THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Roosevelt Simmons.....Petitioner

Vs.

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

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**REPLY BRIEF OF PETITIONER**

**TO**

**RESPONDENT BERKELEY ELECTRIC COOPERATIVE, INC.**

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### I. SUMMARY

Petitioner has demonstrated that the Master's decision granting summary judgment as to Respondent Berkeley Electric Cooperative, Inc., and affirmed by the Court of Appeals was contrary to the established law. Neither the Master nor the Court of Appeals applied the correct standard in interpreting the express easements at issue here, i.e. the use must be reasonably necessary and least burdensome to the servient estate. Petitioner's Brief at page 20-21. Respondent does not cite any case which interprets an unlocated easement by a different standard than Petitioner has asserted.

Petitioner has also demonstrated that the Respondent's motion for summary judgment which was limited to a prescriptive easement lacked " clear and convincing evidence" . Petitioner's Brief at page 25-29. Respondent's motion for a prescriptive easement lacks any

evidence which is clear and convincing and instead Respondent asks the Court to supply the missing information by referring to the Lacey plat.

Furthermore, Petitioner's opposition to this Motion presented genuine issues of material fact that the Respondent's distribution line was not in the location claimed for 20 years. Apart from Petitioner's own statements about the age of the line, two plats dated in the 1908's, one of which was prepared for Respondent, did not contain the distribution line. Petitioner contended that under the circumstances, both plats could support a "negative inference" as to the non- existence of the distribution line which Respondent's employees claimed was located there. Respondent has not provided any controlling authority which prevents the Court from adopting a reasonable negative inference to overcome the Seeney and Frank affidavits.

Respondent has made contains numerous incorrect statements as to Petitioner's position .Respondent's Brief at pages 9-13. Respondent asserts that Petitioner has no issue with the transmission line constructed pursuant to the 1956 easement Respondent's Brief at page 9-10. However, the citation to the record upon which Respondent relies is incomplete because it omits comments by both the Master and Petitioner's counsel wherein it was indicated that Petitioner did object to the two distribution lines running from that line in different directions. R. p. 198, line 16-21. These were identified as the "yellow lines" shown on the Lacey plat. R. p. 130.

Respondent then asserts that there is no issue about the scope of the 1972 easement as to TMS 498. Respondent's Brief at page 10. However, that is not correct. Respondent ignores the argument that Petitioner presented below. See Appellant's Brief at pages 24-25; R. p. 115-116. Petitioner established that the Brown easement in 1972 allowed Respondent to

cross property then owned by Brown including TMS 498; and that this easement was in connection with a subdivision of the property. Petitioner contended that it was unreasonable for Respondent to extend its power line from the transmission line down Kitford Road and then cross TMS 498 to connect to the transmission line again forming a "loop". Therefore, the issue is not whether Respondent could cross TMS 498 but whether it was unreasonable to do so given the existing location of its power line down Kitford Road and the transmission line also crossing TMS 498.

Respondent cites the affidavits of its employees Seeney and Frank as evidence of a prescriptive easement . Respondent's Brief at page 10. However neither the Seeney or Frank affidavits say what Respondent claims they do. These affidavits say only that there is a power line "in front of 3705 Kitford Road" but do not identify the directions in which this line runs. Neither of these affidavits mentions that the line "in front of 3705 Kitford Road" runs along Kitford Road across TMS 135 to the Andersen property. There is nothing in the record to support the contention that once the distribution line enters the 75' right of way, it would be covered by that express easement. Respondent's Brief at page 11. See Point II below.

Finally, Respondent's argument that the evidence upon Petitioner relied to dispute its claims for prescriptive easement , Respondent's Brief at pages 11-2 was not admissible has not been adopted by the lower Courts and should likewise be rejected by this Court.

## II. THE LOWER COURTS' RULINGS ON THE SCOPE OF THE EASEMENTS SHOULD BE REVERSED

Respondent claims that Petitioner's complaint was not about the 1956 easement, only about TMS 498, citing excerpts from the Motion hearing. Respondent's Brief at page 15.

Respondent omits the critical lines which contradict its assertion. In the lines omitted it is made clear by both the Master and Petitioner's counsel that Petitioner did object to the two distribution lines running from the transmission line under the 1956 easement. R. p. 198 line 16 to 199, line 5. Respondent further asserts that Petitioner does not show any lines crossing the boundaries on TMS 135. Respondent's Brief at page 15. However, Petitioner's affidavit which references the Lacey supplemented plat does contain that information. R. p. 188, Para. 3 to 199, Para. 5.

Respondent concedes that the Court of Appeals did not find that the 1972 easement permitted Respondent to cross TMS 135. Respondent's Brief at page 16. Since the 1972 easement did not extend into TMS 135 and the distribution lines were outside of the 75'transmission line, then Respondent must establish that it is entitled to a prescriptive easement as to those lines. As previously argued and addressed herein, see Point III, Respondent has failed to carry its burden of proof.

Respondent asserted that it had no obligation to submit any evidence as to the scope of the easement under R 56(b) SCRCP. Respondent's Brief at page 17.That is incorrect because of how the issues were framed by Respondent in its summary judgment motion. Its Motion was for a prescriptive easement not based upon any specific written easement. Respondent never identified the area under which it asserted such a right in its initial Motion for summary judgment. In opposition, Petitioner , then pro se responded as if the prescriptive easement were across TMS 498. R. p. 49, Para 3- 50, para.4.When renewing ( and amending ) its motion, Respondent used the same non-descriptive affidavits. In opposition to this Motion, Petitioner asserted that there was no basis for a prescriptive easement across TMS 498 or TMS 135 for several reasons including the lack of the 20 year duration and the excess use of

the easement by crossing Petitioner's property in different directions. R. p. 110-116. The Lacey plat indicated that there were distribution lines connected to the transmission line to the north of TMS 498, crossing TMS 498 on the west and running down Kitford Road across TMS 135 and connecting to the transmission line again thus creating a loop with the transmission line. R.p.130.[1]

Petitioner argued that Respondent could not rely upon its express easements because they had not been reasonably implemented and interfered with his use of TMS 498. R.p.119, Para. 5. Therefore, Respondent had the burden to show that its use was not unreasonable.

Respondent's assertion that this loop was not an unreasonable use as a matter of law is incorrect. The law concerning the use of an unlocated easement is clear: " A grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the **servient** estate as possible for the use contemplated." Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E.2d 545 (1944). Once petitioner had made a prima facie showing of an unreasonable use, Respondent had to explain why it was necessary.

Respondent have failed to explain why it was necessary for it to connect to its own transmission line to create a loop which diminishes the usable area of TMS 498. Instead it criticizes Petitioner's " lack of proof as to the unreasonableness." Respondent's Brief at page 20-21. Petitioner contends that the Master and Court of Appeals failed to apply the correct legal standard by finding that the easements did not exceed their scope and that the record was incomplete. "Summary judgment is not appropriate where further inquiry into the facts of

[1] Respondent claimed that Petitioner did not raise this issue on his Motion for Rehearing . Respondent's Brief at page 17, fn 2. This same argument was asserted in opposition to this Petition. Respondent's return to Petition at page 12, fn.2. This statement is incorrect since the scope of the easement was an issue throughout the appeal and on rehearing. Resolution of the scope of the easements for TMS 498 and 135 was interrelated . See SCACR 242(d)2. Furthermore, this Court granted a Writ of Certiorari without any limitation of the issues.

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). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Baughman v. American Tel & Tel. Co., 306 S.C. 101,410 S.E. 2d 537 (1991).

Respondent criticizes Petitioner's statements regarding the use of another line on Kitford Road to provide power as being inadmissible. Respondent's Brief at page 19. However, those statements do not affect Respondent's obligation to establish why the loop was necessary and least burdensome. Respondent also alleges that an expert report regarding the value of loss trees on TMS 498 should not be considered but it was submitted by Respondent as part of its Amended Summary Judgment Motion , See R. p. 98-99. Since Respondent obviously intended to rely upon it, it has no basis to question its own exhibit. Furthermore Petitioner described the loss of trees in his Affidavit, R. p. 119 Para. 5. The expert report only quantifies the damages and is not necessary to establish a dispute of fact as to the excessive burden on petitioner's property.

Respondent's assertion that a party cannot identify details of a plat he asked to be prepared, citing State v. Crocker, 49 S.C. 242, 27 S.E. 49 ( 1897) is not an accurate statement of the holding in that case. There, the Court refused to allow a party to explain what a surveyor meant by lines on a plat that were unintelligible. " I can't allow a party outside to say what the surveyor meant by certain marks which are not designated." 27 S.E. at 49. Here all of the details of the power lines on the Lacy plat are identified on the Legend. Petitioner initially asked Lacey to prepare a plat of all of his property , R. p. 49,Para. 3 but the 2005 plat Lacey prepared only contained the portion west of the Seaboard Coastline Railway right of

way. Id. The 2010 plat was prepared to include the location of electrical lines on the remaining area, TMS 135. R. p. 118, Para. 3- 119, Para. 4.

Lastly, Respondent asserts that the Lacy plat should not be considered but then relies upon it to assert that the Seeney and Frank Affidavits describe the lines which are the subject of prescriptive easements. Respondent's Brief at page 23, 34. Respondent has waived any objection to consideration of this plat because it never objected to either the 2005 plat which was served as part of Petitioner's original response in 2009 or the 2010 revised plat. Furthermore, Petitioner referenced both plats in his affidavits and adopted them as accurately describing the conditions. See R. p. 49, para.3; 118, Para. 3 -119, para.4. The Lacey plat was reviewed by the Master again without objection. R. p, 199, line 6-23.

Respondent alleges that Petitioner waived any objection about the scope of the 1956 easement. Respondent's Brief at page 24. Respondent again cites to the same incomplete excerpt of the transcript of the motion hearing which does not accurately reflect Petitioner's position that the distribution lines running to that transmission line were objectionable. R. p. 198, line 16-21. However, by claiming that the line to the Andersen property was within the scope of the 1956 easement, respondent has made an issue of it. R. p. 154, Para. 3, p. 157.

Respondent argues that the terms " necessary fixtures and wires" in the 1956 easement encompasses the installation of distribution lines within the 75 foot easement. Respondent's Brief at page 25. Respondent contends it would be unreasonable not to include such wires within the meaning of " necessary wires and fixtures. However, the context within which the terms "necessary wires and fixtures" is mentioned must be considered. See Bolt v. Ligon, 144 S.C. 218, 142 S.E. 504,505 ( 1928). See also Sparks v. Palmetto Hardwood, Inc., 401 S.C.

619, 738 S.E.2d 831, 834 ( 2013)( context of terms to be considered in statutory interpretation); University of Southern Cal. v. Moran, 365 S.C. 270, 617 S.E.2d 135, 139 ( 2005) These terms are contained in a part of the grant which references " towers, poles and anchors". They are clearly intended to reference the structural aspects of the transmission line, i.e. what supports it . Moreover , the 1956 easement uses the term " transmission line and the 1972 easement uses the terms "transmission line" or "distribution line". These are terms which are commonly understood. Respondent has failed to justify its interpretation of "wire" to mean a distribution line when Respondent in its own easement uses the term "line" when referring to that which carries its electric power and uses wire in the context of poles, towers and anchors. By failing to clearly specify that a " distribution line" could be connected to its "transmission line" in the 1956 easement which it prepared, the easement will be interpreted against it. " A court will construe any doubts and ambiguities in an agreement against the drafter of the agreement." Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981)(citing 17A C.J.S. Contracts § 324).

Respondent argues that the general grant entitles it to all of the uses which are reasonable and necessary to enjoyment of the grant. Respondent's Brief at page 26.However, Respondent's failure to include any specific reference to a distribution line cannot be overcome claiming it is an incidental right. Plott v. Justin Enterprises, 374 S.C. 504, 649 S.E.2d 92 (Ct. App. 2007) cited by Respondent does not support this contention. The easement in question there granted the right of ingress and egress "upon, over and across" Encampment Plantation Drive and provide[d] no express limits on the right of Respondents to traverse it." 649 S.E. 2d at 97. The easement at issue there clearly intended to allow the grantee to cross the subject property. The lower Court's determination that a fence and

shrubbery interfered with the use provided for in the easement was clearly appropriate and the Court of Appeals affirmed. Id. There is no contention that Petitioner has interfered with Respondent's use and Plott is not applicable.

Respondent cites Hill v. Carolina Power & Light Co, 204 S.C. 83, 28 S.E.2d 545 ( 1943) also cited by Petitioner. Respondent's Brief at page 26. However, Respondent omits the relevant portion of the Court's discussion of an unrestricted easement. "The right of the easement owner and the right of the landowner are not absolute, irrelative and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both." 204 S.C. at 96, 28 S.E.2d at 549. The Court went on the state that such easements only allow a reasonable and necessary use which is least burdensome to the servient estate. Id. Furthermore, Respondent ignores the holding in Smith v. Commissioners of Public Works of City of Charleston, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1993) which Petitioner contends is directly applicable.

Respondent again asserts that Petitioner's affidavit only identifies one line crossing TMS 135. Respondent's Brief at page 27. However, Petitioner's Supplemental Affidavit clearly states that Lacey was asked to survey all of the property acquired in 2003 but that the 2005 survey only included the portion of this property to the west of the Seaboard Coastline Railroad right of way. Petitioner then stated he asked Lacey to return to survey all of the power lines affecting his property including TMS 135. R, p. 118-119, Para 3; R. p. 126. As discussed previously, the Lacey plat which was presented to the Master without objection clearly shows both lines. It became an issue after Respondent submitted the Bradley Affidavit to attempt to rebut the Lacey plat . Respondent's contention that the second line was not raised with the Master, Respondent's Brief at page 27, fn 7, is incorrect. The Master referred

to the yellow highlighted line in the Lacey plat during the motion, R. p. 119 line 17 and Petitioner's counsel then directed the Master's attention to the other yellow highlighted line. Id. line 19-21.

Respondent also alleges incorrectly that TMS 135 is west of the Seaboard Coastline Railroad right of way, Respondent's Brief at page 28, but the citation to the Record which it provides, R. p. 205, lines 4-8, clearly says that TMS 135 is to the east, as described in the Lacey plat. Respondent argues that the Lacey plat is inconsistent with Petitioner's statements, Respondent's Brief at pages 29-30. However, these claims are not accurate, both the 2010 Lacy plat and Petitioner's statements are consistent, as described above. Respondent has not rebutted the relevancy of the Lacey plat since it has relied upon it itself to support its interpretation of the non specific reference in the Seeney and Frank affidavits about a " power line". Respondent claims there are contradictions in the Lacey plat, Respondent's Brief at page 29-30 but it is clear that the 2010 plat does show Petitioner's property TMS 135. That has never been an issue in dispute and Respondent is merely try to cause confusion by claiming it is. As part of its Motion for summary judgment, Respondent attached a copy of the Charleston County Tax Map which shows TMS 135 adjacent to the Seaboard Coastline Railroad right of way. R. p. 96. Furthermore, in its supplemental submission, Respondent submitted the Affidavit of Robert Bradley, which references an Exhibit B which locates TMS 135 to the west of the 75 ' transmission line and adjacent to the Seaboard Coastline Railroad right of way. R. p. 154, Para. 3, R. p. 157. Respondent's assertion that " there is a no evidence of any line extending from the 1956 easement onto TMS 135" Respondent's Brief at page 32 , is contradicted by its own witness. Therefore Respondent has no legitimate basis to claim any contradiction , inconsistency or lack of a factual basis about TMS 135 since it has

accepted the location as shown in the Lacey plat by its own submissions and has waived any possible objection to claims about its distribution line across TMS 135 by failing to object to the Lacey 2010 plat.

Respondent refers to the Bradley Affidavit to rebut Petitioner's claim about encroachment on TMS 135 to the east of its 75' transmission line easement. Respondent's Brief at page 31. The Bradley affidavit stated that in his opinion "Our easement encroaches on property owned by the Andersen's, shown as TMS 282-00-00-136. R. p. 134, Para. 3. Petitioner objected to consideration of the Bradley affidavit below on multiple grounds , including that it should have been submitted initially, not as rebuttal and that it contained an opinion that was not disclosed in discovery. R. p. 212, line 24 to p. 214, line 14. Notwithstanding these objections, Petitioner contends that by its response, Respondent wanted to address the location of its distribution line extending to the Andersen property.

In summary, Respondent does not address the appropriate standard for interpretation of the unlocated easement found here. Many if not all of Respondent's allegations about the evidence being inconsistent or unsupportive of Petitioner's claims are not supported in the Record. All of Respondent's claims about issues not being preserved have been rejected by the Court of Appeal since it dealt with all of the issues decided by the Master. Similarly this Court agreed to hear them as well.

## III. A PRESCRIPTIVE EASEMENT WAS NOT ESTABLISHED AS A MATTER OF LAW

Respondent asserts that the prescriptive easement was established as a matter of law because it satisfied all of the criteria and that there were no reasonable inferences that could

support denial of its motion. Respondent's Brief at pages 33-42. Initially, Respondent contends that Petitioner did not raise an issue about the identity of the thing enjoyed before the Master or Court of Appeals. Respondent's Brief at page 33. This is incorrect. Petitioner asserted before the Master and on appeal that Respondent did not establish all of the elements needed for a prescriptive easement citing Horry County v Laychur, 315 S.C. 364,367 (1993). R. p. 109, 110-113; Appellant's Brief at pages 27, 34.

Respondent further contends that the Seeney and Frank affidavits are themselves sufficient to meet its burden of "clear and convincing proof" as to the identity of the thing enjoyed. Respondent's Brief at pages 33-34. Petitioner asks this Court to reject that argument because Respondent relies upon the details of the Lacey plat to supply critical details missing from their affidavits: that its power distribution line runs across TMS 498 and down Kitford since 1980. See Respondent's Brief at page 34. Although the Lacey plat was part of Petitioner's opposition to Respondent's original summary judgment motion in 2009 when he was pro se, neither Seeney nor Frank refer to it in their affidavits submitted in November 2010. R. p. 52 . Therefore, the statement that "the line at 3507 Kitford Road is clearly visible from the road . . . and has been used to provide power to residents in the area" does not have the required specificity. The statement does not refer to any TMS designations or other geographical reference indicating the direction(s) in which the line runs. It is simply too vague to satisfy the "clear and convincing" standard. Respondent tries to stretch this language even further by asserting that it identifies the line running down Kitford Road onto Petitioner's property TMS 135. Respondent's Brief at page 35. Respondent is asking this Court to incorporate the details shown on the Lacey plat originally prepared in 2005 into the Seeney and Frank affidavits without any reasonable basis to do so. If Seeney and Frank wanted to

incorporate the details of the Lacey plat into their statements about the power line being in existence since the 1980s they had simply to do so. Since they did not, it is not reasonable to infer that these details can be made a part of their statements.

Petitioner has contended throughout this appeal that the lower courts have interpreted the evidence as favorable to Respondent Berkeley Electric when the Court should be interpreting the inferences in favor of Petitioner. Respondent is encouraging this Court to do the same by asking it to infer that the Seeney and Frank affidavits incorporate the information contained on the Lacy plat when they do not mention it.

Respondent asserts that Petitioner's contention of a loop in the power lines which surround TMS 498 is itself acknowledgement that this is the area to which the prescriptive easement applies. Respondent's Brief at page 34-35. However, Respondent cannot rely upon Petitioner's opposition to its summary judgment motion to establish a lack of specific detail in the Seeney and Frank affidavits. Once Petitioner presented the "loop" as a reason for denial of summary judgment, Respondent could have supplemented its argument with further affidavits addressing Petitioner's contention that the line had been moved there subsequently. The fact that it did not do so makes it unreasonable to infer that the "loop" was intended to be what Seeney and Frank were addressing. The reasonable inference is that they were referring to the line across TMS 498 alone. That was how Petitioner interpreted it when he was pro se. See R. p. 49-50. Furthermore, nothing which Respondent submitted since 2009 indicates that it was asserting that its power lines going down Kitford Road and crossing TMS 135 were part of what Seeney and Frank were describing in their Affidavits.

Petitioner contends that the reference to the line in front of 3507 Kitford Road could just as easily mean the line running to the north across TMS 498, or a line running down

Kitford Road; in other words, that statement is susceptible to more than one interpretation, Respondent wants this Court to pick the one that favors its position but that is not the appropriate standard when considering summary judgment as a matter of law.

In summary, Respondent is asking this Court to supply missing information. Respondent bears the burden to establish all of the elements of a prescriptive easement by clear and convincing evidence as a matter of law ( as well as the lack any dispute of a material fact) to obtain summary judgment. However, the Court can do so only under certain circumstances: "[W]hen only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court." Hart v. Doe, 261 S.C. 116,120 198 S.E.2d 526,528 ( 1973) .

Respondent further asserts that Petitioner's affidavit does not raise a genuine issue of material fact. Respondent's brief at page 36-37. In addition to the statement in Petitioner's Affidavit that the line across TMS 498 was not there since the 1980's, R.p.119, Para. 2, the Record reflects that Petitioner lived at the end of Kitford Road for many years, R.p.119, Para. 4, and that his family had owned TMS 498 "before the 1960's". R.p.49, Para. 2. These statements are specific facts which provide the basis for Petitioner's knowledge. They are not speculative or theoretical. The reasonable inference is that Petitioner had to drive past TMS 498 which is on Kitford Road on the way to and from his house and also knew of the conditions on this property because it was in his family's name before the 1972 easement was even granted. Respondent asks this Court to ignore those facts and reasonable inferences.

Respondent next claims that the Galliard and Schuler plats produced by Simmons did not create an issue of fact because there is no foundation for admissibility. Resp. Brief at page 38-39. However, Respondent did not make any contemporaneous objection to them

being considered in its supplementary submission to the Master. The Schuler plat was prepared for Respondent and provided by it in discovery. R. p. 205, line 25 to p.206, line 5. Respondent's counsel considered it to be "irrelevant". R. p. 235, line 9.Therefore, Respondent has waived any right to object that they should not have been considered on appeal. State v. Patterson, 367 S.C. 219 , 625 S.E.2d 239,243 (Ct. App. 2006).[2]

Respondent contends that it is unreasonable to infer that the absence of a feature means that the feature did not exist and that Petitioner cited no authority for this proposition. Id. page 37, 39. Petitioner asserts that prior research did not identify any reported case which deals specifically with this issue but Respondent has likewise not cited any case to the contrary. Id. Therefore, this case may be one of first impression and as such precedent does not restrict this Court's ability to agree with Petitioner's argument.

The bases for the negative inference are these facts. The Galliard plat dated October 7, 1981was prepared for the purpose of creating a subdivision and recorded. R. p. 53. The plat indicates the location of Respondent's 75 foot transmission line. The fact that the surveyor indicated the location of one power line creates a reasonable inference that he would have indicated the presence of another line connecting to it at the same location.. The 1983 Schuler plat was prepared for Respondent . The legend on the Schuler plat states." Area under power line easement ". R. p. 134. The plat does not reference any particular easement or indicate that it pertains to only one easement. The Schuler plat shows the same pole on TMS 118 as the Lacey Plat. R. p. 130. Respondent does not deny that the details shown on the Lacey plat indicating that its line crosses TMS 498 and connects to the transmission line to the north of TMS are accurate. Respondent's own surveyor, not Petitioner, must explain why he did not include the other power line. The Galliard and Schuler plats depict the area

[2] This includes any claim that the Schuler plat was " late". See Respondent's Brief at page 41,fn 13.

where this line crossing TMS should have terminated. The fact that these plats are not of Petitioner's property is not dispositive because they describe the details of the area where the distribution line would have been located in 1980- if it was there. Another relevant fact is that Respondent never provided any documentary evidence of a distribution line across TMS 498 when it said it was there in 1980. Another relevant fact is that the 75 foot transmission line is shown on both plats. Therefore, the reasonable inference is that both surveyors intended to locate power lines. These facts taken together, not speculation, support the negative inference that Petitioner urges. Respondent's argument that both surveyors ignored another power line is not based upon a reasonable inference given what the plats do contain.

Respondent urges this Court to reject this inference but not based upon any facts. None of Respondent's arguments about the relevancy of the Galliard and Shuler plats before the Master, the Court of Appeals or this Court are based upon any evidence. For example: "The level of detail in a plat is determined by the requirements of the property owner." Respondent's Brief at page 39. This and other similar statements, Id. at page 39 ff. are solely argument of counsel. Petitioner has repeatedly emphasized that accepting these arguments on their face is " weighing the evidence" , instead of determining whether there is only a single reasonable inference which can be supported by all of the evidence.

Respondent's comments about alleged inconsistencies in the Lacey plat and Respondent's St. John's Water Company survey are not valid. Respondent's Brief at pages 39-40. Petitioner asserted that the 2005 Lacey did not contain details about his property TMS 135 so he asked Lacey to revise it. R. p. 118, Para, 3. The survey prepared for Respondent St. John's Water Company states that it is a "Survey of existing 2.5" Waterline. R. p. 78. By its

terms it is limited to water lines. Respondent's argument about " examples of inconsistencies" should be rejected.

No floodgate of litigation would be opened as Respondent fears, Respondent's Brief at page 39, fn 12 because each case stands on its own facts. See Estate of Revis by Revis v. Revis, 326 S.C. 470, 484 S.E.2d 112,117 (Ct. App. 1996) ( evidence of change of one beneficiary creates negative inference that decedent decided not to change second beneficiary). Petitioner urges this Court to remand so that the Master can take testimony not merely accept the argument of counsel in determining the weight to be accorded to all of the evidence.

In summary, Petitioner submitted evidence , the Galliard and Schuler plats, to which Respondent never objected , from which a reasonable inference arises , that the power line across TMS 498 was not attached to respondent's pole on TMS 118 as of the latest date, i.e. the Schuler plat. The Master disregarded this reasonable inference because he "weighed" the evidence. Therefore, his decision to grant summary judgment must be reversed.

Finally, Respondent asserts that two system maps, R. pp. 136, 137, depicting the location of its power lines require a factual basis . Respondent's Brief at page 42. Petitioner asserted before the Master that only two maps were produced by Respondent in response to a discovery request for all system maps locating its lines across Petitioner's property. R.p.112. The maps indicate that the date of their preparation was 1995 and "current' representing the present system. R. p. 136,137. At the motion hearing, Petitioner's counsel mentioned the lack of evidence of the power line location , referring to the system maps . R. p. 210, line 25 to 211,line 5. Respondent's counsel never objected to consideration of its own system maps or denied that there were only two of them the earliest

which was done in 1995. Consequently Respondent has waived any right to object to a lack of factual basis for the maps. State v. Patterson, 367 S.C. 219 , 625 S.E.2d 239,243 (Ct. App. 2006). Therefore, this Court should accept them for what Respondent has identified them to be in discovery: "maps showing the location of the disputed power line from 1980 to the present ".

Petitioner contends that the Master should not have disregarded these maps because they are probative of the issue of the location of the power line across TMS 498 in the past. They contain information about the location of the power line across TMS 498 at different times. If as Petitioner asserts, the maps depict the power line in two different locations, then the reasonable inference is that the line had been moved. Respondent asserts that the maps are different in terms of perspective, scale and level of detail. Respondent's brief at page 42. However, those arguments do not relate to the relevancy or materiality of the maps.

The scale is irrelevant because geometry doesn't change due to changes in scale. In other words, a map of South Carolina would show the same relative locations of the cities, towns and roads, regardless of whether the map was small or large based upon a north – south orientation. The level of detail is irrelevant because Respondent provided them as showing the location of the disputed power line and thus had reason to believe that the map shows a power line over TMS 498, otherwise they would not have produced it. Finally, there is no issue of perspective involved. A map is a map. It describes the location of different points in relation to one another based upon a standard reference point, i.e. North-south –east-west. All that matters is the relationship of the points to each other.

Petitioner asserts that the maps plainly depict different locations of the same power line because the geometry of the power lines in relation to one is different on the 1995 map

and the current map. The current map R. p. 136 shows a power line located in front of the Ivory Turner property at 3507 Kitford Road as identified by Seeney and Frank. R. p.101, Para. 3, R. p. 103, Para. 3. The 1995 map, R. p. 137 shows a power line crossing Kitford Road but further to the west. The scale of the current map is slightly larger than the 1996 map but the change in location of the power line is not a function of a change in scale. The orientation of the transmission line and Kitford Road are the same in both maps as expected but not the disputed line. Petitioner therefore urges this Court to remand to the Master in order that this discrepancy can be addressed. "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). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Baughman v. American Tel & Tel. Co., 306 S.C. 101,410 S.E. 2d 537 (1991).

In summary, Respondent failed to establish a prescriptive easement by clear and convincing evidence. The Seeney and Frank affidavits do not say what Respondent claims they do. Respondent failed to amend them when it filed an Amended Motion knowing that the Lacey plat contains further details including a power line on Kitford Road. Respondent never produced a single document showing that its distribution line across TMS 498 was there in the 1980s. The facts as to the existence of a prescriptive easement across 498 and 135 were in dispute. Petitioner therefore urges this Court to reverse the lower Court's decision.

## IV. APPLICATION OF THE SCINTILLA RULE REQUIRES REVERSAL

Petitioner contended that the Court of Appeals misapplied the " scintilla rule " in affirming the Master's Decision. Petitioner's Brief at page 30-33. Respondent asserted that the issue was not ruled on by the Master. Respondent's Brief at page 43, fn 17. However, in his Decision, the Master states that "Plaintiff has failed to establish any sufficient evidence to rebut BEC's showing of a continuous and uninterrupted use of the property for at least twenty years. ". R. p. 20. Petitioner addressed this issue in his Motion to Alter /Amend the Decision. R. p. 182-185. Consequently it was preserved on appeal and the Court of Appeals also addressed it. App at page 4.

Respondent asserts that Petitioner's Affidavit does not meet the requirements of the scintilla rule because it does not state specific facts based upon personal knowledge. Respondent's Brief at page 44-45,46-47. Respondent is again incorrect. In addition to the statement in Petitioner's Affidavit that the line across TMS 498 was not there since the 1980's, the Record reflects that Petitioner lived at the end of Kitford Road ( which TMS 498 abuts) for many years, R.p.119, Para. 4, and that his family had owned TMS 498 "before the 1960's". R.p.49, Para. 2. These statements are specific facts which provide the basis for Petitioner's knowledge. They are not speculative or theoretical. The reasonable inference is that Petitioner had to drive past TMS 498 on the way to get to and from his house and knew of the conditions on this property because it was in his family's name before the 1972 easement was even granted. Respondent asks this Court to ignore those facts and reasonable inferences as the basis for applying the 'scintilla rule" but its argument should be rejected.

Appellant contended that Zurich American Ins. Co. v. Tolbert, 387 S.C. 280, 692 S.E.2d 523 ( 2010) provided support for his position but Respondent asserts it is inapplicable,

Respondent's Brief at p. 45, but does not provide any case which is factually superior. All of the cases cited by Respondent are distinguishable. Thus in Bloom v. Ravoira, 339 S.C. 417,424 , 529 S.E.2d 710, (S.C., 2000) this Court held that " the undisputed facts establish that Bloom attempted to cross the street but did not do so in a safe, reasonable manner." The facts here are far from undisputed. Petitioner presented recorded plats on which the power line location does not appear. Respondent produced no document in discovery which demonstrates that the power line has been in that exact position since 1980 as alleged by Seeney and Frank. Resolution of the issue involves credibility not a question of law.

Similarly, Hart v. Doe, 261 S.C. 116, 198 S.E.2d 526 ( 1973), another auto negligence case, does not support any assertion that Petitioner's Affidavit is insufficient. In Hart, plaintiff sued for property damage to her vehicle by an unidentified driver of another vehicle. Plaintiff testified that she swerved to avoid the other vehicle, there was no evidence of any damage due to contact with the other vehicle and no passenger or witness was called to testify as to any contact. 261 S.C. at 119, 198 S.E.2d at 527. This Court affirmed the entry of judgment n.o.v. on the basis that " when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court." 261 S.C. at 120, 198 S.E.2d at 528. Here the evidence is not so overwhelming that only one reasonable inference can be drawn from the facts.

Thompkins v. Festival Centre Group I, 306 S.C. 193,196, 410 S.E.2d 593, 595 (Ct. App. 1991) cited by Respondent several times in its Brief is not applicable. The plaintiff there sued for nonpayment of a Note and filed a motion for summary judgment. The debtor did not submit any affidavits in opposition , instead relying upon allegations in its Verified Answer that there were "implied conditions" in the Note. The Court of Appeals held that this

was not a sufficient basis to raise a dispute of fact. 306 S.C. at196, 410 S.E.2d at 595. Here the fact that the property was in Petitioner's family since the 1960s and he lived there for many years provides the facts upon which to base his statement that the power line did not cross TMS 498 in 1980 as alleged by Seeney and Frank.

In summary, sufficient admissible evidence , including Petitioner's affidavit, the plats and system maps was presented to satisfy the standard for denying summary judgment.

## CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that this Court reverse the January 18th Order granting summary judgment to Respondent and remand the matter to the Master in Equity for further proceedings.

Respectfully submitted,

Edward A. Bertele
Attorney for Petitioner

June 1, 2015

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

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

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Petitioner's Reply Brief to Respondent Berkeley Electric Cooperative, Inc. was served upon the Respondents' attorneys, John Williams Esq. and Gaines Smith, Esq. by regular mail postage prepaid at their last known mailing address.

Edward A. Bertele, Esq.

June 1, 2015