easement directly onto the Anderson property. R. p. 154, ¶ 4. He states that BEC's service to the Anderson property does not encroach on Simmons' property outside the 1956 easement. R. p. 154, ¶ 3.

Simmons argues that Bradley's statements create a disputed fact because "Petitioner contended the line encroaches on TMS 135." Brief of Petitioner, p. 24. Simmons' evidence for this contention is paragraph 5 of his supplemental affidavit. *Id.* The evidentiary problems with paragraph 5 of Simmons' supplemental affidavit have been addressed in detail, *supra*, at pp. 27-28 and are

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<sup>9</sup> The 1956 easement is recorded in the Charleston Office of the Register of Deeds in Book E 62 at page 302-302.

incorporated by reference herein. Simmons' affidavit says nothing about BEC's service line extending from its pole in the transmission line easement directly onto the Anderson property. R. p. 119, ¶ 5. The only line shown on Lacey's revised plat "running over a driveway" out to Kitford Road is the line located within the Seaboard Coastline Railroad Right-of-Way. R. p. 130. Lacey's revised plat does not depict TMS 135 anywhere. According to the Lacey plat, an "OHL" overhead line is not a power line. *Id.* Simmons' "evidence" does not contradict Bradley's affidavit and fails to create a genuine issue for trial.

Simmons' brief arguments regarding BEC's "second line" over TMS 135 are based on the same evidence and therefore equally deficient. Petitioner's Brief, p. 24. As set forth above, there is no evidence of any line extending from the 1956 easement onto TMS 135. Further, even if Simmons was able to establish his claim that BEC's line extended beyond the 75 foot boundary of the 1956 easement onto TMS 135, the Master held that any lines outside the express easements were covered by a prescriptive easement. R. pp. 18-20.

Simmons' argument that BEC exceeded the scope of the 1956 easement is not based on fact. Simmons' argument is based on allegations and misstatements of fact. The inferences he attempts to draw are not reasonable. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *See Thompkins v. Festival Centre Group, Supra* at 306 S.C. 193, 194, 410 S.E. 3d 593, 593. The Court should reject his unfounded claims and affirm the Master's grant of summary judgment.

### **III. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE MASTER'S RULING THAT BEC'S LINES WERE AUTHORIZED BY A PRESCRIPTIVE EASEMENT.**

Simmons contends that the prescriptive easement standard was not satisfied. Petitioner's Brief, p. 25. He accuses the the Court of Appeals of overlooking the deficiencies in the evidence submitted by BEC and discounting Simmons' affidavit and other documents. *Id.*

As stated by this Court:

A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). To establish a prescriptive easement, one must show: (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse or under claim of right.

*Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005). The elements of a prescriptive easement must be established by clear and convincing evidence.

*Bundy v. Shirley*, Op. No. 27520 (S.C. Sup. Ct, filed May 6, 2015).

#### **A. BEC Established the Identity of the Thing Enjoyed.**

Simmons first argues that Berkeley Electric failed to establish the identity of the thing enjoyed. This claim of error was neither raised nor ruled on by the Master and was never presented to the Court of Appeals. "It is the litigant's duty to bring to the trial court's attention any perceived error, and the failure to do so amounts to waiver of the alleged error." *South Carolina Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903, 907 (2007). This issue has not been preserved and is not subject to review.

Simmons claims 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 establish the identity of the thing enjoyed. Brief of Petitioner, p. 26. The Seeney and Frank affidavits identify BEC's distribution line located at 3507 Kitford Road. R. pp. 44, ¶ 3; 47, ¶ 3. 3507 Kitford Road is the physical address of the property identified as "Lot A, TMS 115" on Lacey's original and revised plats. R. pp. 52, 130. According to Simmons, that property is owned by the Turners. R. p. 119, ¶4. As depicted on Lacey's original plat, BEC's distribution line extends from its transmission line across the western side of "Lot C, TMS 115" (TMS 498) to a pole marked "C4" in front of the Turner property along Kitford Road.<sup>10</sup> R. pp. 52. From pole C4, the line branches out along Kitford road in both directions. R. pp. 52. On Lacey's revised plat, the Kitford Road line is shown extending through the Seaboard Coastline Easement and into BEC's transmission line easement. R. p. 130. Simmons claims that the line crosses over his driveway. R. p. 119. ¶ 4. Seeney and Frank testify that the line at 3507 Kitford Road is clearly visible from the road, obvious, and has been used to provide power to residents in the area since at least 1980. R. pp. 45, ¶¶ 3-4; 47, ¶¶ 3-4.

There is no dispute regarding the identity of the thing enjoyed. Simmons admitted to the Court of Appeals:

It is not disputed that the 1956 Heyward easement allowed Berkeley Electric to erect a transmission line

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<sup>10</sup> The Master was provided with a full size copy of Lacey's original plat and referred to it repeatedly during the hearing. R. p. 199, lines 9-23.

through TMS 282-00-00-135 and 283-00-00498; or that the 1972 Brown easement allowed Berkeley Electric to cross TMS 283-00-00-048.

Petitioner's Brief to the Court of Appeals, p. 23. Simmons argued that BEC "has never produced any document to rebut [his] claim that the power lines running west from the 75 foot transmission line is not on TMS 135 so that fact is not in dispute." Petitioner's Reply Brief to the Court of Appeals, p. 13. Simmons insists that BEC's use is unreasonable because its line runs over TMS 498 and TMS 135 and form a "loop" to its transmission line. Brief of Petitioner, p. 21; R. p. 130. In making such a claim, he necessarily admits the identity of the prescriptive easement enjoyed by BEC.

This evidence clearly and convincingly established the identity of the thing enjoyed by Berkeley Electric—the power line located at 3705 Kitford Road. That line crosses TMS 498 and branches out along Kitford Road and, according to Simmons, across TMS 135 and into the 1956 easement. R. pp. 52, 130. There is no genuine dispute as to the "identity" of BEC's claimed easement and the Court should affirm the Master's grant of Summary judgment.

**B. BEC Established Continued and Uninterrupted Use for 20 Years.**

Simmons next argues that there were disputed issues of fact over whether BEC established continued and uninterrupted use or enjoyment for the required 20 year period. Respondent's brief, p. 27. As before, Simmons' affidavit failed to set forth specific facts, his documents lacked the requisite factual foundation, and his

inferences were unreasonable. Summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *David v. McLeod Reg'l Med. Ctr.*, *supra*, 367 S.C. 242, 250, 626 S.E.2d 1, 5; *see also* Rule 56(e) SCRPC.

**1. Simmons' affidavit fails to raise a genuine issue of dispute regarding the period of BEC's use.**

Simmons claims that he “asserted based on personal knowledge that the line across TMS 498 was not there in 1980.” Brief of Petitioner, p. 15. This is what Simmons actually said in his supplemental affidavit:

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. In my previous affidavit, I referred to a plat dated October 7, 1981 prepared by W. L. Gaillard which shows the location of the Berkeley Electric distribution line easement crossing the property but does not show the other power line which Berkeley Electric claims was there then.

R. 118, ¶ 2. According to a plain reading of his affidavit, Simmons' claim is based on the Gaillard plat. *Id.* He fails to provide specific facts demonstrating any kind of personal knowledge, recollection, or understanding regarding his bare conclusion that BEC's line has not been located over TMS 498 since 1980 as claimed by Seeney and Frank.<sup>11</sup> Simmons certainly does not claim that he was involved in or had any personal knowledge regarding the preparation of the Gaillard plat. Simmons' rote statement that his affidavit is based on “personal

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<sup>11</sup> As stated by Seeney and Frank, the power poles supporting the line over TMS 498 have birthmarks of 1984 and 1986. R. pp. 45 ¶ 4; 47 ¶ 4. BEC's power lines could have been installed as late as April 8, 1988, and still come within the 20 year period required for a prescriptive easement.

knowledge” is no substitute for the specific facts required. Affidavits must be based on personal knowledge and must show affirmatively that the affiant is competent to testify to the matters stated in his affidavit. Rule 56(e) SCRPC. The statement is insufficient to raise a disputed issue of fact.

**2. It is unreasonable to infer that the absence of a feature on a plat means that the feature is absent from the property.**

Simmons contends that because plats prepared by W. L. Gaillard and Robert Shuler do not depict BEC’s distribution line over TMS 498, it is reasonable to infer that BEC’s lines were not there when the surveys were performed. Brief of Petitioner, p. 28. He argues that the Court of Appeals “should not have rejected them as irrelevant.” *Id.* Simmons accuses the Court of Appeals of improperly weighing the evidence “instead of accepting it as basis for a dispute of fact, i.e. when the line was installed.”

The Court of Appeals did not rule that the plats were irrelevant. Rather, the Court ruled that the Gaillard and Shuler plats were not surveys of Simmons’ property and did not purport to establish the location of all power lines. Appendix, p. 9. The Court of Appeals agreed with the Master’s conclusion that the plats did not provide contradictory evidence to the Berkeley Electric employee affidavits. *Id.* The Court did not weigh the evidence. The Master and the Court of Appeals simply refused to let Simmons draw a self-serving conclusion from the plats that had absolutely no basis in fact. It is unreasonable to infer that the absence of a feature means that the feature does not exist.

The Gaillard plat was attached as an exhibit to Simmons' initial affidavit. (R. p. 53.) In his original and supplemental affidavits, Simmons states that the Gaillard plat shows the location of BEC's easement crossing his property but does not show any other power line. R. pp. 50, ¶ 3; 118, ¶ 2. Simmons offers no information regarding the Shuler plat; the drawing is merely identified as a true copy of a survey dated November 8, 1983 and attached as an exhibit to the affidavit submitted by Simmons' attorney. R. pp. 121, ¶ 7; 134.)

At best, the plats might qualify as demonstrative evidence. Demonstrative evidence is not the thing itself, it only demonstrates or illustrates the facts given by other evidence. There is no testimony that either of the plats are authentic representations of the features they are supposed to illustrate—i.e., the lack of a power line on a neighboring property. See Danny R. Collins, Esq., *South Carolina Evidence*, § 13.15(A) (2d Ed. 2000). A chart, diagram, or drawing is authenticated by showing

- 1.) The drawing is relevant; 2.) the witness is familiar with the scene or object at the relevant time; 3.) the drawing is useful in helping the witness to explain what he or she saw; and 4.) the drawing is reasonably accurate and is not misleading.

*Id.* § 13.15(B)(4).

Neither Simmons nor his attorney claim to have been involved in the preparation of either of these plats and neither claim any personal knowledge, experience, or understanding regarding the preparation of these renderings or the scene at the relevant time. Simmons failed to provide any affidavits or testimony

from either Gaillard or Shuler or any other surveyor so there is no foundation regarding how the plats were prepared, what the plats are meant to depict, and the significance of the features noted on each plat or—in this case—not noted.

Simmons cites no authority in support of his contention that the absence of a feature on a plat means that the feature was absent. The plats do not show *any* distribution lines *anywhere*, even to the structures depicted on the property. R. pp. 53, 34. The level of detail in a plat is determined by the requirements of the property owner. Additional features require more work by the surveyor and, accordingly, extra expense. The surveyor and his customer determine how much or how little to depict. With a proper foundation, a plat might be offered as demonstrative evidence of the features shown, but it is unreasonable to allow a plat to be used as evidence of a feature not shown without some testimony regarding the alleged omission of the feature.

The absurdity of Simmons' logic can be demonstrated by reviewing the initial and revised plats prepared by Simmons' surveyor, Richard Lacey.<sup>12</sup> The plat submitted with Simmons' initial affidavit shows a power line ending in the abandoned Seaboard Coastline Railroad right-of-way. R. p. 52. The "revised" plat submitted by Simmons attorney on the eve of the hearing shows an "OHL" line extending through the Seaboard Coastline right-of-way and into BEC's 75' foot easement. R. p. 130. Based on Simmons' reasoning, we can infer that BEC's

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<sup>12</sup> Simmons' argument, if accepted, would open the floodgates for litigation based on features not shown on plats.

line did not extend through the right-of-way when the plat was originally prepared in 2005 because that feature was not shown until 2010. R. pp. 52, 130. Likewise, one could infer that the water line and setbacks noted on “Lot C” in the revised plat did not exist when the original plat was prepared. R. pp. 52, 130. Since neither plat depicts TMS 135, the property does not exist. *Id.* St. John’s plat showing TMS 498 in 2008 shows no power lines on the property at all, so they did not exist then. R. p. 78. Such inferences are unreasonable. As demonstrated by Simmons’ own materials, the lack of a feature on a plat does not support the inference that the feature does not exist on the property.

As observed by both the Master and the Court of Appeals, the Gaillard and Shuler plats were prepared for other properties, not Simmons’ property. R. p. 19-20, Appendix, p. 9. Simmons submitted the plats and is responsible for laying a proper foundation for his evidence. Simmons’ bare assertions of what he thinks the plats show is opinion, not evidence, and insufficient to defeat summary judgment. Rule 56(e) SCRCF. Simmons’ inferences are based on conjecture and have no basis in fact. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *Thompkins supra*, at 194, 593-94.

Viewed in a light most favorable to Simmons, these plats alone do not constitute admissible evidence that BEC’s lines were not located on Simmons’

property when those plats were created.<sup>13</sup> The Court of Appeals did not improperly *weigh* this evidence as claimed by Simmons because Simmons failed to establish that the plats were evidence of anything. The Master properly rejected Simmons' faulty logic and spurious inferences as baseless and unreasonable and properly ruled that the plats did not contradict the affidavits of BEC's district supervisors. R. p. 19. The Court of Appeals agreed with the Master and affirmed his decision. App. p. 9. This Court should do the same.

**3. Simmons' "system maps" do not raise a genuine issue for trial.**

Simmons argues that two so-called "system maps" he submitted created a factual dispute which precluded summary judgment. Brief of Petitioner, p. 29. Simmons admits these maps do not identify any property lines but nevertheless contends that these maps contradict BEC's claim of a prescriptive easement over TMS 498 because they "show a power line across Kitford Road in a substantially different location." *Id.* From this inference, Simmons contends that it is reasonable to further infer that the power line over TMS 498 had been moved sometime after 1995 because "otherwise the two system maps would be identical."<sup>14</sup> *Id.*

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<sup>13</sup> The Shuler plat attached to the affidavit of Simmons' attorney was untimely served and may be disregarded by the Court. Rule 56(c) SCRCP.

<sup>14</sup> Neither plat depicts the supposed "loop" in the system claimed by Simmons.

It is Simmons' obligation to provide a factual basis for his arguments. The maps were attached to the affidavit of Simmons' attorney and served on the eve of the hearing. R. p. 21, ¶¶ 8-9. As with the Gaillard and Shuler plats, Simmons failed to provide any kind of foundation authenticating the maps and as such they are not admissible evidence. Simmons did not mention either map in his original or supplemental affidavits. R. pp. 49-50, 118-119. Simmons did not prepare the drawings and he provided no facts supporting his conclusion regarding the purported differences. There are no facts or testimony establishing what these drawings depict or their level of accuracy. The system maps are patently different in terms of scale, perspective, and level of detail. R. pp. 135-136.

The Master made the following ruling on this issue:

Plaintiff failed to provide any affidavits or reference any testimony explaining what these maps depict, how accurate they are, or how they are to be properly interpreted. Plaintiff's theory that some of the power lines might not have been there for at least twenty years remains that—just a theory.

R. p. 20. A factual dispute is not raised simply because the opposing party makes inaccurate and unreasonable characterizations of the evidence. The issue must be genuine. *Thompkins supra* at 194, 593-94. Simmons' claim that the maps show BEC's line in "substantially different" locations is an opinion, not fact.<sup>15</sup>

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<sup>15</sup> Simmons' claim that there is "substantial difference" between the plats misrepresents the evidence. Each map shows a line extending from BEC's transmission line to a point located across Kitford Road. R. pp. 135, 136. A disputed issue of fact must be material and must be genuine. Rule 56 SCRCF.

Simmons' inference that the lines have been moved is based on opinion rather than on facts established by admissible evidence and is therefore not reasonable. Conclusory statements regarding ultimate issues in a case do not create genuine issues of fact. *See Germann v. New York Life Ins. Co., supra.* The Court of Appeals did not err in affirming the Master's decision and this Court should affirm.<sup>16</sup>

**IV. THE COURT OF APPEALS CORRECTLY APPLIED  
THE SCINTILLA OF EVIDENCE RULE AND DID  
NOT ERR IN AFFIRMING THE MASTER'S GRANT  
OF SUMMARY JUDGMENT.**

Simmons contends that he submitted sufficient evidence to satisfy the scintilla of evidence rule.<sup>17</sup> Brief of Petitioner, p. 30. In cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence in order to withstand summary judgment. *Holmes v. East Cooper Comm. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483, 492 (2014), citing *Handcock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Nevertheless, when the evidence is susceptible to only one reasonable interpretation, summary judgment may be granted. *Id.* A scintilla of evidence is any material evidence that, if true, would tend to establish the issue

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<sup>16</sup> The "system maps" attached to the affidavit of Simmons' attorney were untimely and may be disregarded by the Court.

<sup>17</sup> This issue was neither raised nor ruled on by the Master and was only presented to the Court of Appeals in the motion for rehearing.

in the mind of a reasonable juror. *Turner v. American Motorists Ins. Co.*, 176 S.C. 260, 189 S.E. 55, 57 (1935).

Simmons cites *Turner* for the proposition that the application of the scintilla rule depends on the facts and evidence of the specific case. Brief of Petitioner, p. 30. *Turner* is especially apt given the substance of Simmons' claims in this appeal. The Court in *Turner* stated:

The meaning of the rule is that there must be some evidence arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical and hypothetical views.

*Id.*, 56. The Court continued:

This declaration is but to say that the scintilla of evidence upon which a case should be sent to the jury must be real, material, and pertinent and relevant evidence, not speculative and theoretical deductions.

*Id.*, 57. See also *Jones v. Sun Publishing Co., Inc.*, 276 S.C. 12, 292 S.E.2d 23, 27 (1982).

In support of his argument that the Court of Appeals misapplied the scintilla rule, Simmons rehashes his earlier arguments. BEC has responded to these arguments, *supra*.

Simmons asserts that "Petitioner's Affidavit that the line was not there in 1980 was sufficient as mere scintilla of evidence alone." Brief of Petitioner, p. 32. He does not bother to cite the actual language from his affidavit. R. p. 118, ¶ 2. As previously discussed, Simmons failed to state specific facts supporting his bare

allegation that “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.” *Id.* Rule 56(e) SCRPC requires specific facts, not conclusions or allegations. *See, e.g., Medical University of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004). Simmons cannot rely on allegations to establish a scintilla of evidence. *See Turner v. American Motorists Ins. Co., supra.*

Simmons cites *Zurich American Ins. Co. v. Tolbert*, 387 S.C. 280, 692 S.E.2d 523 (2010) as support for his position, asserting that “the Court held that the insured’s affidavit alone stating that the vehicle being driven was a “substitute vehicle” was a scintilla of evidence. Brief of Petitioner, p. 32. The statement actually before the Court was: “The reason I drove the [Honda] and not the BMW was due to the fact that the BMW was in need of service and an oil change and could not be driven.” *Id.*, 524. The Court determined that the statement constituted a scintilla of evidence that the auto was a “Temporary Substitute” vehicle under the insured’s auto policy. *Id.*, 525.

The *Zurich* case is an insurance coverage case and is inapposite. The issue in that case was whether the insured’s representations invoked coverage under the “Temporary Substitute” vehicle endorsement in his policy. *Id.* There is no indication that the grant of summary judgment was reversed because the insured failed to state specific facts in his affidavit. Moreover, the insured’s fact-based assertions are in no way comparable to Simmons’ factually devoid allegations.

Simmons argues that because his affidavit stated that he had “personal knowledge of the facts set forth herein” the Court of Appeals was wrong to find that it was not based on personal knowledge. Brief of Petitioner, p. 32. Simmons’ bare assertion of “having personal knowledge” fails to make his subsequent allegations any more fact specific. Simmons contends that the Court of Appeals failed to view the evidence in the light most favorable to the nonmoving party and instead “tried to interpret this statement as something else than what it says.” *Id.* The Court of Appeals did not have to “interpret” Simmons’ statement because there was nothing in the statement to interpret. While it is true that evidence must be viewed in a light most favorable to the party opposing summary judgement, “nonetheless, a court cannot ignore facts unfavorable to that party and must determine whether a verdict for the party opposing summary judgement is reasonably possible.” *Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). *See also Hart v. Doe*, 261 S.C. 116, 118, 198 S.E.2d 526, 527 (1973) (“The requirement that testimony shall be considered in a light most favorable to the plaintiff does not by some legerdemain serve as a substitute for evidence, nor is it of sufficient potency itself to create and generate evidentiary matter. There must always be present a scintilla of evidence before the rule may be invoked.”)

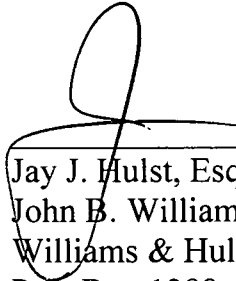
As previously stated, the scintilla of evidence must be real, material, pertinent and relevant evidence, not speculative and theoretical deductions. *See Turner v. American Motorists Ins. Co.*, *supra*. Moreover, the evidence must comply with the requirements of Rule 56(e) SCRPC. Simmons’ claim that BEC’s

line “has not been located across TMS 283-00-00-498 since 1980 as their witnesses claim” fails to state specific facts based on demonstrated personal knowledge as required by Rule 56(e) SCRCF. Bald allegations are insufficient to create a genuine issue of fact. Rule 56(e), *see also Baughman v. AT&T*, 306 S.C. 101, 410 S.E. 537, 546 (1991). The scintilla rule does not apply to Simmons’ bald allegation.

The Gaillard and Shuler plats and the “system maps” were unauthenticated and Simmons failed to provide any foundation for his unreasonable inferences. Such evidence fails to satisfy the requirements of Rule 56(e) SCRCF. Speculative and theoretical deductions do not create a scintilla of evidence. *See Turner v. American Motorists Ins. Co., supra*. The Court of Appeals did not misapply the scintilla rule and properly affirmed the Master’s grant of summary judgment.

CONCLUSION

Based on the foregoing, BEC respectfully asks that this Court affirm the Court of Appeals decision upholding the Master's grant of summary judgment in favor of Berkeley Electric Cooperative, Inc.



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May 20, 2015

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Hon. Mikell Scarborough, Master-In-Equity

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Appellate Case No.: 2013-001477

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Roosevelt Simmons.....Petitioner

v.

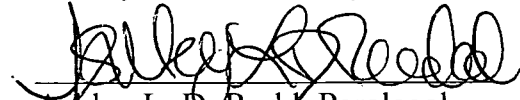
Berkeley Electric Cooperative, Inc.  
& St. John's Water Company, Inc.,.....Respondents

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CERTIFICATE OF SERVICE

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I certify that I have served a copy of the Brief of Respondent Berkeley Electric Cooperative, Inc. with regard to the above cited matter on all parties by depositing a copy of said Brief of the Brief of Respondent Berkeley Electric Cooperative, Inc in the United States Mail, postage prepaid, on May 20, 2015, addressed to the attorney for the Petitioner, Edward A. Bertele, 1812 Pierce Street, Charleston, SC 29492 and to the attorney for St. John's Water Company, Inc., Gaines Smith, 720 St. Andrews Boulevard, Charleston, South Carolina, 29407.



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May 29, 2015