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S.C. Supreme Court

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

# REPLY BRIEF OF PETITIONER

# TO

# RESPONDENT ST. JOHN'S WATER COMPANY, INC.

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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases



## REPLY TO THE STATEMENT OF THE CASE

Petitioner responds to certain assertions in Respondent St. John's Water Company, Inc. ( St. John's) Statement of the Case because they are not statements of fact but contentions and are not supported by the Record on Appeal. Respondent states that Charleston

County issued an Encroachment Permit after it determined that it had the authority to allow St. John's to encroach on the lands covered by the permit. Respondent's Brief at page 2. However, there is nothing in the Record to support an assertion that Charleston County approved an encroachment upon Petitioner's property. The Encroachment Permit indicates that the water line is to be located along Kitford Road. The map U25 referenced in the Encroachment Permit was prepared at Respondent's request. R. p. 245. There is no evidence that the County reviewed and approved the map or merely included it in the encroachment Permit without any verification as to accuracy. In either case, the County had not authority to approve encroachment upon private property and the water line location was limited to Kitford Road. The Court of Appeals rejected the Master's finding that the Encroachment Permit was also an express easement. App. at page 10. The Court of Appeals only affirmed the existence of a prescriptive easement based upon a "mistaken belief". App. at page 11. Therefore, Respondent has no basis to assert that the Encroachment Permit granted it an express right to encroach on Petitioner's property. Respondent did not seek further review of the Court of Appeals' Decision that it held only a prescriptive easement to cross TMS 498.

Similarly, Respondent's assertion that the spur to the water line was to extend northeast under Petitioner's property which was considered as part of Kitford Road, Respondent's Brief at page 2, is also incorrect. There is nothing in the Record which established that this "northeast spur" was intended to cross Petitioner's property since U 25 has no property identifications or street names other than "Kitford Road". Respondent's Counsel stated at the Motion Hearing that a dirt road across TMS 498 was part of Kitford Road and the Master relied upon that statement. R. p. 11, Para. 2. However, the Court of

Appeals relied solely upon U 25 as establishing Miley's belief that the Encroachment Permit covered the installation of the water line as shown on the Permit. App. at page 11.

Based upon the foregoing, Respondent's Statement of the Case does not correctly identify the issues which have been presented before this Court.

## REPLY ARGUMENT

## SUMMARY OF REPLY ARGUMENT

A fair reading of the Court of Appeal's Decision is that Respondent's claim of right was based upon a mistaken belief. Petitioner contends that its Decision did not meet the "substantial belief" test as required under the established law of this State. Petitioner contends that U25 alone cannot establish a "substantial belief" and that Respondent was required to present evidence of the reasonableness of its mistake. None of the cases upon which Respondent relies recognize a claim of right under the circumstances present here. These factual differences together with the need for clear and convincing evidence require that this Court reverse the Decision below.

Petitioner contends that notice of actual use has been an implicit requirement for a finding of a claim of right in prior cases and should be made an express condition by this Court in the case of a hidden use. Respondent has not presented any authority which rejects notice as an element of a claim of right. Respondent failed to establish that its hidden use was widely known in the area by clear and convincing evidence. The only evidence that arguably could create constructive notice was customer records that show that service began in 1986-87 to the north of TMS 498; that is not sufficient to satisfy the 20 year requirement. The lack of clear and convincing evidence of actual or constructive notice requires that this Court reverse the Decision below.

## I. THE COURT OF APPEALS DID NOT APPLY THE LAW CORRECTLY

Respondent asserts that the Court of Appeals decision was correct because it applied the "substantial belief" test in determining that there was a claim of right for a prescriptive easement. Respondent's Brief at page 5. However, there is nothing in that Decision which refers a finding of a claim of right based upon a " substantial belief ". The only reference is to a mistaken belief citing that specific language in Loftis v S.C. Electric & Gas Co., 361 S.C. 434, 440, 604 S.E. 2d 714, 717 (Ct. App.2004). App. at page 11. The Court of Appeals did not say what Respondent is urging this Court to accept as its view of the evidence. Therefore, a fair reading of the Decision does not justify the conclusion that the Court of Appeals applied the correct standard for determining the existence of a claim of right.

Respondent further asserts that it met the "substantial belief test" by submitting objective evidence in the form of the Encroachment Permit and U 25. Respondent's Brief at page 6,9. However, there is nothing in the Record to establish why Respondent believed that one ( of two) northeast spurs from Kitford Road shown on U 25 was supposed to represent Petitioner's property. U25 can not by itself create a substantial belief because it does not have any lot lines or secondary street indications upon which Respondent could have relied in locating its water line across TMS 498. Respondent had to produce testimony from a competent witness to establish why U 25 created a substantial belief for location of a water line across TMS 498 because the Miley affidavit does not say that the water line was installed according to U 25.

U 25 was prepared for St. Johns Water Company as evidenced by the legend which appears on the drawing. R. p. 245. It was annexed to the Encroachment Permit which was approved by Charleston County. The Encroachment Permit only authorizes encroachment along Kitford Road. R. p. 69. The preparer of U 25 either made a mistake by including a water line across private property or Respondent mislocated the line and didn't rely upon U 25. Since the origin of the mistake was never determined in the Record, the Master or Court of Appeals Court could not have made a determination of a substantial belief based upon a mistake without knowing the mistake.

Respondent attempts to overcome this gap in its evidence by claiming that the present location of the water line supports the inference that it was located according to U 25. Respondent's Brief at page 9. However, it is just as reasonable to assume that there was a mistake in the location of the line. Respondent had it within its ability to determine where the mistake arose. U 25 was drawn to a certain scale and Respondent could have easily verified that the distance from Main Road shown on U25 corresponds to the distance to Petitioner's property. Respondent had previously obtained a survey in 2008 after Petitioner objected to its water line on TMS 135. R. p. 78. This survey indicates that the distance from Petitioner's property corner to Main Road is 1652 feet. Id. Respondent had to establish a substantial belief by showing that this is the same distance shown on U 25. It should be noted that Respondent's own surveyor misidentified the location of the water line as being on " Brunson and Kitford Road". Id. The Miley Affidavit alone cannot be relied upon to support a substantial belief that the water line across TMS 498 was installed according to the distances shown on U25.Therefore, Respondent had no "objective evidence" to justify the wrong location for its water line.

The Master relied upon Respondent's counsel's statements at oral argument that a dirt road across TMS 498 was shown on U 25. R. p. 11. Para. 2. Because U25 was not presented as part of Respondent's motion for summary judgment but at the Motion Hearing only to the Master and not identified in the transcript or shown to Petitioner's counsel, Respondent's assertion that one of the northeast spurs off Kitford Road was across TMS 498 went unchallenged. Respondent attempts to minimize the impact of its counsel's conduct by asserting that the same conclusion can be drawn from U 25. Respondent's Brief at page 10. However, there is no objective evidence showing where TMS 498 appears on U 25. Counsel's statements were his interpretation unsupported in the Record and not entitled to any weight. The Court of Appeals did not mention this in its Decision but said that Miley believed that the water line could encroach on TMS 498 because that was where it ended up. App. at page 11. The Court of Appeals Decision is not convincing because it didn't explain how Miley could believe that the water line could be in the wrong (mistaken) place because he doesn't know how it got there.

Respondent further argues that the properties to the north of TMS 498 have Kitford Road addresses and thereby support the conclusion that the dirt road was part of Kitford Road. Id. This is further speculation not supported in the Record. There is no evidence that the dirt road was ever considered to be part of Kitford Road. There is no evidence why the customers to the north were given Kitford Road addresses.

Respondent had the burden of proof by "clear and convincing evidence" to establish a substantial belief. Polson v. Ingram, 22 S.C. 541(1885). U25 and the Miley affidavit do not

provide clear evidence that Respondent reasonably believed it could encroach TMS 498 for its water line.

Respondent argues that it produced more evidence than other cases where a substantial belief was found to justify a prescriptive easement. Respondent's Brief at page 9. However, most of the cases cited by Respondent, Respondent's Brief at pages 6-8 involve a prior history of usage of lands by adjacent property owners. In Hartley v. John Westly United Methodist Church , 355 S.C. 145, 151, 584 S.E.2d 386 (Ct. App. 2003), the property owners whose access would blocked by a proposed Church project had used Evans Road for 40 years earlier. In Matthews v. Dennis, 365 S.C. 245, 616 S.E.2d 437, 439-440 ( Ct. App. 2005) , the Court of Appeals affirmed a finding of a claim of right based upon a prior use of over 35 years because plaintiffs thought they had legal documents. In Revis v. Barrett, 321 S.C. 206, 209, 467 S.E.2d 460,462 (Ct. App. 1996), the Court of Appeals affirmed a finding of a claim of right based upon use of Hawk Road since 1956 almost forty years prior. In Loftis v S.C. Electric & Gas Co., 361 S.C. 434, 440, 604 S.E. 2d 714, 717 (Ct. App.2004), the utility company had served customers in the area for 40 years pursuant to service agreements. The utility company believed that it had a right of way agreement to across the property in question but couldn't locate it.

The facts here are entirely distinguishable. Respondent had no prior service down Kitford Road before the issuance of the Encroachment Permit in 1977. It had no customary usage of Kitford Road which might justify a belief that it had an easement to cross TMS 498 , S.C.E.& G. in Loftis . Respondent's claim of right arises solely from its activities under the Encroachment Permit and it must justify why it did what it did, i.e. locate its water line under the wrong property.

Respondent suggests that the Court gives "deference" to claimants attempting to prove a claim of right by allowing testimony without any need for written corroboration. Respondent's Brief at pages 6-8, 9. However, the cited cases do not allow for such an interpretation. The standard of proof of any prescriptive easement is clear and convincing evidence. Polson v. Ingram, 22 S.C. 541, 545 (1885). All of the cited cases require a "substantial belief". The evidence in those cases may well have been deeds and other evidence of title of adjacent lands. In Loftis, the Court of Appeals referred to a history of electric service including service agreements with customers. Therefore, there is no basis to find that a claim of right can be based upon any less than clear and convincing evidence showing a "substantial belief".

Unlike the utility company in Loftis, Respondent cannot rely upon a history of prior use as a basis for a substantial belief; it must rely upon U25. Because there is no evidence of why Respondent believed that Petitioner's property was shown on U 25; because U 25 does not identify TMS 498 or indicate why it should pertain to Petitioner's property; because Hugh Miley did not identify it as being part of the area covered by the Permit, Respondent failed to satisfy the "substantial belief" test. Respondent has the burden of proof, by clear and convincing evidence to explain why it did what it did. Respondent's failure to provide any explanation for its belief that TMS 498 was shown on U25 is fatal to its claim of right because it lacks any substantial basis. Because Respondent did not meet its burden and because the Court of Appeals erroneously used a "mistaken belief" standard, that Decision should be reversed.

## II. ACCRUAL OF A CLAIM OF RIGHT SHOULD BE BASED UPON NOTICE OF USE

Petitioner has asserted in his Petition that the issue of notice of use for a claim of right to accrue is one of first impression. Respondent has not provided any case law or other citation of South Carolina law to establish that the Court has ruled adversely to the issue. Respondent's Brief at page 12. Respondent argues that this Court has never held that a claim of right requires actual or constructive notice and therefore should not do so now. Id. However, none of the cases cited by respondent involve a hidden use such a pipeline. Almost all of the cases involve the uses of land for roads or access to adjacent property. See Horry County v. Laychur, 315 S.C. 364,366, 434 S.E.2d 259,260 ( 1992)( use of Reaves Ferry adjacent to Waccamaw River); Crystal Pines Homeowners Ass'n Inc. v. Phillips, 394 S.C. 527, 531 716 S.E.2d 682,684 (Ct. App., 2011)( use of boat ramp); Matthews v. Dennis, 365 S.C. 245 616 S.E.2d 437, 438(Ct., 2005)( use of Hawk Lane), Jones v. Daley, 363 S.C. 310,312-314 609 S.E.2d 597 (Ct. App. 2005)( use of trail for logging road); Hartley v. John Westly United Methodist Church, 355 S.C. 145,147 584 S.E.2d 386 (Ct. App. 2003)( use of Evans Road ); Morrow v. Dyches, 492 S.E.2d 420,422-423, 328 S.C. 522 (Ct. App. 1997) (use of CSX tract for parking) Revis v. Barrett, 321 S.C. 206, 207-208,467 S.E.2d 460, 461 (S.C. App., 1996) (use of access road). The only case cited by Respondent not involving an access road concerned overhead power lines. See Loftis v. S.C.E.& G. Co., 361 S.C. 434,436-437 604 S.E.2d 714 (Ct. App. 2004) Since this Court has never had to deal with the issue of a hidden use, the requirement for actual or constructive notice of a claim of right was never brought before it.

**A. Notice of initial use is an element of a claim of right**

Respondent argues that notice of use has no place in determining of the existence of a prescriptive easement for claim of right but has no valid reason for its conclusion.

Respondent's Brief at page 12-13. It asserts that the apparent disparity between the elements required for a prescriptive easement under adverse possession is because there are "differences between easements". Respondent's Brief at page 14. Respondent attempts to explain the difference by saying that a valid claim of right negates the need to prove adverse use since the claimant would not have to put anyone on notice of its use. Id at page 18. This argument is not persuasive because it ignores the fact that a claim of right (just like an adverse use) must arise by some initial use and when the initial use is hidden no one knows that there is such a claim. Both types of prescriptive easements require use although the type of the uses may be different. Respondent has not cited any cases either from South Carolina or elsewhere where this distinction is recognized as a basis for disregarding notice of use as an element of a claim of right.

Petitioner contends that notice of the initial use was already an implicit element in the claim of right. The cases cited above involve a history of customary usage of the property for which the claim of right is being asserted such as logging trials and access roads, all of which are open and visible. The Loftis case is a different example of a historical usage, namely that the utility company had provided power to many homes in the area for 40 years, usually had easements to run its overhead lines, but couldn't find any easement for the property in question. It was this historical background of an open and public initial use that created a "substantial belief" in the mind of the user that it had a right to the use of the land, however it might have arisen.

Therefore, Petitioner urges this Court to reject Respondent's argument that there are differences between types of prescriptive easements as to the requirement of notice of use. No South Carolina case makes that distinction and Respondent has no valid reason to support this

type of distinction. Either a claim of right or adverse use requires an initial use and this Court should recognize notice of such initial use as essential to accrual of the claim.

**B. Actual or constructive notice of use was not established**

It is not disputed that the area surrounding TMS 498 is rural and that there was no water service on Kitford Road until Respondent's line was first installed in 1978. Petitioner asserted that he had no notice until 2005 when he discovered a water meter on TMS 135 and objected to this. As a result of his complaint, Respondent obtained a survey showing its line across TMS 498 in 2008. R. p. 78. Petitioner contended that the earliest that he could have had constructive notice of the water line under TMS 498 was 1986-87 when the residents to the north of that property were hooked up to Respondent's system. Petitioner's Brief at 45 - 46. Respondent asserts that there was earlier notice of use as evidenced by the hookup of a customer (Elijah Commodore) on the other side of Kitford Road from TMS 498 in 1979. Respondent's Brief at page 19. Respondent argues that since there was only a single water main down Kitford Road, Petitioner was on notice of water service in the area. Id. However, the water line serving Mr. Commodore was in Kitford Road. Petitioner had no reason to know that the same line had crossed TMS 498 in 1978 because it wasn't connected to any customers on the north side of Kitford Road until 1986-87. The use was hidden until then because no one would have reasonably known it was there. Petitioner lived to the east beyond the paved portion of Kitford Road and had and still has well water. Therefore, the facts do not support any constructive notice prior to the earliest date of service on the north side of Kitford Road.

Respondent argues that "the knowledge of underground water lines was widely known in the community". Respondent's Brief at page 21. However, it's citation to the

Record contains only the Miley Affidavit and its own customer lists. There is nothing in the record to support Respondent's contention that Petitioner should have known that his property was the site of one of these lines. The fact that customers north of TMS 498 received water service does not necessarily create constructive notice of a line under TMS 498 since Respondent could have relied upon some other route to those properties. Respondent asserts that it had to install a large line before it could install smaller lines to service its customers as a way to justify an earlier accrual date for its use. Respondent's Brief at page 19. However, Respondent was still required to show that it was making use of Petitioner's property in a way that would put the ordinary person on notice of such a use.

Therefore, Petitioner submits that the facts present here do not support a finding that the claim of right accrued in 1978 at the time the water line was first installed.

**C. There are no adverse effects or public policy considerations**

Respondent asserts that there are many other water lines in its system that may be in a similar position to the line at issue. Respondent's Brief at page 21. There is nothing in the Record to support this statement and it is speculative at best. Respondent is concerned that it may be subject to future claims as to such lines if this Court adopts Petitioner's interpretation of the law. Id at page 22. This is likewise speculation and does not represent any basis to assume that there will be unintended consequences to the Court's decision on the issues. Moreover, Petitioner suggests that if Respondent operates its business so as to ignore the limits within its Encroachment Permits and routinely trespasses on private property without obtaining easements, then it should be subject to suits for trespass. As a public utility, Respondent has duty to the public it serves to use its best efforts to carry out its activities with due regard for private property.

Petitioner is asking this Court to explicitly recognize that there is a notice requirement to a claim of right and that the right accrues after actual or constructive notice. This is not a dramatic change in the law of prescriptive easements as it already applies to adverse use easements and had been implicit in the claim of right cases.

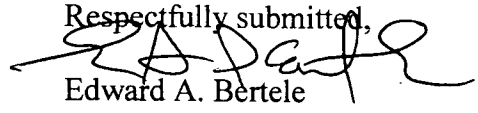
Petitioner has presented an analysis of adverse possession cases where notice is an aspect of both types of claims to support his argument that notice should be required for both types of prescriptive easements as well. Petitioner's Brief at page 42-43. Petitioner further pointed to the consistency of the other elements needed to recognize a prescriptive easement, namely 20 years uninterrupted use and identity of the thing enjoyed. Petitioner pointed this Court to its decision in Polson v. Ingram, 22 S.C. 541, 545 (1885) as recognizing the need for clear and convincing evidence to create a prescriptive easement. Id at 44. Petitioner cited to the Restatement and other authorities in other jurisdictions to demonstrate that his view is widely recognized as a sound application of the principles behind the law of prescriptive easements. Petitioner's Brief at pages 43-45. Petitioner believes that these are ample justification for the recognition of a notice requirement as an element of a claim of right. Respondent has not provided any analysis or case law from any other jurisdiction or other legal authority to demonstrate that its arguments against the element of notice are the mainstream of judicial thinking.

In summary, Petitioner has established that notice should be an element of a claim of right of right and has not been established her by clear and convincing evidence.

## CONCLUSION

Petitioner respectfully requests that this Court reverse that part of Court of Appeals decision affirming St. John's prescriptive easement across TMS 498 due to the lack of a substantial belief and to the lack of constructive notice of the use for the statutory period.

Respectfully submitted,



Edward A. Bertele
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June 26, 2015

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY
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ST. JOHNS WATER COMPANY, INC. )
Respondents )

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Petitioner's Reply Brief to Respondent St. John's Water Company, 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 26, 2015