

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge
Case No.: 2008-CP-23-5245

RECEIVED

AUG 31 2015

S.C. Supreme Court

Appellate Case No.: 2009-141246
Unpublished Opinion No. 2015-UP-031 filed February 14, 2015
Order Denying Petition for Rehearing filed July 29, 2015

Blue Ridge Electric Cooperative, Inc.Petitioner

v.

Kathleen J. GreshamRespondent.

AMENDED PETITION FOR WRIT OF CERTIORARI

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill
RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street (29201)
P.O. Drawer 7788
Columbia, South Carolina 29202
803-771-4400

Larry C. Brandt, Esquire
P.O. Box 738
3691 Blue Ridge Blvd
Walhalla, South Carolina 29691
864-638-5406
*Counsel for ~~Appellant~~ Blue Ridge Electric
Cooperative, Inc.*

Other Counsel or Pro Se Respondent of Record:
Kathleen Jennings Gresham (Pro Se)
1524 Highway 11
Landrum, SC 29356
Pro Se Respondent

TABLE OF CONTENTS

Table of Authorities	iii
Certification By Counsel	1
Questions Presented For Review	2
Statement of Facts and Case	3
Procedural History	6
Relevant Facts	7
Argument	9
I. THIS PETITION PRESENTES AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE NECESSITATING THE GRANT OF PETITIONER’S PETITION FOR WRIT OF CERTIORARI	10
II. BREC ALSO PETITIONS THAT THE MISSING TRANSCRIPT IS OF GREAT IMPORTANCE AND THE LACK OF A TRANSCRIPT INFLUENCED THE OPINIONS OF THE COURT OF APPEALS	10
III. BREC’s Petition for Writ of Certiorari is warranted because the trial court erred as a matter of law in declining to grant BREC’s post-trial motions.....	12
a. The Trial Court erred in failing to grant the JNOV; thus, the Court of Appeals erred when it failed to grant BREC’s Petition for rehearing and when it failed to reverse the lower court	13
b. The Trial Court erred in failing to grant BREC a new trial; thus the Court of Appeals erred when it failed to grant BREC’s Petition for rehearing and when it failed to reverse the lower court.....	15
1. The Trial Judge’s Order is Wholly Unsupported by the Evidence	15
2. The Trial Judge’s Ruling is Controlled by an Error Law	18
Conclusion	20

TABLE OF AUTHORITIES

Cases

<i>Austin v. Stokes-Craven Holding Corp.</i> , 387 S.C. 22, 691 S.E.2d 135 (2010)	12
<i>Brinkley v. S.C. Dep't of Corrections</i> , 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009)	16, 17
<i>Gastineau v. Murphy</i> , 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)	13
<i>Gressette v. South Carolina Electric & Gas</i> , 370 S.C. 377, 655 S.E.2d 538 (2006)	passim
<i>Hamm v. South Carolina Public Services Commission</i> , 298 S.C. 309, 312, 380 S.E.2d 428, 430 (1989)	8
<i>Hawkins v. City of Greenville</i> , 356 S.C. 280, 296, 594 S.E.2d 557, 556 (Ct. App. 2004)	15
<i>Ledford v. Pa. Life Ins. Co.</i> , 267 S.C. 671, 230 S.E.2d 900 (1976)	12
<i>Norton v. Norfolk S. Ry. Co.</i> , 350 S.C. 473, 567 S.E.2d 851 (2002)	15
<i>Small v. Pioneer Machinery Incorporated</i> , 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997)	17
<i>State v. Ladson</i> , 373 S.C. 320, 325, 644 S.E.2d 271, 273	11
<i>Strange v. S.C. Dep't. of Highways and Pub. Transp.</i> , 314 S.C. 427, 445 S.E.2d 439 (1994)	13
<i>Sweat v. Crawford</i> , 292 S.C. 324, 327, 356 S.E.2d 147, 149 (Ct. App. 1987) 1997)	11
<i>Weston v. Hillyer</i> , 160 S.C. 541, 159 S.E. 390 (1931)	17

CERTIFICATION BY COUNSEL

The Court of Appeals issued its decision on January 14, 2015.

The Petitioner Blue Ridge Electric Cooperative, Inc. (BREC) timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on February 9, 2015.

The Court of Appeals denied the Petition for Rehearing by Order dated July 29, 2015.

QUESTIONS PRESENTED FOR REVIEW

- I. DID THE COURT OF APPEALS ERR IN FAILING TO REVERSE THE TRIAL COURT WHICH COMMITTED REVERSIBLE ERROR AS A MATTER OF LAW WHEN IT DID NOT RECOGNIZE, FOLLOW AND ADHERE TO S. C. SUPREME COURT PRECEDENT, GRESSETTE V. SOUTH CAROLINA ELECTRIC AND GAS CO., 370 S.C. 377, 635 S.E.2D 538 (2006), DIRECTLY APPLICABLE IN THIS MATTER?
- A. Well-established state law and precedent provide clear standards on the right of Blue Ridge Electric Cooperative, Inc., to utilize existing highway right-of-way when Blue Ridge obtained written approval from SCDOT to install utility poles and lines in the SCDOT right of way and was not required to seek adjacent landowner approval. See, Gressette v. South Carolina Electric & Gas, 370 S.C. 377, 655 S.E.2d 538 (2006).
- B. The Gressette opinion does not require permission of the property owner to constructs utility instrumentality inside an existing SCDOT right-of-way.
- C. The Court of Appeals erred in affirming the trial court's ruling(s) and the jury verdict of trespass when Blue Ridge obtained written SCDOT approval to construct in the right of way and based upon an incomplete record.
- D. The Court of Appeals erred in denying Petitioner's request for a new trial based upon an incomplete record, and as a matter of law since the jury verdict of trespass is based solely on Respondent's personal opinion testimony founded upon surmise, conjecture, and speculation and without Respondent presenting any fact evidence on the existing right of way.
- E. The Court of Appeals erred in denying Petitioner's request for a new trial as a matter of law since the trial court's ruling is based upon an error of law where the trial court failed to set aside jury verdict of trespass based solely on Respondent's opinion testimony founded upon surmise, conjecture, and speculation and without any basis of fact evidence.
- F. The Court of Appeals further erred in denying Petitioner's appeal of the trial court post-trial motions for a new trial and/or to set aside the jury's verdict of trespass as a matter of law since the trial court's ruling is founded upon and controlled by an error law.

STATEMENT OF FACTS AND CASE

Pursuant to Rule 242 SCACR, Petitioner Blue Ridge Electric Cooperative, Inc. (“BREC”) hereby respectfully petitions the Court for a writ of certiorari to review the following opinion of the Court of Appeals: Blue Ridge Electric v. Gresham, Op. No. 2015-UP-031 (S.C. Ct. Ap. Filed January 14, 2015) (Shearouse Adv. Sh. No. 2 at 4).

This case presents a matter of exceptional importance. The appeal arises from Petitioner’s system engineering need to upgrade an existing power line running along S.C. Highway 11 in Greenville County, South Carolina. The Court of Appeals misapprehended the law when BREC obtained the required SCDOT approval to upgrade permission and permits from the South Carolina Department of Transportation (the owner of the easement) and it also overlooked that almost all portions of the trial transcript addressing the claim of trespass are missing and not in existence due to error by the court reporter.

In the construction plan for the Blue Ridge line upgrade, some poles already supporting the then existing line were to be used and some were to be merely replaced and a few new poles were to be installed. Prior to any work being done, pursuant to South Carolina law, BREC submitted its plans for the line upgrade to SCDOT through scale drawings showing what it wished to construct within the highway right-of-way and to obtain permission from SCDOT to further burden the right-of-way with new poles necessary to support the new upgraded line.

On April 12, 2007, Staking Sheets (scaled drawings) for the project that BREC intended to construct were rendered showing the location of the old or existing poles and guy wires that would be used or changed out and the new poles and guy wires that were to be installed within the South Carolina right-of-way with references to the specific location of the individual poles

and guy wires from the centerline and within the SCDOT right-of-way.

Thereafter, on September 28, 2007, BREC submitted its application to SCDOT for an Encroachment Permit to construct and maintain the proposed upgraded 7.2 KV overhead power line along the right-of-way of S.C. Highway 11. [R. pp.192-201]. The BREC application was signed by Ronnie Alexander, Staking Supervisor for BREC, who personally supervised the development and preparation of the Staking sheets, or drawings, which were submitted to SCDOT as part of the permit application, as well as measuring and establishing the actual location of the poles and guy wires that were subsequently constructed. [Id.] The BREC permit was then approved by SCDOT on October 16, 2007, for the proposed maintenance and construction work as shown on Staking Sheets 1-5 which were attached to the permit and were an integral part of the approved application. [Id.] Sheet 2 of the Staking Sheets showed pole #10A, the pole which Respondent, Kathleen Jennings, claimed was on her property without her permission and constituted a trespass, to be a stub or support pole for the electric distribution line installed on the south side of S.C. Highway 11. [Id.] It also showed that pole #10A was to be placed on the north side of S.C. Highway 11, thirty-four (34') feet from the centerline of S.C. Highway 11 and well within the SCDOT right-of-way of fifty (50') feet from the centerline of the highway. [Id.] The permit application, approved by SCDOT on October 16, 2007, specifically enumerated the new poles that were to be permitted as poles #5, #10, #10A, #11, #12, #13, #14, #15, #16, #17 and #17.5, for a total of eleven (11) poles to be located within the SCDOT right-of-way of S.C. Highway 11. [Id.]

As the facts of this case demonstrated, BREC construction on SC Highway 11 was completely within the SCDOT right-of-way, had submitted power line upgrade plans (which were approved) to SCDOT, and all required permits were obtained by BREC. BREC was operating lawfully and within well-established precedent and law when it obtained SCDOT approval to utilize an existing highway right-of-way to install utility poles and lines. BREC was not required to seek or obtain the approval of the adjacent landowner. See, Gressette v. South Carolina Electric & Gas, 370 S.C. 377, 655 S.E.2d 538 (2006). Therefore, the decision of the Court of Appeals to deny BREC's original Appeal, Petition for Rehearing and to affirm the lower court's rulings and jury verdict finding on "trespass" has a long-term, adverse impact not only BREC and also the entire utility industry in South Carolina.

Based on the procedural posture of this case, the evidence presented, and the ruling of the trial court and the Court of Appeals, a South Carolina resident now need only "say" they "believe" a utility is trespassing on their property, despite an express written permit duly approved by SCDOT to construct instrumentalities within the SCDOT easement, for the utility to be subject to a verdict of trespassing on the resident's property. This disturbing and adverse result has now been sanctioned by the Court of Appeals, despite BREC presenting uncontroverted, documentary evidence in the trial record, without objection, regarding the position of the pole and guy wire at issue as fully within the SCDOT fifty (50) foot right-of-way. The ruling by the Court of Appeals, despite clear, well-established precedent of the South Carolina Supreme Court that allows BREC to apply for and obtain SCDOT approval to install utility poles and lines with the highway right-of-way without the approval of the adjacent landowner. The uncontroverted evidence at trial included exact measurements and testimony from a thirty-five-year BREC employee who personally conducted the measurements as part of

filing for and obtaining prior approval from SCDOT to proceed with upgrading the instrumentalities within SCDOT's easement. The Court of Appeals' Opinion in this matter, if allowed to stand, has unprecedented and serious implications and potential liability for all utility providers regardless of whether they properly act and construct within the scope of SCDOT permits issued to the affected utility. This verdict of trespass marks the first time in BREC's seventy-five year history where there is a Court ruling that it had engaged in an intentional invasion of private property amounting to a trespass when it had complied with all applicable SCDOT easement rules and guidelines. For these important and public policy reasons, the Court should grant this petition for a writ of certiorari.

PROCEDURAL HISTORY

This matter was initially brought by BREC to collect an unpaid utility bill owed by Respondent Kathleen Gresham ("Ms. Gresham") and her husband, Defendant Steve Gresham. Respondent counter-claimed, raising allegations of trespass related to the installation and position of a single utility pole and guy wire on her property. At trial, the jury found in favor of Ms. Gresham as to the debt collection and as to the trespass claim. The jury awarded Ms. Gresham a nominal amount of \$ 0.01 for trespass. BREC and Ms. Gresham timely filed post-trial motions, which were summarily denied.

BREC timely filed a notice of appeal and attempted to order a transcript. There were significant delays in obtaining the transcript and it was eventually discovered that substantial portions of the trial testimony related to the claim of trespass were lost.¹ A reconstruction hearing was ordered by the Court of Appeals. Following further delays in the scheduling of the reconstruction hearing, a reconstruction hearing was finally conducted. Thereafter, the Court of

¹ It was discovered that the Court Reporter apparently lost the tapes.

Appeals decided on the appeal without oral argument from counsel.

RELEVANT FACTS

BREC's final brief to the Court of Appeals enumerated the facts of this matter; however, a brief recitation to underscore the exceptional circumstances and adverse impact of this Court's Opinion is warranted. The South Carolina Department of Transportation ("SCDOT") has obtained thousands of right-of-way easements from property owners in order to construct, operate, and maintain the roads and highways of the state. The law provides that within these right-of-way easements, SCDOT is authorized to award encroachment permits to utility providers such that the utilities may construct and maintain instrumentalities necessary for the provision of utility services to South Carolina residents. When a utility seeks to construct instrumentalities within the SCDOT right-of-ways, it must first apply to the SCDOT for an encroachment permit by submitting detailed scale drawings and plans establishing their intended use and location within the SCDOT right-of-way. BREC followed all required steps and obtained SCDOT approval to construct within the designated right-of-way.

BREC is a South Carolina electric cooperative that serves members in Greenville County, Pickens County, Oconee County, and Anderson County, South Carolina. In 2007, BREC sought SCDOT approval to upgrade existing power lines along S.C. Highway 11 in Greenville County. As required by law, BREC submitted its detailed line and pole installation plans for the electric line upgrade to SCDOT because it was seeking approval to build within the SCDOT right-of-way. BREC submitted scale drawings showing where it would construct within SCDOT's right-of-way—which extended out from the center line of the highway fifty (50) feet—and to obtain express permission from SCDOT to further burden the right-of-way with any new poles that were necessary to support the upgraded line. SCDOT approved BREC's plans. (R. pp.192-

201). Importantly, because BREC was operating service instrumentalities within the SCDOT right-of-way in this matter, it was operating within the easement obtained by SCDOT. Based upon a South Carolina Supreme Court decision, BREC was not required to obtain prior approval from the landowner and should not have been subject to claims of trespass. *See Gressette v. South Carolina Electric and Gas Co.*, 370 S.C. 377, 635 S.E. 2d 538 (2006).

At trial, BREC presented both sworn testimony and documentary evidence that the single pole and guy wire at issue were installed within SCDOT's right-of-way, as expressly approved by SCDOT on October 16, 2007. (**Id.**) In order to try to support her claim of trespass, Ms. Gresham offered only her own personal opinion testimony, the personal opinion testimony of her husband Steve Gresham, and the personal opinion testimony of Steve Austin in order to claim that the BREC pole and guy wire were erected upon her land without her express permission. Importantly, neither Ms. Gresham nor her two witnesses presented any specific testimony or documentary evidence challenging the exact location of SCDOT's right-of-way or the exact position of the utility pole and guy wire installed by BREC. [**R. p.87, lines 13-24; p.89, line 13**]. The opinion testimony from Respondent's witnesses established that it was only their respective beliefs that BREC pole and guy wire were trespassing on Ms. Gresham's property.² [**Id.; p.67, line 22-p.68, line 16; p.70, lines 7-23; p.73, line 19-p.74, line 3; p.74, line 23-p.75, line 8; p.75, lines 21-25; pp.202-206**]. Stated differently, Respondent's opinions and beliefs were unsupported by any factual basis or specific measurements, and were contradicted by the specific SCDOT documentary evidence, including the encroachment permit to construct issued by SCDOT. *See, Hamm v. South Carolina Pub. Svs. Comm'n*, 298 S.C. 309, 312, 380 S.E.2d 428, 430 (1989) (recognizing that opinions and assertions, to be accorded any weight or

² Importantly, Ms. Gresham's own testimony as to the location of the pole and guy wire at issue also establishes that the instrumentalities at issue were within the SCDOT right-of-way.

reliability, must have a factual foundation). Despite the fact that BREC obtained the required SCDOT encroachment permit prior to commencing any work on the Highway 11 project, the jury returned a verdict of trespass and the trial judge declined BREC's post-trial motions for new trial and Judgment Notwithstanding the Verdict ("JNOV"). The trial court's rulings to deny BREC's post-trial motions directly contradicts and ignores well-established law providing that BREC can utilize an existing highway right-of-way if it obtains approval to install utility poles and lines without having to seek adjacent landowner approval when it receives permission from the SCDOT via its encroachment permit. See, Gressette v. South Carolina Electric & Gas, 370 S.C. 377, 655 S.E.2d 538 (2006).

ARGUMENT

I. THIS PETITION PRESENTS AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE NECESSITATING THE GRANT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

As discussed more fully below, the Court of Appeals failed to rule or address BREC's arguments that the actions of the trial court and the jury's verdict are controlled by an error of law. The Court of Appeals decision ignores the fact that key portions of the trial transcript addressing the claim of trespass that are missing and not in existence. The impact of the Court of Appeal's decision has a long-term, adverse impact on BREC and the entire utility industry as a whole. Based on the procedural posture of this case, the evidence presented, and the ruling of the trial court and the Court of Appeals, a South Carolina resident now need merely to "say" they "believe" a utility is trespassing on their property, despite the existence of an express written right-of-way construction permit duly approved by SCDOT to construct instrumentalities within the SCDOT easement, for the utility to be subject to a verdict of trespassing on the resident's property even though the utility has followed the proper procedures and guidelines granting permission to construct in a SCDOT right-of-way. This disturbing result has been fully

sanctioned by the Court of Appeals in its recent Opinion, despite the utility —here BREC— presenting uncontroverted, documentary evidence in the trial record, without objection, regarding the position of the pole and guy wire at issue as fully and clearly within the SCDOT fifty (50) foot right-of-way. There was no question that (a) BREC was within the SCDOT fifty (50) foot right-of-way and (b) that BREC had obtained the necessary permit from SCDOT to construct the power line upgrade to an existing line. BREC is the only party that presented evidence of exact measurements and testimony from a thirty-five-year BREC employee. That BREC employees conducted the specific measurements as part of filing for, and obtaining prior approval from SCDOT for BREC to proceed with upgrading the instrumentalities within SCDOT's easement.

If the Court does grant the petition for certiorari, then the Court of Appeals Opinion in this matter would stand. If allowed to stand, the Opinion of the Court of Appeals will have unprecedented and serious adverse implications and potential liability for utility providers regardless of whether they properly act and construct within the scope of SCDOT permits issued to the affected utility – all of which would serve to deter innovation, upgrades, improvements, and efficiencies necessary to address growth, safety, and economic development for our communities and State. The verdict of trespass in this matter marks the first time in BREC's seventy-five year history where there is a Court ruling that it had engaged in an intentional invasion of private property amounting to a trespass despite the fact that it had complied with all applicable SCDOT easement rules and guidelines. Accordingly, BREC respectfully petitions the Court for a writ of certiorari so these issues of exceptional statewide importance can be heard and resolved.

II. THE MISSING TRIAL COURT TRANSCRIPT ADDRESSING THE CLAIM OF TRESPASS IS OF GREAT IMPORTANCE AND THE COURT OF APPEALS ERRED WHEN IT APPARENTLY

ASSUMED WHAT THE MISSING TRANSCRIPT ADDRESSED.

The Court of Appeals filed its Opinions pursuant to Rule 220, SCACR, and supporting authorities; however, the result is that BREC's request for a reversal of the jury verdict on trespass or for a new trial is based on an incomplete appellate record. Specifically, and of import, the Court of Appeals cited in its Opinion, dated January 14, 2015, *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273, for the proposition that, "[b]efore a defendant can establish that he is entitled to a new trial on the basis of an inadequately reconstructed record, he must identify a specific appellate claim that this court would be unable to review effectively using the reconstructed record;" and *Sweat v. Crawford*, 292 S.C. 324, 327, 356 S.E.2d 147, 149 (Ct. App. 1987), for the proposition that omissions from the record did not prejudice BREC because the available evidence included in the record sufficiently supported the rulings made by the lower court.

However, the Court of Appeals completely misapprehended the importance of the missing trial transcript addressing the claim of trespass and of the trial court ruling being controlled by an error of law; thus, inadvertently creating an internally inconsistent opinion. An appellate review of the motion for a new trial motion and the JNOV motion requires a review of all of the evidence adduced at trial, the testimony and factual basis for that testimony, and the reasonable inferences to be drawn therefrom. See *Brinkley v. S.C. Dep't of Corrections*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). Given the fact that the transcript of the trial is incomplete in that all of the trespass claim testimony adduced at trial was lost by the court reporter; respectfully, the Court of Appeals could not have adequately assessed whether the trial court erred in denying the post-trial motions; therefore, the petition for writ of certiorari should be granted so that the Petitioner can be afforded his constitutional and legal right to its duly

requested appeal. The missing trial transcript testimony deals specifically with the trespass claim—the single subject of BREC’s post-trial motions. For these reasons, BREC respectfully requests this Court grant its petition for writ of certiorari to rehear this matter to address the necessity for a new trial based on a substantial portion of the trial transcript that does not exist which focused on the claim of trespass, and to order a new trial in this matter.

III. BREC’S PETITION FOR WRIT OF CERTIORARI IS WARRANTED BECAUSE THE TRIAL COURT ERRED AS A MATTER OF LAW IN DECLINING TO GRANT BREC’S POST-TRIAL MOTIONS.

At the close of the trial, BREC timely made two post-trial motions, a motion for a new trial, and a motion for JNOV. Both motions were summarily denied by the trial judge. The trial judge’s rulings to approve a jury verdict of trespass that were based solely on Respondent’s personal opinion testimony, which itself was based upon surmise, conjecture, and speculation, were wholly unsupported by any fact-based evidence and controlled by an error of law. [R.p.67, line 22-p.68, line 16; p.70, lines 7-23; p.73, line 19-p.74, line 3; p.74, line 23-p.75, line 8; p.75, lines 21-25; p.87, lines 13-24; p.89, line 13; pp.192-206]. The Court of Appeals misapprehended the evidence in the Record. The Record remains devoid of any factually-based evidence required to support the jury trespass verdict. The jury verdict of trespass is not supported by substantial evidence or any evidence. The trial court abused its discretion when it failed to grant the post-trial motions of BREC as there is a lack of any evidence supporting a trespass verdict. An abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an error of law. Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976); Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 37, 691 S.E.2d 135, 143 (2010). The jury awarded damages to the Respondent in the amount of \$0.01 regarding a single electric pole and guy line that the SCDOT Encroachment Permit

specifically authorized BREC to construct within the existing SCDOT right-of-way. The amount of the damage award suggests that the jury was confused. It is uncontroverted in the Record that BREC followed the proper procedures, made the necessary filings with SCDOT requesting a permit, and that BREC obtained a SCDOT Encroachment Permit authorizing BREC to construct within the existing SCDOT right-of-way. It is uncontroverted that BREC constructed within that SCDOT permit.

The Court of Appeals' ruling improperly affirmed the trial court's denial of BREC's motion for a new trial and its JNOV Motion despite the fact that BREC placed in the trial record the only factually-based evidence – the SCDOT permit approval for the placement of the specific electrical pole and guy wire within the SCDOT right-of-way in dispute as to the trespass claim. [R.pp. ____]. For these reasons, BREC respectfully petitions that the Court grant its writ of certiorari so these issues of exceptional statewide importance can be heard and decided.

A. THE TRIAL COURT ERRED IN FAILING TO GRANT THE JNOV; THUS, THE COURT OF APPEALS ERRED WHEN IT FAILED TO GRANT BREC'S PETITION FOR REHEARING AND WHEN IT FAILED TO REVERSE THE LOWER COURT.

The trial court erred in failing to grant BREC's motion for JNOV. The standard for the denial of a JNOV motion is "if the evidence yields more than one reasonable inference or its inference is in doubt." Strange v. S.C. Dep't. of Highways and Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994). Thus, a motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

The evidence adduced at trial cannot yield more than one inference based upon the uncontroverted fact that BREC obtained express SCDOT approval and an encroachment permit to construct and upgrade electric instrumentalities within the fifty-foot right-of-way **prior to**

commencing any work on its lines and poles along Highway 11. BREC presented the only specific evidence as to the exact location of the pole and guy wire and the existence of a SCDOT right-of-way. Ms. Gresham testified she “thought” the offending pole and wire were between twenty and thirty-four feet from the center of the highway. [R.p.38, lines 1-12; p.89, lines 8-25]. Even if Ms. Gresham’s testimony as to where she “thought” the pole and guy wire were ultimately placed were true, such testimony does **not** contradict BREC’s evidence regarding the placement of the pole and guy wire as being within the existing fifty-foot right-of-way. Ms. Gresham’s opinion testimony as to the placement of the poles—even taken as true—still places the pole and guy wire firmly in the SCDOT fifty-foot right-of-way and thus still not subject to a claim of trespass. Moreover, if the right-of-way were limited in the way Ms. Gresham “believed,” SCDOT would have had to reject BREC’s encroachment permit application because SCDOT would have no authority to approve the construction of utility instrumentalities beyond its authorized easement and thus on private property. SCDOT’s approval of the encroachment permit confirms that BREC’s planned and constructed facilities near Ms. Gresham’s property were not on property of which Ms. Gresham had sole and exclusive possession and control, but were placed in the SCDOT right-of-way.

Accordingly, there can be no fact-based evidence that a jury could have used to support a jury verdict of trespass by BREC. There is only one reasonable inference from the evidence presented at trial—the pole and guy wire were constructed within the SCDOT right-of-way for which BREC obtained a SCDOT encroachment permit. Therefore, there was no evidence which could support a jury verdict that BREC was trespassing when it was constructing within the existing SCDOT right-of-way on Ms. Gresham’s property. Therefore, the trial judge erred in failing to grant the JNOV. The Court of Appeals failed to properly, simply consider or

overlooked such considerations and therefore, for these reasons, BREC respectfully petitions that the Court grant its writ of certiorari so these issues of exceptional statewide importance can be heard and decided.

B. THE TRIAL COURT ERRED IN FAILING TO GRANT BREC A NEW TRIAL; THUS, THE COURT OF APPEALS ERRED WHEN IT FAILED TO GRANT BREC’S PETITION FOR REHEARING AND WHEN IT FAILED TO REVERSE THE LOWER COURT JURY TRESPASS VERDICT.

As the Court of Appeals noted on this matter, a “trial court's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence or the conclusion reached was controlled by an error of law.” *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). Simply put, the trial judge’s summary denial of the post-trial motion for a new trial on the verdict of trespass, given that BREC had previously obtained express written SCDOT-approval to construct within the SCDOT easement, was wholly unsupported by the evidence and is controlled by an error of law. The Court of Appeal’s Opinion, dated January 14, 2015, and its denial of rehearing appear to expressly condone a jury verdict that ignores uncontroverted evidence that SCDOT expressly approved the BREC construction of its upgraded instrumentalities within the SCDOT established fifty-foot right-of-way and as a result, there was no factual evidence to support a verdict of trespass.

1. **The Trial Judge’s Order is Wholly Unsupported by the Evidence**

There exists no credible evidence upon which a trespass could be found by the jury. A “trespass” occurs when there is an intentional invasion of the plaintiff’s interest in the exclusive possession of his property. See *Hawkins v. City of Greenville*, 356 S.C. 280, 296, 594 S.E.2d 557, 556 (Ct. App. 2004). To prove a trespass, the landowner must present evidence to establish that (1) he was in exclusive, legal possession of the property, (2) the defendant voluntarily entered upon the plaintiff’s property; and (3) such entry was made without the plaintiff’s

permission.

In this case, the record is devoid of any evidence to support a finding that BREC, operating under the express construction placement terms approved by the SCDOT permit to construct within the SCDOT right-of-way, could have intentionally invaded Ms. Gresham's interest in the exclusive possession of her property, especially in light of the fact that Ms. Gresham had no exclusive interest due to the existing SCDOT right-of-way easement. To the contrary, the evidence admitted at trial indicated that Ms. Gresham's property was subject to an existing SCDOT right-of-way; therefore, as an initial matter, Ms. Gresham did not have exclusive possession to that portion of her property subject to the SCDOT right-of-way. Additionally, the only fact based evidence adduced at trial was that the single pole and guy wire complained of by Respondent was well within the SCDOT fifty (50) foot right-of-way. [R.pp.192-201]. The SCDOT encroachment permit issued to BREC, which conclusively demonstrated that the BREC utility pole and guy wire were installed within the SCDOT fifty (50) foot right-of-way was entered into evidence without objection. [Id.]. Various individuals with personal, fact-based knowledge related to the placement of the BREC marking stakes, the application for and approval by the SCDOT to issue BREC the encroachment permit, and the individual that personally measured the actual location of the utility pole and guy wire in relation to the SCDOT right-of-way and Ms. Gresham's property, testified at the trial. [R.pp.101-107]. Given these facts, there is absolutely no factual basis for the jury to use or apply in order to reach a verdict that a trespass—an intentional invasion of Ms. Gresham's exclusive interest in her own property—ever occurred. Therefore, the jury verdict has no proper evidentiary basis or foundation, is unlawful and should not be permitted to stand by this Court.

Notwithstanding the foregoing, the jury's verdict is also clearly erroneous and

unsupported by the evidence in the record. A closer reading of the Court of Appeals' cited case, Brinkley v. South Carolina Dept. of Corrections, 386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009) is instructive here. There, the South Carolina Department of Corrections ("SCDC") filed a motion for a new trial regarding a jury verdict in favor of an inmate alleging gross negligence, assault and battery, and intentional infliction of emotional distress. *Id.* After a hearing, the circuit court granted the motion for a new trial and the inmate appealed. *Id.* Although this Court agreed with the appellant that the record contained some evidence to support a verdict against SCDC, mainly appellant's testimony and the testimony of two inmates who claimed to have witnessed the assault, this court noted **"that is not the lens through which an appellate court must view a circuit court's [ruling] on a new trial."** *Id.* (emphasis added). Rather, the Brinkley case focused on the fact that the appellant did not introduce any medical records tending to show the effects of the alleged assault—i.e. the damages element of his claims. *Id.* Ultimately, the court in the Brinkley decision affirmed the trial court's grant of a new trial because it was clear the jury's findings were not supported by evidence in the record.

The Court of Appeals should have applied the same result in the instant case, but erred when it failed properly rule. Respondent never provided the jury with any fact-based evidence to support her belief and personal opinion that the SCDOT right-of-way was limited to twenty-feet. Respondent only provided the jury with her personal opinion which was based solely on surmise, conjecture and speculation. *See* Weston v. Hillyer, 160 S.C. 541, 159 S.E. 390 (1931) ("Verdict cannot rest upon guess or conjecture;" it is the duty of the Plaintiff to affirmatively prove her allegations); Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E. 2d 835 (Ct. App. 1997) (stating verdicts may not rest upon surmise, conjecture, or speculation).

For the same reasons, the trial court herein should have granted a new trial but it erred

when it failed to do so in this instant case. The jury was presented with uncontroverted evidence that SCDOT's right-of-way was fifty (50) feet. [R.pp.192-201]. The jury was also presented with uncontroverted evidence that Ms. Gresham's property was subject to an SCDOT right-of-way. The SCDOT right-of-way encroachment permit did not forbid commencing any construction by utility companies. BREC previously applied for and was awarded an encroachment permit and then installed its power poles and guy wires strictly in accordance with the SCDOT-awarded encroachment permit. Notably, even Ms. Gresham's "estimation" of where the BREC pole and guy wire were installed places them within the fifty (50) feet right-of-way. Ms. Gresham testified she believed or thought the pole and guy wire were between twenty and thirty-four feet from the center of the highway—all distances entirely within SCDOT's fifty (50) feet right-of-way established by the fact-based evidence placed in the record by BREC in this matter. [R.p.38, lines 1-12; p.89, lines 8-25]. The Court of Appeals failed to consider and apply this same standard of appellate review of a motion for a new trial in its Opinions in this matter, and therefore, for these reasons, BREC respectfully petitions that the Court grant its writ of certiorari so these issues of exceptional statewide importance can be heard and decided.

2. *The Trial Judge's Ruling is Controlled By an Error of Law*

One of the central problems and concerns in this case is that the trial judge's ruling on BREC's post-trial motions was also controlled by an error of law. As cited in Petitioner's Final Brief and other appellate filings, the 2006 South Carolina Supreme Court decision of Gressette v. South Carolina Electric and Gas Co., 370 S.C. 377, 635 S.E.2d 538 (2006), *ruled that utility instrumentalities*, such as lines and poles, *may be located and placed within highway rights-of-way with the express permission of SCDOT*. Id. at 382, 635 S.E.2d 540. Further, the Gressette case does not require permission of the property owner to construct utility instrumentalities

inside an existing SCDOT right-of-way. The jury's verdict in the instant case—and subsequent ruling by the trial judge related to the post-trial motions—serves to vitiate the Gressette opinion. BREC sought and received express permission from SCDOT to install utility lines before commencing work, but the jury verdict now imposes a new and restrictive requirement on BREC, and other utilities, to seek direct permission to construct in the SCDOT right-of-way from the landowner, regardless of the fact that BREC obtained prior approval to place electric service instrumentalities specifically within the SCDOT right-of-way. Thus, the trial judge's failure to grant the new trial—in the face of the established law of this state which determines that there can be no trespass to the property owner when the utility fixture is placed in the SCDOT right-of-way pursuant to an approved encroachment permit—is an error of law.

An appellate court may freely and absolutely review a trial court's decision concerning an issue of law. *See Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 126, 623 S.E.2d 860, 863 (Ct.App.2005). In this instant case, it is clear that the trial court ruling was controlled by an error of the law as it did not apply Gressette v. South Carolina Electric and Gas Co., 370 S.C. 377, 635 S.E.2d 538 (2006), when denying BREC's post-trial motions. Moreover, the Court of Appeals failed to even discuss or consider that an error of law occurred when issuing its Opinions and has acted in direct contradiction to established South Carolina Supreme Court precedent.

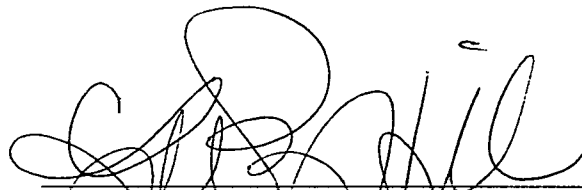
This Court must not subject BREC, or all other utilities that have obtained encroachment permits from the SCDOT, to be subject to the same harsh result and fate. The trial court rulings need to be addressed so all utilities, will know that when they lawfully obtain an Encroachment Permit from the SCDOT that they will not be subject to a claim of trespass simply because a landowner "believes" there was a trespass in absence of supporting evidence. Based on the only factual evidence in the record addressing the claim of trespass, including the SCDOT-approved

BREC encroachment permit, the trial judge's decision to deny the grant of a new trial on the issue of trespass was wholly unsupported by the evidence in the record and controlled by an error of law. For these reasons, BREC respectfully petitions that the Court grant its writ of certiorari so these issues of exceptional statewide importance can be heard and decided.

CONCLUSION

As a result of the trial court's rulings and the Opinion issued by the Court of Appeals, BREC now has a jury verdict of trespass on record in Greenville County, in spite of following the exact procedure in seeking and securing an encroachment permit from SCDOT in compliance with well-established state law, Gressette v. South Carolina Electric and Gas Co., 370 S.C. 377, 635 S.E.2d 538 (2006). The testimony and factual evidence at trial confirmed that BREC constructed within the SCDOT right-of-way in accordance with the permit SCDOT awarded to it. BREC is now faced with the potential of other trespass claims from property owners who "believe" BREC may somehow be trespassing on their property with poles and electric wires despite specific SCDOT approval to construct in its right-of-way and exact measurements that confirm such construction was in the SCDOT right-of-way. The vital protections afforded to a public utility like BREC under Gressette and related case law has been denied to BREC by the trial court's order refusing BREC motion for a new trial or JNOV and by the Court of Appeals. Accordingly, BREC respectfully petitions that the Court grant its writ of certiorari so these issues of exceptional statewide importance can be heard and decided. BREC respectfully seeks a new trial on the sole issue of trespass; or, in the alternative, a reversal of the trial judge's denial of the motion for JNOV.

[Signature Page to Follow]



Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street (29201)
P.O. Drawer 7788
Columbia, South Carolina 29202
803-771-4400

Larry C. Brandt, Esquire
P.O. Box 738
3691 Blue Ridge Blvd
Walhalla, South Carolina 29691
864-638-5406

*Counsel for Petitioner Blue Ridge Electric
Cooperative, Inc.*

Columbia, South Carolina

August 31st, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge
Case No.: 2008-CP-23-5245

Appellate Case No.: 2009-141246
Unpublished Opinion No. 2015-UP-031 filed February 14, 2015
Order Denying Petition for Rehearing filed July 29, 2015

Blue Ridge Electric Cooperative, Inc. Appellant,

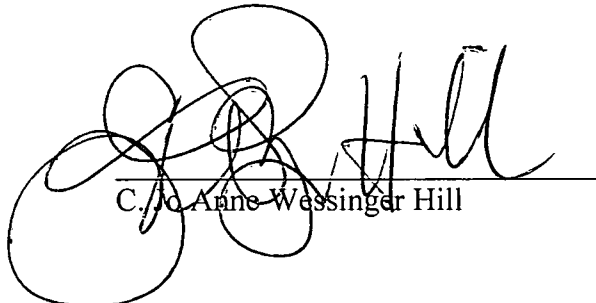
v.

Kathleen J. Gresham Respondent.

CERTIFICATE OF SERVICE

I, C. Jo Anne Wessinger Hill, the undersigned attorney of Richardson, Plowden & Robinson, P.A., attorneys for Blue Ridge Electric Cooperative, Inc., do hereby certify that I have served the *AMENDED PETITION FOR WRIT OF CERTIORARI* in the above referenced case, by causing a copy of same to be personally deposited in a United States Postal Services mail box, postage prepaid, with the return address clearly visible, addressed to the party as indicated below on August 31, 2015:

**Kathleen Jennings Gresham
1524 Highway 11
Landrum, South Carolina 29356**


C. Jo Anne Wessinger Hill

August 31, 2015