

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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Unpublished Opinion No. 2015-UP-031 filed February 14, 2015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.

**PETITIONER'S REPLY IN RESPONSE TO RESPONDENT'S RETURN/REPLY TO
PETITIONER'S WRIT OF CERTIORARI**

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Kathleen Jennings Gresham (*Pro Se Respondent*)
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CERTIFICATION BY COUNSEL

On Tuesday, September 8, 2015, the Petitioner Blue Ridge Electric Cooperative, Inc. ("BREC") received via U.S. Mail, certified with return receipt, a copy of the Return/Reply filed by Respondent, Kathleen J. Gresham.

ARGUMENT

On Tuesday, September 8, 2015, the Petitioner Blue Ridge Electric Cooperative, Inc. (“BREC”) received via U.S. Mail, certified with return receipt, a copy of the Return/Reply filed by Respondent, Kathleen J. Gresham, to its Petition for Writ of Certiorari. The cover letter of the Respondent addressed to the Clerk, the Honorable Daniel E. Shearouse, states that the Respondent did not receive a copy of the Petitioner (then Appellant) BREC’s Petition for Rehearing and Suggestion for Rehearing En Banc, filed February 9, 2015. Attached as an Exhibit to this Reply is a copy of the Response of the Respondent received by the Petitioner (then-Appellant) BREC, which bears a filing date of February 26, 2015, to such motion for rehearing. BREC respectfully asks for the Court to review this matter to grant its Petition for Writ of Certiorari for the reasons expressed herein and within its Petition. It is a matter of great importance and significance for the Petitioner and for the State of South Carolina; otherwise, the result will have an adverse impact upon BREC and will allow for well-established law to be ignored and discarded at a whim so that no utility can utilize an existing highway right-of-way when it obtains approval to install utility poles and lines lawfully within the existing right-of-way without having to also seek adjacent landowner approval after it receives permission from the SCDOT via its encroachment permit in direct contradiction to Gressette v. South Carolina Electric & Gas, 370 S.C. 377, 655 S.E.2d 538 (2006).

- I. **THIS PETITION DOES PRESENT AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE NECESSITATING THE GRANT OF PETITIONER’S WRIT OF CERTIORARI AS THE DECISION OF THE SOUTH CAROLINA COURT OF APPEALS AND THE LOWER COURT DISREGARD ESTABLISHED PRECEDENT BY THE SOUTH CAROLINA SUPREME COURT AND WELL ESTABLISHED LAW RELIED UPON BY ALL UTILITIES.**

As stated in its Petition for Writ of Certiorari, as well as within BREC’s post-trial motions made with the trial court, its Petitioner’s Final Brief and other appellate filings, the

failure of the trial court to grant BREC's motion for JNOV or its post trial motions is controlled by an error of law. With regard to the cause of action for trespass, the only evidence in the record is that the pole and guy wire anchor is well within the South Carolina highway right-of-way of fifty (50) feet from the center line of South Carolina Highway 11. (**R. pp. 192-201**). BREC applied for and was issued an encroachment permit from the South Carolina Department of Transportation (SCDOT) in accordance with state law and procedure. (**R. p. 195**). The encroachment permit entered into evidence clearly shows that the pole is well within the right-of-way. (**R. pp. 192-201**). Even the testimony of all witnesses who have credible knowledge of the width of the right-of-way testified that the pole and guy wire were within the fifty (50) feet from the center line of the South Carolina Highway 11. (**R. p. 101-105**). None of the witnesses for Respondent could show that the pole and guy wire were outside the SCDOT fifty (50) foot right-of-way from the center of South Carolina Highway 11 and no one (other than the Petitioner's employees and representatives) ever made any measurements. (**R. pp. 75-76, 89, & 138-139**). The Petitioner through the testimony of Ronnie Alexander and others along with the permitting and staking sheets clearly demonstrated that guy wires were, at most, forty-seven (47) feet from the center line of South Carolina Highway 11. (**R. pp. 101-105, 137-139, & 192-201**). Therefore, all evidence shows that the BREC's pole and guy wires were clearly within the highway right-of-way with the express permission of the SCDOT— which was the entity with the legal right to provide and grant access and use of the right-of-way to BREC.

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. The Petitioner, just like any other utility, relied upon the well-established process by applying for an encroachment permit. The Petitioner was ultimately granted the encroachment permit from the SCDOT. Therefore, when the Petitioner followed the well-established process and law, it was then punished and found guilty of a trespass even though there was evidence of an encroachment permit from the SCDOT granting permission to the Petitioner to place its instrumentalities, as well as credible evidence that the utility's instrumentalities (i.e., pole and guy wire) were within the SCDOT right-of-way. (**R. p. 194**). The use of encroachment permits from the SCDOT has been used by all utilities for numerous years and is relied upon by all utilities to ensure its ability to provide efficient, safe, and reliable services to the people of South Carolina. If this Court does not grant this Petition for Writ of Certiorari, there is no assurance to any utility wanting to place, or having already placed, any of its instrumentalities within a SCDOT right-of-way that it will not be sued for a trespass cause of action even though they had a proper, lawful permit granting permission and use of the right-of-way. It also creates an unstable environment for a utility not knowing if it will be sued for trespass or how a judge or jury would rule. Juries in different counties, or maybe within the same county, could reach a different conclusion and finding with similar facts. This type of uncertainty or inconsistency is likely to restrict and discourage business development, innovation, and lead to higher costs.

If the Court does not 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 for the Court to grant its writ of certiorari so these issues of exceptional statewide importance can be heard and resolved.

II. THERE IS NO EVIDENCE, MUCH LESS ANY CREDIBLE EVIDENCE, UPON WHICH TRESPASS COULD OR CAN BE FOUND AND THE TRIAL COURT ERRED IN ITS FAILURE TO GRANT THE PETITIONER’S POST-TRIAL MOTIONS.

As the Petitioner has stated in its Writ for Certiorari, the underlying case before the trial court was initially brought by BREC to collect an unpaid utility bill owed by Respondent Kathleen Gresham (“Ms. Gresham”) and her husband, Defendant Steve Gresham. The claims against her husband were dismissed by the Petitioner. (**R. p. 12**). The case then proceeded on the Petitioner’s claims. The 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 Appeals decided on the appeal without oral argument from counsel.

This case has exceptional circumstances and which result in an adverse impact upon not only the Petitioner, but also all and any utility with its instrumentalities located within, or planned to be located within, any SCDOT right-of-way. The 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. The Petitioner followed all required steps and obtained SCDOT approval to construct within the designated right-of-way; however, despite this approval and placing instrumentalities within the boundaries of the right-of way, the Petitioner has been found to have trespassed – which is an error of law in direct conflict with the law. *See Gressette v. South Carolina Electric and Gas Co., 370 S.C. 377, 635 S.E. 2d 538 (2006).* The Petitioner was operating service instrumentalities within the SCDOT right-of-way in this matter. It was operating within the easement obtained by SCDOT. (**R. p. 194**). 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*

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

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. The law of South Carolina requires that the opinions or assertions of the witness must have a factual foundation. *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 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

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.

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).

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. For these reasons (and as more fully explained and set forth in the Petitioner’s Petition for Writ of Certiorari, BREC respectfully petitions the Court for a Writ of Certiorari so these issues of exceptional statewide importance can be heard and resolved.

III. WHEN THE COURT OF APPEALS APPARENTLY ASSUMED WHAT THE MISSING TRANSCRIPT ADDRESSED, THE COURT OF APPEALS ERRED AND MAKES THIS PETITION AND THE ISSUES WITHIN OF GREAT IMPORTANCE.

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.

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 when BREC followed and adhered to the exact procedure to prevent a claim of trespass by obtaining 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 clearly confirm that BREC constructed within the SCDOT right-of-way in accordance with the permit SCDOT awarded to it. However, 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; and therefore, 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.

Dear Court Justices,

Dear Justice Rendunas,

I realize I am excluded

from this matter though I

always met every Brief and

other deadlines even when the

Appellant did not. I was

forceably ejected by the Court

as I was told my Brief was

several pages over your limit,

thus my years of intensive work,

preparation and thousands of

dollars in cost at great sacrifice

to my family were tossed out as

if we would not care or matter.

We prevailed on all matters pre sc

in a unanimous jury verdict after

three days of trial. Appellants

wrongly sued me for an alleged

debt which did not occur as our

bill was always fully paid.

That was proven and after several

years of harassment, acknowledged,

This case is a travesty against

justice. Please do not make it

worse by a retrial. Blue Ridge's

support line is trespassing on my

property. It is not even a

power like serving me or anybody

else. It is but a prop

for hoped-increased service in

the future. It has to go and

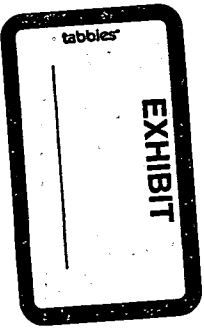
our trial costs paid. Blue Ridge

had over 3 years to access this

law suit and prepare. The

document they now seek to

wrongly enter is not



one properly presented (3)
at trial over 7 years ago.
One of my key witnesses
has died as the court was
made aware by his elderly
mother and my husband is
with cancer. It is not fair
that a just jury verdict
be ignored as they correctly
found the facts and applied
the law. Blue Ridge is
engaged in frivolous lawsuit
which I detailed raised with
you in my Briefs. I am
framed up by a "justice"
system you swore to protect
by a limitless pocket of
cooperative money and
fulltime team of lawyers
who won't stop until they
get you to do their bidding.
It is tragically sad and
you, as our Court, should
the little guy too, should
really see the facts and end
this charade. We in my family
have paid a huge personal and
financial price for standing up
for right and principles.
No case should drag on like
this. No case should have
the record ironically of my
testimony destroyed even though
recreated by a court reporter

not properly overseen by a (3)
trial judge who blatantly
accused me of being a
deadbeat even though
Blue Ridge's own sworn
witnesses at trial
confirmed I was an "excellent
customer." The facts I
established at trial are falling.
Please please review my Briefs,
duh filed and end this insanity
with a ruling confirming the
verdict and disallowing any
retrial. I am not notified
by you as you have bulldozed
over me the little guy pro se.
Blue Ridge deserves your
sanctions. The jury verdict
deserves confirmation. We all
deserve justice and I deserve
to keep my own land free from
unjust taking by Blue Ridge.
Please do the right thing. I
am out of state again with
family on medical mission and
tired of this unjust turmoil.
Thank you for letting truth
prevail.

Sincerely

Kathleen Jennings

APP. # 2009-141246

and APP # another number
should be reviewed as it is
paramount

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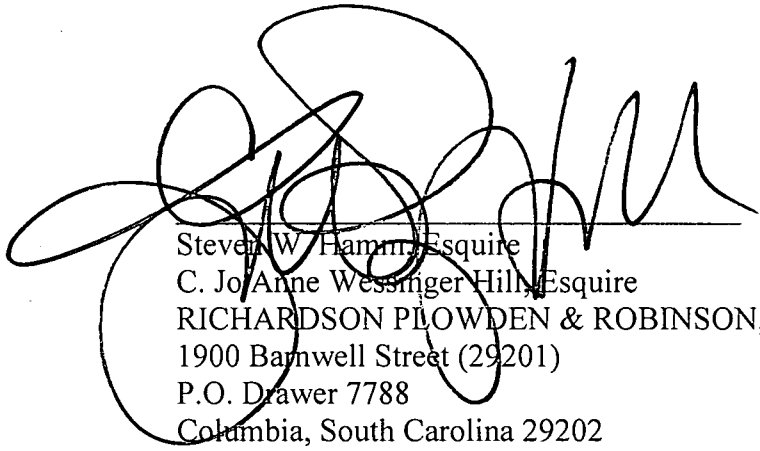


Judge A. Kondoros
SC Court of Appeals

Priority
Attention

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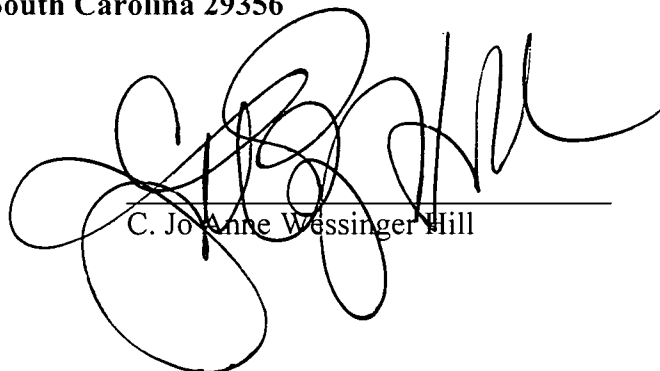
v.

Kathleen J. Gresham Respondent.

CERTIFICATE OF SERVICE

I, C. Jo Anne Wessinger Hill, the undersigned employee of Richardson, Plowden & Robinson, P.A., attorneys for Blue Ridge Electric Cooperative, Inc., do hereby certify that I have served the **PETITIONER'S REPLY IN RESPONSE TO RESPONDENT'S RETURN/REPLY TO PETITIONER'S 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 September 18, 2015:

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



C. Jo Anne Wessinger Hill

September 18th, 2015