IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Mikell Scarborough, Master-in-Equity

Appellate Case No.: 2013-001477

Roosevelt Simmons ..... Petitioner

v.

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

BRIEF OF RESPONDENT ST. JOHN'S WATER COMPANY, INC.

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STATEMENT OF THE CASE

Petitioner Roosevelt Simmons, ("Simmons") seeks review of the decision of the Court of Appeals which affirmed a grant of summary judgment in favor of St. John's Water Company, Inc. ("St. Johns").

On April 9, 2008, Petitioner filed an action for trespass and conversion against Respondents St. Johns and Berkeley Electric Cooperative, Inc. R. p.p. 24-27. After all pleadings were filed and discovery was completed, both Respondents filed a motion for summary judgment. R. p. 43; R. p. 57. The motion hearing was held on November 22, 2010, at which time the motions for summary judgment were granted. R. pp. 10-12; R. pp. 13-21. Simmons filed a timely motion to alter or amend, which was heard on April 11, 2011. R. pp. 158-66. The Master-in-Equity denied the motion to reconsider, and an appeal was filed with the Court of Appeals. R. pp. 22-23; The Court of Appeals issued a decision on March 30, 2013 affirming in part, reversing in part, and remanding in part. App. p. 3.

Simmons acquired a parcel of property along Kitford Road in Johns Island SC, with TMS# 283-00-00-498, in 1992 as trustee. R. p. 49. Full legal title vested in Simmons in 2003 as the result of an inter-family transaction. R. p. 75. According to Simmons, he subsequently discovered a water meter located on the subject property, and upon further inspection, determined that it belonged to St. Johns, one of the Respondents herein. R. pp. 75-76.

Petitioner continues to suggest that St. John has a water line under TMS 285-00-00-035, but has set forth no evidence demonstrating that this is the case. St. Johns maintains that it does not have a water line under parcel -035, nor does it have any line under Petitioner's property other than the main line located under parcel -498.

In the late 1970's, over twenty years prior to Simmons acquiring title to the subject

property, St. Johns began installing water lines all over Johns Island. R. pp. 59-60. Charleston County issued Encroachment Permits that covered many different roads and many different properties. R. pp. 66-69. Charleston County granted these permits, which covered areas all over the then-rural island, after the county had determined that it had the authority to allow St. Johns to encroach in order to install its lines. The permits show that St. Johns applied for the permits in February of 1977, and the county granted the request the following month. R. pp. 67. Until the time that St. Johns began installing these lines, the only way for Johns Island residents to receive water was through the use of wells and pumps.

During this process, St. Johns obtained the specific right to install water lines along Kitford Road via an Encroachment Permit. R. pp. 66-69. The permit granted St. Johns the right to install water lines "[a]long Kitford Road as shown on sheet U25" R. p. 67. The corresponding map U25 (dated 1977) shows a then-unpaved Kitford Road and the planned locations of the water lines that were to be placed around that road R. p. 245. At the end of Kitford Road, the map indicates that a spur of the main water line is to turn roughly northeast and extend under what is now the subject property. Id. At that time, the dirt road that currently extends across the subject property was considered part of Kitford Road. Id.

According to the affidavit of Hugh Miley, the engineer who oversaw the original construction project, the line was begun in 1977 and completed in 1978, at which time the water line under the subject property was functioning and operational R. pp. 59-60. Since that time, St. Johns has never stopped using that line and has supplied water to the residences located along Kitford Road and to the north of the subject property via the same water line that was installed as a result of the construction project commenced in 1977. R. p. 60 No other lines have been installed by St. Johns along Kitford Road, and there is no other way for

the residences on Kitford Road to receive municipal water except via that water line, a portion of which currently runs under the subject property. R. p. 60; R. p. 78. In the thirty years between the end of that construction and the filing of this action, St. Johns has maintained and used the original main water line installed along Kitford Road and under the subject property with no interruption of use whatsoever. R. pp. 59-60.

Petitioner believes that St. Johns "violated his property rights by installing . . . below ground water lines on two parcels he owned on James Island. The parcels are TMS 283-00-00-048 and TMS 282-00-00-135." Brief of Appellant[1], p. 5. Simmons admits that St. Johns obtained an Encroachment Permit from Charleston County that would allow it to install its water lines along Kitford Road in 1977, but contends that the "location of the line(s) is the subject of this action." Id. at p. 7. Simmons's position is that he "never gave St. John's any easements for water lines across TMS 498 or 135 and they never marked the location of their lines before they installed them." Id. at p. 8. Thus, Simmons claims that "[t]he date of the installation and location of the lines and their actual use were material facts in dispute." Id. at p. 11.

Petitioner contends that there is a map which is improperly included in the Record on Appeal. Brief of Petitioner, p. 16. The basis of the contention is the allegation that counsel for St. Johns did not properly introduce the map at the motion hearing. Id. In rebuttal of this assertion, St Johns provided the Court of Appeals with the transcript of the motion hearing, which showed that the Master viewed a map in conjunction with the encroachment permit at the motion hearing. Additionally, the Encroachment Permit specifically references the map that Petitioner objects to. R. p. 67. This issue was also brought before the Court of Appeals

1 The Table of Contents in the Petitioner's Appendix to Petition for Writ of Certiorari indicates several documents are under "separate cover." St. Johns has not received any additional copies under separate cover, and therefore cites to Petitioner's Brief to the Court of Appeals by its original title and page numbers.

via Petitioner's motion, and the Court of Appeals determined that the map was properly included in the Record on Appeal.

The Court of Appeals affirmed in part and reversed in part, finding that St. Johns had a prescriptive easement for the water main located under parcel 498, and remanded the case to the trial court to determine if any other water lines exist under Petitioner's property. App. pp. 11-12. The Court of Appeals denied Simmons's request for a rehearing. App. p. 26. Simmons filed a Writ of Certiorari on July 8, 2013, which was granted on March 19, 2015. St. Johns obtained an extension of time until June 19, 2015 in which to file its Brief on May 6, 2015.

I. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002). To establish an easement by prescription, a claimant must show (1) the continued and uninterrupted use or enjoyment of the right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005).

Petitioner has never demonstrated anything that could be considered a genuine issue of material fact in dispute. Even when the facts are viewed in the light most favorable to Simmons, it is clear that St. Johns holds an easement by prescription to run and maintain water lines under the subject property. St. Johns contends that the Court of Appeals did not err in its decision, and this Court should affirm.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT ST. JOHNS HELD A SUBSTANTIAL BELIEF THAT IT HAD THE RIGHT TO USE THE SUBJECT PROPERTY TO INSTALL AND MAINTAIN ITS WATER LINE.

The Court of Appeals correctly determined that St. Johns showed all three elements required to prove the existence of a prescriptive easement, including St. Johns' demonstration that it had a substantial belief that it had the right to use the property in the manner in which it is used. The opinion states that St. Johns "presented undisputed evidence that a water main was placed along Kitford Road between 1977 and 1978 to service residents in the area . . . Consequently, St. John's Water established the water main had been under -498 and continuously used by the water company for the required twenty-year period." App. p. 11.

It is worth noting at the outset that St. Johns disagrees with Petitioner's statement that "[t]he Court of Appeals found that the Encroachment Permit together with the [map] U25 created a claim of right based upon a 'mistaken belief'." Brief of Petitioner, p. 16. The text of the decision does not support that reading. The exact language of the Court's decision is,

> "Furthermore, St. John's Water established the water main was installed under a claim of right. Miley's affidavit demonstrates his belief that the encroachment permits obtained from Charleston County covered the installation of the water main as illustrated on the map. The fact that the claim *may have been based on a mistake* does not negate the claim of right required to establish a prescriptive easement."

App. p. 11 (emphasis added). This is not a finding that the belief was mistaken as Petitioner suggests. Instead, the Court of Appeals found that St. Johns held a substantial belief that it had the right to install its water main under the subject property, and merely stated that even if that belief were mistaken, the claim would still stand. Simmons goes on to state "[t]he Court of Appeals did not address how the Record established that a mistake was made." Brief of Petitioner, p. 38. That's because the Court of Appeals did not find that there was a

mistaken belief, and therefore had no reason to address that issue. Regardless, case law is clear that a mistaken belief can support a claim for a prescriptive easement, and in fact, a substantial belief can actually be based on a mistake and not prove fatal to the claim itself. Loftis v. South Carolina Electric and Gas Company, 361 S.C. 434, 440, 604 S.E.2d 714, 717 (2004). Petitioner offers no compelling reason for this Court to change the current law or reverse the lower court's decision.

The standard required to demonstrate a substantial belief of a claim of right is well established, and was met by St. Johns. The issue of a "claim of right" is at the heart of many claims of a prescriptive easement. South Carolina courts have consistently required the party claiming an easement to demonstrate "either a justifiable claim of right *or* adverse and hostile use." Jones, 363 S.C. at 316, 609 S.E.2d at 600. (emphasis in original). In regard to the proof of a claim of right, "[o]ur courts have held that a party may earn a prescriptive easement under a claim of right if 'he demonstrate[s] a substantial belief that he had the right to use' the property in a manner consistent with the alleged easement." Loftis, at 434, 604 S.E.2d at 717 (quoting Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003)). As discussed herein, this is an exceedingly straight-forward definition which has been applied consistently by appellate courts.

The definition and application of the standard are already clear when it comes to proving a claim of right. Case law demonstrates that it is the claimant's subjective belief that is at issue, and the following cases provide numerous examples of what types of evidence claimants can present to demonstrate their "substantial belief." The claimant must "demonstrate a substantial belief that he had the right to use the parcel or road based upon the totality of circumstances surrounding his use. Hartley, at 145, 584 S.E.2d at 389. Loftis

helps clarify what type of proof can support a claim that a "substantial belief" existed. Loftis, at 434, 604 S.E.2d 714. There, the court considered oral testimony that "the property in question ha[d] received electrical service through the power lines since at least 1949," and "that the power lines at issue have been on the property since the 1930's, and electrical service provided every decade since." Loftis, at 439, 604 S.E.2d at 717. SCE&G presented testimony "regarding SCE&G's search for documents, believed to exist but missing, proving a filed right-of-way on the property," in addition to its standard written service contracts. Id. at 440, 604 S.E.2d at 717. The court found that a prescriptive easement did exist based on the totality of the circumstances. Id. SCE&G presented overwhelming evidence to demonstrate its substantial belief of its claim of right, but other cases have not required nearly as much evidence as SCE&G presented in Loftis.

In Matthews v. Dennis, the court found a prescriptive easement existed without any written documentation whatsoever. Matthews v. Dennis, 365 S.C. 245, 616 S.E.2d 437 (Ct. App. 2005). The property owners testified that members of the family "had always used Hawk Lane for access while acknowledging they may not have had legal documents granting them the right to do this." Id. at 250-51, 616 S.E.2d at 440. Even in the absence of a written document, the Court of Appeals in Matthews considered the totality of the circumstances, and determined that the claimants had proven that they had a substantial belief that they could use the property as they always had. Id.

Similarly, in Hartly v. John Wesley United Methodist Church of Johns Island, the court found that church members' oral testimony that they had always used a certain road was sufficient to establish a substantial belief that they had the right to use the road. Hartley, at 145, 584 S.E.2d at 389. It appears that there was no written documentation to support that testimony, and the court still found that the church members had carried their burden. Id.

Revis v. Barrett further demonstrates the deference that courts give to claimants who are attempting to prove a claim of right. Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct. App 1996). In Revis, the testimony of one person, unsupported by any additional written documentation, was sufficient for the Court of Appeals to state that "[t]here was certainly ample evidence to support the Master's finding Revis' belief about her right to use the road flowed from a 'claim of right'." Id. At 210, 467 S.E.2d at 462.

Petitioner cites Morrow v. Dychess as support that a "mere belief" is insufficient to establish a prescriptive easement. Brief of Petitioner, p. 35. However, he misstates the rationale and holding of the court, which was much more concerned with the statutory time requirement than it was with the belief of the claimant. Morrow v. Dychess, 328 S.C. 522, 492 S.E.2d 420 (Ct. App. 1997). In 1997, Morrow sought a prescriptive easement on a parcel of property that he acquired title to in 1992, contending that it had been used for many years as a parking lot. Id. at 522, 492 S.E.2d at 422. Since he did not have title for the required twenty years, he therefore attempted to "tack" onto the ownership of his predecessor-in-interest. Id. at 528, 492 S.E.2d at 424. The only evidence produced to support Morrow's belief that a right-of-way existed was his own testimony regarding various "assumptions" that he had made concerning the character of the property. Id. There was, of course, no evidence before the court concerning the mindset of the prior owner. Id. The dispositive issue was not merely whether Morrow had a substantial belief that he could use the property, but rather what belief was held by his predecessor-in-interest. Id. at 529, 492 S.E.2d at 424. Morrow's claim failed primarily due to the fact that he could not demonstrate the mentality of the prior owner, rendering it impossible to "tack" and therefore impossible to show use for twenty years. Id. In spite of the fact that the only evidence before the court regarding his claim of right was Morrow's own oral testimony regarding certain "assumptions" he had

made, the court nevertheless noted "[i]t possibly could be contended that Morrow's belief that he had a right-of-way was sufficient for a prescriptive easement pursuant to a 'claim of right'." Id. at 528, 492 S.E.2d at 424.

St. Johns presented ample evidence to demonstrate its substantial belief that it had the right to use the property for its water main. The Court of Appeals correctly applied the standard as set forth in South Carolina case law and determined that St. Johns' substantial belief was reasonable based on the totality of the circumstances. Miley's affidavit establishes that St. Johns believed it had the right to use the subject property to run its water line in 1977, and the permit and map show where the water line was installed. R. pp. 59-60, pp. 66-69, R p. 245. St. Johns' belief is supported by objective evidence: Miley's affidavit, the permit granting the right, and the map showing the location of the planned water line. Id. St. Johns presented more objective evidence than either of the claimants in Morrow or Revis, and those claims for prescriptive easements were affirmed. Much like SCE&G in Loftis, St. Johns presented evidence that the lines have been operating in their current position for many years, in addition to written documentation that supports the contention that St. Johns had the right to install the lines there in the first place.

Petitioner further argues that the permit does not authorize encroachment on Petitioner's parcel, and only authorizes encroachment along Kitford Road. Brief of Petitioner, p. 37. However, as was ruled on by the Master and the Court of Appeals, the permit authorized the placement of the water line under the subject property. The permit authorized the placement of water lines "[a]long Kitford Rd. as shown on sheet U25." R. p. 69. Sheet U25 shows Kitford Road and the proposed placement of the water line. R. p. 245. Near the end of Kitford Road, the water line turns ninety degrees towards the northeast, and continues until it terminates several hundred yards further on. Id. It is this line that currently

runs under Petitioner's property. Petitioner suggests "the Master relied upon counsel's representation that the Encroachment Permit to install water lines under Kitford Road 'included a portion of the road extending north from the main portion of Kitford Road to residences along said roadway'." Brief of Petitioner, p. 38. However, such a conclusion can be reasonably based on the Miley Affidavit, Encroachment Permit, and Map U25. It is not dependent solely on further clarification by counsel. Moreover, the residences to the north of Petitioner's tract all bear addresses on Kitford Road, further bolstering St. Johns' assertion that the dirt road extending over the subject property was once considered part of Kitford Road. R. p. 65.

Simmons also takes issue with the consistent finding that the original location and the current location of the water line are one in the same, "since there is no way to reference the location of 498 on U25." Brief of Petitioner, p. 37. By examining the totality of the circumstances it is easy to come to the logical conclusion, just as both lower courts did. The original map shows the location of the water line along Kitford Road as it was approved and installed in 1977-78. R. p. 245. Miley's affidavit establishes that the line has not been moved since its original installation. R. p. 59-60. Petitioner's own evidence and allegations show that a water line runs beneath the subject property. R. p. 78. There are no other water companies on Johns Island who might have installed a line where the current line is. It is obvious that the line there now is the same line that was installed in 1977.

Petitioner asks this Court to "reject the language in Loftis and remand the case to the Master to apply the correct standard [of] the 'substantial basis' test." Brief of Petitioner, p. 39. Presumably he means that portion of Loftis that explicitly states a claim of right can be based on a mistaken belief. First, there is not a mistaken belief on the part of St. Johns. The evidence supports the contention that St. Johns had a valid claim of right to install the water

line in its current position, and St. Johns maintains that it in 1977 it obtained the right from Charleston County to install its water lines where they currently are.

Second, St. Johns has provided ample evidence to support its substantial belief that it had a valid claim of right, namely the permitting process, the Miley affidavit, the encroachment permits themselves, and Map U25. Further, even if St. Johns' belief was mistaken, Loftis shows that a mistaken belief is not fatal, provided that there was a substantial belief that the right existed. Loftis, at 440, 604 S.E.2d at 717. Petitioner offers no case law to contradict Loftis, nor does he offer any compelling argument as to why the Court should require more requirements of those seeking to establish prescriptive easements than the case law already requires.

The standard required of one seeking a prescriptive easement based on a claim of right is clear, and there is no need for further clarification of this issue, which has been decided consistently by the lower courts. Petitioner misreads the decision of the Court of Appeals, as it did not find that St. Johns' belief was mistaken, but rather that St Johns established its easement under a "claim of right," which is supported by the Miley affidavit, Encroachment Permits, and map U25. R. p. 11. Even if St. Johns' belief was mistaken, Loftis establishes that a prescriptive easement can be based on a mistaken belief. There is no genuine issue of material fact, and the Court of Appeals correctly affirmed the Master's ruling regarding the main line under the subject property.

III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE ACCRUAL OF THE STATUTORY TIME PERIOD BEGAN WITH ST. JOHNS' FIRST USE OF THE WATER LINE IN 1978.

Petitioner presents the issue to the Court of "whether a claim of right for a water line constructed underground in 1978 across Petitioner's property can accrue if he had no actual or constructive knowledge of it until more than 20 years later." Brief of Petitioner, p. 39.

Petitioner seeks to import the elements required of a claimant proceeding under a use that is adverse to those required of a claimant proceeding under a claim of right. The requirement of "actual and constructive notice" does not appear in any of the South Carolina case law dealing with a claim of right. See Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993); Crystal Pines Homeowners Association, Inc. v. Phillips, 394 S.C. 527, 716 S.E.2d 682 (Ct. App. 2011); Matthews v. Dennis, 365 S.C. 245, 616 S.E.2d 437 (Ct. App. 2005); Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005); Loftis v. South Carolina Electric and Gas Company, 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004); Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 584 S.E.2d 386 (Ct. App. 2003); Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (Ct. App. 1997); Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996). Instead, the case law is consistent, and provides that to obtain a prescriptive easement, one must show (1) the continued and uninterrupted use or enjoyment of the right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse *or* under a claim of right. Jones at 316, 609 S.E.2d at 600-601. In a situation where a claimant is proceeding under a use that is adverse, it is arguable that constructive notice may be applicable, but not where the use is under a claim of right. However, even if Petitioner's argument is accepted that notice is required for use that is under a claim of right, the Master-in-Equity found that Petitioner did have notice of the existence of the underground line. R. p. 11. In either event, this Court should affirm the ruling of the Court of Appeals.

A. Claimants seeking a prescriptive easement pursuant to a "claim of right" do not have the burden to show notice under South Carolina law.

Notice is an aspect of adverse possession, and has no place in the determination of whether or not a prescriptive easement exists when that prescriptive easement arises from a

valid claim of right. St. Johns knows of no South Carolina case that has required a claimant to show constructive notice in conjunction with a claim of right. While there are South Carolina cases that deal with easements based on adverse use, they are inapplicable in this matter, as the decision in Jones makes it clear that the the third prong of the test for a prescriptive easement may be fulfilled by "either a justifiable claim of right *or* adverse and hostile use." Jones at 316, 609 S.E.2d at 600-601.

Petitioner is not the first to be confused by South Carolina case law pertaining to prescriptive easements. This confusion seems to stem from a poorly worded decision in the case of Nelums v. Cousins. In Nelums, the court stated, "[t]o establish a private right of way by prescription over Cousins' property, Nelums was required to show his use and enjoyment was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge or acquiescence of Cousins or of her predecessors in title." Nelums v. Cousins, 304 S.C. 306, 308, 403 S.E.2d 681, 682 (Ct. App. 1991). The subsequent decision in Jones v. Daley clarified the requirements for a prescriptive easement in South Carolina, and specifically addressed the issue that Petitioner now raises.

In Jones v. Daley, the matter before the Court of Appeals was whether a certain road was subject to a prescriptive easement. Jones, at 310, 609 S.E.2d at 597. The trial court found that there was no easement, but the Court of Appeals reversed, pointing out the misstatement of law set forth in the trial court's decision. Id. at 315, 609 S.E.2d at 599. The court stated,

> Jones argues the referee erred in concluding a prescriptive easement can only be established by use that is both adverse *and* under a claim of right. We agree. Relying on the case of Nelums v. Cousins, the referee incorrectly stated the elements of establishing a prescriptive easement as twenty years of use which is 'adverse, exclusive, continuous, and uninterrupted and occurred under claim of right and with the knowledge or acquiescence of [the] owner of [the] servient estate or predecessors in title.' Applying these elements, he

> concluded Jones failed to establish an easement because 'there is no exclusive use of the premises nor was the use by the Plaintiff's predecessors in title hostile or adverse to that of the owner of the property in question.'

Id. at 315-16, 609 S.E.2d at 599 (emphasis in original) (citation omitted). Further clarifying the issue and in an attempt to rectify the confusion, the court went on to say,

> Since Nelums, South Carolina courts have simplified the elements of establishing a prescriptive easement. In order to establish an easement by prescription, a party must only show: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse *or* under a claim of right. The source of the referee's understandable confusion on this matter was discussed and resolved in this court's case of Revis v. Barrett. To establish an easement by prescription, one need only establish either a justifiable claim of right *or* adverse and hostile use.

Id. at 316, 609 S.E.2d at 599-600. (emphasis in original) (citations omitted). The decision in Jones makes it clear that in South Carolina, a person or entity claiming a prescriptive easement may demonstrate either adverse use or a claim of right to carry its burden. While notice may be required of an adverse and hostile use, no such requirement exists for a use flowing from a claim of right.

Petitioner cites several South Carolina cases to support his position that there is a "disparity in the law." Brief of Petitioner, p. 41. However, an analysis of those cases reveals that any disparity that may exist is related only to the differences between easements arising out a claim of right and those arising out of adverse use. South Carolina courts are already adept at determining whether claims of prescriptive easements arise pursuant to a claim of right or adverse use and they consistently require the appropriate evidence from claimants depending on which prong they pursue.

Petitioner first cites Babb v. Harrison, which determined that a respondent needed to prove adverse use to support her prescriptive easement claim. Babb v. Harrison, 220 S.C 20,

66 S.E.2d 457 (1951). However, the facts of that case can be distinguished from the facts here, as the respondent never had a claim of right to use the driveway in question. Id. Instead, she merely used the driveway and attempted to gain ownership through an action to acquire title. Id. Without having a claim of right, respondent could only proceed by showing use that was adverse. The court recited the test for prescriptive easements, stating "[i]t has long been recognized that the requirements necessary to establishing a right by prescription are: (1) the continued and uninterrupted use or enjoyment of the right for the full period of twenty years, (2) the identity of the thing enjoyed, (3) that the use or enjoyment was adverse or under claim of right." Id. at 24-25, 66S.E.2d at 458. While Petitioner contends that the court in Babb "considered the element of notice essential regardless of the type of use," there is no language in the case to support that contention.

Petitioner next states that County of Darlington v. Perkins "resulted in the merging of the two elements." Brief of Petitioner, p. 41. Given that County of Darlington was about a public right-of-way, it is not dispositive to the determination of a private easement by prescription in the first place. County of Darlington v. Perkins, 269 S.C 572, 239 S.E.2d 69 (1977). Further, it appears more likely that the court in County of Darlington simply misquoted Babb v. Harrison. Id. at 576, 239 S.E.2d at 71. In its decision, the Darlington court stated, "[i]t is well settled that the requirements necessary to establish a right by prescription are: (1) the continued and uninterrupted use or enjoyment of the right for a period of 20 years; (2) the identity of the thing enjoyed; and (3) the use must be adverse under claim of right. Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457, 458 (1951)." Id. (citation in original). However, that citation refers to the section of Babb cited above, the language of which states, "[i]t has long been recognized that the requirements necessary to establishing a right by prescription are: (1) the continued and uninterrupted use or enjoyment of the right

for the full period of twenty years, (2) the identity of the thing enjoyed, (3) that the use or enjoyment was adverse *or* under claim of right." Babb, at 24-25, 66S.E.2d at 458 (emphasis added). It appears that the court in County of Darlington either misquoted or misunderstood the holding in Babb. The footnote that Petitioner points out from the Revis case further clarifies that the citation from Babb correctly asserts that South Carolina allows a claimant to prove a prescriptive easement either by adverse use or claim of right. Revis at 209 n.1, 467 S.E.2d at 462 n.1.

Regardless of the state of the law at the time of Babb in 1951 and County of Darlington in 1977, the court's 2005 decision in Jones resolved any discrepancy and made it clear that a prescriptive easement can be established by either adverse use or showing a claim of right. Jones, at 310, 609 S.E.2d at 597.

Petitioner cites three other South Carolina cases in support of his position: State v. Tyler, Atl. Coast Line R.R. Co. v. Searson, and Atlanta & C.A.L. Ry. Co. v. Limestone-Globe Land Co. Brief of Petitioner, p. 42. State v. Tyler was about a jury charge in a nineteenth century criminal case, and as such has no bearing on the case at hand. Tyler, 54 S.C 394, 32 S.E. 422 (1899) The remaining two cases both involved a railroad company's right-of-way, and stood for the proposition that "a right of way of a railroad, having been acquired for a public purpose, cannot be lost by prescriptive use or adverse possession, unless by erection of a permanent structure, accompanied by notice to the railroad of an intention to claim adversely to its right." Atl. Coast Line R.R. Co. v. Searson, 137 S.C 468, 135 S.E. 567, 573 (1926); Atlanta & C.A.L. Ry. Co. v. Limestone-Globe Land Co., 109 S.C 444, 96 S.E. 188, 190 (1918). Since the laws relating to railroads are not generally applicable to private citizens, St. Johns contends that those two cases have no bearing on the issue at hand. To the extent that Petitioner argues that the cases are analogous to the issue here, St.

Johns submits that the subsequent and more modern decisions of Jones and the like are much more appropriate for use herein.

The remainder of Petitioner's support consists of non-binding authority that does not merit consideration by this Court. This Court is not bound by American Jurisprudence, and the prior decisions of this Court and the Court of Appeals are much more relevant to the laws of this state than the broad definitions contained in a legal encyclopedia.

The two out-of-circuit cases presented by Petitioner are likewise not persuasive. The first, Woodroffe v. Woodroffe, was decided pursuant to an Iowa Supreme Court decision which "relaxed the traditional requirements for a prescriptive easement 'in those situations in which a party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner's consent or his oral agreement to the use'." Woodroffe v. Woodroffe, No. 13-2034, p. 10 (Iowa Ct. App. filed April 8, 2015). The Iowa Court of Appeals found that the "evidence shows there was labor and money put towards the installation, coupled with the fact that the system has been in place for over fifty years and no one had complained. Because the evidence supports the finding of an easement, we affirm." Id. at 11. Notice was not at issue in that case, just as it is not at issue in the present case.

The second case, County of Westchester v. Town of Greenwich, Conn., involved a New York court interpreting Connecticut aviation law. County of Westchester v. Town of Greenwich, Conn., 193 F. Supp. 1195 (S.D.N.Y. 1992). St. Johns contends that the laws of Connecticut, as interpreted by New York, concerning aviation easements have no bearing on the issue in this case. Furthermore, the case was reversed by the U.S. Court of Appeals for the Second Circuit in the subsequent case of County of Westchester v. Comm'r. of Transp. of State of Conn., which considered Connecticut law, federal aviation law, and constitutional

law before reversing the decision cited by Petitioner. County of Westchester v. Comm'r. of Transp. of State of Conn. 9 F.3d 242, 245-47. (2d Cir.).

A prescriptive easement proven via a claim of right is, and should be, treated differently than one proven via adverse use. For a claim of right, the claimant must demonstrate a substantial belief that it had the right to use the property at the commencement of the actual use. The showing of a valid claim of right negates the need to prove adverse use, since a claimant who has a right to use property in a certain way would not have to put anyone on notice of its valid use arising from that right. For adverse use, there is no belief that the claimant has the right to use the property at the outset, and thus, the claimant has no right to use the property. Therefore, the only other way to gain that right is by showing that the use has been adverse for the statutory time period. South Carolina imposes different standards for the two types of claims because the nature of each type of claim is different.

The gist of Petitioner's argument here is that the requisite twenty year period has not been shown. However, both lower courts found that it has been shown. As indicated in the affidavit of the head engineer of the original construction project, the water line in question was installed well over twenty years ago. R. pp. 59-60. The construction project which installed the water line under the subject property began in 1977 and was completed in 1978. R. pp. 59-60. The line is "currently in the same place and location as originally installed during this period of time." R. p. 60. The line has been used continuously ever since that time, and there has been no interruption of service whatsoever. R. p. 60.

Petitioner suggests that the first use did not commence until 1986. Brief of Petitioner, p. 39. This contention is based on selected customer records of St. Johns which indicate the dates on which service was established at individual residences along Kitford Road, including several residences to the north of the subject property. R. p. 65. However, in his

brief to the Court of Appeals, Petitioner admitted that St. Johns had a customer on Kitford Road as early as 1979. Brief of Appellant p. 40. The Record reflects the same. R. p. 65. There was only one main water line constructed under Kitford Road, and no other main lines have been installed since its construction in 1977-78. That main line includes the line that runs under the subject property now. The only way for any customer on Kitford Road to receive municipal water is through that single water main. By Petitioner's own admission, St. Johns had a customer on Kitford Road in 1979, thus establishing that the water main was used to provide service to customers at least as early as then. There has been no interruption of water service since that time, and there was no evidence before the court to suggest that service has ever been interrupted.

As was further presented to the Court of Appeals, the customer records are not the only way to determine the date of first use, nor are they even the most accurate. The Miley affidavit establishes that St. Johns completed installation of the water line on Kitford Road in 1978, and has continuously used it to deliver water to customers on Kitford Road since that time. App. p. 11; R. pp. 59-60. This affidavit is sufficient to definitively show that St. Johns' first use occurred in 1978, some twenty-seven years before Petitioner's first complaint, which occurred sometime in 2005. At that time, construction was completed and the line was operational. It stands to reason that before a water company can service customers it must first install a large-gauge main line, which is pressurized with water at the time that it is placed into service. Once an individual customer applies for service, smaller gauge lines are tapped into the main line and installed under the customer's property. The only line under the subject property is the same large-gauge main line that was installed along Kitford Road in 1978. R. p. 60. There are simply no other water lines under the subject property. This is further confirmed by a map submitted by Petitioner in conjunction with his

Affidavit, which shows the 2.5 inch main line running under the property until it meets the first of two water meters servicing the parcels located to the north of Petitioner's parcel. R. p. 78.

The statutory period of twenty years began to run when St. Johns completed construction of the water line and placed it in service in 1978. Petitioner's first complaint to St. Johns came twenty-seven years later in 2005, and he didn't file any legal action until 2008. There is no genuine issue of material fact regarding any aspect of St. Johns' water main. The Master's ruling on this issue was affirmed by the Court of Appeals, and that decision should be upheld.

B. Simmons did have notice of St. Johns water lines.

Even if it is assumed that South Carolina law requires notice of a prescriptive easement established pursuant to claim of right, there is evidence in the record that the Master-in-Equity addressed that issue at the summary judgment hearing. The original order granting summary judgment states that St. Johns' "use has been open and obvious due to the fact that there has been continuous water service without the use of wells by those customers [to the north of the subject property] and is under the original claim of right granted by the 1977 easement." R. p. 11. In the transcript of the summary judgment hearing, the Master stated "[y]ou've got to have [main] water lines installed for people to have water lines [to their houses]. You determine there is water there by turning the spigot and having no well . . . for the water lines, they're visible by the inverse . . . There's water lines at the spigot and there's no well, if there [are] not pumps sitting over there . . ." R. pp. 221-22. The Master-in-Equity imposed constructive knowledge of the existence of the water lines to Petitioner by virtue of the fact that his neighbors all had water without the use of wells, as indicated by the lack of any pumps above-ground.

Petitioner notes that the First Restatement of Property provides that "[u]nderground uses . . . are not open unless a reasonably diligent landowner would become aware of them. However, if the installation of underground utilities [is open and their location remains notorious,] either because actually known to the owner or widely known in the community, the prescriptive period will continue to run even though evidence of the use is subsequently buried." Brief of Petitioner, p. 45. By applying the doctrine as set forth in his own supporting authority, Petitioner has knowledge of St. Johns' water lines.

In this case, the knowledge of the underground lines was widely known in the community, as demonstrated by their initial installation and historical use to service customers on Kitford Road. R. pp. 59-60, 65. Additionally, a reasonably diligent landowner would become aware of their existence underneath his property by merely looking at his neighbors' access to running water, despite a lack of any pumps above-ground. Consequently, Petitioner had constructive knowledge of the water lines. The Master-in-Equity's findings of fact indicate that the lines were open and obvious, and Petitioner had constructive knowledge of their existence. R. p. 11. Accordingly, the judgment of the Court Appeals should be affirmed.

C. Public policy supports a finding that the statutory time period for a prescriptive easement obtained via a claim of right begins when the claimant first uses the property pursuant to its claim of right.

St. Johns provides municipal water to over six thousand Johns Island customers, and it is responsible for the maintenance of nearly a hundred miles of underground service lines. At the time that St. Johns commenced operation, it obtained Encroachment Permits for a vast number of underground installations all over Johns Island. R. pp. 66-69. Due to the nature of the rural island and the subsequent explosion of growth that it has seen, many of those original water lines may now be in a similar position to the line at issue here. Working under

the authority of the Encroachment Permits, St. Johns has operated many of its lines in the same manner as the line in question here. If the Court requires St Johns to begin operating its lines in accordance with the Petitioner's interpretation of the law, then it would bring the use of many other water lines around the island into question. A change in the law could potentially subject St. Johns to future claims regarding other lines installed pursuant to the Encroachment Permits, which could negatively impact St. Johns' current customers via price increases and service interruptions.

There are likely many other municipal water companies in the state operating underground lines pursuant to prescriptive easements obtained via claims of right. Their customers would also potentially be affected by a change in the law. Such a change could threaten water companies and other utilities similarly situated, and given the long history of consistent application of the law as set forth in Loftis, Jones, Hartley, and similar cases, it is apparent that the law as applied by the Court of Appeals in this matter is perfectly suited for determining prescriptive easements.

Petitioner presents nothing to the Court that would justify overturning the Court of Appeal's decision in this case, and he has presented no compelling reason to alter the long line of cases that clearly establish the laws pertaining to prescriptive easements. Petitioner's request should be denied, and the Court of Appeal's decision should be affirmed.

CONCLUSION

Based on the foregoing, St. Johns respectfully requests that this Court affirm the Court of Appeals decision upholding the grant of summary judgment in favor of St. Johns Water Company, Inc.

Respectfully submitted,
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June 15, 2015

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Hon. Mikell Scarborough, Master-in-Equity

ROOSEVELT SIMMONS..... Petitioner,

v.

BERKELEY ELECTRIC
COOPERATIVE, INC. and ST. JOHN'S
WATER COMPANY, INC.....Respondents.

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Respondent St. Johns Water Company Inc.'s Brief in the above-captioned matter was served upon Appellant's attorney, Edward A. Bertele, and Respondent Berkeley Electric Cooperative, Inc.'s attorney, John B. Williams, by regular mail postage prepaid to their last known mailing addresses.

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Dated: June 16, 2015
Charleston, SC